SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0854-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

M.D.M.,

Defendant-Appellant.

Submitted September 19, 2016 – Decided May 1, 2017

Before Judges Nugent and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 12-06-0431.

Joseph Krakora, Public Defender, attorney for appellant (Richard Sparaco, Designated Counsel, on the brief).

Geoffrey D. Soriano, Somerset County Prosecutor, attorney for respondent (James L. McConnell, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant M.D.M. appeals from a judgment of conviction for aggravated assault and a weapons offense, charges lodged against

her after she scalded her husband with cooking oil. Defendant also appeals from her six-year custodial sentence. She raises the following points for our consideration:

POINT I: THE DEFENDANT WAS DENIED A FAIR TRIAL DUE TO THE COURT'S DENIAL OF HER MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM HER RESIDENCE BY POLICE ON APRIL 6, 2012.

POINT II: THE DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL DUE TO FAULTY JURY INSTRUCTIONS.

A. THE DEFENDANT WAS DENIED A FAIR TRIAL DUE TO THE COURT'S FAILURE TO GIVE A PROPER INSTRUCTION ON FLIGHT WHEN IT FAILED TO OFFER DEFENDANT'S EXPLANATION FOR DEPARTING THE RESIDENCE (Not Raised Below).

B. THE COURT'S MISLEADING INSTRUCTIONS ON THE REQUIREMENT TO DISPROVE SELF-DEFENSE WAS MISLEADING, DENYING THE DEFENDANT THE RIGHT TO A FAIR TRIAL.

POINT III: THE SENTENCE OF SIX YEARS WAS EXCESSIVE.

A. THE COURT ERRED IN EVALUATING THE MITIGATING AND AGGRAVATING FACTORS.

B. THE COURT UTILIZED A MID-RANGE STARTING POINT OF 7 1/2 YEARS TO DETERMINE THE APPROPRIATE SENTENCE IN VIOLATION OF STATE V. NATALE, 184 N.J. 458 (2005).

For the reasons that follow, we affirm.

A Somerset County grand jury indicted defendant in June 2012 and charged her with first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3, two counts of third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d), and third-

degree theft, N.J.S.A. 2C:20-3. Following the indictment, defendant moved to suppress evidence police seized from her residence on the day of the incident and four days later. In an April 10, 2014 written decision, the trial court denied defendant's motion to suppress the evidence seized on the day of the incident, but granted the motion as to the evidence seized four days later.

Jury selection for defendant's trial began on April 10, 2014. On April 15, the trial court granted defendant's motion in limine to bar the State from eliciting testimony from treating physicians that her husband's right eye injury was caused by a chemical burn. The State filed a motion for leave to file an interlocutory appeal, which we granted. We reversed the trial court's ruling and noted that to the extent defendant needed additional time to prepare for the medical testimony, the trial court could exercise its discretion to adjourn the trial or schedule the medical testimony later in the trial.

The jury found defendant not guilty of attempted murder on count one, but guilty of the lesser-included offense of aggravated assault — serious bodily injury. The jury also found defendant guilty on count two of possessing a weapon — a pot of hot cooking oil — for an unlawful purpose. The jury found defendant not guilty on the remaining counts.

At sentencing, the court merged the weapons offense and sentenced defendant on the aggravated assault offense to a six-year term of imprisonment subject to the No Early Release Act, N.J.S.A. 2C:43-7.2. This appeal followed.

The issues defendant raises on appeal implicate the hearing on her suppression motion as well as her trial. The State developed the following proofs at the hearing on defendant's motion to suppress.

On Friday, April 6, 2012, at approximately 8:55 a.m., two uniformed Franklin Township police officers, patrolling in separate vehicles, drove to a condominium complex in the Somerset section of the Township where a 9-1-1 caller had reported a male burned as the result of an assault. Defendant and her husband resided in one of the condominium units, which was owned by the husband's sister.

Officers Frank Mahon and Gregory Wilson arrived at the condominium complex at approximately the same time and were directed by a man on a second floor balcony to the victim's location. On the exterior staircase, the officers found defendant's husband, who had severe burns to his skin and chest and had difficulty talking and breathing.

Officer Wilson, who was assigned to the Police Department's Emergency Services Unit, had extensive training as an emergency

medical technician. He attended to defendant's husband. Meanwhile, Officer Mahon went to the condominium unit where the assault allegedly occurred. Although the 9-1-1 caller stated the suspect, defendant, had left the area in an unknown direction and by unknown means, Officer Mahon entered the condominium unit. Officer Mahon testified he entered the unit to check for the suspect, further victims, and to determine what defendant used to cause the burns. He explained that a suspect could always return to the scene.

Officer Mahon opened the unit's unlocked screen and front doors and yelled "Police!" No one responded. The officer smelled some sort of cooking oil and began clearing the residence. He explained that "clearing the residence" meant a "[s]ystematic check of the residence, one room at a time, to see if there [are] any further people inside." While clearing the residence, he noticed a nearly empty bottle of cooking oil on the kitchen counter and a pot on the floor of the master bedroom. He also noticed the bed in the master bedroom was wet near the pillow. Officer Mahon then stood at the doorway and secured the premises until a detective arrived.

Meanwhile, defendant's husband managed to tell Officer Wilson defendant was upset because he had requested a divorce. She sprayed some sort of substance on him and then fled. Officer

Wilson knew defendant's husband needed assistance at a burn center. While providing first aid, Officer Wilson requested a medivac helicopter. Paramedics soon arrived.

The paramedics expressed concern about the burns and asked Officer Wilson if he could find out what had caused them. The officer proceeded to defendant's condominium unit to determine what her husband had been exposed to. Officer Wilson believed it was important to determine the cause of the burns before defendant's husband was flown to a distant hospital.

When Officer Wilson entered the unit, he immediately noticed the smell of cooking oil. There was a haze in the apartment and an empty bottle of cooking oil on the kitchen counter. On the floor of the master bedroom was a stove pot containing an oily residue. The officer exited the condominium unit and reported his findings to the paramedics. They had defendant's husband transported by ambulance to a helicopter and then flown to St. Barnabas Medical Center.

Detective Patrick Lilavois, who was assigned to the case, arrived at the condominium unit at approximately 9:15 a.m. He met Officer Mahon, who was at the door guarding the residence. Officer Mahon related his observations of defendant's husband and the inside of the unit. He led the detective to the master bedroom

where the detective noticed the aluminum pot on the floor and the bed soaked with a liquid.

The detective photographed the scene and collected the bottle of cooking oil from the kitchen and the pot from the floor of the master bedroom. Three days later, he went to the hospital and learned that defendant had also allegedly tried to assault her husband with an axe. The next day, Detective Lilavois met defendant's sister-in-law at the condominium unit where she signed a consent—to-search form. The detective entered the apartment, photographed cut phone wires, and collected other evidence: the axe, bed sheets, a laptop computer, paperwork and bills addressed to defendant.

Based on the foregoing proofs, the trial court denied defendant's motion in part and granted it in part. In a comprehensive written opinion, the court denied the motion "as to the April 6, 2012 warrantless search." After reviewing applicable case law, the court concluded that police may enter a private residence when they reasonably believe a crime has taken place, "for the limited purpose of rendering aid to a possible victim of the crime or seeking or apprehending the perpetrators or taking the necessary steps to secure the premises."

Conversely, the trial court granted the motion "[a]s to the April 10, 2012 warrantless search." As to the latter, the court

determined the police had ample reason and sufficient time to obtain consent to search from defendant's husband or apply for a warrant. The husband's sister did not have the authority to consent to the search of defendant's residence, even though she owned it.

At defendant's trial, Officers Mahon and Wilson, and Detective Lilavois gave testimony consistent with that they had given at the suppression hearing concerning their observations of defendant's husband and the condominium. In addition, the State presented the testimony of a neighbor who observed defendant's husband on the morning of the incident before the police arrived. The State also moved into evidence the bottle of vegetable oil and the pot with residual oil the police seized on the day of the incident.

Both defendant's husband and defendant testified. Each gave long accounts of their pre-marital and marital history. The husband acknowledged the marriage was plagued by arguments but denied ever hitting defendant. He testified he served defendant with a divorce complaint shortly before the incident.

According to defendant's husband, he worked through the early morning hours of April 6, 2012, arriving home at approximately six o'clock in the morning. He fell asleep in a spare bedroom, but defendant later woke him and asked him to come into the master

bedroom, which he did. He again fell asleep. Shortly thereafter, defendant jumped on top of him, held his head down, forced open his right eye, and sprayed something into it. His eye began to burn and his face felt wet. He pushed her off, ran to the shower, and soaked his head and eye under water. He testified defendant repeatedly said how dare he give her divorce papers, and if she could not have him, nobody could. As he stood in the shower, she poured something on his back, which started to burn.

Defendant's husband said defendant next left the room and returned with an axe in her hand. After he wrestled it away from her, she said she loved him. When he begged her to call 9-1-1, she refused. He managed to force defendant out of the bathroom and locked the door. When he looked in the mirror, he saw his face was disfigured, his mouth was drooping down, and his skin was peeling off. Realizing he needed to go to the hospital, he unlocked the door and called defendant's name, but she was gone.

After exiting the bathroom, defendant's husband attempted to use the telephone to get help, but the phone was dead. The wires had been cut. He went to his car to get a cellular phone, but it was missing, along with $500 he kept in his wallet. He went to the home of a neighbor, who called 9-1-1 and an ambulance. The ambulance drove him to a helicoper site where he was transported to a burn center.

Defendant contradicted her husband's testimony. She claimed he became abusive, first verbally and then physically, shortly after she moved in with him in August 2008. Thereafter, he persistently abused her by beating her, kicking her, punching her, slapping her in the face, and throwing her into a wall. On several occasions she summoned the police. Nonetheless, she stayed with him.

As described by defendant, on the morning of the incident, her husband came home at approximately five or six o'clock, when she was still in bed. Her husband then climbed into bed with her. When she refused his advances and attempted to get out of bed, he grabbed the back of her neck and pulled her down. He forced her face down on the bed and sexually assaulted her. When he finished, he asked her several questions, to which she did not respond, so he kicked her out of bed and onto the floor. He followed and kicked her in the stomach. He continued to abuse her, verbally and physically, and then he ordered her into the kitchen to make breakfast. She complied. While preparing his favorite meal, defendant poured oil into a pan, turned on the flame, and went into the bedroom to change. She explained that when she returned to the kitchen, her husband came in, cursed at her, and called her names. She did not respond. He said, "[y]ou make me want to

F'ing kill you. You know, I feel like killing you." Then he walked away.

According to defendant, her husband returned a short time later and grabbed her around the throat. He said he wanted to kill her, and the angrier he got, the tighter he gripped her throat. He had a small axe in his right hand. As he tightened the grip around her throat, she reached back with her right hand, grabbed the pot of oil, and threw it on him.

After defendant threw the oil on her husband, he ran into the bedroom screaming and got in the shower. She followed, concerned she had badly hurt him. She set the pan down on the floor in the bedroom and went into the shower with him. She hugged him and said she was sorry. He turned around and pushed her up against the shower door. She left, changed out of her wet clothes into a pair of jeans and t-shirt, and ran from the house in a frightened panic. She took a cab to the train station and went to her cousin's house in Yonkers. She eventually contacted a lawyer and turned herself into the police.

The State presented three medical witnesses and defendant presented one. The medical testimony established, indisputably, that defendant's husband sustained serious bodily injuries. He was hospitalized from April 6, 2012 to May 9, 2012. He suffered first, second, and third-degree burns over twenty-three percent

of his body. He underwent skin grafting and he also sustained a permanent injury to his right eye.

The primary dispute among the medical experts was whether defendant's husband sustained a chemical burn, as opposed to a thermal burn from cooking oil, to his right eye. The State's medical experts testified the injury to his right eye was consistent with a chemical burn. Defendant's expert testified the burn to his right eye was caused by a thermal burn, as distinguished from a chemical burn.

The jury rejected defendant's claim of self-defense and found her guilty of second-degree aggravated assault and possession of a weapon for an unlawful purpose — the pot of hot oil.

In defendant's first argument on appeal, she challenges the partial denial of her suppression motion. She argues the bottle of cooking oil and the pot with the oily residue were unlawfully seized because the warrantless entry and search of her residence were objectively unreasonable and did not fall within an exception to the warrant requirement. Specifically, she argues the trial court erroneously approved the police entry into her home to gather evidence of the assault. She also contends no exigent circumstances justified the warrantless intrusion.

The State counters that police justifiably entered defendant's home to look for victims or perpetrators of the

assault. In searching for such individuals, the officers were lawfully permitted to seize the bottle and the pot, which were both evidence of the crime and in plain view. We affirm that part of the order partially denying defendant's suppression motion, substantially for the reasons the trial court expressed in its written opinion. We add the following comments.

Neither federal nor our State's jurisprudence recognize a broad "crime scene" exception to the warrant requirement. See Mincey v. Arizona, 437 U.S. 385, 390-91, 98 S. Ct. 2408, 2412, 57 L. Ed. 2d 290, 298-99 (1978); State v. Faretra, 330 N.J. Super. 527, 531-32 (App. Div.), certif. denied, 165 N.J. 530 (2000). Both jurisdictions, however, recognize a limited exception. In Mincey, the Court explained that "when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises." Supra, 437 U.S. at 392-93, 98 S. Ct. at 2413, 57 L. Ed. 2d at 300. The Court further explained "the police may seize any evidence that is in plain view during the course of their legitimate emergency activities." Id. at 393, 98 S. Ct. at 2413, 57 L. Ed. 2d at 300.

We have recognized that:

> the rejection of a crime scene exception does not affect the authority of police to enter private premises when the police reasonably believe that a crime is taking place or has

> just taken place, for the limited purpose of rendering aid to a possible victim of the crime or seeking or apprehending the perpetrators or taking any necessary steps to secure the premises.
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> [Faretra, supra, 330 N.J. Super. at 531-32.]

Here, Officer Mahon knew a crime had taken place in the condominium unit just before he arrived at the complex. By systematically going from room to room, he assured the crime scene would not be disturbed, and he also assured defendant had not returned to the premises. In that event, she would have posed a threat not only to the integrity of the crime scene, but also to the officer's safety. The steps the officer took were necessary and reasonable measures to secure the premises. See ibid. The trial court did not err by so concluding.

Moreover, though defendant's husband was not in the unit, it was necessary for Officer Wilson to enter the unit and determine the source of the husband's burns so that paramedics, and eventually doctors at a burn center, could render appropriate aid. See ibid; State v. Vargas, 213 N.J. 301, 323-24 (2013) ("Under the emergency-aid doctrine, a police officer can enter a home without a warrant if he has 'an objectively reasonable basis to believe that an emergency requires that he provide immediate assistance to protect or preserve life, or to prevent serious injury' and there is a 'reasonable nexus between the emergency and the area

or places to be searched.'") (quoting State v. Edmonds, 211 N.J. 117, 132 (2012)). Once the officers justifiably entered the unit for these purposes, they were justified in seizing evidence in plain view. See State v. Bruzzese, 94 N.J. 210, 236 (1983).[1]

Nor was it fatal to the admissibility of the evidence that Officer Mahon secured the scene and waited until a superior officer arrived before the police seized the evidence. Detective Lilavois' seizure of the evidence was simply a matter of protocol. But for that protocol, Officer Mahon would have seized the evidence. The slight delay in seizing evidence in plain view does not render the otherwise lawful seizure unconstitutional. See State v. O'Donnell, 408 N.J. Super. 177, 178-79 (App. Div. 2009) (upholding the warrantless police entry and seizure of evidence in a residence despite a short delay between the entry to provide emergency aid and the seizure), aff'd, 203 N.J. 160 (2010), cert. denied, 562 U.S. 1094, 131 S. Ct. 803, 178 L. Ed. 2d 537 (2010).

Defendant next contends the court's erroneous jury instructions on flight and the State's burden of proof deprived

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[1] In State v. Gonzalez, 227 N.J. 77, 82 (2016) the Supreme Court prospectively modified the plain view doctrine, eliminating the requirement that discovery of evidence be inadvertent. The doctrine had previously required that the police be lawfully in the viewing area; discover the evidence inadvertently, that is, they did not know in advance where the evidence was located and did not have a predetermined intention to seize it; and it had to be "immediately apparent" the items in plain view were evidence of a crime. Bruzzese, supra, 94 N.J. at 236.

her of a fair trial. Concerning the court's instruction on flight, she argues for the first time on appeal that the trial court failed to include in its charge her explanation as to why she left the residence after throwing oil on her husband. Her argument, which the record contradicts, is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Second, defendant argues the court's instruction on the State's burden of proof concerning self-defense was erroneous. Significantly, defendant does not contend the court erred in its instructions when it first charged the jury. Indeed, the court instructed: "If you find that the State has proved beyond a reasonable doubt that the defendant committed the crime of attempted murder, the State then has the burden to prove beyond a reasonable doubt that the defense of self[-]defense is untrue." After explaining why the State had the burden of disproving self-defense, the court continued: "If you find that the State has proved beyond a reasonable doubt all of the elements of attempted murder, and you find that the State has disproved self[-]defense beyond a reasonable doubt, you must find her guilty." The court also instructed the jury on the elements of attempted murder, self-defense, and the lesser-included offense of aggravated assault.

The problem arose when, during deliberations, the jury requested clarification on the charge of aggravated assault, serious bodily injury. The court explained:

> The only way to find her not guilty on count 1 is to determine that the State has failed to establish the elements of attempted murder beyond a reasonable doubt, and - - emphasis on the conjunctive "and" - - has failed to disprove self defense beyond a reasonable doubt. Okay? If the State has failed to prove any of the elements or disprove self defense beyond a reasonable doubt, then the verdict is not guilty on count 1. That requires you to go to the lesser included offense, aggravated assault serious bodily injury.
>
> In order for - - and you consider that anew. In order for her to be found guilty of aggravated assault serious bodily injury, the State has to prove beyond a reasonable doubt the elements of that crime, and - - once again emphasis on the conjunctive "and" - - the State has to disprove self defense beyond a reasonable doubt.
>
> If the State has proven the elements and disproven self defense, or to state it another way, has proven that the defense of self defense is untrue, then your verdict is guilty.
>
> If the State failed in your judgment to prove beyond a reasonable doubt the elements of aggravated assault serious bodily injury, or failed to prove beyond a reasonable doubt that the defense of self defense is untrue, then your verdict is not guilty.

Defendant did not object to the instruction when the court gave it. Now, seizing for the first time on the court's

misstatement concerning attempted murder — an offense for which the jury did not ask for clarification — defendant argues the erroneous instruction deprived her of a fair trial.

Because defendant did not object to the court's instruction, "we review the charge for plain error and reverse only if such an error was 'clearly capable of producing an unjust result.'" State v. Miller, 205 N.J. 109, 126 (2011) (quoting R. 2:10-2). For several reasons, we do not find plain error. First, as we have pointed out, the jury did not request a clarification on the charge of attempted murder. The jury initially wrote a note, "Number 1. Question of Judge . . .: Clarification of count 2 number 2. What to do?" In response to the court's inquiry the jury clarified, "It's a mistake. It should be count 1, number 2." On the jury verdict sheet, under count 1, number 2, the jury was asked: "How do you find defendant . . . on the charge of aggravated assault serious bodily injury?" Thus, the court's misstatement was made concerning a count on which the jury had requested no clarification.

Second, the jury acquitted defendant of attempted murder. It is difficult to understand how defendant could possibly have been prejudiced by the instruction on a charge of which she was acquitted.

Third, both the court's original charge on aggravated assault and its clarifying charge on aggravated assault properly informed the jury of the State's burden of proving the elements of the offense and disproving self-defense. The court's instructions were errorless on the one count on which the jury sought clarification.

For these reasons, we conclude the trial court's use of the word "and" instead of "or," on a charge not the subject of the jury's request for clarification, and on a charge on which the jury acquitted defendant, was not clearly capable of producing an unjust result. Miller, supra, 205 N.J. at 126.

In her final argument, defendant challenges her sentence. She contends the court improperly found aggravating factor one, N.J.S.A. 2C:44-1(a)(1). She also contends the court failed to find certain mitigating factors. Lastly, defendant contends the court improperly utilized a seven and one-half year mid-range starting point in determining defendant's sentence, thereby violating State v. Natale, 184 N.J. 458 (2005).

We review a trial court's sentence under a deferential standard, being careful not to substitute our judgment for that of the trial court. State v. O'Donnell, 117 N.J. 210, 215 (1989). We will:

> affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating

> and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."
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> [State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting Roth, supra, 95 N.J. at 364-65).]

When we review a trial court's determination of aggravating and mitigating factors, we will remand for resentencing if the court "fails to provide a qualitative analysis of the relevant sentencing factors on the record," or "the trial court considers an aggravating factor that is inappropriate to a particular defendant or to the offense at issue." Ibid. (citations omitted). The aggravating and mitigating factors found by the trial court must be based on "competent, reasonably credible evidence." Roth, supra, 95 N.J. at 363. When the judge has followed the sentencing guidelines, and his findings of aggravating and mitigating factors are supported by the record, we will only reverse if the sentence "shocks the judicial conscience" in light of the particular facts of the case. Id. at 364-65.

We find no error in the court's determination that aggravating factor one applied. The first aggravating factor looks to: "[t]he nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially

heinous, cruel, or depraved manner." N.J.S.A. 2C:44-1(a)(1). The term "cruel" as used in the statute requires the defendant to have inflicted pain or suffering gratuitously, as an end in itself. See O'Donnell, supra, 117 N.J. at 217-18. When evaluating this factor, a court "must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense." Fuentes, supra, 217 N.J. at 74-75.

In this case, the evidence supported the trial court's finding of aggravating factor one. Not only did the trial evidence establish defendant poured a chemical substance into her husband's right eye, the evidence also established she scalded her husband with hot cooking oil. Then, to delay his ability to get help, she cut the wires to the house phone. These events justified the trial court's finding that defendant committed the assault on her husband in a heinous, cruel, or depraved manner.

Nor do we find error in the trial court's failure to find the other mitigating factors urged by defendant. Defendant insists three mitigating factors not found by the court apply, namely: there were substantial grounds tending to excuse defendant's conduct, N.J.S.A. 2C:44-1(b)(4); the victim induced defendant's conduct, N.J.S.A. 2C:44-1(b)(5); and the character and attitude of defendant indicates she is unlikely to commit another offense, N.J.S.A. 2C:44-1(b)(9). Credible evidence must exist to support

both aggravating and mitigating factors. See State v. Dalziel, 182 N.J. 494, 504-05 (2005); Roth, supra, 95 N.J. at 356-64. No credible evidence supported the mitigating factors urged by defendant, which were based in large part on her claim of self-defense, a claim the jury rejected.

Defendant also argues the trial court's use of a mid-range starting point when balancing aggravating and mitigating factors violates the principles of Natale, supra, 184 N.J. at 484. There, the Supreme Court eliminated presumptive terms from the sentencing process, thus requiring judges to "sentence defendants within the statutory range after identifying and weighing the applicable mitigating and aggravating factors." Id. at 466. Here, the trial court did not impose a presumptive term. Rather, it employed a methodology in balancing aggravating and mitigating factors. The trial court's use of the methodology was not error. As the Court explained in Natale:

> Although judges will continue to balance the aggravating and mitigating factors, they will no longer be required to do so from the fixed point of a statutory presumptive. We suspect that many, if not most, judges will pick the middle of the sentencing range as a logical starting point for the balancing process and decide that if the aggravating and mitigating factors are in equipoise, the midpoint will be an appropriate sentence. That would be one reasonable approach, but it is not compelled. Although no inflexible rule applies, reason suggests that when the mitigating factors preponderate, sentences will tend toward the

> lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range. In the past, defendants with long criminal records have been sentenced toward the upper part of the sentencing range. They should not anticipate a departure from that practice with the presumptive terms gone.
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> [Id. at 488.]

In the case before us, the court followed this methodology. The court noted "the mid[-]range" of a second degree offense, "which is seven and a half years," and then sentenced defendant toward the lower end of the range because the mitigating factors slightly outweighed the aggravating factors. The trial court committed no error in imposing defendant's sentence.

Affirmed.