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

D32798
C/prt

_____AD3d_____ Submitted - October 13, 2011

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
JEFFREY A. COHEN, JJ.

2011-01975 DECISION & ORDER

People of State of New York, respondent, v
Absalon Vasquez, appellant.

Frank T. Kelly, Bayside, N.Y., for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano and Jeanette Lifschitz of counsel; Andrew Dykens on the brief), for respondent.

Appeal by the defendant from an order of the Supreme Court, Queens County (Aloise, J.), dated February 7, 2011, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6-C.

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

Contrary to the defendant's contention, the Supreme Court properly assessed 30 points under risk factor 9 based upon his prior youthful offender adjudication for burglary in the second degree (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 13 [2006 ed.]; *People v Stacconi*, 81 AD3d 1046; *People v Thomas*, 59 AD3d 783, 784; *People v Baker*, 57 AD3d 1472, 1473; *People v Swackhammer*, 25 AD3d 892). To the extent that the defendant maintains that the Supreme Court failed to set forth the findings of fact and conclusions of law upon which it based its determination to assess those points, remittitur is not required because the record is sufficient for this Court to make its own findings of fact and conclusions of law (*see People v Lyons*, 72 AD3d 776; *People v Hill*, 50 AD3d 990, 991).

Moreover, the defendant's argument with regard to risk factor 1 is without merit. The defendant's infliction of physical injury upon the victim was "previously proven at trial" (*People v*

Vasquez, 297 AD2d 297, 298). Thus, that fact "shall be deemed established by clear and convincing evidence and shall not be relitigated" (Correction Law § 168-n[3]; *see People v Davenport,* 38 AD3d 634, 635).

Finally, under the circumstances of this case, the Supreme Court properly determined that an upward departure to risk level three was warranted based upon clear and convincing evidence of the existence of aggravating factors not accounted for in the risk assessment instrument (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006 ed.]; *People v Wyatt,* _____AD3d_____, 2011 NY Slip Op 07404 [2d Dept 2011]; *People v Freeman,* 85 AD3d 1335, 1336; *People v Twyman,* 59 AD3d 415, 416; *People v Heichel,* 20 AD3d 934, 935-936).

ANGIOLILLO, J.P., FLORIO, LEVENTHAL and COHEN, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court