

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

D33600
G/mv

_____AD3d_____

Submitted - December 16, 2011

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
JOHN M. LEVENTHAL, JJ.

2009-01230

DECISION & ORDER

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

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

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

Appeal by the defendant, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Garnett, J.), dated February 5, 2009, as, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6-C.

ORDERED that the order is affirmed insofar as appealed from, without costs or disbursements.

Correction Law § 168-n(3) requires a court making a risk level determination pursuant to the Sex Offender Registration Act (hereinafter SORA; *see* Correction Law article 6-C) to “render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based.” Here, the Supreme Court failed to adequately set forth its findings of fact and conclusions of law in its order. However, since the record is sufficient for this Court to make its own findings of fact and conclusions of law, remittal is not required (*see People v Lashway*, 66 AD3d 662, 662; *People v Guitard*, 57 AD3d 751, 751).

The defendant contends that the Supreme Court improperly granted the People's application, upon the recommendation of the Board of Examiners of Sex Offenders (hereinafter the

January 10, 2012

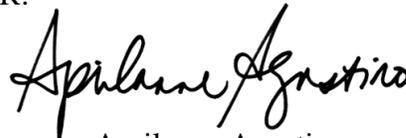
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Board), for an upward departure to risk level three. “A court may exercise its discretion and depart upward from the presumptive risk level where ‘it concludes that there exists an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines’” (*People v McDonnell*, 89 AD3d 815, ___, *1, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006 ed.]). “There must be clear and convincing evidence of the existence of the aggravating factor to warrant the court's exercise of discretion” (*People v McDonnell*, 89 AD3d at ___, *1; *see* Correction Law § 168-n[3]; *People v Wyatt*, 89 AD3d 112). Here, in departing from the presumptive risk level, the Supreme Court properly considered the evidence of the brutality and violence of the underlying crimes committed by the defendant in Ohio, as set forth in the case summary completed by the Board. In addition to raping the victim, the defendant, during the attack, struck the victim on the head multiple times, inflicted bruises and abrasions on her and, most significantly, choked her to the point of unconsciousness twice, resulting in his conviction of attempted murder as well as rape. Contrary to the defendant’s contention, and notwithstanding the fact that the defendant was assessed 15 points under risk factor one for inflicting physical injury on the victim, the People demonstrated by clear and convincing evidence the existence of an aggravating factor that was not adequately taken into account by the guidelines and the risk assessment instrument (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 14 [2006 ed.]; *People v Miller*, 48 AD3d 774, 775; *People v Joslyn*, 27 AD3d 1033, 1034-1035; *see also* *People v Neal*, 73 AD3d 1145, 1145-1146).

DILLON, J.P., DICKERSON, ENG and LEVENTHAL, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court