

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

1057

KA 09-00601

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, SCONIERS, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LEE O. MAY, DEFENDANT-APPELLANT.

GAIL R. BREEN, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DOUGLAS A. GOERSS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered February 23, 2009. The order determined that defendant is a level three 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 three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 et seq.), defendant contends that Supreme Court's upward departure from his presumptive classification as a level two risk is not supported by clear and convincing evidence. We reject that contention (*see People v Gandy*, 35 AD3d 1163; *People v Seils*, 28 AD3d 1158, *lv denied* 7 NY3d 709). "A court may make an upward departure from a presumptive risk level when, 'after consideration of the indicated factors . . .[,] there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines' " (*People v Cruz*, 28 AD3d 819, 819; *see People v Foley*, 35 AD3d 1240). Here, there is clear and convincing evidence that, over a three- to four-month period, defendant committed numerous sexual offenses against his stepdaughter, who was eight years old when the abuse began. In addition, defendant began abusing his stepdaughter within six months of his release from probation for a prior conviction arising from his sexual abuse of two female cousins, who were eight and nine years old at the time of the abuse. We conclude that both the ages of the victims and the gross abuse by defendant of the familial relationship that he had with those young children constituted proper aggravating factors not otherwise taken into account by the risk assessment guidelines (*see People v Hill*, 50 AD3d 990, *lv denied* 11 NY3d 701; *People v Ferrer*, 35 AD3d 297, *lv denied* 8

NY3d 807) .

Entered: October 1, 2010

Patricia L. Morgan
Clerk of the Court