ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
Plaintiff-Appellee,	:	Case No. 12-1410
v.	:	On Appeal from the Hamilton County Court of Appeals First Appellate District
Eric Long,	:	
Defendant-Appellant.	:	Court of Appeals Case No. C-110160

Memorandum in Support of Jurisdiction of Appellant Eric Long, a Minor Child

Joseph T. Deters, #0012084
Hamilton County Prosecutor

Ronald W. Springman, #0041413
Assistant Prosecuting Attorney
(Counsel of Record)

Hamilton County Prosecutor's Office
230 E. 9th Street - Suite 4000
Cincinnati, Ohio 45202
(513) 946-3000
(513) 946-3105 - Fax

Counsel for Plaintiff-Appellee

Office of the Ohio Public Defender

By: Stephen P. Hardwick, 0062932
Assistant Public Defender
(Counsel of Record)

250 East Broad Street - Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
stephen.hardwick@opd.ohio.gov

Counsel for Defendant-Appellant

Table of Contents

Page No.

This Case Presents a Substantial Constitutional Question and Concerns an Issue of Public and Great General Interest 1

Statement of the Case and the Facts 4

The house shooting. 4

The freeway shooting 5

Plea discussions, 18-20 years of flat time instead of life without parole. 6

The trial. 7

The sentence. 7

The appeal. 8

Argument 9

Proposition of Law:

The Eighth Amendment requires trial courts to consider youth as a mitigating factor when sentencing a child to life without parole for a homicide. 9

Children are different. 9

Application of Miller *to this case.* 10

The record must show that the trial court considered youth as a mitigating factor 11

Eric's crimes were not the "worst of the worst" as the General Assembly defined aggravating factors in R.C. 2929.12(B). 14

The trial court's explanation of Eric's sentence pales in comparison to the explanation recently affirmed by the Indiana Supreme Court. 15

Conclusion 15

Certificate of Service 16

Table of Contents

Page No.

Appendix:

State of Ohio v. Eric Long, Hamilton County Court of Appeals Case No. C-110160 (July 3, 2012), Judgment Entry and Opinion..... A-1

This Case Presents a Substantial Constitutional Question and Concerns an Issue of Public and Great General Interest

This case is important because it involves a new constitutional rule that instructs trial judges how to sentence the most serious juvenile law offenders for the most serious crimes. Specifically, it concerns what factors *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012), requires a trial court to consider when sentencing a child to life without parole for aggravated murder. These cases are infrequent, but because life without parole must be reserved for the worst of the worst child offenders who commit the worst of the worst offenses, each case is inherently important and of great public interest. This case is also important because *Miller* requires trial courts to consider mitigating factors beyond those expressed in R.C. 2929.12, so trial courts need guidance as to what evidence they should consider and how they should weigh it.

In this case, the defense argued at trial that Eric Long's youth should be a mitigating factor. By contrast, the State argued that youth should be an aggravating factor, because a longer term was needed to deprive Eric of the chance of release. The trial court explained its decision, but did not mention any consideration of youth as a mitigating factor. The trial court's explanation did not even fill one page of the transcript.

Further, the court of appeals instructions gave trial courts incorrect guidance on how to handle future cases. The court of appeals ruled that the trial court considered youth as a mitigating factor because defense counsel argued that it should. Opinion at ¶ 53. But the court of appeals ignored the

fact that the prosecutor made the opposite argument—asserting that youth was an aggravating factor.

This case is a good vehicle to decide the issue because Eric properly raised his Eighth Amendment claims in the trial and appellate courts, and the court of appeals made a merits ruling on how trial courts should apply *Miller*.

This Court should also accept this case because this State's prosecutors and trial courts are not reserving life without parole for the worst of the worst offenses committed by children. The *Miller* Court noted that "sentencers impose life without parole on children relatively rarely." *Miller*, 132 S.Ct. at 2472. That does appear to be the case in Ohio—the Office of the Ohio Public Defender has identified only two children sentenced to life without parole in Ohio: Eric, in this case, and Willie Evans. *See State v. Willie Evans*, 9th Dist. No. C. A. No. 07CA009274, 2008-Ohio-4295. But neither case involves sexual assault, and neither case has a child victim. Eric's case involves two deaths (and another incident with felonious assaults on three victims), while Willie's case involved only one. Further, in Willie's case, the adult victim was shot in the stomach during a robbery. The jury acquitted Willie of committing aggravated murder with prior calculation and design, but convicted him of purposefully killing the victim in the course of the robbery. Tellingly, both children took their cases to trial, and *Miller* explains that children are less capable of making rational decisions as to pleas. *Id.*, at 2468.

Life without parole is the most serious penalty that can be imposed on a child—the juvenile version of the death penalty. This Court hears every direct appeal from a sentence of death on adults. Cases in which the State has sentenced a child to die in prison deserve no less scrutiny, especially since they remain relatively rare. And although it is rare for a trial court to sentence a child to die in prison, the sentences are being imposed in a haphazard and random fashion. This Court should accept this case and set a uniform standard for how trial courts should handle the most serious offenses committed by children.

Statement of the Case and the Facts

The house shooting.

In early 2009, Mark Keeling had an "altercation" with Fonta Whipple, and Jashawn Clark, as well as Eric Long, the appellant in this case. Whipple was 26 years old. Clark was 25 years old. Eric was 17 years old.

A few days after the "altercation," in the early morning hours, Keeling and his girlfriend, Keyonni Stinson, were returning to Stinson's Sharonville home from a birthday party, along with their friend Kyrie Maxberry. On the way home, the group saw a grey van. Whipple was driving. Clark, the other adult, was in the passenger seat. Eric was in the back seat. Whipple followed Keeling's group to Stinson's house. When they arrived, Keeling and Maxberry quickly went into the house.

Within seconds, bullets were flying through the house. Neither Stinson nor her children were hurt, but Keeling suffered a gunshot wound at the base of his neck. Maxberry was shot in the face. They said the gunfire lasted a few minutes. Police recovered from the house 28 cartridge casings, 13 bullets, some bullet fragments, and one live round. A firearms examiner said that the 28 cartridge casings were fired from three separate high-caliber weapons.

A day or two after the shooting, Stinson went back to her house. She said that while she was there, the same van slowly drove by. She said that Whipple and Clark, as well as Eric, were in the van.

The freeway shooting.

Two weeks later, Whipple, through Alisha Kloth, the mother of one of his children, rented a silver Dodge Caliber. That night, Trenton Evans got into an argument with a group that included Scott Neblett. Evans pulled out a gun, and the argument ended. At a gas station, Evans saw Whipple in the rented car. Whipple was in the driver's seat, Clark was in the front passenger seat and, again, Eric was in the back seat with a man named Jackie Thomas. Evans told them about the argument, and then Neblett arrived and went into the gas station.

In the early morning hours later that night, William gray was driving to work in I-75. A Chevy Blazer and a Dodge Caliber sped past him toward an exit ramp. He saw a muzzle flashes and heard the sound of multiple gun shots from the Caliber, and then the Blazer spun out of control, hit a guardrail, and rolled over several times. He stopped and called 911. Keith Cobb and Scott Neblett were found dead inside the red Chevy Blazer, and a deputy coroner said the two died from gun shots.

Police discovered ten shell casings scattered along 1-75. Six were 9-millimeter casings, three were .223 casings, and one was a 7.62 casing. Police speculated that, because of the nature of the crime scene, there were other bullets that they could not find.

Kloth testified that, later that day, Whipple called her from Atlanta. He told her to report the rental car stolen. She said she called the rental company, which told her to call the police, but she did not call the police.

Police soon found the Dodge Caliber. Inside was Whipple's discharge papers from a local hospital indicating that he had been released after receiving treatment for gunshots wounds to his hand. DNA evidence indicated that the two adults were in the front seat—Whipple's DNA was found on the steering wheel, and Clark's DNA was found on the right front passenger seat. A mixture of DNA was found in the rear seat, and Eric could not be excluded as the donor.

A firearms examiner examined the shell casings and said that two of the weapons used in the house shooting were also used in the freeway shootings, and that a third weapon could not be ruled out as having been used in both shooting incidents.

Five days later, a police officer approached Eric, and Eric fled. The officer said that Eric had a gun. The officer chased Eric through the neighborhood, losing sight of him. A woman in the neighborhood told the officer that she someone running in a nearby parking lot, where the officer found Eric hunched in the back of a pickup truck. Another resident found a 9mm handgun and turned it over to the police. A firearms examiner said that it was one of the weapons used in the freeway shooting.

Plea discussions, 18-20 years of flat time instead of life without parole.

Early in the process, Eric rejected plea discussions that likely would have resulted in a jointly recommendation for 18-20 years of flat time in return for testifying against his adult co-defendants.

The trial.

Eric was bound over from juvenile to adult court. He was then indicted along with the two adults who had been in the front seats of both the van and the Dodge Caliber. A jury found him guilty of three counts of felonious assault, one count of improper discharge of a firearm into a habitation, two counts of aggravated murder, two counts of having a weapon while under a disability, one count of carrying a concealed weapon, and various gun specifications.

The sentence.

At the sentencing hearing, defense counsel filed a sentencing memorandum and argued that the trial court should consider youth as a mitigating factor, and that failure to do so would violate the Eighth Amendment to the United States Constitution. But the prosecutor asked the judge to treat Eric's youth as an aggravating factor—a reason to sentence Eric to a longer sentence:

> I know that youth is usually a mitigating factor. In this case, we have people, despite their youth, that, as they stand before the Court, have shown no inclination to change, or to show that they recognize the terrible damage they've done. Why would you give a sentence that's going to let them out, even at some date in the future? I ask the Court to make sure they stay where they are, and stay where they cannot hurt anybody else, and give them a sentence of life without parole.

The trial court imposed a sentence of life without parole on Eric. The court explained its sentence at the hearing:

> THE COURT: Having tried this case and heard this case for four weeks, having had experience with Mr. Whipple and Mr. Clark [the adult co-defendants], having observed also the violent history and record of Mr. Long, it's clear to me that all three defendants, for whatever reason, don't value human life.

> I mean, the violence, senseless, just indiscriminate violence absolutely, as everyone has said here, absolutely no remorse. It's chilling. It's chilling to see you three stand here, and I have no doubt in my mind that if you walked out the door of this courtroom, you would kill again, and it wouldn't bother you. And that's sad, but it's true.
>
> After considering the risks that you'll will commit another offense, the need for protecting the public, nature and circumstances of these offenses, your history, character and condition, Court finds that prison sentences are required.

The trial court also sentenced Eric to 19 years in prison for the remaining counts and specifications.

The appeal.

On appeal, Eric again argued that the trial court failed to treat youth as a mitigating circumstance. After briefing, but before decision, the United States Supreme Court released *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (2012), which held that trial courts must consider youth as a mitigating circumstance. The First District cited to *Miller* in its opinion, but held that the trial court considered youth as a mitigating factor because defense counsel argued that it should and because the trial court explained the sentence. Opinion at ¶ 53-54. The First District did not say which words in the trial court's explanation showed that the trial court had done so. There were none.

This timely discretionary appeal follows.

Argument

Proposition of Law:

The Eighth Amendment requires trial courts to consider youth as a mitigating factor when sentencing a child to life without parole for a homicide.

In *Miller v. Alabama*, the Supreme Court held that when sentencing a child for a homicide offense, sentencers must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Despite defense counsel's request, the trial court here did not do that.

Children are different.

Miller is part of a trio of recent cases in which the United States Supreme Court has found that children are less responsible for their actions and more amenable to rehabilitation for three principle reasons:[1]

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S., at 569, 125 S.Ct. 1183, 161 L. Ed. 2d 1. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Id.* And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id., at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1.*

Miller, 132 S.Ct. at 2464. The Court based its holding not simply on:

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[1] The other two cases are *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed. 2d 1(2005); and *Graham v. Florida*, 560 U.S. __, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

> what "any parent knows"—but on science and social science as well. [*Roper*], 543 U.S., at 569. In *Roper*, we cited studies showing that "'[o]nly a relatively small proportion of adolescents'" who engage in illegal activity "'develop entrenched patterns of problem behavior.'" *Id.*, at 570 (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)). And in *Graham*, we noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." 130 S.Ct., at 2026. We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his "'deficiencies will be reformed.'"

Miller, 132 S.Ct. at 2026-7 (quoting *Roper*, 543 U.S., at 570).

Application of* Miller *to this case.

At the sentencing of Eric and his adult co-defendants, the trial judge explained her sentence, and none of her reasons included a consideration of youth as a mitigating factor. That is not surprising—the United States Supreme Court had not yet ruled that trial courts must consider youth a mitigating factor. The court of appeals held that the trial court considered youth as a mitigating factor because defense counsel argued it should. But the State argued that youth was an aggravating factor because a longer prison term was needed to keep someone of Eric's young age in prison long enough to protect the public. It is difficult to argue that the trial court accepted the defense view of youth as a mitigating factor when the trial court imposed the sentence suggested by the State based on an argument that youth was an aggravating factor.

The record must show that the trial court considered youth as a mitigating factor.

When the United States Supreme Court requires that a sentencer consider a mitigating factor, it is not sufficient that the issue be "potentially relevant" to a factor the sentence considered. *Penry v. Johnson*, 532 U.S. 782, 787, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (concerning mental illness). Instead, the reviewing court must "be sure that the [sentencer] fully considered the mitigating evidence as it bore on the broader question of [the defendant's] moral culpability." *Id.* (citing *Penry v. Lynaugh*, 492 U.S. 302, 322-3, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989)).

Nothing in the trial court's description indicates that it has considered youth as a mitigating factor. And certainly nothing in this record allows this Court to "be sure that the [sentencer] fully considered the mitigating evidence as it bore on the broader question of [the defendant's] moral culpability." The Court stated that Eric had a long juvenile record, that his two adult co-defendants showed no remorse, and that Eric and his adult co-defendants posed a threat to public safety at that time. The trial court then made the generic statement, "After considering the risks that [you] will commit another offense, the need for protecting the public, nature and circumstances of these offenses, your history, character and condition, Court finds that prison sentences are required."

Further, the United States Supreme Court held that mitigating factor cannot be "relevant only as an aggravating factor." *Johnson*, 782 U.S., at 787 (citing *Lynaugh*, 492 U.S. at 323). This Court and at least one lower court have

repeatedly ruled that it is improper to consider mitigating factors as aggravating factors. *State v. Wogenstahl*, 75 Ohio St.3d 344, 356 (1996) ("the nature and circumstances of the offense may only enter into the statutory weighing process on the side of mitigation"); *State v. Penix*, 2d Dist. No. 1835, 1986 WL 9094 (Aug. 18, 1986), *affirmed* at 32 Ohio St.3d 369 (1987) ("The court may not turn absence of mitigating factors into aggravating factors."); *State v. Beuke*, 38 Ohio St.3d 29, 32 (1988) (contrasting arguments that "transform mitigating factors into aggravating circumstances" with arguments that "fall within the permissible bounds of closing argument").

Based on the record, this Court cannot "be sure that the [sentencer] fully considered the mitigating evidence as it bore on the broader question of [the defendant's] moral culpability." *Johnson*, 532 U.S. at 787 (citing *Penry v. Lynaugh*, 492 U.S. at 322-3). Not only did the trial judge fail to consider youth as a mitigating factor, several of her reasons stand in stark contrast with the holdings of *Graham* and *Miller:*

Trial Court's Explanation of Eric's Life Without Parole Sentence	**Holding of *Miller v. Alabama***
"[I]t's clear to me that all three defendants, for whatever reason, don't value human life. I mean the violence, the senseless, just indiscriminate violence. . . ."	"[L]ife without parole for a juvenile precludes consideration of his chronological age and its hallmark features--among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him. . . ." *Miller*, 132 S.Ct. at 2468.

"absolutely no remorse"	"Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." *Graham*, 130 S.Ct. at 2032.
"I have no doubt in my mind that if you walked out the door of this courtroom, you would kill again, and it wouldn't bother you. After considering the risks that [you] will commit another offense, the need for protecting the public, nature and circumstances of these offenses, your history, character and condition, Court finds that prison sentences are required."	"Deciding that a 'juvenile offender forever will be a danger to society' would require 'mak[ing] a judgment that [he] is incorrigible'--but 'incorrigibility is inconsistent with youth.' *Graham*, 130 S. Ct. at 2029 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. App. 1968)).

Miller is especially applicable in this case because 1) Eric literally took a back seat to his adult co-defendants; 2) Eric showed bad judgment typical of children in turning down a plea offer; and 3) these crimes clearly demonstrate "immaturity, impetuosity, and failure to appreciate risks and consequences[.]"

Eric's backseat role in this case illustrates one of the key deficiencies of childhood: "[C]hildren 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 132 S.Ct. at 2464 (quoting *Roper*, 543 U.S. at 569). Here, in both incidents, Eric was in the back seat while his two adult co-defendants sat in front. Of course, shooting from the back seat of a car causes as much harm as shooting out of the front seat, but Eric was the only child in a car with two men in their mid-20's.

Eric also showed the deficiencies of youth in terminating plea discussions that would likely have resulted in a jointly recommended sentence of 18-20 years flat time in return for testifying against his co-defendants. As the *Miller* Court explained, "he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth--for example, his inability to deal with police officers or prosecutors (including on a plea agreement). . . ." *Id.* at 2468

Eric's crimes were not the "worst of the worst" as the General Assembly defined aggravating factors in R.C. 2929.12(B).

Eric's crime, while undoubtedly serious, is not the "worst of the worst" of homicides. This case contains none of the factors that the General Assembly has determined aggravate a homicide. R.C. 2929.12(B). Although the "victim[s] of the offense suffered serious physical . . . harm as a result of the offense[,]" that is an element of homicide, and factors, the case involves two assaults, and no additional offenses such as rape, kidnapping or burglary. And as the lower courts have correctly and consistently found, a factor inherent to an offense cannot make one commission of that offense worse than any other.[2]

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[2] *State v. Sims*, 4th Dist. No. 10CA17, 2012-Ohio-238, ¶ 16 "(a trial court may not elevate the seriousness of an offense by pointing to a fact that is also an element of the offense itself")(quoting *State v. Davis*, 4th Dist. No. 09CA28, 2010 Ohio 555, ¶ 24 and citing *State v. Schlecht*, 2d Dist. No. 2003-CA-3, 2003 Ohio 5336, ¶ 52, *State v. Stroud*, 7th Dist. No. 07MA91, 2008-Ohio-3187, and *State v. Smith*, 8th Dist. No. 85245, 2005-Ohio-3836, ¶ 17-18.

The trial court's explanation of Eric's sentence pales in comparison to the explanation recently affirmed by the Indiana Supreme Court.

The Indiana Supreme Court held last month that a trial court's sentence complied with *Miller* because the trial judge had issued a 30-page sentencing statement that "was detailed and explained its rationale for awarding weight, or affording no weight, to each and every mitigating circumstance proffered by [the child]." *Conley v. State*, 2012 Ind. LEXIS 642 (Ind., July 31, 2012). By contrast, here the trial judge's explanation covered less than a page of double-spaced transcript with wide margins, and the explanation does not even mention the counsel's argument that Eric's youth was a mitigating factor. Based on this record, this Court certainly cannot "be sure that the [sentencer] fully considered the mitigating evidence as it bore on the broader question of [the defendant's] moral culpability." *Johnson*, 532 U.S. at 787 (citing *Lynaugh*, 492 at 322-3).

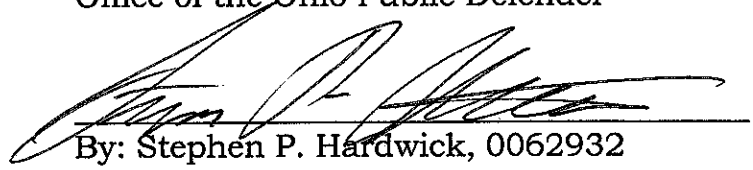
Conclusion

Life without parole is the most severe punishment that can be imposed on a child, and it must be reserved for the most serious offenses. As a result, all cases in which a trial court has sentenced a child to die in prison are cases of public and great general interest. This case presents a substantial constitutional question because is concerns what trial courts must do to comply with the United States Supreme Court's decision in *Miller v. Alabama.*

This Court should accept jurisdiction, vacate Eric's sentence, and remand this case for resentencing.

Respectfully submitted,

Office of the Ohio Public Defender



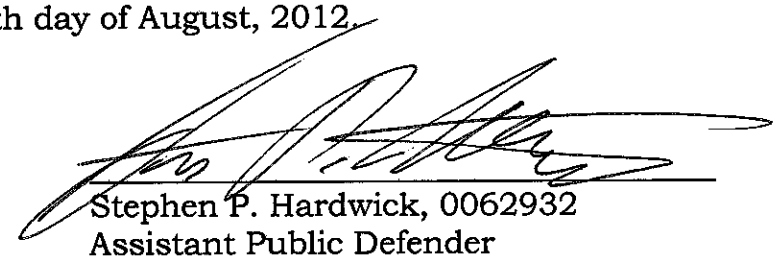
By: Stephen P. Hardwick, 0062932
Assistant Public Defender

250 East Broad Street - Suite 1400
Columbus, Ohio 43215
(614) 466-5394; (614) 752-5167 (Fax)
stephen.hardwick@opd.ohio.gov

Counsel for Eric Long

Certification of Service

This is to certify that a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant Eric Long** was forwarded by regular U.S. Mail, postage prepaid to the office of Ronald W. Springman, Assistant Prosecuting Attorney, Hamilton County Prosecutor's Office, 230 E. 9th Street - Suite 4000, Cincinnati, Ohio 45202this 17th day of August, 2012.



Stephen P. Hardwick, 0062932
Assistant Public Defender

Counsel for Eric Long

#374350

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No.
Plaintiff-Appellee,	:	On Appeal from the Hamilton
v.	:	County Court of Appeals First Appellate District
Eric Long,	:	Court of Appeals
Defendant-Appellant.	:	Case No. C-110160

Appendix to

Memorandum in Support of Jurisdiction of Appellant Eric Long

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-110160 TRIAL NO. B-0903962-C
Plaintiff-Appellee,	:	
vs.	:	
ERIC LONG,	:	*JUDGMENT ENTRY.*
Defendant-Appellant.	:	

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on July 3, 2012 per order of the court.

By: _____
Presiding Judge

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-110160 TRIAL NO. B-0903962-C
Plaintiff-Appellee,	:	
vs.	:	
ERIC LONG,	:	*OPINION.*
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: July 3, 2012

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Ronald W. Springman*, Chief Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Timothy J. McKenna, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

HILDEBRANDT, Presiding Judge.

{¶1} Defendant-appellant Eric Long appeals from his convictions, following a jury trial. In July 2009, the Hamilton County Grand Jury returned a 13-count indictment charging the then 17-year-old Eric Long with offenses arising out of three separate incidents that had occurred over a three-week span in and near Lincoln Heights. The charges set forth in the indictment accused Long and his codefendants, Fonta Whipple and Jayshawn Clark, with the felonious assaults of Keyonni Stinson, Mark Keeling, and Kyrie Maxberry; the aggravated murders of Keith Cobb and Scott Neblett with prior calculation and design; and various weapons charges including carrying a concealed weapon, having a weapon under a legal disability, and discharging a firearm at or into a habitation.

{¶2} Long argues in his eight assignments of error that (1) his convictions were contrary to the manifest weight of the evidence and were based upon insufficient evidence, (2) he was denied the effective assistance of trial counsel, (3) the trial court erred in imposing an excessive sentence, (4) the trial court failed to keep evidence of prior bad acts from the jury, and (5) the trial court erroneously permitted joinder of the offenses in a single trial proceeding. We find none of the assignments to have merit and affirm the trial court's judgment.

I. The Matthews Avenue Shooting

{¶3} In the early morning hours of March 4, 2009, Keyonni Stinson, her boyfriend, Mark Keeling, and Kyrie Maxberry returned to Stinson's Matthews Avenue[1] home in Lincoln Heights after an evening at the Garage Bar in Sharonville. Keeling had had a previous altercation with Whipple, Clark, and Long. Therefore, when he spotted the

[1] The various witnesses and parties also refer to Matthews Street and Matthews Drive. Stinson refers to her home as being on Matthews Avenue, and so shall we.

three codefendants sitting in a gray van outside Stinson's house, he and his friends hurried inside. Within seconds, a hail of gunfire engulfed the house. The rounds penetrated the windows and walls and severely injured Keeling and Maxberry.

{¶4} Police investigators recovered nearly 30 spent rifle cartridges in 7.62 mm and .223-caliber outside the residence. A ballistics expert determined the rounds had come from three different assault rifles.

II. The I-75 Murders

{¶5} Two weeks later, an altercation occurred outside the Garage Bar between Scott Neblett and Trenton Evans. At a nearby gas station, Evans found Whipple, Clark, Long, and another person sitting in a silver Dodge Caliber rented for Whipple by Alisha Kloth, the mother of one of his children. They discussed Evans's altercation with Neblett. Neblett arrived at the gas station. Moments later, at about 2:30 a.m., William Gray was heading for work on southbound I-75. Gray spotted Neblett's red Chevy Blazer in hot pursuit of a silver Caliber. The two vehicles pulled next to each other, and Gray saw muzzle flashes and heard multiple gunshots coming from the Caliber. The Caliber exited from the highway at the Woodlawn/Evendale exit toward Lincoln Heights. The Blazer spun out of control, hit the guardrail, and rolled several times. Both Neblett and his passenger, Keith Cobb, were dead from multiple gunshot wounds.

{¶6} Police recovered the Caliber rented for Whipple in a Lincoln Heights parking lot. Inside the vehicle were hospital discharge papers for Whipple. Whipple's and Clark's DNA was found inside the vehicle. A third DNA sample was found to be not inconsistent with Long's DNA.

{¶7} Police recovered three .223-caliber casings, one 7.62 mm casing, and six 9 mm pistol cartridge casings from the highway. A ballistics expert testified at trial that by comparing marks on the casings, he had determined that two of the assault rifles used in the Matthews Avenue shooting had also been used to attack Neblett and Cobb on I-75.

III. Long's Capture on Steffen Street

{¶8} Five days later, Lincoln Heights police officer Michael Lowe spotted Long. Officer Lowe chased Long down Steffen Street and through the yards of a number of homes. Officer Lowe noted that Long was brandishing a silverish or gray handgun in his right hand when he fled. Long was ultimately captured hiding in a pickup truck bed. He did not have the handgun on his person when captured. Two weeks later, Keith Harris, a Steffen Street homeowner, found a loaded 9 mm Smith & Wesson semiautomatic pistol in his yard. The ballistics expert testified at trial that the 9 mm pistol was one of the weapons used in the I-75 attack.

IV. Trial

{¶9} Before trial, Long moved the trial court to separate the trial of the three incidents. The court denied the motion, and in January 2011, the three codefendants were tried together for each indicted offense. Twenty-five witnesses testified at trial, and dozens of pieces of physical evidence were introduced. At the conclusion of the trial, the jury returned guilty verdicts on each offense lodged against Long and many of the accompanying firearm specifications. After reviewing sentencing memoranda, a presentence investigation report, victim-impact statements, and the statement of Long's grandfather, the trial court sentenced Long to two terms of imprisonment for life without possibility of parole for the aggravated murders of Neblett and Cobb. It also imposed an aggregate prison term of 19 years on the remaining charges and firearm specifications. This appeal ensued.

V. No Prejudicial Joinder

{¶10} For clarity, we will address Long's assignments of error in temporal order.

{¶11} Long first asserts that his right to a fair trial was compromised by the trial court's decision to permit the I-75 murders and Matthews Avenue shooting to be tried together. Long argues the trial court erred when it permitted the state to join the incidents

for trial in a single proceeding, even though they had been presented in a single indictment.

{¶12} In most cases, a criminal trial revolves around one discrete incident—a single assault or a single theft. But the state may join separate incidents for trial in a single proceeding. The joinder of multiple offenses for trial is encouraged to conserve judicial resources, to reduce the chance of incongruous results in successive trials, and to diminish inconvenience to victims and witnesses. *See State v. Clifford*, 135 Ohio App.3d 207, 211, 733 N.E.2d 621 (1st Dist.1999), citing *State v. Thomas*, 61 Ohio St. 2d 223, 400 N.E.2d 401 (1980).

{¶13} Long argues that the evidence of the two offenses was not interwoven and did not demonstrate a common modus operandi or behavioral fingerprint. He argues that little evidence links Long to these offenses. Thus, he asserts that joinder of the offenses permitted the jury to hear cumulative evidence of Long's "criminal disposition," and that the jury acted on that evidence to find him guilty of the two offenses.

{¶14} Two or more offenses may be charged in the same indictment if the charged offenses are (1) of "the same or similar character," (2) "based on the same act or transaction," (3) "based on two or more acts or transactions connected together or constituting parts of a common scheme or plan," or (4) "part of a course of criminal conduct." Crim.R. 8(A).

{¶15} Crim.R. 14 provides for relief from prejudicial joinder: "[i]f it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment * * * the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires."

{¶16} The state can negate claims of prejudice by showing either (1) that the evidence for each count will be admissible in a trial of the other counts under Evid.R. 404(B) or (2) that the evidence for each count is sufficiently separate and distinct so

as not to lead the jury into treating it as evidence of another. *See State v. Echols*, 128 Ohio App.3d 677, 692, 716 N.E.2d 728 (1st Dist.1998), citing *State v. Wiles*, 59 Ohio St.3d 71, 77, 571 N.E.2d 97 (1991). We note that the satisfaction of one test "negates the defendant's claim of prejudice without the need to consider the other." *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, 937 N.E.2d 136, ¶ 38 (10th Dist.); *see also State v. Garrett*, 1st Dist. No. C-090592, 2010-Ohio-5431.

{¶17} Where, as here, a defendant has moved for severance and has renewed the motion at trial, we review the trial court's decision to join offenses for trial under an abuse-of-discretion standard. *See State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶ 197, citing *State v. Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981), syllabus; *compare State v. Echols*, 146 Ohio App.3d 81, 88, 765 N.E.2d 379 (1st Dist.2001) (failure to renew objection to joinder waives the issue on appeal).

{¶18} Thus, to succeed on this assignment of error, Long must demonstrate that, in making its decision, the trial court exhibited an attitude that was "unreasonable, arbitrary or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). In applying this standard, a reviewing court "is not free to substitute its judgment for that of the trial judge." *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990); *see also State v. Morris*, ___ Ohio St.3d ___, 2012-Ohio-2407, ___ N.E.2d ___, ¶ 14. Rather, if the trial court's exercise of its discretion exhibited a "sound reasoning process" that would support its decision, a reviewing court will not disturb that determination. *Morris* at ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶19} Here, we find no prejudice from the trial court's failure to sever the charges for the I-75 murders and the Matthews Avenue shooting. The proof presented as to each of the charges was direct and uncomplicated, thus enabling the jury to

segregate the relevant proof for each offense. *See Echols*, 128 Ohio App.3d at 692, 716 N.E.2d 728. Long conceded as much in his trial motion, noting that evidence of the crimes was "separate and distinct." The two incidents occurred in separate locations, two weeks apart. The state's ballistics expert tied the assault rifles used in the Matthews Avenue shooting to those used in the I-75 murders and also tied the spent 9 mm casings found at the I-75 scene with the semiautomatic pistol found along the route that Long had taken when fleeing from Officer Lowe. The state's evidence was presented chronologically by incident, and the trial court instructed the jury to consider each count separately.

{¶20} Since the trial court exhibited a sound reasoning process supporting the conclusion that evidence of the two offenses was sufficiently separate and distinct, the court did not abuse its discretion in denying Long's motion for separate trials for offenses arising out of these incidents. The eighth assignment of error is overruled.

VI. Effective Assistance of Counsel

{¶21} In his third assignment of error, Long claims he was denied the constitutionally guaranteed effective assistance of trial counsel when his counsel failed to give Long all the "trial paperwork" that he had requested. At the commencement of trial, Long complained to the court that his counsel had failed to share all the state's discovery with him.

{¶22} To prevail on a claim of ineffective assistance of trial counsel, an appellant must show, first, that trial counsel's performance was deficient and, second, that the deficient performance was so prejudicial that he was denied a reliable and fundamentally fair proceeding. *See Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *see also Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. A reviewing court must indulge a strong presumption that

counsel's conduct fell within the wide range of reasonable professional assistance. *See State v. Mason*, 82 Ohio St.3d 144, 157-158, 694 N.E.2d 932 (1998).

{¶23} Here, experienced trial counsel explained in open court that he had provided Long with all discovery material that had not been designated "counsel only" under Crim.R. 16(C) and 16(F). After reviewing the entire record, we hold that counsel's efforts were not deficient and that Long was not prejudiced in any way. The third assignment of error is overruled.

VII. Other-Acts Challenges

{¶24} In his sixth and seventh assignments of error, Long argues that the trial court erred in not declaring a mistrial on grounds that the jury had repeatedly heard improper evidence of the defendants' prior bad acts.

{¶25} Generally, Evid.R. 404(B) provides that evidence of prior crimes, wrongs, or bad acts committed by a defendant are inadmissible at trial to prove that the defendant is a criminal. *See Morris*, ___ Ohio St.3d ___, 2012-Ohio-2407, ___ N.E.2d ___, ¶ 12. The rule prohibits the state from arguing that because a person acted in a particular way on a distinct occasion in the past, he likely acted in the same way with regard to the facts raised in this trial. *E.g., State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994). Other-acts evidence is often excluded because the jury might punish the defendant for his past conduct rather than weighing only the evidence produced at trial and relating to the charged crimes. The challenged acts, however, do not have to be like or similar to the crimes raised at trial. Other-acts evidence is admissible to show the defendant's motive, opportunity, intent, or identity. *See* Evid.R. 404(B). Or the prior acts may be admissible where they form the immediate background of the charged crimes and are inextricably related to those crimes. *See Morris* at ¶ 13.

{¶26} The trial court's rulings "regarding the admissibility of other-acts evidence under Evid.R. 404(B) are evidentiary determinations that rest within the

sound discretion of the trial court. Appeals of such decisions are considered by an appellate court under an abuse-of-discretion standard of review." *Morris* at syllabus.

{¶27} The decision to grant or deny a motion for mistrial is also consigned to the sound discretion of the trial court. *See State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 92; *see also State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, ¶ 42. A mistrial "need be declared only when the ends of justice so require and a fair trial is no longer possible." *See State v. Garner*, 74 Ohio St.3d 49, 59, 656 N.E.2d 623 (1995). The Ohio Supreme Court has repeatedly noted that the trial court is in the best position to reach this determination and to decide whether the situation warrants the declaration of a mistrial. *E.g., Ahmed* at ¶ 92.

{¶28} The gravamen of Long's argument is that, at six points in the trial, various witnesses made inadmissible statements informing the jury that the defendants had committed violent or other illegal acts in the past. He argues that the trial court erred either in admitting that testimony or in denying his motions for mistrial. We disagree.

{¶29} Long begins his argument addressing Keyonni Stinson's statement that two nights before the Matthews Avenue attack, the three codefendants had "shot up the highway coming from Annie's" bar. We note that Long objected to the statement. The trial court sustained the objection and issued a curative instruction to the jury that it should disregard it. The jury can be presumed to have followed the court's instructions, including instructions to disregard testimony. *See Ahmed* at ¶ 93. In light of the curative instruction and the fact that Stinson's statement was corroborative of Keeling's unobjected-to testimony about incidents with the defendants at Annie's, the trial court's decision to deny the mistrial motion exhibited a sound reasoning process and will not be disturbed. *See Ahmed* at ¶ 92; *see also Morris*, ___ Ohio St.3d ___, 2012-Ohio-2407, ___ N.E.2d ___, at ¶ 14.

{¶30} Long next contests Mark Keeling's statement that he had not wanted to visit the Garage Bar on the night of the Matthews Avenue shooting "because we had just got shot at Sunday night." We find no error because when Long objected to the statement, the trial court again sustained the objection and issued a curative instruction. *See Ahmed* at ¶ 92.

{¶31} Long also contests the more problematic statements made by Evendale Police Officer Steve Niehauser. Officer Niehauser testified that Trenton Evans had identified the individuals in the silver Dodge Caliber and Neblett in the Chevy Blazer after viewing various surveillance videos from the gas station and a restaurant near the Garage Bar. Upon the vigorous objection of each defendant, the trial court struck Officer Niehauser's statement and issued a curative instruction. Officer Niehauser ultimately corrected his statement when he testified that Evans had not identified any of the codefendants from the video. The trial court took an active role in resolving this matter and did not abuse its discretion in denying the mistrial motion. *See Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, at ¶ 92. We note that in this appeal Long has not raised the issue of whether the surveillance videotape had been properly authenticated under Evid.R. 901.

{¶32} Long's next contention concerns the statement of Derryl Anderson, a Garage Bar patron, that he had seen Whipple and Clark, but not Long, together and armed with an assault rifle days before the Matthews Avenue shooting. We note that the testimony referred only to Whipple and Clark. The trial court's decision to admit Anderson's statement because it described the immediate background of one of the charged crimes, and because it identified an unusual weapon that was inextricably related to that crime, exhibited a sound reasoning process and will not be disturbed on appeal. *See Morris* at ¶ 13.

{¶33} Next, Long argues that a mistrial should have been granted based on Officer Niehauser's trial testimony that he had told Evans, during questioning, that Long

was in custody, was crying, and was telling the whole story to the authorities to cut a favorable deal. The trial court again took an active role in clarifying the issue. A stipulation by the parties was read to the jury stating that there had been no discussions about any of the defendants becoming witnesses for the state, that neither the state nor the defendants had engaged in negotiations for plea bargains, and that the defendants had maintained their innocence throughout the proceedings. In light of this unusual and complete repudiation of Officer Niehauser's testimony, the trial court did not abuse its discretion.

{¶34} Finally, Long argues that police officer LaRoy Smith improperly commented on Long's bind-over proceeding in juvenile court. Again, trial counsel objected. And again, the trial court sustained the objection and issued a curative instruction that the jury was to disregard any reference to juvenile court proceedings. In light of the curative instruction, the trial court's decision to deny the mistrial motion exhibited a sound reasoning process and will not be disturbed. *See Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, at ¶ 92; *see also Morris*, ___ Ohio St.3d ___, 2012-Ohio-2407, ___ N.E.2d ___, at ¶ 14.

{¶35} In addition to these arguments, Long contends that the cumulative effect of the trial court's evidentiary errors denied him a fair trial. Under the doctrine of cumulative error, even though "violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus.

{¶36} But the doctrine is not applicable where the trial court did not commit multiple errors. *See State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 132. We have reviewed the entire transcript of the trial and the related evidence. We are convinced that Long received a fair trial. None of the trial court's

rulings on other-acts evidence individually or cumulatively support any demonstration that the outcome of the trial would have been different but for those rulings. *See State v. Dieterle*, 1st Dist. No. C-070796, 2009-Ohio-1888, ¶ 38.

{¶37} The sixth and seventh assignments of error are overruled.

VIII. Sufficiency and Weight-of-the-Evidence Claims

{¶38} In two interrelated assignments of error, Long challenges the weight and sufficiency of the evidence adduced at trial to support his convictions. He argues that the state failed to identify him as one of the perpetrators of the Matthews Avenue assault, failed to identify him as one of the I-75 attackers, and failed to produce evidence that he had possessed a firearm when he was chased and arrested near Steffen Street.

{¶39} For his role in the Matthews Avenue shootings, Long was convicted of felonious assault under R.C. 2903.11(A)(2), which proscribes knowingly causing or attempting to cause physical harm to another by means of a deadly weapon. He was also convicted of knowingly discharging a firearm into an occupied habitation without privilege to do so. *See* R.C. 2923.161.

{¶40} The aggravated-murder charges against Long for the I-75 murders were governed by R.C. 2903.01(A). Under this statute, the state was required to prove that Long or his accomplices had purposely and with prior calculation or design caused the deaths of Cobb and Neblett.

{¶41} The remaining convictions, related to Long's capture on Steffen Street, required proof beyond a reasonable doubt that Long had knowingly carried a concealed firearm, and that he had done so under the disability of a prior juvenile adjudication for drug trafficking. *See* R.C. 2923.12 and 2923.13.

{¶42} Our review of the entire record fails to persuade us that the jury, acting as the trier of fact, clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. *State v. Thompkins*, 78

Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We can find no basis in this record to conclude that this is "an exceptional case" in which the jury lost its way. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶43} The jury was entitled to reject Long's theory that he simply had not participated in the Matthews Avenue shooting and the I-75 murders, and that the state had failed to prove he had possessed a firearm. Long's theory of defense rested largely on the circumstantial nature of the state's evidence and on the trial testimony of three defense witnesses who questioned the veracity of the Matthews Avenue victims and denied seeing the codefendants at the Garage Bar before the I-75 murders. And Long's experienced trial counsel highlighted the inconsistencies in the testimony of the state's witnesses.

{¶44} But it is abundantly clear that the state presented ample evidence to support the convictions. The state introduced substantial physical and testimonial evidence tying Long to both shootings. The Matthews Avenue victims each testified that they had seen Long in the gray van immediately before they entered the house. Keeling testified that he had been involved in a recent incident with the three perpetrators at a bar. The evidence was undisputed that moments after entering Stinson's home, the victims were the target of multiple rounds of assault-weapons fire. Keeling and Maxberry sustained serious injuries in that fusillade. The state's ballistics expert testified that the spent 7.62 mm and .223-caliber shell casings outside the home had come from three different assault rifles.

{¶45} Witnesses also identified Long and his codefendants sitting in the silver Caliber rented by Kloth for Whipple after the Neblett-Evans altercation at the Garage Bar and just before the I-75 murders. Witnesses described the horrific scene on I-75 of the Caliber occupants shooting into the vehicle occupied by Neblett and Cobb. The rented Caliber was later found abandoned with numerous bullet holes in

the roof and body. Police recovered Whipple's hospital discharge papers and the DNA of Whipple and Clark from inside the vehicle. Officers also recovered three .223-caliber casings, one 7.62 mm casing, and six 9 mm pistol cartridge casings from the highway. A ballistics expert testified that two of the assault rifles used in the Matthews Avenue shooting had also been used on I-75.

{¶46} Finally, Officer Lowe reported that Long had brandished a silverish or gray handgun when he fled capture on Steffen Street. When Long was found and arrested, the firearm was gone. The state's ballistics expert testified the stainless steel 9 mm semiautomatic pistol found in Keith Harris's Steffen Street yard was used in the I-75 murders.

{¶47} While there were inconsistencies in some witnesses' testimony, these inconsistencies did not significantly discredit the testimony and were to be expected when ordinary citizens observed rapidly occurring and shocking events such as bar fights, a drive-by shooting, and a moving gunfight on a public highway. As the weight to be given the evidence and the credibility of the witnesses were for the jury, sitting as the trier of fact, to determine in resolving conflicts and limitations in the testimony, the jury could have found that Long had committed, with the requisite mens rea, each of the charged offenses. *See State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶48} When reviewing the legal sufficiency of the evidence to support a criminal conviction, we must examine the evidence admitted at trial in the light most favorable to the prosecution and determine whether the evidence could have convinced any rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt. *See State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 36; *see also Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560

(1979). In deciding if the evidence was sufficient, we neither resolve evidentiary conflicts nor assess the credibility of the witnesses, as both are functions reserved for the trier of fact. *See State v. Williams*, 197 Ohio App.3d 505, 2011-Ohio-6267, ___ N.E.2d ___, ¶ 25 (1st Dist.2011).

{¶49} Here, the record reflects substantial, credible evidence from which the triers of fact could reasonably have concluded that all elements of the charged crimes had been proved beyond a reasonable doubt, including that Long had feloniously assaulted the Matthews Avenue victims by firing into an occupied habitation, had purposely caused the deaths of Neblett and Cobb, and had knowingly carried a concealed firearm while under a disability. *See Conway* at ¶ 36.

{¶50} The first and second assignments of error are overruled.

IX. The Sentences Were Neither Excessive Nor Cruel and Unusual

{¶51} In his fourth and fifth assignments of error, Long argues that the trial court erred in imposing an excessive sentence.

{¶52} First, he asserts that the trial court's imposition of two sentences of life imprisonment without parole eligibility constituted a cruel and unusual punishment proscribed by the Eighth Amendment to the United States Constitution. We note that the United States Supreme Court has recently held that a mandatory life-without-parole sentence for juvenile offenders is cruel and unusual punishment. *See Miller v. Alabama*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2012 U.S. LEXIS 4873. While Long was under age 18 when he committed aggravated murder, the trial court's sentence, unlike that in *Miller*, was not mandated by operation of law. The trial court had discretion to impose either life without parole eligibility or a lesser sentence of life with parole eligibility after serving a definite period of incarceration. *See* R.C. 2929.03(A)(1); *compare* R.C. 2929.03(E)(2) (mandatory life term without parole

eligibility for juvenile convicted of aggravated murder and an aggravating circumstance). The court was able to consider whether Long's "youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate." *Miller* at ___, 2012 U.S. LEXIS 4873, *9.

{¶53} The record reflects that the trial court did consider those factors before imposing sentence. The trial court, which had supervised the trial and had heard all the evidence, reviewed the parties' sentencing memoranda, the presentence investigation report reflecting Long's record of juvenile adjudications, victim-impact statements, and a plea for mercy from Long's grandfather. At the sentencing hearing, Long's counsel argued that Long's youth "puts him in a different light than the other two individuals" and asked the court to impose a minimum term of 30 years in prison that would "give [Long] a glimmer of hope, give him a chance that some day he [could] return to society, hopefully a changed and rehabilitated man."

{¶54} At the conclusion of the sentencing hearing, the court stated that:

> Having tried this case and heard this case for four weeks, * * * having observed also the violent history and record of Mr. Long, it's clear to me that all three defendants, for whatever reason, don't value human life.
>
> I mean, the violence, the senseless, just indiscriminate violence absolutely, as everyone has said here, absolutely no remorse. It's chilling. It's chilling to see you three standing here, and I have no doubt in my mind that if you walked out the door of this courtroom, you would kill again, and it wouldn't bother you. And that's sad, but it's true.

> After considering the risks that [you] will commit another offense, the need for protecting the public, nature and circumstances of these offenses, your history, character and condition, Court finds that prison sentences are required.

{¶55} The court then imposed life-without-parole-eligibility sentences for the killing of Keith Cobb and Scott Neblett. Long's sentence did not run afoul of the Eighth Amendment's proscriptions affecting juvenile offenders.

{¶56} Otherwise, a sentence such as this one that falls within the range provided by statute cannot amount to cruel and unusual punishment. *See McDougle v. Maxwell*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964). In light of the facts revealed at trial and in the sentencing proceedings, Long's sentence of life without parole eligibility was not so grossly disproportionate to the offenses that it "shock[s] the sense of justice of the community." *State v. Weitbrecht*, 86 Ohio St.3d 368, 371, 715 N.E.2d 167 (1999), quoting *McDougle* at 70; *see also State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, ¶ 14.

{¶57} Long next argues that the trial court erred in imposing an excessive sentence and in failing "to even consider" the purposes and principles of felony sentencing and the other statutory sentencing factors before imposing sentence. Since Long's sentence was imposed before the effective date of Am.Sub.H.B. 86, we conduct a two-part review of the sentences of imprisonment. *See State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. First, we must determine whether the sentences were contrary to law. *See id.* at ¶ 14. Then, if the sentences were not contrary to law, we must review each sentence to determine whether the trial court abused its discretion in imposing it. *See id.* at ¶ 17.

{¶58} Here, the sentences imposed were not contrary to law. Long concedes that the sentences were within the ranges provided by statute for aggravated murder, a

special felony, and for the other felony offenses and specifications. *See* R.C. 2929.03(A) and 2929.14(A); *see also State v. Phelps*, 1st Dist. No. C-100096, 2011-Ohio-3144, ¶ 40. In light of the seriousness of the offenses—which include killing two human beings during a moving gunfight on an interstate highway, spraying an occupied home with assault-rifle fire, seriously injuring two persons, and carrying a concealed weapon—we cannot say that the trial court abused its discretion in imposing life sentences and the other sentences of set length, many of which were ordered to be served concurrently. *See Kalish* at ¶ 17.

{¶59} And although the trial court did not specifically state that it had considered the R.C. 2929.11 and 2929.12 factors, its statements made before imposing sentence demonstrate that the court engaged in a particularized consideration of the purposes and principles of felony sentencing before imposing sentence. To the limited extent that the trial court record is silent on any other statutory factors, we presume that the court properly considered them. *See State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31; *see also State v. Love*, 194 Ohio App.3d 16, 2011-Ohio-2224, 954 N.E.2d 202, ¶ 14 (1st Dist.). Moreover, the record simply does not reflect Long's contention that the trial court failed to consider Long's youth as a mitigating factor. Having presided over Long's trial, the court was well acquainted with the facts surrounding the crimes. The court was also aware of Long's extensive juvenile record. On the state of this record, we cannot say that the trial court acted unreasonably, arbitrarily, or unconscionably in imposing the sentences.

{¶60} Finally, we note that in his separate appeal, Long's co-defendant Whipple assigned as error the imposition of multiple punishments by the trial court. *See State v. Whipple*, 1st Dist. No. C-110184, 2012-Ohio-2938. Whipple argued that felonious assault and discharging a firearm into a habitation are allied offenses of similar import. We rejected that argument. *Id.*

{¶61} But Long's experienced appellate counsel has not raised this matter for review in this appeal. And we will not review the matter of our own volition. *See* App.R. 12(A)(1)(b) and 16(A).

{¶62} After our review of Long's sentences for these offenses, we conclude that the fourth and fifth assignments of error are meritless, and we overrule them.

{¶63} Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

DINKELACKER, J., concurs.
FISCHER, J., concurring separately.

FISCHER, J., concurring separately.

{¶64} In his direct appeal from the same trial, Long's co-defendant Fonta Whipple argued that the trial court erred under R.C. 2941.25 in convicting him of both improperly discharging a firearm and felonious assault in connection with the Matthews Avenue shooting. *State v. Whipple*, 1st Dist. No. C-110184, 2012-Ohio-2938, ¶ 35. Although, despite Whipple's deplorable conduct, I would have held that his assertion had merit, the majority disagreed. *See id.* at ¶ 47-55 (Fischer, J., concurring in part and dissenting in part). Thus, even if Long had raised the issue of merger in this appeal, I am now bound by the holding in *Whipple*.

Please note:

The court has recorded its own entry on the date of the release of this opinion.