

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

**361**

**KA 17-00750**

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DERRELL AUSTIN, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. KULESUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Erie County Court (Sheila A. DiTullio, J.), entered March 16, 2017. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that he was entitled to a downward departure to a level one risk (*see People v Nilsen*, 148 AD3d 1688, 1689 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]; *People v Brockington*, 94 AD3d 1433, 1434 [4th Dept 2012], *lv denied* 19 NY3d 809 [2012]). In any event, we conclude that "defendant failed to establish his entitlement to a downward departure from his presumptive risk level inasmuch as he failed to establish the existence of a mitigating factor by the requisite preponderance of the evidence" (*People v Phillips*, 162 AD3d 1752, 1753 [4th Dept 2018], *lv denied* 32 NY3d 908 [2018] [internal quotation marks omitted]; *see People v Puff*, 151 AD3d 1965, 1966 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]; *Nilsen*, 148 AD3d at 1689).

Defendant also failed to preserve for our review his contention that County Court erred in assessing 10 points under risk factor 8 (*see People v Kyle*, 64 AD3d 1177, 1178 [4th Dept 2009], *lv denied* 13 NY3d 709 [2009]). In any event, that contention lacks merit. Correction Law § 168-a provides that kidnapping offenses committed against minors are registerable sex offenses, and the Court of Appeals has held that provision constitutional (*see* § 168-a [1], [2] [a] [i]; *People v Knox*, 12 NY3d 60, 68-69 [2009], *cert denied* 558 US 1011 [2009]). Contrary to defendant's contention, risk factor 8 takes into

account a defendant's "age at the time of commission" of the relevant sex offense (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 13 [2006]; see *People v Pietarniello*, 53 AD3d 475, 476-477 [2d Dept 2008], *lv denied* 11 NY3d 707 [2008]).

Entered: April 26, 2019

Mark W. Bennett  
Clerk of the Court