

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

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KA 24-01194

PRESENT: CURRAN, J.P., MONTOUR, OGDEN, DELCONTE, AND KEANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

FREDDIE PAGAN, ALSO KNOWN AS FREDDIE MARTINEZ,
DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR
DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL),
FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered May 8, 2024. 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 sex offender pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*).

We conclude that County Court did not abuse its discretion in granting the People's request for an upward departure (*see generally* *People v DeCapua*, 179 AD3d 1460, 1461 [4th Dept 2020], *lv denied* 35 NY3d 906 [2020]). 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* Correction Law § 168-n [3]; *People v Gillotti*, 23 NY3d 841, 861-862 [2014]), 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' " (*People v Morin*, 232 AD3d 1241, 1241 [4th Dept 2024], *lv denied* 43 NY3d 903 [2025]; *see People v Vaillancourt*, 112 AD3d 1375, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). Here, the People met their burden of establishing by clear and convincing evidence the existence of aggravating factors not adequately accounted for in the risk assessment instrument, including that the victim's 4-year-old child was awake in the next room while defendant raped the victim, and that defendant had previously followed and threatened the victim with a firearm (*see People v Rodriguez*, 196 AD3d 43, 54 [2d Dept 2021], *lv denied* 37 NY3d 913 [2021]; *see*

generally Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 7-8 [2006])). Contrary to defendant's contention, the court did not fail to properly weigh the aggravating and mitigating factors in determining that the totality of the circumstances warranted a discretionary upward departure (*see Morin*, 232 AD3d at 1241; *People v Tidd*, 128 AD3d 1537, 1537 [4th Dept 2015], *lv denied* 25 NY3d 913 [2015]; *see generally Gillotti*, 23 NY3d at 861). To the extent that defendant's contention may be construed as an invitation to determine that an upward departure is precluded by the fact that he received a low-risk score on an alternate risk assessment instrument, we decline that invitation (*see generally People v Rolon*, 210 AD3d 708, 708-709 [2d Dept 2022], *lv denied* 39 NY3d 907 [2023]; *People v Curry*, 158 AD3d 52, 60 [2d Dept 2017], *lv denied* 31 NY3d 905 [2018])).