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

D31722
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_____AD3d_____ Submitted - May 27, 2011

WILLIAM F. MASTRO, J.P.
DANIEL D. ANGIOLILLO
CHERYL E. CHAMBERS
JEFFREY A. COHEN, JJ.

2010-06398 DECISION & ORDER

People of State of New York, respondent,
v Lorenzo Scott, appellant.

Lynn W. L. Fahey, New York, N.Y. (Lisa Napoli of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Morgan J. Dennehy of counsel; Gamaliel Marrero on the brief), for respondent.

Appeal by the defendant from an order of the Supreme Court, Kings County (Brennan, J.), dated February 24, 2009, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6-C.

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

"[U]tilization of the risk assessment instrument will generally 'result in the proper classification in most cases so that departures will be the exception not the rule'" (*People v Guaman*, 8 AD3d 545, 545, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [1997 ed.]; *see People v Martin*, 79 AD3d 717). However, "an objective instrument, no matter how well designed, will not fully capture the nuances of every case" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006 ed.]). An upward departure from the presumptive risk level is warranted where "there exists an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (*id.*; *see People v Lee*, 77 AD3d 897, 898; *People v Bowens*, 55 AD3d 809, 810).

Here, the People presented evidence, including the defendant's own admission, establishing that he intended to rape the victim, but his attempt was thwarted by a police officer who heard the victim screaming for help. This was an aggravating factor of a kind, or to a degree,

otherwise not adequately taken into account by the guidelines. Since the rape was not completed, the defendant was assessed only 10 points under factor two for touching that occurred under the clothing, and not 25 points for sexual intercourse. As a result, the defendant's total assessment was 65 points, placing him at level one. However, it is "evident that [the defendant] intended to rape his victim, [and] that the lack of points in this category result[ed] in an under-assessment of the [defendant's] actual risk to public safety" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 9 [2006 ed.]; *see People v Mudd*, 43 AD3d 1128, 1129). Accordingly, the Supreme Court providently exercised its discretion in upwardly departing from level one to level two (*see People v Mudd*, 43 AD3d at 1129).

The defendant's remaining contentions are academic.

MASTRO, J.P., ANGIOLILLO, CHAMBERS and COHEN, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court