

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

1266

KA 18-01551

PRESENT: SMITH, J.P., NEMOYER, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

VINCENT CATALANO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Victoria M. Argento, J.), entered May 8, 2018. 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: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that he was entitled to a downward departure from his presumptive risk level. Defendant is correct that “[a] court may choose to downwardly depart from the presumptive risk assessment level in an appropriate case and in those instances where (i) the victim’s lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points [for sexual contact with the victim, risk factor 2] results in an over-assessment of the offender’s risk to public safety” (*People v Cathy*, 134 AD3d 1579, 1580 [4th Dept 2015] [internal quotation marks omitted]). Here, however, a downward departure is not warranted given the circumstances surrounding the sexual assault, the age disparity between the 25-year-old defendant and the two 15-year-old victims, the absence of any evidence supporting defendant’s allegation that the victims willingly engaged in sexual activity with him, and the fact that defendant is only five points below the threshold for a level three risk (*see People v Fryer*, 101 AD3d 835, 836 [2d Dept 2012], *lv denied* 20 NY3d 859 [2013]; *cf. People v George*, 141 AD3d 1177, 1178 [4th Dept 2016]; *People v Carter*, 138 AD3d 706, 707-708 [2d Dept 2016]; *see generally People v Love*, 175 AD3d 1835, 1835 [4th Dept

2019]; *Cathy*, 134 AD3d at 1580).

Entered: December 20, 2019

Mark W. Bennett
Clerk of the Court