

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1075-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

VIRGINIA A. VERTETIS,
a/k/a VIRGINIA BERDECIA,

Defendant-Appellant.

Argued June 1, 2023 – Decided July 5, 2023

Before Judges Accurso, Vernoia and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 14-08-0797.

Kevin S. Finckenauer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; James K. Smith, Jr., Assistant Deputy Public Defender, of counsel and on the briefs).

Paula Jordao, Assistant Prosecutor, argued the cause for respondent (Robert J. Carroll, Morris County Prosecutor, attorney; Paula Jordao, on the brief).

PER CURIAM

This appeal, which returns after remand, requires us to determine if the court's twenty-year custodial sentence imposed on defendant Virginia Vertetis is consistent with the Code of Criminal Justice. After careful consideration, we conclude the court's analysis of aggravating and mitigating factors was based, in part, on factual findings that were unsupported by competent, credible evidence in the record. We therefore vacate defendant's sentence and remand the matter once again, with directions that a different judge resentence defendant.

I.

The facts underlying defendant's conviction and sentence involve the shooting death of Patrick Gilhuley,¹ a private security worker and retired New York City police officer, by defendant, his estranged significant other. The State contended defendant shot him out of jealousy because he dated multiple women. It further maintained she acted out of anger because her attempts to continue their relationship through sex and threats had failed. Defendant initially claimed

¹ We refer to Patrick Gilhuley as decedent or victim throughout the remainder of our opinion.

she shot decedent in self-defense after he had assaulted and threatened to kill her in her home.

After a month-long trial, the jury rejected defendant's self-defense claim and convicted her of first-degree murder and unlawful possession of a weapon. At sentencing, the court applied aggravating factors one ("[t]he nature and circumstances of the offense"), three ("[t]he risk that the defendant will commit another offense"), and nine ("[t]he need for deterring the defendant and others from violating the law"), and mitigating factor seven (the defendant's "history of prior delinquency or criminal activity"). N.J.S.A. 2C:44-1(a)(1), (3), (9), (b)(7). The court found the aggravating factors outweighed the sole mitigating factor and noted "defendant's psychiatric history, . . . although not amounting to substantial grounds to excuse or justify" her conduct, warranted a thirty-year sentence with a thirty-year parole bar, which it imposed after merger.

On appeal, defendant challenged her conviction, and we reversed and remanded for a new trial because of critical flaws in the jury instructions on the central issue of self-defense. See State v. Vertetis, No. A-1687-17 (App. Div.

Mar. 18, 2020).² We incorporate by reference the facts set forth in our prior unpublished opinion.

On remand, defendant pled guilty to first-degree aggravated manslaughter in exchange for the State's promise to dismiss the unlawful possession of a weapon charge and to recommend a twenty-year custodial term, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, with defendant reserving her right to argue for a lesser sentence. During her plea, defendant stated on the night of the shooting, decedent came to her home and "issues" arose. Defendant also admitted that following an argument, she removed a handgun from underneath her mattress and shot decedent six times while he was descending a narrow stairwell. She acknowledged in doing so she was not acting in self-defense, "there was a probability as opposed to a possibility" she would cause his death, and her behavior was reckless as it "disregarded a risk" that decedent would be injured.

At her resentencing, the victim's daughter and brothers testified. One of his brother's also read a statement from their mother. Each explained the devastating impact defendant's actions have had on their lives. For her part,

² The Supreme Court denied the State's petition for certification and defendant's cross-petition. State v. Vertetis, 247 N.J. 218 (2021); 247 N.J. 220 (2021).

defendant stated she was "ashamed" for what she had done and what she had "taken away" from the victim's family.

In a presentencing memorandum, defendant's counsel requested the court impose a sentence "less than the twenty years recommended by the plea agreement." In support, counsel requested the court apply mitigating factors three ("[t]he defendant acted under a strong provocation"), four ("[t]here were substantial grounds tending to excuse or justify the defendant's conduct"), five ("[t]he victim of the defendant's conduct induced or facilitated its commission"), seven, eight ("[t]he defendant's conduct was the result of circumstances unlikely to recur"), and nine ("[t]he character and attitude of the defendant indicate that the defendant is unlikely to commit another offense"). N.J.S.A. 2C:44-1(b)(3) to (5), (7) to (9). Defendant also maintained only aggravating factor nine potentially applied, and solely because that aggravating factor "is arguably present in every criminal case."

Defendant's counsel stressed, both in her memorandum and during the sentencing proceeding, that through "perseverance" defendant stood before the court as a better person than she was on the day of the shooting. Counsel also attached supporting documentation and letters from the Chaplain and a counselor at the Morris County Correctional Facility, and informed the court

since defendant's incarceration, she has undergone "numerous hours of therapy . . . working to unravel negative relationship patterns and low self-esteem," and has "[w]eaned off most of the prescribed medication for depression."

Counsel also stated defendant assisted other prisoners and held numerous leadership roles in prison, including acting as a tier representative for fellow inmates; tutoring inmates in preparation for the GED exam; providing orientation for new inmates; completing an online paralegal course; engaging in Bible study; assisting the prison administrative staff by mending officers' uniforms, delivering mail, and organizing packages for newly released inmates.

As to mitigating factor three, counsel noted defendant admitted her guilt and, although she waived any claim of self-defense, argued evidence in the record supported a finding defendant was "pushed around, thrown, and shaken" by decedent during the evening of the shooting. With respect to mitigating factor four, counsel requested the court consider defendant's "extreme mental health issues at the time of the offense," as well as her physical issues and "financial stressors."

Counsel also advocated for mitigating factor seven, pointing out defendant lived a law-abiding life up until the date of the offense, which occurred when she was fifty-two years old. She maintained mitigating factors eight and nine

applied based on defendant's "overwhelming efforts . . . to change bad relationship patterns and understand her own mental health issues" and her "deep commitment to community service for inmates at the jail." Finally, counsel disputed the State's claim defendant planned decedent's death.

Conversely, the State argued for aggravating factors one, three, and nine, and also maintained no mitigating factors applied. It requested the court impose a twenty-year prison consistent with the plea agreement.³

As noted, the court agreed with the State and sentenced defendant to a twenty-year NERA sentence and in doing so found applicable aggravating factors three and nine and mitigating factors seven and nine. The court rejected the State's request for the application of aggravating factor one, reasoning the parties' plea agreement concerned "a reckless offense manifesting extreme indifference to the value of human life rather than a first-degree purposeful or knowing murder" and as such, it did not "think . . . factor [one] applied at . . . re-sentencing." It further commented it was "not sure in hindsight whether the facts in this case actually support[ed] that factor." According to the court, "the nature of the offense and the role of the defendant in that offense are factors" to be considered, but "the nature of the offense is better served in the [c]ourt's

³ The State's sentencing memorandum is not included in the record.

consideration of other aggravating factors and not aggravating factor number one."

Instead, the court determined "the nature of the offense itself reflect[ed] better under aggravating factor three." That aggravating factor applied because despite defendant's post-incarceration "steps . . . to better herself," the court explained the shooting:

was not a spontaneous act by the defendant. There was evidence of planning and particular evidence, compelling evidence in this [c]ourt's view that prior to the homicide, the defendant drove to the victim's house in Staten Island to retrieve his service weapon unbeknownst to him and there was evidence from cell tower records showing on the day in question [decedent] was at his place of employment in Manhattan and the defendant drove from her home to Staten Island, her cell phone bounced or pinged off of towers along the way, it placed her in the vicinity of [decedent's] house for a short period of time and then had her driving back to her home in Morris County.

The court further found the "credible evidence at trial" supported the conclusion "defendant retrieved the weapon and lied about it during the course of her testimony." The court pointed out the victim's "daughter exposed that lie . . . because the daughter had seen the gun in the interim after the [decedent] had moved out [of defendant's residence] . . . and . . . supposedly left it behind."

According to the court, "[t]he daughter not only saw the gun in his possession, . . . but took a photograph of it that was presented at trial."

In addition, the court found significant the fact defendant shot at decedent six times including "in the back as he was walking down the stairs away from the defendant and towards the front door on his way out of the defendant's life." The court conclusively found defendant "engaged in efforts to cover up the crime," stating "there was no immediate call to 9-1-1" after shooting the victim during which time he "lay bleeding on the foyer floor." Instead, according to the court, defendant was "walking around her house in the upstairs and then downstairs" and it was "only when the police entered the house that the defendant called 9-1-1 and that was not to get aid for the victim, that was to cover up the crime that she committed."

In addition, the court characterized defendant's trial testimony as "dishonest" and "not remotely truthful," again finding she attempted to "cover up" the shooting. On this point, the court found:

victim was on the phone with his daughter, Jennifer, at the time of the shooting . . . yet his phone miraculously was found in his jeans' pocket at the time the officers arrived. And the only reasonable inference from that is that the defendant put it there after the shooting.

The court also found evidence regarding the underlying "motive for the shooting" supported application of aggravating factor three. According to the court, defendant's motive was not fueled by "any domestic violence by the victim" nor "due to the fact that the victim was assaulting the defendant and she had to defend herself" when she killed him. On this point, the court found there was "no credible evidence of any assault by [decedent] on the day of the incident," and explained when decedent called his daughter on the night he died, his daughter reported he told her defendant was hitting him. The court therefore concluded, "if there was domestic violence there, it was on the part of the defendant." The court further rejected defendant's claims she was a victim of domestic violence because "[t]here were never any reports to police, never any injuries treated by doctors," and the only evidence of defendant's injuries related to "scratches on her arms which the evidence revealed were caused by the defendant herself while at the police station" after her arrest.

According to the court, defendant's "real motive" for the killing "was a combination of factors," including her mental health issues and "significant history with regard to failed relationships," which "culminated in the shooting" and supported the conclusion defendant posed a risk of re-offense. As the court further explained, "the evidence showed that she was a jealous person,

vindictive, perhaps even obsessive and she did communicate with another woman and threaten that other woman," and it was "not clear" she would be capable of handling another relationship differently once out of prison, meaning she may again behave violently "with a man that leaves her."

The court acknowledged defendant's mental health counseling while incarcerated but noted she was also receiving treatment when she shot decedent. Thus, "notwithstanding [defendant's] lack of prior record," the court concluded "the nature and circumstances of the offense, her attempts to cover it up, her lies during the course of the testimony[,] as well as the underlying motive for the shooting" established a risk of re-offense pursuant to aggravating factor three.

The court also found aggravating factor nine applied and ascribed it significant weight, stating "the need to deter this defendant and others from violating the law" and "the need for public safety and deterrence under this factor increases proportionally with the degree of the offense." That principle was particularly applicable here because defendant pled guilty to "one of the most serious offenses under our jurisprudence."

The court determined only mitigating factors seven and nine applied. As to mitigating factor seven, the court noted defendant "had no history of delinquency or criminal activity." With respect to mitigating factor nine, the

court recognized defendant's steps "with regard to her mental health" and the "positive things" she was undertaking in prison, such as "being a seamstress for the officers" and "mentoring other inmates." Based on the "nature and circumstances of the offense," however, the court gave minimal weight to mitigating factor nine, and "certainly not enough [weight] to overcome the two aggravating factors."

In rejecting the application of mitigating factor three, the court relied on many of the same bases as in its aggravating factor three analysis, specifically finding: "there was no credible evidence in the record to support" decedent assaulted defendant including on the night of the shooting. And, although recognizing decedent "had a high alcohol content" the night he was killed, the court found that fact did not support a finding he assaulted defendant.

The court determined mitigating factor four did not apply because although "[t]here was certainly arguing between the parties . . . the only evidence of the assaultive conduct was on the part of the defendant, not the victim." The court further recognized although "defendant suffered from mental health issues," she did not advance a "mental health defense," and "the extent of . . . mental health issues was not something that was set forth on the record in any detail." On this point, the court explained "[t]here were no expert witnesses that

testified that may have supported that those mental health issues were extreme and substantial enough to excuse the conduct to some extent although failing to establish a defense."

The court also determined mitigating factor five did not apply after finding there was no evidence decedent "induced or facilitated" his killing because "the victim's only conduct here was going to [defendant's] house to break up with her finally." The court rejected defendant's request to apply mitigating factor eight because that factor needed to be "balanced against aggravating factor three."

After determining the aggravating and mitigating factors to be "in equipoise," it concluded the negotiated plea to be fair under all the circumstances and sentenced defendant to the recommended twenty-year custodial term. Before us, defendant argues the court committed multiple sentencing errors and asks that we vacate her sentence and remand the matter to a different judge for resentencing. She specifically argues:

THE SENTENCE IMPOSED WAS THE RESULT OF THE JUDGE'S CONTRADICTIONARY FACT-FINDING AND HIS IMPROPER FINDING OF THE RISK AGGRAVATING FACTOR WHICH WAS NOT SUPPORTED BY COMPETENT CREDIBLE EVIDENCE IN THE RECORD.

A. The Finding That There Was A Risk That The 59-Year-Old Defendant Would Commit Another Offense Was Unsustainable Given That She Had

No Prior Record. Moreover, The Finding Of The "Risk" Factor Was Contrary To The Judge' Finding That The Character And Attitude Of The Defendant Indicated That She Would Be Unlikely To Commit Another Offense

B. It Was Improper For The Judge To Find The Risk Of Another Offense Aggravating Factor Based Upon His Assessment That Defendant Had Lied About What Had Happened When The Uncontested Physical Evidence Supported Her Testimony

1. The Allegation That Virginia Had Lied About Patrick's Prior Acts Of Domestic Violence

2. The Allegation That Virginia Had Put Scratches On Her Own Arms

3. The Allegation That Defendant Put The Cell Phone In The Victim's Pocket After The Shooting.

4. The Allegation That Defendant Stole The Gun From [Decedent's] Apartment Because She Was Planning The Crime

C. The Judge Erred In Not Finding Mitigating Factors Which Were Clearly Set Forth In The Record

II.

Our review of a sentence is limited and subject to an abuse of discretion standard. State v. Jones, 232 N.J. 308, 318 (2018). "[A]ppellate courts are

cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). We therefore affirm a sentence "unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record'; or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

Of course, deferential review of a sentence "presupposes and depends upon the proper application of sentencing considerations." State v. Melvin, 248 N.J. 321, 341 (2021) (citing Case, 220 N.J. at 65); accord State v. Trinidad, 241 N.J. 425, 453 (2020). "In determining the appropriate sentence to impose within the range, judges first must identify any relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case." Case, 220 N.J. at 64. "[I]n all sentencing decisions, the trial court must clearly identify the relevant sentencing factors and describe how it exercised its discretion balancing these factors." State v. Megargel, 143 N.J. 484, 502 (1996).

"The finding of any factor must be supported by competent, credible evidence in the record." Case, 220 N.J. at 64. "Speculation and suspicion must

not infect the sentencing process; simply put, the finding of aggravating or mitigating factors must be based on evidence." Ibid. Additionally, in considering mitigating factors, "[t]he sentencing court is required to consider evidence of a mitigating factor and must apply mitigating factors that 'are amply based in the record.'" State v. Grate, 220 N.J. 317, 338 (2015) (quoting State v. Dalziel, 182 N.J. 494, 504-05 (2005)).

Further, a "sentence imposed pursuant to a plea agreement is presumed to be reasonable" but "a sentence recommended as part of a plea agreement . . . may be vacated if it does not comport with the sentencing provisions of our Code of Criminal Justice." Fuentes, 217 N.J. at 70-71. "When a trial court imposes a sentence based on defendant's guilty plea, the defendant's admissions or factual version need not be the sole source of information for the court's sentencing decision." State v. Sainz, 107 N.J. 283, 293 (1987). Rather, "[t]he court evaluates 'a range of information unconstrained by evidential considerations.'" Fuentes, 217 N.J. at 71-72 (quoting State v. Randolph, 210 N.J. 330, 348 (2012)); see also State v. Davis, 96 N.J. 611, 620 (1984) ("[T]he sentencing process should embrace an evidential inquiry 'broad in scope, largely unlimited either as to the kind of information that may be considered, or the source from

which it may come." (quoting United States v. Tucker, 404 U.S. 443, 446 (1972))).

Additionally, "the court may look to other evidence in the record when making such determinations, . . . [and] it should consider 'the whole person[]' and all the circumstances surrounding the commission of the crime." Sainz, 107 N.J. at 293. "What is important—when the court goes beyond defendant's admission or factual version—is that the court not sentence defendant for a crime that is not fairly embraced by the guilty plea." Ibid. Finally, a "sentencing court is required to 'view a defendant as [that defendant] stands before the court on the day of sentencing.'" State v. Rivera, 249 N.J. 285, 299 (2021) (alteration in original) (quoting State v. Jaffe, 220 N.J. 114, 124 (2014)).

III.

Before us, defendant contends the court's factual findings supporting its application of aggravating factor three were unsustainable, particularly given her lack of criminal history, and its application of that factor was "contrary" to its "finding that [her] character and attitude . . . indicated that she would be unlikely to commit another offense." She additionally argues the court "erred in not finding mitigating factors which were clearly set forth in the record."

We agree, in part, with defendant that certain findings the court relied upon in applying aggravating factor three were not "supported by competent, credible evidence in the record." Case, 220 N.J. at 64. We specifically express reservation over the court's finding defendant "retrieved" decedent's service revolver from his residence with intent to shoot him and that "there were no injuries to the defendant other than the scratches on her arms," thereby supporting the court's conclusion decedent did not engage in any domestic abuse of defendant in light of her lack of reporting of any such abuse to authorities. Further, after careful consideration, we cannot discern the extent to which the court's reliance on those findings materially impacted its sentencing calculus, particularly in light of its conclusion that the aggravating and mitigating factors were in "equipoise." We are therefore constrained to vacate the court's sentence and direct defendant be resentenced anew. We provide the following to guide the court on remand.

To rely on aggravating factor three, "the court must find particular facts supporting it." Cannel, N.J. Criminal Code Annotated, cmt. 3 on N.J.S.A. 2C:44-1 (2023) (citing Case, 220 N.J. at 66-67). A court's findings regarding aggravating factor three "should . . . 'include an evaluation and judgment about the individual in light of his or her [criminal] history.'" State v. Locane, 454

N.J. Super. 98, 125 (App. Div. 2018) (quoting State v. Thomas, 188 N.J. 137, 153 (2006)). In that analysis, "[a] defendant's claims about rehabilitation have to be weighed against the criminal history, and include, when possible, objective information in the record such as the offense circumstances." Ibid. The court may find defendant poses a risk of reoffending even though she has no prior record. See State v. Varona, 242 N.J. Super. 474, 491 (App. Div. 1990).

Here, the court's application of aggravating factor three was substantially animated by its findings with respect to the "nature of the offense." Based on the trial evidence, the court concluded the shooting "was not a spontaneous act by the defendant," but rather "there was evidence of planning" and "compelling evidence" that defendant effectuated the crime by driving to decedent's house in Staten Island "to retrieve his service weapon unbeknownst to him." As best we can discern, however, the State did not introduce competent evidence defendant retrieved decedent's revolver from his residence, let alone she did so as part of a plan to shoot him, nor was such a finding logically inferred from the State's proofs.

At her initial trial, defendant testified decedent gave her his service revolver when he moved out of her house and the weapon stayed in her home until the night of the shooting. Her testimony was rebutted by the testimony of

decedent's daughter and his ex-wife, as well as a time-stamped photograph of the gun at his ex-wife's house on August 27, 2012, which was between the time he moved out of defendant's house and the shooting. At sentencing, the court relied on that rebuttal evidence, as well as "evidence from cell tower records" which established that on February 19, 2014, defendant was in "close proximity" to decedent's residence in Staten Island while he was in Manhattan, to conclude defendant retrieved "the victim's service weapon and store[d] it in her house."

Although the court may consider the nature of the offense when applying aggravating factor three, see Locane, 454 N.J. Super. at 125-26, the evidence that the revolver was located outside of defendant's residence at some time between decedent moving out and the shooting paired with defendant's presence near decedent's residence does not reasonably support the inference that defendant retrieved decedent's revolver as part of a plan to shoot him. Rather, the court's finding defendant retrieved the victim's service revolver appears to be an adoption of the State's trial theory and amounts to unfair speculation, which should not have factored into its sentencing calculus. See Case, 220 N.J. at 64.

Nor was the court's inference that defendant retrieved decedent's revolver and planned the shooting "fairly embraced by [defendant]'s guilty plea." Sainz,

107 N.J. at 293. During her plea colloquy, defendant admitted that she shot decedent but did not acknowledge she did so pursuant to a preconceived plan. And, as noted, defendant pled guilty to aggravated manslaughter, which did not require the State prove defendant planned the shooting. See N.J.S.A. 2C:11-4; State v. Wilder, 193 N.J. 398, 409 (2008) (explaining aggravated manslaughter differs from serious bodily injury murder because "it does not require an intention to cause serious bodily injury or an awareness that death is 'practically certain' to follow") (quoting State v. Cruz, 163 N.J. 403, 417-18 (2000)).

We acknowledge evidence of planning and any attempted cover up of a crime may, in certain circumstances, be probative of a defendant's risk of re-offense when supported by competent evidence in the record. Here, however, neither the trial proofs nor defendant's guilty plea reasonably supported the court's inference that defendant retrieved decedent's revolver from his residence and stored it in her home until the night of the shooting. On remand, although the court may rely on "evidence not adduced specifically through . . . defendant's plea allocution," it must be sure not to sentence "defendant for a crime that is not fairly embraced by the guilty plea." State v. Hupka, 407 N.J. Super. 489, 497 (App. Div. 2009) (quoting Sainz, 107 N.J. at 293).

The court also supported its application of aggravating factor three by concluding the shooting was not prompted by "any domestic violence by the victim." In so holding, the court relied upon the absence of "reports to police" and "injuries treated by doctors" and determined "[t]here's no credible evidence of any assault by [decedent] on the day of the incident." It further stated, "there were no injuries to the defendant other than the scratches on her arms."

It does not appear the court acknowledged, let alone considered, contrary evidence in the record arguably corroborating defendant's claims of domestic abuse, including photographs and expert testimony establishing defendant had bruising, discoloration, and abrasions over her body on the night of the shooting. Furthermore, absence of reporting is not dispositive, particularly in the context of domestic abuse allegations. See Wildoner v. Borough of Ramsey, 162 N.J. 375, 393 (2000) ("Courts . . . have recognized that victims of domestic violence do not often report their abuse to law enforcement agencies.").

To be clear, we do not express an opinion on whether the record supports defendant's domestic abuse claims. On remand, however, should the court apply aggravating factor three based, in whole or in part, on a finding decedent did not injure defendant, it should support that conclusion by weighing the evidence tending to support or contradict defendant's claims.

As noted, defendant contends the court's application of aggravating factor three was inconsistent with its application of mitigating factors seven and nine. As our Supreme Court has explained, mitigating factor seven stands "as a counterpoise" to aggravating factor three. Case, 220 N.J. at 67. Additionally, the Court held in Fuentes that, although it is not impossible for seemingly contradictory aggravating and mitigating factors to apply at the same time, such an occurrence would be "exceptional" and "rare." 217 N.J. at 80.

We do not presume, however, that conflicting aggravating and mitigating factors cannot coexist. Case, 220 N.J. at 67. Rather, if the sentencing court applies conflicting factors, it must "explain how it reconciles those two findings," giving "greater detail [to] its assessment of the weight assigned to each aggravating and mitigating factor, and its balancing of those statutory factors as they apply to defendant." Fuentes, 217 N.J. at 80. On remand, the court should be guided by Case and Fuentes and base its sentence on evidence in the record.

With respect to mitigating factors, the court again relied, in part, on its conclusion that defendant's claims of domestic abuse were unfounded. Again, we express no opinion on whether the evidence in the record supported defendant's claims, we simply reiterate the court's conclusion "there were no

injuries to the defendant other than the scratches on her arms" and thus "no credible evidence in the record to support that [decedent] was assaultive of [defendant]" appears to overstate the record, particularly in light of the expert testimony describing defendant's injuries. As noted, sentencing courts are "required to consider evidence of a mitigating factor," Grate, 220 N.J. at 338, and the court, on remand, should therefore address the significance of any credible evidence in the record that corroborates defendant's domestic abuse claims.

On remand, the court should sentence defendant "anew," Randolph, 210 N.J. at 350, and pursuant to an updated presentence report, see State v. Tavares, 286 N.J. Super. 610, 616 (App. Div. 1996). Furthermore, we direct the matter be heard by a different judge on remand. See State v. Melvin, 248 N.J. 321, 352-53 (2021) (directing a different judge preside over resentencing because, "[v]iewing the proceedings from the defendant's perspective, it might be difficult to comprehend how the same judge who has twice sentenced him could arrive at a different determination at a third sentencing"). We stress that nothing in our opinion should be interpreted as an indication of our view of the outcome of the resentencing proceedings.

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION