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

Decided and Entered: April 9, 2026 CV-24-1378

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
v MEMORANDUM AND ORDER

EYZAIYA ORTIZ,
Appellant.

Calendar Date: February 10, 2026

Before: Clark, J.P., Aarons, Pritzker, McShan and Corcoran, JJ.

Elizabeth M. Corrado, Public Defender, Kingston (*Carly Burkhardt* of counsel), for appellant.

Emmanuel C. Nneji, District Attorney, Kingston (*Joan Gudesblatt Lamb* of counsel), for respondent.

Clark, J.P.

Appeal from an order of the County Court of Ulster County (James Farrell, J.), entered April 3, 2024, which classified defendant as a risk level two sex offender pursuant to the Sex Offender Registration Act.

In 2021, defendant waived indictment and was charged in a superior court information with rape in the third degree, stemming from allegations that, when he was between the ages of 22 and 23, he had sexual intercourse with someone under the age of 17. Pursuant to a negotiated plea agreement, which encompassed the superior court information and an uncharged offense, defendant pleaded guilty to the charged crime and

was thereafter sentenced to a prison term of 2½ years, to be followed by 10 years of postrelease supervision. In anticipation of his release, the Board of Examiners of Sex Offenders prepared a risk assessment instrument pursuant to the Sex Offender Registration Act (*see* Correction Law art 6-C [hereinafter SORA]) that assigned him a total of 80 points and presumptively placed him in the risk level two classification. The People, in turn, prepared their own risk assessment instrument that also assigned defendant 80 points, adding 20 points under risk factor four for a continuing course of sexual misconduct that was not assessed by the Board, but omitting 20 points assessed by the Board under risk factor three for more than one victim, conceding that there was only one victim in this matter. Defendant opposed the assessment of points under various risk factors and, alternatively, sought a downward departure to a risk level one classification. Following a hearing, County Court agreed with the People's assessment of 80 points and further assessed defendant 10 points under risk factor 12 for failing to accept responsibility, for a total of 90 points, and classified him as a presumptive risk level two sex offender. The court also denied defendant's request for a downward departure. Defendant appeals.

"In determining a defendant's risk level classification under SORA, the People 'bear the burden of proving the facts supporting the determinations sought by clear and convincing evidence' " (*People v Dority*, 234 AD3d 1211, 1212 [3d Dept 2025], quoting Correction Law § 168-n [3]; *see People v Bellinger*, 233 AD3d 1331, 1332 [3d Dept 2024]). "The People may use reliable hearsay, including case summaries and victim statements, to establish the appropriateness of a point assessment" (*People v Smith*, 128 AD3d 1189, 1189 [3d Dept 2015] [citation omitted]; *see People v Mingo*, 12 NY3d 563, 571-574 [2009]; *People v Deming*, 155 AD3d 1262, 1262 [3d Dept 2017], *lv denied* 30 NY3d 911 [2018]).

Defendant challenges the 10 points assessed under risk factor 1 for use of forcible compulsion. According to the SORA guidelines, "[f]orcible compulsion means to compel by either '(a) use of physical force or (b) a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person' " (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 8 [2006], quoting Penal Law § 130.00 [8]). The People presented a statement from the victim that relayed the circumstances surrounding the uncharged crime that was encompassed by defendant's plea agreement.[1] In her statement, the victim described an

[1] Contrary to defendant's contention, a victim's unsworn statement is admissible in a SORA proceeding (*see People v Sincerbeaux*, 27 NY3d 683, 688 [2016]; *People v*

incident that occurred after she turned 17 years of age, when, despite informing defendant that she did not want to have sex, defendant pulled her out of a car and forced her "to perform oral sex on him, ripped [her] pants down and forced himself on [her]." Given the foregoing, we find that clear and convincing evidence supports the assessment of 10 points under risk factor 1 for use of forcible compulsion (*see People v Aldous*, 231 AD3d 1243, 1244 [3d Dept 2024], *lv denied* 42 NY3d 913 [2025]; *People v Roubik*, 231 AD3d 1210, 1211 [3d Dept 2024]).

County Court also properly assessed 20 points under risk factor 4 for continuing course of sexual misconduct, as information in the case summary and the presentence report, including statements made by defendant, supports a finding that defendant engaged in "three or more acts of sexual contact over a period of at least two weeks" against the victim (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006]; *see People v Snay*, 122 AD3d 1012, 1013 [3d Dept 2014], *lv denied* 24 NY3d 916 [2015]; *People v Richards*, 50 AD3d 1329, 1330 [3d Dept 2008], *lv denied* 10 NY3d 715 [2008]). We further reject defendant's contention that he was erroneously assessed 5 points under risk factor 9, as County Court properly considered a prior youthful offender adjudication in making the assessment (*see People v Francis*, 30 NY3d 737, 749-751 [2018]; *People v Butler*, 161 AD3d 1232, 1232 [3d Dept 2018], *lv denied* 32 NY3d 904 [2018]).[2] Finally, in light of the foregoing, even if we were to agree with defendant that he was erroneously assessed 10 points for failing to accept

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Mingo, 12 NY3d at 576-577). Moreover, when assessing points related to the current offense, the court is not limited to considering a defendant's current conviction but "may also assess points for clear and convincing evidence of other criminal acts presented in . . . statements from victims . . . or other reliable sources" (*People v Sincerbeaux*, 27 NY3d at 688).

[2] Defendant relies on this Court's decision in *People v Norris* (223 AD3d 1060 [3d 2024]) for the proposition that a prior youthful offender adjudication may only be considered when deciding whether to depart from the recommended risk level and cannot be used in the assessment of points under risk factor 9. Although our decision in *Norris* contains certain language supporting such proposition, as noted by County Court in assessing points under this risk factor, *Norris* is distinguishable insofar as it concerned a defendant's *subsequent* youthful offender adjudication. Under the Court of Appeals precedent, a prior youthful offender adjudication may be used to assess points under risk factor 9 (*see People v Francis*, 30 NY3d at 749-751 [2018]; *see also* Correction Law § 168-l [b] [iii]).

responsibility because he was not provided a meaningful opportunity to respond to that assessment, the remaining 80 points would still presumptively classify him as a risk level two sex offender.

Defendant also argues that County Court erred in denying his request for a downward departure. "As the party seeking the downward departure, defendant was required to demonstrate, by a preponderance of the evidence, the existence of mitigating factors not adequately taken into consideration by the risk assessment guidelines" (*People v Smith*, 211 AD3d 1127, 1128 [3d Dept 2022] [internal quotation marks and citations omitted]; *accord People v Sanders*, 228 AD3d 1184, 1186 [3d Dept 2024]). Although this Court may, in appropriate cases, exercise its "independent discretion" to grant a defendant a downward departure even where the trial court declined to do so (*People v Waterbury*, 231 AD3d 201, 208 [3d Dept 2024]), "[w]hether to grant a downward departure from the presumptive risk level is [typically] a matter within the sound discretion of the trial court" that is reviewed on appeal for an abuse of discretion (*People v Arroyo*, 202 AD3d 1212, 1213 [3d Dept 2022] [internal quotation marks and citations omitted], *lv denied* 38 NY3d 910 [2022]; *see People v Pardee*, 228 AD3d 1142, 1144 [3d Dept 2024], *lv denied* 42 NY3d 909 [2024]). County Court did not abuse its discretion in denying defendant's request for a downward departure in this case and we discern no basis upon which to exercise our own independent discretion to grant such request.

Initially, inasmuch as the victim's statement indicated that defendant used forcible compulsion to have sexual intercourse with her, his contention that her lack of consent was due only to her age warranting a downward departure is rejected (*see People v Legall*, 63 AD3d 1305, 1307 [3d Dept 2009], *lv denied* 13 NY3d 706 [2009]). Defendant further contends that a downward departure is appropriate due to what he considers to be his "exceptional" response to the sex offender treatment program while incarcerated (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006]). In support, defendant relies on four monthly evaluations of his performance in the program from July 2023 to October 2023. Participants in the program are scored points for various behaviors exhibited, which are totaled, and participants are then ranked as either "highly motivated," "motivated," "needs improvement" or "below minimum standard." Defendant's evaluations reflect that he was scored as "motivated" in three of the months and "highly motivated" in the last month. Defendant also relies on the opinion of a former clinical social worker who had worked in the sex offender unit for the Ulster County Probation Department, and who reviewed defendant's monthly evaluations and opined that "[m]ost [incarcerated individuals] score significantly lower than [defendant]" in the program and that his performance was exceptional as "compared to the typical

[incarcerated individuals] who complete the program." While defendant's scores are commendable, we cannot conclude that the scores, and the clinical social worker's associated opinion, demonstrate an exceptional response to treatment so as to serve as a basis for a downward departure (*see People v Salerno*, 224 AD3d 1016, 1017 [3d Dept 2024]; *People v Glowinski*, 208 AD3d 1392, 1394 [3d Dept 2022]). Additionally, the record reflects that defendant scored as an "[a]verage risk" to reoffend in a Static-99 test. Although the social worker opined that defendant's results reflect a low risk to reoffend for someone who had been incarcerated, the results of a Static-99 test, "do not, standing alone, necessarily establish a mitigating factor" (*People v Roubik*, 231 AD3d at 1213 [internal quotation marks and citation omitted]; *see People v Saunders*, 209 AD3d 776, 778 [2d Dept 2022], *lv dismissed* 39 NY3d 1126 [2023]). Finally, defendant has not demonstrated by a preponderance of evidence that the expressed support of family and friends reduces his likelihood to reoffend (*see People v Dawson*, 243 AD3d 1024, 1026 [3d Dept 2025]; *People v Ojeda*, 216 AD3d 819, 820 [2d Dept 2023], *lv denied* 40 NY3d 906 [2023]). Given the totality of the circumstances, we find no abuse of discretion in the denial of defendant's request for a downward departure (*see People v Roubik*, 231 AD3d at 1213; *People v Porter*, 201 AD3d 1152, 1154 [3d Dept 2022], *lv denied* 38 NY3d 908 [2022]; *compare People v Waterbury*, 231 AD3d at 208-209).

Aarons, Pritzker, McShan and Corcoran, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court