

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

**381**

**KA 20-00738**

PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER J. WEBER, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered December 20, 2019. 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: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). On a prior appeal, we reversed an order determining that defendant was a level three risk, concluding that County Court erred in assessing points for the use of forcible compulsion (*People v Weber*, 176 AD3d 1631, 1631-1632 [4th Dept 2019]). Although we vacated the risk level determination, we also remitted the matter to County Court " 'for further proceedings to determine whether an upward departure from defendant's presumptive risk level [was] warranted' " (*id.* at 1632). Defendant now appeals from an order that granted the People's request for an upward departure and again classified him as a level three sex offender.

Contrary to defendant's initial contention, the court did not err in considering the People's request for an upward departure. We remitted the matter for such a determination (*id.*), and it " 'is well settled that a trial court, upon a remand or remittitur, is without power to do anything except to obey the mandate of the higher court, and render judgment in conformity therewith' " (*Wiener v Wiener*, 10 AD3d 362, 363 [2d Dept 2004]; *see e.g. People v Dennis*, 148 AD3d 927, 928 [2d Dept 2017]; *People v Garcia*, 145 AD3d 1032, 1033 [2d Dept 2016]). Moreover, although the People did not request such a departure during the original SORA proceeding, there was no reason for them to do so inasmuch as the court had classified defendant as a

level three risk based upon the presumptive risk level yielded by the score on his risk assessment instrument (see *People v Swain*, 46 AD3d 1157, 1159 [3d Dept 2007]; cf. *People v Bryant*, 187 AD3d 1657, 1659 [4th Dept 2020]; see generally *People v Brown*, 148 AD3d 1705, 1707 [4th Dept 2017]).

Contrary to defendant's further contention, the court did not err in granting an upward departure. It is well settled that "[a] court may make an upward departure from a presumptive risk level when, after consideration of the indicated factors[,] . . . [the court determines that] there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines" (*People v Abraham*, 39 AD3d 1208, 1209 [4th Dept 2007] [internal quotation marks omitted]; see generally *People v Gillotti*, 23 NY3d 841, 861 [2014]), and the People bear the burden of establishing such a factor by clear and convincing evidence (see *People v Seabolt*, 148 AD3d 1650, 1650 [4th Dept 2017]; see generally *Gillotti*, 23 NY3d at 861-862). Here, the court found that defendant "was unsuccessful on interim probation" inasmuch as he committed unrelated sexual assaults while on probation and was eventually adjudicated a youthful offender after pleading guilty to charges resulting from those assaults. The events underlying those offenses "were 'not adequately taken into consideration by the risk assessment guidelines and [were] properly considered as justification for the upward departure' " (*People v Castaneda*, 173 AD3d 1791, 1793 [4th Dept 2019], lv denied 34 NY3d 929 [2019], lv denied 34 NY3d 1126 [2020]; see also *People v Mangan*, 174 AD3d 1337, 1338 [4th Dept 2019], lv denied 34 NY3d 905 [2019]).