

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

1141

KA 16-00076

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DONALD SCHWARTZ, DEFENDANT-APPELLANT.

JEREMY D. SCHWARTZ, BUFFALO, FOR DEFENDANT-APPELLANT.

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Niagara County Court (Sara Sheldon, J.), dated November 10, 2015. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 et seq.). County Court determined that defendant was a presumptive level three risk by applying the automatic override for a psychological abnormality "that decreases his ability to control impulsive sexual behavior" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006]), and then granted him a downward departure to a level two risk. Contrary to defendant's contention, the court's conclusion that the override applies based on his diagnosis of pedophilia is supported by clear and convincing evidence (see *People v Cobb*, 141 AD3d 1174, 1175; *People v Ledbetter*, 82 AD3d 858, 858, lv denied 17 NY3d 702; see generally *People v Andrychuk*, 38 AD3d 1242, 1243-1244, lv denied 8 NY3d 816). We also reject defendant's contention that the court abused its discretion in declining to grant him a further downward departure to a level one risk (see *People v Busby*, 60 AD3d 1455, 1456; *People v Suarez*, 52 AD3d 423, 423-424, lv denied 11 NY3d 710; see generally *People v Gillotti*, 23 NY3d 841, 861). "The departure to level two sufficiently addressed the mitigating factors cited by defendant" (*People v Billups*, 58 AD3d 425, 426, lv denied 12 NY3d 707).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court