

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D22766
Y/prt

_____AD3d_____

Submitted - February 2, 2009

STEVEN W. FISHER, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
JOHN M. LEVENTHAL, JJ.

2007-01482

DECISION & ORDER

People of State of New York, respondent,
v Michael Caban, appellant.

Steven Banks, New York, N.Y. (Laura Lieberman Cohen of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Jeanette Lifschitz, and Jaclyn Belson of counsel), for respondent.

Appeal by the defendant from an order of the Supreme Court, Queens County (Grosso, J.), dated January 30, 2007, which, after a hearing to redetermine the defendant's sex offender risk level pursuant to the stipulation of settlement in *Doe v Pataki* (3 F Supp 2d 456), designated him a level two sex offender pursuant to Correction Law article 6-C.

ORDERED that the order is affirmed, without costs or disbursements.

At the hearing held pursuant to the Sex Offender Registration Act (hereinafter SORA) to redetermine the defendant's risk level (*see* Correction Law § 168-a *et seq.*), the Supreme Court properly assessed the defendant 20 points under risk factor 5 because the victim was between 11 and 16 years old (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [2006]) and 20 additional points under risk factor 6 because the victim was asleep at the beginning of the incident and therefore was "physically helpless" (*id.* at 11; *see* Penal Law § 130.00[7]; *People v Bush*, 57 AD3d 1119, *lv denied* 12 NY3d 756; *People v Ramirez*, 53 AD3d 990, 990–991; *People v Davis*, 51 AD3d 442; *People v DiCicco*, 38 AD3d 937; *People v Vaughn*, 26 AD3d 776, 776–777; *People v Greene*, 13 AD3d 991, 992; *People v Sensourichanh*, 290 AD2d 886). Inasmuch as the victim's physical helplessness was not the result of, or in any way connected with, her age, assessing points in both categories did not constitute impermissible double counting (*see People v Davis*, 51 AD3d at 442; *cf.* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [2006], at 11).

April 21, 2009

Page 1.

The defendant's remaining contention is unpreserved for appellate review and, in any event, is without merit.

FISHER, J.P., COVELLO, ANGIOLILLO and LEVENTHAL, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court