148 A.D.3d 1064
Supreme Court, Appellate Division, Second Department, New York.

PEOPLE of State of New York, respondent,
v.
Quinn BRITTON, appellant.

March 22, 2017.

Synopsis
Background: Defendant appealed from an order of the Supreme Court, Kings County, Del Giudice, J., which designated him a level two sex offender pursuant to the Sex Offender Registration Act (SORA).

Holdings: The Supreme Court, Appellate Division, held that:

[1] despite his acquittal on certain underlying charges, defendant engaged in sexual intercourse, deviate intercourse, or aggravated sexual abuse with victim, which warranted assessing 25 points under certain risk factor;

[2] court should not have assessed ten points based on his failure to accept responsibility for his criminal conduct; but

[3] even deducting the ten points improperly assessed, the court properly designated defendant a level two sex offender.

Affirmed.

Attorneys and Law Firms

****743** Lynn W.L. Fahey, New York, NY (John B. Latella and Denise Corsi of counsel), for appellant.

Eric Gonzalez, Acting District Attorney, Brooklyn, NY (Leonard Joblove, Morgan J. Dennehy, and Julian Joiris of counsel), for respondent.

JOHN M. LEVENTHAL, J.P., L. PRISCILLA HALL, LEONARD B. AUSTIN, and BETSY BARROS, JJ.

Opinion

***1064** Appeal by the defendant from an order of the Supreme Court, Kings County (Del Giudice, J.), dated November 19, 2013, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6–C.

ORDERED that the order is affirmed, without costs or disbursements.

[1] [2] The defendant contends that, in determining his risk level under the Sex Offender Registration Act (*see* Correction Law art. 6–C; hereinafter SORA), the Supreme Court erroneously assessed 25 points against him under risk factor 2. We disagree. Correction Law § 168–n(3) states that, in a SORA proceeding, the court "shall review any victim's statement," which includes a victim's testimony before the grand jury (*see People v. Harmon,* 145 A.D.3d 688, 690, 44 N.Y.S.3d 68). Grand jury minutes constitute reliable hearsay that is sufficient for SORA purposes (*see People v. Mingo,* 12 N.Y.3d 563, 573, 883 N.Y.S.2d 154, 910 N.E.2d 983; *People v. Harmon,* 145 A.D.3d at 690, 44 N.Y.S.3d 68). Here, even though the defendant was acquitted of rape in the first degree and criminal sexual act in the first degree at his criminal trial relating to the underlying conduct, the People established by clear and convincing evidence, including the trial testimony and the victim's grand jury testimony, that the defendant engaged in sexual intercourse, deviate intercourse, or aggravated sexual abuse with the victim (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [hereinafter Commentary] at 9 [2006]).

[3] [4] Additionally, the defendant contends that the Supreme Court erred in assessing 10 points against him under risk factor

12 for failure to accept responsibility for his criminal conduct. Under the particular circumstances of this case, the court should not have assessed 10 points under risk factor 12. While testifying at his criminal trial, the defendant vigorously denied committing any of the charges. ****744** Thereafter, during the SORA ***1065** hearing, which occurred simultaneously with the defendant's sentencing in the underlying criminal trial, the defendant invoked his Fifth Amendment privilege against self-incrimination. This unique situation presented him with the choice of either exercising his Fifth Amendment privilege against self-incrimination and appealing his conviction with the hope of dismissal of the remaining criminal charge against him or a new trial on that charge but being assessed 10 points under risk factor 12, or, on the other hand, accepting responsibility and possibly incriminating himself if his conviction was reversed on appeal resulting in a new trial (*see People v. Kearns,* 68 A.D. 3d 1713, 1714, 891 N.Y.S.2d 802). Further, the People failed to establish, by clear and convincing evidence, facts to support the assessment of these points (*see* Correction Law § 168–n[3]; Commentary at 5, 15–16; *People v. Mingo,* 12 N.Y.3d at 571, 883 N.Y.S.2d 154, 910 N.E.2d 983). However, even deducting these 10 points from the total points assessed, the defendant remains a presumptive level two sex offender (*see People v. Correnti,* 126 A.D.3d 681, 681, 2 N.Y.S.3d 375; *People v. Marsh,* 116 A.D.3d 680, 681, 983 N.Y.S.2d 91; *People v. Mabee,* 69 A.D.3d 820, 820, 893 N.Y.S.2d 585).

Accordingly, the Supreme Court properly designated the defendant a level two sex offender pursuant to Correction Law article 6–C.

All Citations

148 A.D.3d 1064, 49 N.Y.S.3d 742, 2017 N.Y. Slip Op. 02073