

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

510

**KA 14-02143**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID A. WITHERSPOON, DEFENDANT-APPELLANT.

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JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO, FOR  
DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF  
COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Livingston County Court (Robert B. Wiggins, J.), dated October 23, 2014. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court's upward departure from his presumptive classification as a level two risk is not supported by clear and convincing evidence. We reject that contention. " 'The court's discretionary upward departure [to a level three risk] was based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument' " (*People v Tidd*, 128 AD3d 1537, 1537, *lv denied* 25 NY3d 913). We reject defendant's further contention that the court improperly admitted a sworn deposition from each of the two victims inasmuch as those depositions constitute "reliable hearsay" that the court could properly consider in making an upward departure (§ 168-n [3]; see *People v Pichcuskie*, 111 AD3d 1344, 1344, *lv denied* 22 NY3d 861).

Entered: June 10, 2016

Frances E. Cafarell  
Clerk of the Court