

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

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**KA 22-01383**

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND OGDEN, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ADAM BURGIO, DEFENDANT-APPELLANT.

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JULIE A. CIANCA, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), entered July 22, 2022. 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 ([SORA] Correction Law § 168 *et seq.*). As defendant correctly concedes, he failed to preserve for our review his contentions that a downward departure was warranted on the bases of, *inter alia*, his significant adult relationship with his wife, probationary sentence, and response to mental health treatment, inasmuch as he did not assert those grounds for a downward departure at the SORA hearing (*see People v Burgess*, 191 AD3d 1256, 1256-1257 [4th Dept 2021]; *People v Colon*, 186 AD3d 1730, 1731 [2d Dept 2020], *lv denied* 36 NY3d 903 [2020]). In any event, defendant's contentions lack merit. Even assuming, *arguendo*, that defendant "satisfied his burden with respect to the first two steps of the three-step analysis required in evaluating a request for a downward departure," we conclude that Supreme Court did not abuse its discretion in denying defendant's request (*People v Cornwell*, - AD3d -, -, 2023 NY Slip Op 00566, \*1 [4th Dept 2023]; *see People v Pritchard*, - AD3d -, -, 2023 NY Slip Op 00549, \*1 [4th Dept 2023]; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). Upon weighing the mitigating circumstances against the aggravating circumstances, including " 'the quantity and nature of the child pornography used by defendant, . . . and the extremely young children depicted therein' " (*People v Varin*, 158 AD3d 1311, 1312 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018]), we conclude that the totality of the circumstances does not warrant a downward departure inasmuch as

"defendant's presumptive risk level does not represent an over-assessment of his dangerousness and risk of sexual recidivism" (*Burgess*, 191 AD3d at 1257; see generally *People v Sincerbeaux*, 27 NY3d 683, 690-691 [2016]).

Entered: March 24, 2023

Ann Dillon Flynn  
Clerk of the Court