

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

**951**

**KA 07-01924**

PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAWN M. KELLEY, DEFENDANT-APPELLANT.

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TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Monroe County Court (Richard A. Keenan, J.), entered August 14, 2007. 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's contention that County Court erred in assessing points under the risk factor for "duration of offense conduct with victim" lacks merit. We conclude that the People established by the requisite clear and convincing evidence that there was a continuing course of sexual contact (see § 168-n [3]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 10 [2006]; see also *People v Wood*, 60 AD3d 1350). We further conclude that the court properly assessed 15 points under the risk factor for defendant's history of drug and alcohol abuse inasmuch as the People presented clear and convincing evidence of such a history (see *People v Ramos*, 41 AD3d 1250, *lv denied* 9 NY3d 809; *People v Vaughn*, 26 AD3d 776, 777), and defendant presented no evidence of prolonged abstinence "in recent years" (*Vaughn*, 26 AD3d at 777; see *Ramos*, 41 AD3d 1250). Finally, defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level (see *People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708; *People v Regan*, 46 AD3d 1434, 1435) and, in any event, that contention lacks merit (see *Ratcliff*, 53 AD3d 1110; *People v Marks*, 31 AD3d 1142, 1143, *lv denied* 7 NY3d 715).

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court