

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

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KA 12-00041

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEPHEN M. COLLINS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (JOHN E. TYO OF COUNSEL),
FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JASON A. MACBRIDE
OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Ontario County Court (William F. Kocher, J.), dated November 21, 2011. 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.*). Based on the risk assessment instrument prepared by the Board of Examiners of Sex Offenders, defendant was presumptively classified as a level one risk based on his total risk factor score. Following a SORA hearing, however, County Court determined that an upward departure to a level two risk was warranted. We reject defendant's contention that the court's upward departure is not supported by the requisite clear and convincing evidence (*see* § 168-n [3]). The presentence report contained evidence that defendant had frequently downloaded pictures of naked young girls onto his home computer, and the mental health therapist who evaluated defendant for SORA classification purposes diagnosed him as a pedophile. A "diagnosis [of pedophilia] alone would support a finding that defendant poses a serious risk to public safety, justifying the upward departure from the presumptively correct classification of defendant as a level [one] risk" (*People v Seils*, 28 AD3d 1158, 1158, *lv denied* 7 NY3d 709; *see People v Zehner*, 24 AD3d 826, 827 n). In any event, we conclude that "defendant's psychological abnormalities are causally related to any risk of reoffense, and thus that there is clear and convincing evidence of special circumstances to support the court's upward departure from defendant's presumptive risk level" (*People v Mallaber*, 59 AD3d 989,

990, *lv denied* 12 NY3d 710).

Entered: March 15, 2013

Frances E. Cafarell
Clerk of the Court