

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 23, 2024

533382

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

v

MEMORANDUM AND ORDER

RAY EAGLIN,

Appellant.

Calendar Date: May 3, 2024

Before: Garry, P.J., Reynolds Fitzgerald, Fisher, McShan and Powers, JJ.

Rural Law Center of New York, Inc., Plattsburgh (Lora J. Tyron of counsel), for appellant.

Jason M. Carusone, District Attorney, Lake George (Robert P. McCarty of counsel), for respondent.

Fisher, J.

Appeal from an order of the County Court of Warren County (John S. Hall Jr., J.), entered December 10, 2020, which classified defendant as a risk level two sex offender pursuant to the Sex Offender Registration Act.

In 2018, defendant was convicted of sexual abuse in the first degree and was sentenced to a prison term of 3½ years, to be followed by 10 years of postrelease supervision. The conviction stemmed from defendant's sexual contact with a 12-year-old girl. In anticipation of defendant's release from prison, the Board of Examiners of Sex Offenders prepared a risk assessment instrument (hereinafter RAI) in accordance with the

Sex Offender Registration Act (*see* Correction Law art 6-C) that presumptively classified defendant as a risk level one sex offender (65 points). The People sought to assess an additional 10 points under risk factor 1 (forcible compulsion), thereby assigning defendant a total score of 75 points, placing him at a risk level two classification. Following a hearing, County Court classified defendant as a risk level two sex offender based upon a total of 75 points, including 10 points under risk factor 1. Defendant appeals.

Initially, defendant contends that the People failed to comply with the timeliness requirements of Correction Law § 168-n (3) when seeking a risk level two classification, depriving him of due process. However, inasmuch as defendant failed to raise this issue before County Court, it is not preserved for our review (*see People v Charache*, 9 NY3d 829, 830 [2007]; *People v Palmer*, 68 AD3d 1364, 1365 [3d Dept 2009]; *People v McLean*, 55 AD3d 973, 974 [3d Dept 2008]).

Turning to the merits, defendant challenges the 10 points assessed him under risk factor 1 for the use of forcible compulsion on the victim. Although defendant argues that he was not prosecuted on a charge that included the element of forcible compulsion, "the trial court is not limited to the crime of conviction and may consider the circumstances of the underlying crime, as well as any victim's statement and any relevant materials" (*People v LaRock*, 45 AD3d 1121, 1122 [3d Dept 2007] [internal quotation marks and citation omitted]). Here, the People relied on statements made during an investigator's interview with the victim, which County Court properly considered (*see People v Jordan*, 62 AD3d 1176, 1177 [3d Dept 2009], *lv denied* 16 NY3d 709 [2011]). The victim stated during the interview that on one occasion defendant removed her pants and placed her on top of him and engaged in sexual contact with her. According to the victim, on another occasion, after defendant removed the victim's pants, she tried to put them back on but defendant would not let her, and then he engaged in sexual contact with her. Defendant would also make the victim touch his penis and he "kept putting [her] hand there." The victim further stated that whenever she had tried to pull away from defendant, he would pull her back. Given the foregoing, clear and convincing evidence supports a finding that defendant used forcible compulsion on the victim and that he was therefore properly assessed 10 points under risk factor 1 (*see People v Green*, 201 AD3d 1137, 1138 [3d Dept 2022], *lv denied* 38 NY3d 906 [2022]; *People v Miller*, 81 AD3d 1064, 1065 [3d Dept 2011]).

Finally, although County Court's assessment of a total of 60 points in its findings of fact, which would equate to a risk level one sex offender classification, differs from its

final assessment of 75 points and a risk level two classification in its decision and order, the record is sufficient to permit this Court to make its own findings of fact and conclusions of law and remittal is not required (*see People v Green*, 201 AD3d at 1138; *People v Brown*, 190 AD3d 1120, 1122 [3d Dept 2021]). The record reflects that defendant did not challenge the 65 points assessed by the Board in its RAI, including the 25 points assessed under risk factor 2. In its findings of fact, County Court noted that defendant had not contested the points assessed by the Board under risk factor 2, but inexplicably only assessed defendant 10 points under that risk factor. Given that defendant did not challenge the 65 points assessed by the Board in its RAI and taking into account the additional 10 points County Court properly assessed under risk factor 1, defendant was properly designated a risk level two sex offender with a total of 75 points.

Garry, P.J., Reynolds Fitzgerald, McShan and Powers, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court