

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

D30222
H/kmb

_____AD3d_____

Submitted - February 8, 2011

JOSEPH COVELLO, J.P.
PLUMMER E. LOTT
SHERI S. ROMAN
ROBERT J. MILLER, JJ.

2009-09409

DECISION & ORDER

People of State of New York, respondent,
v David Kost, appellant.

Robert C. Mitchell, Riverhead, N.Y. (James H. Miller III, of counsel), for appellant.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Marion M. Tang of counsel),
for respondent.

Appeal by the defendant from an order of the County Court, Suffolk County (Kahn, J.), dated September 22, 2009, which, after a hearing, designated him a sexually violent offender and a level three sex offender pursuant to Correction Law article 6-C.

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

The County Court's designation of the defendant as a level three sexually violent offender under the Sex Offender Registration Act (hereinafter SORA) was supported by clear and convincing evidence (*see* Correction Law § 168-n[3]). Contrary to the defendant's contention, he was properly assessed 30 points under risk factor one for having been armed with a dangerous instrument during the commission of the underlying offense (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 7-8 [2006 ed.]). In establishing a defendant's risk level assessment pursuant to SORA, "the People bear the burden of establishing the facts supporting the determination sought by clear and convincing evidence" (*People v King*, 80 AD3d 681; *see* Correction Law § 168-n[3]; *People v Hewitt*, 73 AD3d 880). The victim's statement, offered by the People at the SORA hearing, constituted "reliable hearsay" (Correction Law § 168-n[3]; *see People v Mingo*, 12 NY3d 563, 573-574; *People v Copeland*, 79 AD3d 716, *lv denied* _____NY3d_____, 2011 NY Slip Op 64715 [2011]), and satisfied the People's burden of proving, by clear and

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convincing evidence, that the defendant was armed with a dangerous instrument during the commission of the offense. That evidence provided a sufficient basis for the assessment of 30 points under risk factor one, notwithstanding that the defendant was acquitted at trial of the counts alleging that he possessed a weapon, which establishes only that the jury did not find all elements of those offenses to have been proved beyond a reasonable doubt, a more rigorous standard of proof than the clear and convincing evidence standard (*see People v Vasquez*, 49 AD3d 1282, 1284; *People v Powell*, 27 Misc 3d 1212[A], 2010 NY Slip Op 50719[U]).

The defendant's remaining contention is without merit.

COVELLO, J.P., LOTT, ROMAN and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court