

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

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KA 15-01103

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MATTHEW SYMONDS, DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Robert B. Wiggins, J.), entered March 5, 2015. 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: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 et seq.), defendant contends that County Court erred in granting an upward departure from his presumptive classification as a level one risk. We reject that contention. It is well settled that a court may grant an upward departure from a sex offender's presumptive risk level when the People establish, by clear and convincing evidence (see § 168-n [3]; *People v Gillotti*, 23 NY3d 841, 861-862), the existence of "an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006]; see *People v Shepard*, 103 AD3d 1224, 1224, lv denied 21 NY3d 856; *People v Wheeler*, 59 AD3d 1007, 1008, lv denied 12 NY3d 711). Here, there is clear and convincing evidence of "defendant's exploitation of his relationship of trust with the victim[]" over a period of more than a year (*People v Botindari*, 107 AD3d 1607, 1608), which constituted an aggravating factor of a kind or to a degree not otherwise taken into account by the risk assessment guidelines (see *People v Mantilla*, 70 AD3d 477, 478, lv denied 15 NY3d 706; *People v Hill*, 50 AD3d 990, 991, lv denied 11 NY3d 701; *People v Ferrer*, 35 AD3d 297, 297, lv denied 8 NY3d 807).

Entered: February 3, 2017

Frances E. Cafarell
Clerk of the Court