SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001444-23T2

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Monmouth County.
R.M.,	:	
		Indictment No. 22-06-00989-I
Defendant-Appellant.	:	
		Sat Below:
	:	
		Hon. Chad N. Cagan, J.S.C.
	:	and a jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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DEFENDANT IS CONFINED

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PRELIMINARY STATEMENT

On trial for aggravated assault by smothering, the crux of R.M.'s[1] defense was simple: there was insufficient evidence of smothering. The only direct evidence was the complaining witness D.P.'s testimony, supported in part by the forensic nurse's findings that D.P. had a few cuts on her face and a bruise on her arm two days after the alleged incident. In response, the defense offered testimony from Dr. Edward Gosselin, an expert in emergency medicine and asphyxiation, disagreeing with the forensic nurse's findings and opining that there was no evidence of smothering.

The jury's evaluation of Dr. Gosselin's testimony was, therefore, critically important. Despite no support in the record and well-established case law prohibiting such argument, the prosecutor explicitly disparaged Dr. Gosselin's credibility before the jury in arguing that he only undermined the State's theory because his expert opinion was bought and paid for to benefit the defense.

This argument amounted to prosecutorial misconduct and deprived R.M. of his constitutional rights to a fair trial and due process. Thus, this Court must reverse his conviction and remand the matter for a new trial.

[1] This letter-brief uses initials for the defendant and victim to protect the victim's privacy. R. 1:38-3(c)(12).

PROCEDURAL HISTORY

On June 21, 2022, a Monmouth County grand jury returned Indictment No. 22-06-00989-I, charging defendant-appellant R.M. with second-degree aggravated assault (smothering), N.J.S.A. 2C:12-1(b)(13), and third-degree terroristic threats, N.J.S.A. 2C:12-3(b). (Da1-2)[2]

R.M. was tried before the Honorable Chad N. Cagan, J.S.C., and a jury from October 10 to 13, 2023. (1T to 4T) On October 13, the jury acquitted R.M. of the threats charge but convicted him of the smothering charge. (4T 80-4 to 25; Da3)

On December 22, 2023, R.M. was sentenced to six years in prison with eight-five percent parole ineligibility pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. (5T 78-12 to 19; Da4-6)

On January 16, 2024, R.M. filed a Notice of Appeal. (Da7-9)

[2] This brief uses the following abbreviations:
Da -- Defendant-Appellant's Appendix
1T -- Trial Transcript, October 10, 2023
2T -- Trial Transcript, October 11, 2023
3T -- Trial Transcript October 12, 2023
4T -- Trial Transcript October 13, 2023
5T -- Sentencing Transcript, December 22, 2023.

STATEMENT OF FACTS

R.M. and his then-girlfriend D.P. dated from October 2020 to August 15, 2021. (1T 48-1 to 11) During this time, the couple spent "almost every day" together, at either D.P.'s house in Asbury Park or R.M.'s house in Wall Township. (1T 48-14 to 49-20) D.P. testified that she and R.M. "enjoyed [their] time together." (1T 48-17)

At around 7:30 a.m. on August 15, 2021, D.P. and R.M. were hanging out at D.P.'s house. (1T 51-8 to 22) In talking about the day before, R.M. asked D.P. if she was with another man. (1T 52-18 to 53-7) R.M. did not yell or raise his voice, but "was just agitated" and "jealous." (1T 54-6 to 15) D.P. explained that she went to lunch with her two sons the day before and showed R.M. the restaurant receipt. (1T 53-2 to 54-20) R.M. apologized for overreacting. (1T 138-3 to 5)

Soon thereafter, R.M. told D.P. he was not feeling well and wanted to get tested for COVID-19. (1T 54-21 to 22) R.M. and D.P. decided to go to an urgent care clinic near R.M.'s house -- a ten-minute drive from D.P.'s house -- where he was an established patient. (1T 54-23 to 25, 89-1 to 5) Despite their earlier disagreement, D.P. testified that R.M. "wasn't agitated" anymore and, "[a]s far as [she] could see everything was fine." (1T 55-25 to 56-10, 138-23 to 25)

R.M. drove himself and D.P. to the clinic. (1T 55-1 to 10) Once there, R.M. and D.P. put their names and phone numbers on a waiting list for a COVID-19 test. (1T 56-19 to 57-3) While waiting, R.M. and D.P. left the clinic, got breakfast, and went to R.M.'s house to eat. (1T 57-5 to 18)

D.P. and R.M. arrived at R.M.'s house at around 9:00 a.m. (1T 57-19 to 23) Once inside, D.P. began unpacking the breakfast on a bistro table in the living room while R.M. went into the front bedroom. (1T 58-1 to 4) Then, D.P. testified that R.M. threw a metal workout bar in front of the front door; she did not see him throw it but heard a "thud" as it hit the floor. (1T 58-6 to 13, 129-21 to 25; 140-10 to 141-25) She "quietly grabbed [her] pocketbook and went to the door." (1T 59-23 to 24)

Before she could open the door, D.P. testified that R.M. ran over to her, pushed her down onto a loveseat, pushed his palm over her nose, and "clasped [her] chin shut" with his index finger and thumb. (1T 60-1 to 5, 71-22 to 25) D.P. testified that she could not breathe. (1T 61-5 to 7) She also testified that she was "trying to move his hand," but later acknowledged that did not try to push R.M.'s hand away or make any physical contact with him. (1T 61-3 to 4, 155-4 to 17)

Afterwards, D.P. testified that R.M. walked away and she sat on the loveseat "screaming. . . at the top of [her] lungs . . . straining [her] voice." (1T

61-15 to 23) D.P. testified that she was walking to the door when R.M. again pushed her down onto the loveseat, pushed his palm over her nose, and "clasped [her] chin shut" with his fingers. (1T 61-23 to 62-4, 71-22 to 25) D.P. explained that she "must have been blacking out" but remembered "hearing [her] head get hit" (1T 62-5 to 9) However, D.P. also asserted that she had "no idea what happened." (1T 63-7, 150-23 to 24, 151-7 to 15) At the time, D.P. was taking Wellbutrin, an antidepressant; Xarelto, a blood thinner; and Temazepam, a sleep medication. (1T 192-17 to 193-15)

Eventually, D.P. testified that she "woke up" face down on the living room floor with no recollection of what happened. (1T 63-14 to 21, 64-1 to 3) R.M. asked D.P. to sit down at the table and he sat down with her. (1T 64-9 to 18) D.P. testified that R.M. then threatened her, screamed at her, took her phone, and threw her pocketbook against the wall. (1T 65-10 to 25) D.P. picked up her pocketbook and sat back down. (1T 66-10 to 23) Then, D.P. heard R.M.'s phone ring and told him that they should head back to the clinic for his COVID-19 test. (1T 66-10 to 67-7) She also asked R.M. for her phone, which he retrieved for her. (1T 67-10 to 14)

Thereafter, D.P. and R.M. left R.M.'s house together. (1T 84-11 to 14) R.M.'s house was a trailer "within close proximity to" many neighboring trailers. (1T 173-18 to 21, 174-4 to 7) D.P. testified that she had been hoping

to get out of R.M.'s house but, once outside, she did not run, yell, or try to get help. (1T 180-1 to 181-6, 13-16) Nor did she try to contact anyone with her phone. Instead, D.P. got into R.M.'s car, and R.M. drove them to the clinic; D.P. testified that R.M. "was not speeding or driving erratically." (1T 67-16 to 18)

At the clinic, D.P. and R.M. checked in and sat down together. (1T 86-5 to 13) D.P. did not run, yell, or otherwise try to get help. (183-7 to 17) There were two receptionists in the waiting area, but D.P. did not ask them for help. (1T 86-19, 87-21 to 25) Rather, D.P. testified that she intended to get tested for COVID-19. (1T 84-19 to 22)

Before getting tested, however, D.P. ordered a car to pick her up via the Lyft app on her phone. (1T 86-2 to 6) When R.M. asked what she was doing, D.P. said she was leaving. (1T 86-17 to 22) Once the car was outside the clinic, D.P. left the clinic and got in the car. (1T 86-24 to 87-3) R.M. did not try to stop her. (1T 86-18 to 22)

In the car, D.P. did not ask the driver for help or tell him about the incident. (1T 87-4 to 10) At some point, however, D.P. realized that she had left her keys at R.M.'s house. (1T 88-14 to 18) D.P. then called her son and told him she needed help; she did not explain why or tell him about the incident. (1T 88-23 to 24, 90-14 to 17) Back at her house, D.P. found a spare

key to her car and drove herself and her son -- who lived next door -- to the store to buy new locks for her house. (1T 89-12 to 23, 90-3 to 8) Her son then replaced the locks at her house, and D.P. put new spare keys outside. (1T 93-25 to 94-1, 96-17 to 21) Later that night, R.M. called D.P. multiple times. (1T 97-5 to 16)

The following morning, D.P. drove herself to the local police station and spoke to Officer Andrew Slinger. (1T 98-22 to 25, 100-23 to 101-4) She explained that she waited to report the incident until the next day because was in shock and because R.M. had her car key, although she acknowledged that she had a spare car key and used it to drive her car on the day of the incident. (1T 124-14 to 125-22) D.P. told Officer Slinger that she was smothered twice but did not mention losing consciousness. (1T 211-8 to 12) She also reported that she did not have any injuries, aside from a cut on the inside of her bottom lip, and that she did not have any pain or need for medical attention. (1T 161-18 to 20, 162-8 to 163-8) Later that day, D.P. gave a written statement that did not mention the alleged second smothering attempt, hitting her head, or losing consciousness. (1T 151-7 to 152-8, 209-1 to 25, 210-21 to 211-7)

Later that day, police arrested R.M. at his house. (2T 10-1 to 17) Officer Scott Fifield testified that R.M. was “genuinely cooperative” during the arrest and search of his home and had no defensive wounds. (2T 16-16 to 20)

The next day, D.P. went to the hospital for a forensic examination. (1T 104-4 to 15, 152-10 to 12) First, D.P. was examined by Dr. Anoop Kotwal, an emergency room doctor. (2T 104-24 to 105-5; 3T 116-21 to 117-9) D.P. told Dr. Kotwal she was feeling "fine but was referred in for the exam" by the Monmouth County Prosecutor's Office. (3T 118-14 to 17) She did not complain about any pain or injuries and did not report the second alleged smothering, hitting her head, or losing consciousness. (3T 123-10 to 25, 127-25 to 128-8) Dr. Kotwal checked D.P.'s vitals and examined her for any pain or injuries but did not "find anything overly unusual or . . . worrisome." (3T 120-25 to 123-2) Notably, Dr. Kotwal did not find any issues with D.P.'s eyes or any "obvious bruising, swelling, lumps, or bumps." (3T 119-16 to 18, 121-3 to 13)

Afterwards, D.P. was examined by forensic nurse Antoinette Geran, who had conducted "probably like five or six" prior smothering examinations. (2T 31-19 to 23, 58-17 to 19, 104-24 to 105-5) Geran testified that D.P. indicated that she was smothered twice and was experiencing headaches, dizziness, loss of appetite, and sleeplessness. (2T 38-24 to 39-2, 43-19 to 44-7) D.P. also reported experiencing ringing in her ears at the time of the incident but not at the time of the exam. (2T 43-23 to 24) Geran observed a bruise on D.P.'s arm, a cut on the left side of her nose, a cut on her left cheek, and an abrasion with

swelling on her lower lip. (2T 44-13 to 20, 53-25 to 54-1) She also observed "vascular congestion," a sign of pressure from increased blood flow, in D.P.'s eyes. (2T 46-23 to 25, 47-21 to 48-6) However, Geran acknowledged that she could not determine the cause of these conditions. (2T 59-7 to 22)

About two weeks later, D.P. received two concert admission wristbands in the mail that R.M. had ordered before the incident. (1T 113-19 to 114-2) On September 5, 2021, about three weeks after the incident, D.P. texted R.M. "I have your wristband." (1T 115-10 to 116-8) That same day, she went to R.M.'s house and left one of the wristbands with a note on his front door that read, "I will always love you. It would have been a year on September 27th." (1T 190-6 to 15) R.M. did not respond. (1T 191-5 to 7) Ultimately, D.P. went to the concert but left after seeing "evidence of [R.M.] there." (1T 190-21 to 191-1)

Dr. Edward Gosselin, an expert in emergency medicine and asphyxiation, testified at trial as to his review of Dr. Kotwal and Nurse Geran's reports. (3T 56-12 to 15, 58-10 to 12) Over his 34 years of professional experience, Dr. Gosselin had worked on a "double digits" number of alleged smothering cases. (3T 57-3 to 12) Having reviewed the photographs taken during Geran's examination, Dr. Gosselin observed some redness in D.P.'s eyes and on her left cheek and a lesion on her lower lip. (3T 82-20 to 83-1) However, he disagreed with Geran and found no evidence of any

vascular congestion, lacerations, or abrasions. (3T 59-15 to 62-16, 63-2 to 65-25, 78-5 to 80-20) He agreed with Dr. Kotwal in not finding "direct evidence of a significant finding." (3T 93-20 to 94-2)

Dr. Gosselin also noted that Xarelto and Wellbutrin, two of the medications D.P. was taking at the time, can create a higher risk of redness of the skin and eyes and bleeding under the skin with little to no force. (3T 70-8 to 74-7, 83-11 to 21, 89-17 to 25) In particular, he noted that "it doesn't take much force," for an individual on Xarelto to experience significant trauma. (3T 86-16 to 21) That said, Dr. Gosselin found no evidence of significant trauma. (3T 85-5 to 13) Although Dr. Gosselin could not say whether D.P.'s allegations were accurate, he did not believe, based on his clinical experience and review of medical textbooks, that D.P.'s condition was consistent with her allegations and found no evidence of asphyxiation. (3T 87-1 to 22, 100-14 to 15, 104-3 to 24, 106-15 to 107-13)

LEGAL ARGUMENT

POINT I

THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT IN SUMMATION BY DENIGRATING THE CREDIBILITY OF THE DEFENSE'S KEY EXPERT WITNESS IN THE EYES OF THE JURY WITHOUT ANY SUPPORT IN THE RECORD. (Not raised below)

It is well-established that prosecutors "must limit their remarks to the evidence, and refrain from unfairly inflaming the jury." State v. Atwater, 400 N.J. Super. 319, 335 (App. Div. 2008). In spite of well-established law prohibiting this type of argument and no support in the record, the prosecutor here argued that Dr. Gosselin's expert opinion -- that D.P. was not smothered -- was bought and paid for to benefit the defense. Referring to Dr. Gosselin's credibility, the prosecutor asserted:

> [Dr. Gosselin] disagreed with the forensic nurse's evaluation. . . . Why would he disagree with that? Because he's paid to, right? He's here for a reason. He was hired to author a report for the benefit of the defendant. When we're talking about credibility and bias, it's a pretty strong one.
>
> [(4T 28-25 to 29-19)]

These disparaging remarks were prosecutorial misconduct and plain error in violation of R.M.'s constitutional rights to due process and a fair trial. R. 2:10-2; U.S. Const., amends. XIV; N.J. Const., art. I, ¶¶ 1, 9 and 10. Therefore, R.M.'s

conviction must be reversed and the matter remanded for a new trial. State v. Timmendequas, 161 N.J. 515, 575 (1999).

A prosecutor cannot "cast unjustified aspersions on the defense or defense counsel." State v. Frost, 158 N.J. 76, 86 (1999). "[T]he primary duty of a prosecutor is not to obtain convictions, but to see that justice is done." State v. Smith, 167 N.J. 158, 177 (2001) (quoting Frost, 158 N.J. at 83). Therefore, a prosecutor's comments are confined to the evidence in the record and any reasonable inferences that can be drawn from that evidence. Frost, 158 N.J. at 85 (citing State v. Marks, 201 N.J. Super. 514, 534 (App. Div.1985)). A prosecutor cannot say -- explicitly or implicitly -- that expert testimony was created to assist the defense without any support in the record. State v. Rose, 112 N.J. 454, 518-19 (1988); see also State v. Moore, 122 N.J. 420, 462 (1991) (directing prosecutors not to discredit an expert witness's credibility without support in the record).

For example, in Smith, the prosecutor asserted on summation that the defense's expert witnesses were "hired, paid consultants" who "charge hefty fees" and urged the jury to consider "whether those hefty fees would influence their testimony at all; whether it would influence them to shade their testimony at all." 167 N.J. at 182. Our Supreme Court, however, found "no aspect of [the] testimony or cross-examination remotely suggested that the defense

expert witnesses fabricated their testimony or that they were motivated to lie" and that the experts were "exceptionally qualified and highly reputable." Id. at 183-84. Furthermore, the comments implied that, unlike the defense's experts, the State's expert was unpaid and therefore more credible. Id. at 188. Thus, the Court found these comments to be prosecutorial misconduct and reversible error. Id. at 185, 189. Even the trial court's curative instruction to the jury -- that it was not improper for an expert to be paid -- did not render the misconduct harmless. Id. at 188.

Despite our well-established law prohibiting prosecutors from baselessly arguing that a defense expert witness is somehow less credible because they are hired and paid by the defense, the prosecutor here did just that. The prosecutor explicitly argued that the sole reason why Dr. Gosselin offered testimony undermining the State's theory was because "he's paid to" and "hired to" do so. (4T 28-25 to 29-19) Like in Smith, the prosecutor's implication is obvious and unfair: Dr. Gosselin was motivated by money to fabricate his opinion or draw favorable conclusions for the defense. Smith, 167 N.J. at 183. More egregiously than in Smith, the prosecutor here made a direct connection for the jury between Dr. Gosselin being a paid expert witness and some alleged pro-defense bias, stating that "[w]hen we're talking about credibility and bias, it's a pretty strong one." (4T 29-19 to 19)

There is simply no evidence in the record to support the prosecutor's disparaging argument. Dr. Gosselin was exceptionally qualified and highly reputable; he had 34 years of experience as a doctor in emergency medicine and regularly worked on smothering cases at the time of trial. (3T 55-9 to 24) Moreover, on direct examination, Dr. Gosselin carefully explained how he formed his expert opinion based on his professional experience and review of medical textbooks. (3T 63-8 to 65-19 87-19 to 22, 89-9 to 90-6)

Furthermore, the prosecutor's cross-examination did not produce any evidence to suggest that Dr. Gosselin was guided by money rather than his three decades of medical experience and research in forming his expert opinion. (3T 96-9 to 113-8) For example, the prosecutor did not elicit any information about how Dr. Gosselin was compensated, the nature of his relationship with the defense, or his motivation in coming to certain conclusions. On cross-examination, Dr. Gosselin merely acknowledged that he did not witness the incident and could not say for certain whether D.P.'s injuries were the result of any alleged conduct. (3T 100-14 to 15, 104-3 to 24, 106-15 to 107-13) Therefore, like in Smith, the prosecutor's argument that Dr. Gosselin's opinion was bought and paid for by the defense was baseless and amounted to prosecutorial misconduct.

The prosecutor's misconduct deprived R.M. of a fair trial. Because the prosecutor's comments on summation "carry the full authority of the State," our courts cannot "sit idly by and condone prosecutorial excesses." Frost, 158 N.J. at 87-88 (quoting State v. Spano, 64 N.J. 566, 568 (1974)). Reversal is required when the prosecutor "substantially prejudice[s] the defendant's fundamental right to have a jury fairly evaluate the merits of his . . . defense." State v. Harris, 181 N.J. 391, 495 (2004). Our Supreme Court has "not hesitated to reverse convictions where," as here, "the prosecutor in [her] summation over-stepped the bounds of propriety and created a real danger of prejudice to the accused." State v. Johnson, 31 N.J. 489, 511 (1960). Even if there is "overwhelming" evidence of guilt, such evidence can "never be a justifiable basis for depriving a defendant of his . . . entitlement to a constitutionally guaranteed right to a fair trial." Frost, 158 N.J. at 87 (emphasis added).

Here, Dr. Gosselin was the defense's key witness; if the jury believed his expert opinion -- that there was no evidence of smothering -- it almost certainly would have acquitted R.M. of the smothering charge. The evidence against R.M. was far from overwhelming. The only direct evidence of the alleged smothering was D.P.'s testimony, which was often inconsistent with her prior statements as to the nature of her injuries, the number of times she

was allegedly smothered, whether she hit her head, and whether she lost consciousness. (1T 151-7 to 152-8, 161-18 to 20, 162-8 to 163-8, 209-1 to 25, 210-21 to 211-7; 3T 123-10 to 25, 127-25 to 128-8) Although D.P.'s testimony was partially corroborated by Geran's testimony about her injuries, Geran could not say whether D.P.'s injuries were consistent with smothering. By asserting that Dr. Gosselin's testimony was tainted by money and pro-defense bias, however, the prosecutor directed the jurors to disregard any reasonable doubt in the State's case.

This argument is particularly unfair because the defense has to hire its experts, while the prosecutor can pull from the State's vast resources, including forensic nurses. See Smith, 167 N.J. at 189 ("[W]e note that in criminal cases the State's expert witnesses are almost always unpaid."). Following the prosecutor's logic, defense experts are inherently less credible than nearly all State experts. Our Supreme Court recognized this danger in Smith, reversing in part because the prosecutor's argument that the defense experts were motivated to lie for money implicitly bolstered the credibility of the State's unpaid expert witness. Smith, 167 N.J. at 184. Similarly, the prosecutor's argument here improperly implied that the State's expert, Nurse Geran, is somehow more credible even though she is employed by Monmouth County as a forensic nurse. See State v. Marshall, 123 N.J. 1, 152-61 (1991)

(finding it improper for the prosecutor to personally vouch for the credibility of the State's witness).

This prosecutorial misconduct was "clearly . . . capable of having an unfair impact on the jury's deliberations, thereby depriving defendant of a fair trial." Smith, 167 N.J. at 188-89; R. 2:10-2. A prosecutor's remarks "[tend to] be given great weight by jurors." State v. Walden, 370 N.J. Super. 549, 558 (App. Div. 2004). Despite clear case law prohibiting such argument and no support in the record, there is a real possibility that jurors adopted the prosecutor's improper arguments and wholly discredited Dr. Gosselin in finding R.M. guilty. See State v. Thornton, 38 N.J. 380, 398 (1962) (there is always a real "possibility that the jurors consciously or unconsciously might adopt the prosecutor's view without applying their own independent judgment to the evidence."). Therefore, R.M.'s conviction must be reversed and the matter remanded for a new trial.

POINT II

R.M. IS ENTITLED TO RESENTENCING BECAUSE THE TRIAL COURT ERRONEOUSLY DOUBLE-COUNTED AN ELEMENT OF THE OFFENSE AND CONSIDERED DISMISSED CHARGES IN FINDING AND WEIGHING AGGRAVATING FACTORS.

At sentencing, the trial court imposed a six-year sentence with eighty-five percent parole ineligibility after finding aggravating factors three, N.J.S.A. 2C:44-1(a)(3) (risk of reoffending); six, N.J.S.A. 2C:44-1(a)(6) (prior criminal record), nine, N.J.S.A. 2C:44-1(a)(9) (deterrence), twelve, N.J.S.A. 2C:44-1(a)(12) (victim is 60 years old or older); and fifteen, N.J.S.A. 2C:44-1(a)(15) (domestic violence), and found no mitigating factors. (5T 71-11 to 12, 77-9 to 12) However, in finding aggravating factor fifteen, the trial court erroneously double-counted an element of the offense. (5T 65-5 to 17, 71-2 to 11) The court also erroneously considered R.M.'s prior dismissed charges that did not result in convictions, in violation of the presumption of innocence. These errors require a remand for resentencing.

The Appellate Division has wide-ranging authority to review sentencing determinations to ensure that the sentencing court properly applied the standards and guidelines of the Criminal Code. State v. Hodge, 95 N.J. 369, 376 (1984). On appeal, this Court must review whether the finding of

aggravating and mitigating factors was based on competent, credible evidence. State v. Roth, 95 N.J. 334, 369 (1984).

Here, the trial court impermissibly double-counted an element of the offense in finding aggravating factor fifteen. The purpose of aggravating and mitigating factors is to identify "individual circumstances which distinguish the particular offense from other crimes of the same nature." State v. Yarbough, 195 N.J. Super. 135, 143 (App. Div. 1984), rev'd on other grounds, 100 N.J. 627 (1985). Therefore, a remand for resentencing is required when a court double-counts an element of an offense as an aggravating factor. State v. Dunbar, 108 N.J. 80, 89-92 (1987); see also State v. Kromphold, 162 N.J. 345, 353 (2000) (holding that if elements of the crime could be used in aggravation, "every offense arguably would implicate aggravating factors merely by its commission, thereby eroding the basis for the gradation of offenses and the distinction between elements and aggravating factors").

Here, the trial court found aggravating factor fifteen: "the offense involved an act of domestic violence and . . . the defendant committed at least one act of domestic violence on more than one occasion." N.J.S.A. 2C:44-1(a)(15); (5T 71-2 to 11) However, the fact that this case involved an act of domestic violence had already been counted against R.M. to convict him under N.J.S.A. 2C:12-1(b)(13) and impose a sentence in the second-degree range;

one of the elements of this offense is that the victim "meets the definition of a victim of domestic violence." N.J.S.A. 2C:12-1(b)(13). The fact that this case involved domestic violence does not make it more severe than any other case under N.J.S.A. 2C:12-1(b)(13). Simply put, aggravating factor fifteen cannot be found here. Therefore, this Court must remand the matter to resentence R.M. without double-counting this element in aggravation.

Additionally, the trial court erred in referring to "a number of matters that reflect dismissals when discussing R.M.'s "substantial criminal history." (5T 65-5 to 17) The trial court then incorporated R.M.'s "substantial criminal history" into its finding of aggravating factor three. (5T 68-2 to 12) The trial court then incorporated R.M.'s "substantial criminal history" into its finding of aggravating factor three. (5T 68-2 to 12) Unless there are "undisputed factors of record," like an admission by the defendant, "prior dismissed charges may not be considered for any purpose in sentencing." State v. K.S., 220 N.J. 190, 199 (2015) (emphasis added). "Deterrence is directed at persons who have committed wrongful acts," not those merely charged with having done so. Ibid. Yet, in discussing R.M.'s "substantial criminal history," the trial court referred to "a number of matters that reflect dismissals." (5T 65-5 to 17) The trial court then incorporated R.M.'s "substantial criminal history" into its finding of aggravating factor three. (5T 68-2 to 12) These dismissals should never have

been considered by the court whatsoever in finding and weighing aggravating factors. Their wrongful consideration requires resentencing.

The trial court erroneously double-counted an element of the offense and improperly considered prior charges that did not result in findings of guilt. These errors are exacerbated by the fact that the court did not assign any weight to any of the aggravating factors, making it impossible to determine the degree to which these errors caused the court to impose a sentence above the minimum. See State v. Case, 220 N.J. 49, 72 (2014) (the sentencing court "must qualitatively assess the relevant aggravating and mitigating factors, assigning each factor its appropriate weight"). Accordingly, this Court must remand the matter for resentencing.

CONCLUSION

For the reasons discussed in Point I, this Court must reverse R.M.'s conviction and remand the matter for a new trial. Alternatively, for the reasons discussed in Point II, this Court must remand this matter for resentencing.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender

BY: /s/ Colin Sheehan
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Dated: July 22, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1444-23T2

WARRANT NO. W-2021-655-1303
CASE NO. 21002661

RAYMOND MATTSON,	:	CRIMINAL ACTION
Plaintiff-Movant,	:	ON APPEAL FROM A JUDGMENT OF CONVICTION IN THE SUPERIOR COURT OF
v.	:	NEW JERSEY, LAW DIVISION (CRIMINAL), MONMOUTH COUNTY
THE STATE OF NEW JERSEY,	:	
Defendant-Respondent.	:	

SAT BELOW: Honorable Chad N. Cagan, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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COUNTERSTATEMENT OF PROCEDURAL HISTORY

On June 21, 2022, a Monmouth County Grand Jury returned Indictment Number 22-06-00989, charging defendant, R.M., with second-degree aggravated assault, contrary to N.J.S.A. 2C:12-1(b)(13) (Count One), and third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3(b) (Count Two). Da1-2.

The Honorable Chad N. Cagan, J.S.C., presided over a four-day jury trial on this indictment in October 2023. See (1T to 4T).[1] At the conclusion of trial, on October 13, 2023, the jury returned a guilty verdict on Count One and a not guilty verdict on Count Two. Da3.

On December 22, 2023, Judge Cagan sentenced defendant to a term of six years' imprisonment subject to an 85 percent period of parole ineligibility pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, and $205 in total fines. (5T:78-12 to 78:23). Before imposing sentence, Judge Cagan found applicable aggravating factors three (risk that defendant will commit another offense); six (extent of defendant's prior criminal record); nine (deterrence of defendant and others from violating the law); 12 (defendant committed offense

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[1] 1T refers to Transcript of Trial, October 10, 2023.
2T refers to Transcript of Trial, October 11, 2023.
3T refers to Transcript of Trial, October 12, 2023.
4T refers to Transcript of Trial, October 13, 2023.

against person he knew or should have known was 60 years of age or older); and 15 (offense involved an act of domestic violence and defendant committed at least one act of domestic violence on more than one occasion). (5T:77-9 to 77-12); see also N.J.S.A. 2C:44-1(a)(3), (6), (9), (12), and (15). He did not find any mitigating factors. (5T:77-9 to 77-12).

Defendant filed the present appeal on January 16, 2024. Da7-9. The State submits the following in support of its opposition to defendant's appeal.

COUNTERSTATEMENT OF FACT

Defendant and D.P. dated from October 2020 to August 2021. (1T:47-25 to 48-11). At approximately 7:30 a.m. on August 15, 2021, defendant asked D.P. to identify the men depicted in pictures on her social media account. (1T:51-8 to 51-13; 52-4 to 52-7). She responded that they were just random people at an Asbury Park music event she had just attended. (1T:52-11 to 52-15). Defendant then demanded D.P. provide him with her whereabouts from the previous day; she explained that she had gone out to eat with her sons. (1T:52-18 to 52-19; 53-2 to 53-6). Defendant questioned D.P. about what she ate and looked at the restaurant's online menu to corroborate her account. (1T:53-19 to 53-22). When he did not find an exact match on the restaurant's

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5T refers to Transcript of Sentencing, December 22, 2023.

"night menu," D.P. showed him a brunch menu and produced a receipt to prove the truth of her story. (1T:53-2 to 53-6; 53-22 to 53-25). During this interaction, defendant appeared "very jealous," "very agitated," and "obsessive almost. Like, trying to accuse [D.P.] of, you know, cheating." (1T:54-6 to 54-8; 54-13).

Defendant eventually calmed down, after which he said he was not feeling well and wanted to get tested for COVID. (1T:54-16 to 54-22). D.P. suggested a clinic around the corner, but defendant wanted to go to one he was more familiar with closer to his home and insisted that they drive there in his vehicle. (1T:54-22 to 54-25; 55-7 to 55-10). When they arrived, staff informed them that they would be contacted by phone when the testing was ready. (1T:57-5 to 57-7). While waiting, defendant and D.P. picked up breakfast at a nearby restaurant and brought it back to eat at defendant's residence in Wall Township. (1T:57-8 to 57-18).

While D.P. was putting the food on the table, defendant went to the front bedroom. (1T:58-1 to 58-4). He then rushed out of the bedroom holding gym equipment – specifically, a two-foot metal bar – and threw it at the front door. (1T:58-6 to 58-19; 59-2 to 59-3). At the same time, defendant "was saying something like you think you're in control, you're not in control. I'm going to show you who's in control. I'm going to show you what control is." (1T:58-7

to 58-10).

Intending to go out to the street and call for help, D.P. grabbed her pocketbook and moved toward the front door. (1T:60-15 to 60-17). After moving the metal bar out of the way, D.P. was grabbed by defendant, who then pushed her down onto a loveseat adjacent to the door, and "put his palm over [her] nose and clasped [her] chin shut with his fingers so [she] couldn't breathe." (1T:59-23 to 60-5). After what felt like minutes of not being able to breathe, D.P. was able to scream and went toward the front door again. (1T:61-15 to 61-23; 62-16 to 62-17). Defendant again smothered her. (1T:61-22 to 62-2). This time, he screamed at her, "the world doesn't have to know my business," and that she should "shut the fuck up." (1T:62-2 to 62-4). D.P. then heard her head get hit, but could not feel any pain. (1T:62-5 to 62-9).

D.P. woke up lying on the floor, and struggled to get up because her hands were trembling so much. (1T:63-10 to 63-11; 64-5 to 64-8). Defendant screamed at her, "I'm not afraid, I have nothing to lose, I could kill you, I could kill myself, I could slit my own throat, I don't care about jail, none of this, I don't care about any of this." (1T:64-21 to 64-25). By this point, defendant had taken D.P.'s cell phone and hid it in his bedroom. (1T:65-10 to 65-11). He also threw D.P.'s pocketbook at the wall above her head so hard that its contents scattered everywhere. (1T:65-19 to 65-23).

D.P. was incredibly relieved when defendant's phone pinged to alert him that his COVID test was ready, as this gave her an opportunity to get out of defendant's home. (1T:66-23 to 67-4). Defendant said that he was too upset, but D.P. convinced him that they should still go. (1T:66-23 to 67-4; 67-12 to 67-14). Defendant retrieved D.P.'s cell phone from his bedroom before they left for the clinic. (1T:67-8 to 67-11).

When they arrived, D.P. surreptitiously used her cell phone to request a rideshare that guaranteed pick-up in only six minutes. (1T:86-2 to 86-6; 86-12 to 86-14; 92-18 to 92-21). D.P. was so focused on getting away from defendant that she did not ask either of the two clinic receptionists to call 911 for police assistance. (1T:87-21 to 87-25). Once the rideshare arrived, D.P. entered the vehicle "trembling" and "hyperventilating" and told the driver that they needed to get out of there as fast as they could. (1T:86-25 to 87-1; 87-5 to 87-10). Defendant tried contacting D.P. via phone "20 times or so" thereafter. (1T:97-5 to 97-7; 97-13 to 97-16). That evening, D.P. went to a local hardware store with her son to purchase new locks for her home. (1T:90-3 to 90-8; 90-20 to 91-18).

The next morning, D.P. went to the Asbury Park Police Department to report the assault from the prior day. (1T:98-24 to 98-25). She provided police with a cell phone photo she took of her injured lip, rideshare receipts, and

records of texts and calls from defendant. (1T: 94-2 to 94-8; 221-16 to 221-21). She also authored a written formal statement. (1T:100-23 to 101-4). Defendant continued to call D.P. while she was at the police station. (1T:100-18 to 100-19).

On August 17, 2021, D.P. underwent a forensic examination at a local emergency department. (1T:104-4 to 105-8). Doctor Anoop Kotwal evaluated D.P. that day. (3T:116-21 to 117-9). He noted no redness of the eyes; no abnormal skin findings; and no injuries. (3T:121-16 to 121-17; 123-10 to 123-25). However, Dr. Kotwal agreed that he would defer to the observations and photographs taken by a forensic nurse examiner if he failed to address any relatively minor injuries because of the busy nature of an emergency department during the middle of the COVID pandemic. (3T:129-9 to 129-16).

Afterward, Antoinette Geran, a registered nurse and forensic nurse examiner for the Monmouth County Strangulation and Smothering Evaluation Team, performed an evaluation on D.P. (2T:18-20 to 18-23; 21-1 to 21-5; 31-19 to 31-23; 36-6 to 36-11). As a forensic nurse examiner, Nurse Geran completed a six-week course that included simulations involving strangulation victims. (2T:24-6 to 25-4). Rather than treatment, her goals in a forensic evaluation are ensuring patient safety while also collecting and preserving evidence for later criminal prosecution. (2T:26-8 to 27-14). In her four years

of practice as a forensic nurse examiner, Nurse Geran conducted 14 evaluations of adult female victims of strangulation or smothering, half of which showed visible signs of injury. (2T:23-8 to 23-9; 30-11 to 30-18; 31-7 to 31-18). She performed "five or six" of these examinations before her examination of D.P. (2T:58-17 to 58-19).

At the time of the examination, D.P. reported a continued headache and feelings of confusion, sleeplessness, dizziness, and loss of appetite. (2T:44-2 to 44-7). Nurse Geran specifically observed during the evaluation "a cut to the left side of her nose, a pinpoint cut on her left cheek, and an abrasion with swelling to the right lower lip." (2T:44-13 to 44-16). She also observed "vascular congestion" to both eyes due to "the buildup of pressure in the eyes from increased blood flow." (2T:46-25 to 47-4). Finally, Nurse Geran identified a purple bruise on D.P.'s right arm in the area of where D.P. claimed that defendant grabbed her during the assault. (2T:53-24 to 54-1; 63-12 to 63-16).

Defendant did not testify at his trial. (3T:21-18 to 21-23). Defendant did offer testimony from Doctor Edward M. Gosselin, an expert in the field of emergency medicine, to dispute the findings of the State witnesses. (3T:55-24 to 56-15). His experience consisted of 34 years of clinical, administrative, and academic practice. (3T:55-9 to 55-11). While he acknowledged encountering a

"double-digit" number of victims of smothering "via a placement of a hand and obstruction of the nose and mouth," (3T:57-6 to 57-12), Dr. Gosselin never received training in forensic strangulation and smothering evaluations. (3T:49-7 to 49-21; 50-1 to 50-6). He was only trained in maintaining open airways in the emergency room setting. Ibid. Dr. Gosselin had been consulting and contracting as an expert witness since he established his limited liability company – EMG Consulting & Contracting – seven years prior. (3T:44-15 to 45-7). He previously served as a fact witness once before, but this was his first time testifying as an expert witness. (3T:51-4 to 51-9). In exchange for his services, Dr. Gosselin received $495 per hour. (3T:32-22 to 33-9).

During his testimony, Dr. Gosselin concluded, based on his review of discovery rather than an evaluation of D.P. herself, (3T:51-22 to 52-17), that D.P. had no significant evidence of trauma. (3T:33-19 to 33-25). He also opined the prescription medications D.P. reported taking could have caused bleeding even with minimal trauma. (3T:68-20 to 68-22; 70-5 to 70-7). Dr. Gosselin opined that D.P. showed no evidence of attempted asphyxiation. (3T:86-22 to 87-7).

LEGAL ARGUMENT

POINT I

THE PROSECUTOR'S STATEMENT IN CLOSING ARGUMENT REFERENCING THE DEFENSE EXPERT'S COMPENSATION DOES NOT MERIT REVERSAL OF DEFENDANT'S CONVICTION.

Defendant argues that the State's reference to Dr. Gosselin's compensation during summation constitutes prosecutorial misconduct that rises to the level of plain error sufficient to require reversal of his conviction. While the State can not dispute that these five lines were not necessarily proper, see State v. Smith, 167 N.J. 158, 182-89 (2001), the State does not agree that this impropriety was clearly capable of producing an unjust result. As such, his conviction should be affirmed.

In closing, defense counsel asked the jury to credit Dr. Gosselin due to his 34 years of medical experience and accept his opinion that D.P. was not the victim of asphyxiation. (4T:13-24 to 15-8). During its summation, the State responded by asking the jury to weigh in its evaluation of Dr. Gosselin's testimony his compensation. (4T:29-15 to 29-19). Defense counsel did not object to this comment. After summations, Judge Cagan instructed the jury on

how to evaluate statements of counsel and expert witness testimony. (4T:36-14 to 37-5; 41-5 to 42-17).

Where a defendant does not object to allegedly improper comment in summation, the court's review is for plain error. State v. Bradshaw, 392 N.J. Super. 425, 436 (App. Div.), aff'd on o.g., 195 N.J. 493 (2008); see also State v. Frost, 158 N.J. 76, 83-84 (1999) (finding the failure to object suggests that defense counsel did not find the prosecutor's comment sufficiently prejudicial to require the trial court's intervention). To be plain error, the error or omission must be of "such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. Reversal requires "'some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it might not otherwise have reached." State v. R.B., 183 N.J. 308, 330 (2005) (quoting State v. Bankston, 63 N.J. 263, 273 (1973)); R. 2:10-2.

Improper comment during summation does not always require reversal of a jury verdict. Smith, 212 N.J. at 403 (citing Frost, 158 N.J. at 88). Criminal trials are not always "tidy things," R.B., 183 N.J. at 333-34, or "perfectly orchestrated productions." State v. Yough, 208 N.J. 385, 388 (2011). Accordingly, "[t]he proper and rational standard is not perfection; as devised

and administered by imperfect humans, no trial can ever be entirely free of even the smallest defect. Our goal, nonetheless, must always be fairness." Ibid.

While defendant's trial may not have been perfection, it was fair. The State's five-line reference to Dr. Gosselin's compensation does not rise to the level of reversible error; it does not raise reasonable doubt as to whether the jury would have reached a different result. The State's five-line comment, in a summation lasting just over 300 lines of transcript, see (4T:18-24 to 31-6), and amidst an entire four-day trial, does not constitute such a substantial prejudice to defendant's fundamental right to fair evaluation of his defense.

The jurors had the opportunity to hear D.P.'s testimony and observe her demeanor. She detailed defendant's assault and explained her actions afterwards. Her testimony was corroborated by evidence in the form of: (1) photographs of her facial injuries, (2) rideshare receipts corroborating that she did not drive home from the local clinic with defendant, and (3) a local hardware store receipt from the day of the assault proving that she purchased new deadbolt locks for her home.

The jurors also heard from a Forensic Nurse Examiner specifically trained in strangulation and smothering injuries. Throughout Nurse Geran's testimony, the State published additional images documenting D.P.'s injuries. Based on her interactions with D.P., Nurse Geran concluded that D.P. had

experienced asphyxiation. Dr. Kotwal did not observe any injuries to D.P., but deferred to the findings of Nurse Geran because of her specific training in forensically evaluating smothering victims, as well as the increased commotion in the emergency room in the middle of the COVID pandemic.

Contarily, Dr. Gosselin's training was for maintaining an open airway for the purpose of medical treatment, not for the specific purpose of completing a forensic evaluation of a potential smothering victim. In this way, his credentials were similar to that of Dr. Kotwal, who in turn deferred to the findings of the specially trained Nurse Geran. Moreover, unlike Dr. Kotwal and Nurse Geran, Dr. Gosselin never directly interaction with D.P.; his analysis was based only on second-hand documentation and photographs.

Defense counsel never objected to the State's five-line improper comment in summation, which suggests that defense counsel did not find that the statement required the trial court's intervention in the form of a curative instruction. During the jury charge, Judge Cagan instructed the jurors that summations of counsel, including these five lines, were not evidence. He also explained that Dr. Gosselin's testimony could be given variable evidential weight based upon his qualifications – broad emergency medicine training rather than specific smothering forensic evaluation training, as well as zero previous expert testimony experience – or the underlying facts he relied on –

second-hand documents and photographs rather than direct interactions with the victim – in forming his opinion.

In light of these considerations, the jurors had more than sufficient evidence to allow its independent consideration of Dr. Gosselin's expert opinion and find defendant guilty of aggravated assault, and that is evidently what they did based on their verdict. Even with the understanding that the prosecutor's comments should have been avoided, they are not of "such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2

POINT II

DEFENDANT IS NOT ENTITLED TO RESENTENCING BECAUSE THE FINDINGS OF THE SENTENCING JUDGE WERE BASED ON COMPETENT CREDIBLE EVIDENCE IN THE RECORD.

Defendant asks this Court to remand for resentencing on three grounds: (1) Judge Cagan's finding of aggravating factor 15 constituted improper double counting; (2) Judge Cagan erred when he listed previous dismissals in finding aggravating factor three, and (3) Judge Cagan failed to assign weight to each individual aggravating factor. The State disagrees. Judge Cagan correctly found aggravating factors three and 15. In light of the sentence defendant received and lack of mitigating factors, Judge Cagan's omission of

an explicit assignment of weight to each individual aggravating factor should not provide a basis for reversal.

In finding aggravating factor 15, Judge Cagan specifically found that defendant committed an act of domestic violence on more than one occasion, as evidenced by defendant's four prior Final Restraining Orders (FROs) and two FRO violations. (5T:71-2 to 71-12). Regarding aggravating factor three, Judge Cagan described defendant's "substantial criminal history." (5T:65-5). Since 1991, defendant has accumulated five criminal convictions, four municipal court convictions, two borough ordinance violations, had four FROs granted in favor of former dating partners, and two prior convictions for violation of these FROs coupled with simple assault and harassment. (5T:60-13 to 61-18). In his sentencing statement, Judge Cagan also mentioned seven charges not resulting in conviction. (5T:65-8 to 65-17). Judge Cagan determined that defendant posed a risk of committing another offense based on "a propensity to disregard societal laws and to commit acts of domestic violence." (5T:68-13 to 68-14). Judge Cagan was clearly convinced that the aggravating factors outweighed the non-existent mitigating factors. (5T:77-9 to 77-12). Nonetheless, he sentenced defendant to a term of six years' incarceration for the second-degree aggravated assault, only one year above

the statutory minimum and two years less than the State requested. (5T:4-12 to 4-16; 78-12 to 78-18).

A narrow and deferential abuse of discretion standard governs appellate review of sentencing. State v. R.Y., 242 N.J. 48, 73 (2020) (citing State v. Robinson, 217 N.J. 394, 401 (1989)); State v. Blackmon, 202 N.J. 283, 298 (2010) (citing State v. Jarbath, 114 N.J. 394, 401 (1989)). Under this deferential standard, review focuses on determining if sentencing guidelines were violated; ensuring that aggravating and mitigating factors found by the sentencing court are based on competent credible evidence in the record; and considering whether the sentence is so unreasonable as to "shock the judicial conscience." State v. Roth, 95 N.J. 334, 364-65 (1984); State v. Case, 220 N.J. 49, 65 (2014).

If these three factors are met, "[t]he reviewing court must not substitute its judgment for that of the sentencing court." State v. Fuentes, 217 N.J. 57, 70 (2014) (citing State v. O'Donnell, 117 N.J. 210, 215 (1989)); see also State v. Case, 220 N.J. 49, 65 (2014) ("[A]ppellate courts are cautioned not to substitute their judgment for those of our sentencing courts."). This is especially so when the sentencing judge presided over the underlying trial and becomes "intimately familiar with the trial evidence concerning the nature and

circumstances of the offense." State v. Canfield, 470 N.J. Super. 234, 347 (App. Div.), aff'd in part, 252 N.J. 497 (2023).

In imposing sentence, courts must weigh the aggravating and mitigating factors listed at N.J.S.A. 2C:44-1 (a) and (b) and should "state on the record the reasons for imposing the sentence…and the factual basis supporting [their] findings of particular aggravating and mitigating factors affecting sentence" to facilitate appellate review. N.J.S.A. 2C:43-2(e); see also R. 3:21-4(h). Because the balancing process is qualitative rather than quantitative, the sentencing judge should do more than enumerate the sentencing factors; the court should provide a record for review. State v. McFarlane, 224 N.J. 458, 466-67 (2016).

Sentencing courts are also to avoid double counting of aggravating factors; facts used to establish elements of underlying criminal conduct can not be considered aggravating factors in the sentencing decision. State v. Yarbough, 100 N.J. 627, 644-45 (1985). For example, in the context of applying N.J.S.A. 2C:44-1(a)(1) to a sentence for murder, consideration of the death of a murder victim on its own would constitute double counting because death is an element of the underlying offense. See State v. Pineda, 119 N.J. 621, 627-28 (1990). However, a sentencing court could appropriately account for additional facts surrounding the murder detailing the specific heinousness, cruelty, or depravity of a homicide, because such facts are not necessary

elements for conviction. Fuentes, 217 N.J. at 63; see also State v. Francisco, 471 N.J. Super. 386, 406-07, 426-27 (App. Div.), certif. denied, 254 N.J. 503 (2023) (sentencing judge did not double count aggravating factor one by considering the dozens of stab wounds with various weapons culminating in the death of the victim when defendant "embedded a hammer in [the victim's] skull"). Aggravating factor one stands in contrast with aggravating factors three, six, and nine, which focus on either the defendant's past conduct or potential for future criminality. Double counting is generally inapplicable to these aggravating factors because they do not consider elements of the present criminal conduct.

Unlike aggravating factor one, aggravating factor 15 is not dependent on elements of the crime being sentenced, as it requires two separate findings: (1) the crime involved an act of domestic violence and (2) "the defendant committed at least one act of domestic violence on more than one occasion." N.J.S.A. 2C:44-1(a)(15). Thus, this factor is more akin to aggravating factors three, six, and nine in that the second finding considers the past conduct of a defendant. Aggravating factor 15 targets recidivism by punishing a defendant for failure to learn from the past commission of acts of domestic violence, but only for defendants whose current crime also involves domestic violence. It is therefore similar to the use of a defendant's prior criminal record, see N.J.S.A.

2C:44-1(a)(6), except that judges specifically consider a defendant's previous commission of acts of domestic violence, rather than all prior criminal acts, in determining an appropriate sentence.

In finding aggravating factor 15, Judge Cagan necessarily considered and relied upon conduct beyond the facts of defendant's present conviction: his four FROs granted in favor of former dating partners and two prior convictions for violating those domestic violence FROs. None of these previous acts of domestic violence constituted the necessary proofs required for the present domestic violence conviction, and his present domestic violence conviction served only to make him eligible for this recidivism-focused factor.

Defendant's second argument stressing Judge Cagan's reference to dismissals in his analysis of defendant's criminal history similarly fails, as it is unsupported by the record, which makes clear that they played no role in Judge Cagan's evaluation of defendant's "substantial criminal history." In finding aggravating factor three, Judge Cagan considered defendant's five previous criminal convictions, numerous municipal court guilty dispositions, and issuance of four FROs, see (5T:60-13 to 61-18) – the last of which was granted for a victim unassociated with the present case amidst the resolution of the present charges. (5T:64-25 to 65-4). Judge Cagan did not include prior

dismissals in his analysis; he simply listed them to provide overall context for defendant's prior interactions with the criminal justice system. Notwithstanding defendant's dismissals, Judge Cagan cited competent credible evidence in finding that defendant posed a risk of recidivism.

Judge Cagan's full sentencing statement as to each individual aggravating factor found applicable provides this Court a record on which to conduct meaningful appellate review. Logically, if a sentencing judge finds any aggravating factor without finding a single mitigating factor, the aggravating factors clearly outweigh the non-existent mitigating factors. Here, Judge Cagan found five aggravating factors, some based on defendant's "substantial criminal history," another based on D.P.'s advanced age, and another based in part on the present domestic violence offense and defendant's domestic violence history. Moreover, Judge Cagan considered more than the quantity of five aggravating factors to zero mitigating factors, but the quality of each of the aggravating factors. His analysis of each individual asserted aggravating and mitigating factor composed approximately 20 pages of sentencing transcript. Having previously presided over the trial, Judge Cagan found that the magnitude of the aggravating factors substantially outweighed the non-existent mitigating factors.

Despite this, Judge Cagan sentenced defendant to a term of incarceration below the midpoint of the sentencing range requested by the State and only one year above the statutory minimum. Such a sentence in no way "shocks the judicial conscience." Because the sentence was based on substantial competent and credible evidence in the detailed record without violation of any statutory guidelines, there is no basis for an appellate court to intervene based on abuse of discretion.

CONCLUSION

For the above-mentioned reasons and authorities cited in support thereof, the State respectfully submits defendant's conviction and sentence should be affirmed.

Respectfully submitted,

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