

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DAVID CARL KINNEY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 BE 0011

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 17 CR 154

BEFORE:

Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:

Affirmed.

Atty. Daniel P. Fry, Belmont County Prosecutor, *Atty. Kevin Flanagan*, Chief Asst. Prosecuting Attorney, 147-A W. Main Street, St. Clairsville, Ohio 43950 for Plaintiff-Appellee and

Atty. Christopher J. Gagin, McCamic, Sacco & McCoid, PLLC, 56 14th Street, Wheeling, West Virginia 26003, *Atty. Peter Galyardt*, Asst. Public Defender, Office of

the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio, 43215, for Defendant-Appellant.

Dated: March 12, 2021

Robb, J.

{¶1} Defendant-Appellant David Carl Kinney was convicted of aggravated murder by a jury and sentenced to life without parole by the Belmont County Common Pleas Court. A three-year sentence for a firearm specification was also imposed. On appeal, this court overruled Appellant's ten assignments of error and affirmed the conviction and sentence. The Ohio Supreme Court agreed to review a constitutional argument Appellant raised about the unreviewability of his sentence. The Supreme Court reversed and remanded to this court for application of the *Patrick* case, which the Supreme Court released the same day. Upon our review of Appellant's arguments about his sentence to life without parole under the new case, we hereby affirm Appellant's sentence.

STATEMENT OF THE CASE

{¶2} On May 6, 2017, Appellant waited at the house of his lover, Brad McGarry, and shot him twice in the back of the head after he returned home. Appellant left the scene, texted the victim's phone, went home to his wife, and returned to the scene three hours later with his wife and her thirteen-year-old daughter. The child approached the door first and found it open. In the kitchen, drawers and cupboards were open and items were in disarray. Appellant then pretended to discover the victim's body in the basement garage. When Appellant yelled for his wife to call 911, his wife and her daughter descended into the basement where the victim's body was lying in a pool of blood.

{¶3} Appellant told the police the victim was his best friend who was like a brother to him. The victim planned to go on vacation with Appellant's family that summer. When asked about suspects, Appellant named a man the victim dated (who was cleared due to his incarceration at the time) and mentioned two men who performed work at the house. A detective explained they would contact Appellant and his wife for follow-up interviews at the police station. The police soon learned the victim had been in a relationship with Appellant and had been threatening to tell Appellant's wife.

{¶4} During the stationhouse interview, Appellant's story evolved through four versions: (1) the one he told at the scene about merely finding the body; (2) watching the victim enter the house with a man and hearing a shot; (3) witnessing a man shoot the victim and being threatened with exposure by the man; and (4) shooting the victim after taking a gun from his hand. In formulating his final version of the incident, Appellant claimed the victim waved a gun around. Appellant was ten inches taller than the victim and suggested he skillfully disarmed the victim and pushed him back. He claimed the victim then rushed at him, at which point he shot the victim in the front top of the head. He said he pushed the victim down and past his own position. Appellant said he then stood over the victim, who was kneeling with his head down, and shot him again in the back of the head.

{¶5} However, the forensic pathologist concluded that the shot to the top of the victim's head was fired from behind the victim. The shot to the top of the head went through the scalp and fractured the skull without entering it. With medical care, it would likely not have caused death. The forensic pathologist opined this shot was fired from less than six inches away. The fatal shot to the occipital portion of the skull was fired with the gun making partial contact with the victim's head.

{¶6} When asked if the scene was staged to look like a robbery, Appellant said the victim opened the drawers while accusing Appellant of taking money. Appellant disclosed they were also arguing about Appellant's expressed intent to end the affair. Attempting to explain his conduct after the shooting, Appellant was evaluated by a forensic psychiatrist who believed Appellant experienced Acute Stress Disorder after the incident. The state responded with a forensic psychiatrist who disagreed with the diagnosis.

{¶7} Appellant was indicted for aggravated murder for causing the death of the victim purposely and with prior calculation and design in violation of R.C. 2903.01(A). He was also indicted for a firearm specification. The case was tried to a jury. For more specifics, we refer to our prior decision where we reviewed the testimony and evidence in detail throughout the 48-page opinion. *State v. Kinney*, 7th Dist. Belmont No. 18 BE 0011, 2019-Ohio-2704, *rev'd on sentencing*, __ Ohio St.3d __, 2020-Ohio-6822, __ N.E.3d __.

{¶8} The jury found Appellant guilty of aggravated murder with a firearm specification. A presentence investigation was ordered. The available sentences for the aggravated murder conviction were: (a) life without parole; (b) life imprisonment with parole eligibility after serving twenty years of imprisonment; (c) life imprisonment with parole eligibility after serving twenty-five full years; or (d) life imprisonment with parole eligibility after serving thirty full years. R.C. 2929.03(A)(1)(a)-(d).

{¶9} The court imposed a sentence of life without parole for aggravated murder plus the statutorily-required consecutive three-year sentence for the firearm specification. Appellant filed a timely notice of appeal from the February 15, 2018 sentencing entry.

APPEAL BEFORE REMAND

{¶10} Appellant's June 18, 2018 brief set forth ten assignments of error, raising issues with: the sufficiency of the evidence on the element of prior calculation and design; the manifest weight of the evidence as to this element; the timeliness of *Miranda* warnings; the voluntariness of his statement to police; the admissibility of a recorded spousal conversation; the denial of access to the grand jury transcript; the failure to excuse two venire members for cause; whether a jury instruction suggested the jury had to unanimously acquit him of aggravated murder before considering the lesser charge of murder; the refusal to instruct on voluntary manslaughter; and *the sentence of life without parole* (which is the only assignment at issue on remand).

{¶11} Appellant's sentencing argument was contained in his tenth assignment of error, which alleged: "AS APPLIED, R.C. §2953.08(D)(3) VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS SECTIONS 1, 2, 9, 16 AND 19 OF THE OHIO CONSTITUTION."

{¶12} The corresponding statement of the issue presented for review asked: "Whether R.C. §2953.08(D)(3), which precludes appellate review of aggravated murder and murder sentences, violates the 8th Amendment of the United States Constitution, as well as Art. 1, §9 of the Ohio Constitution."

{¶13} The state's January 2, 2019 brief responded by stating the sentence was not reviewable and there was no bias. Appellant's January 18, 2019 reply brief did not further address the sentence. On June 28, 2019, this court overruled Appellant's ten assignments of error and upheld Appellant's conviction and sentence. *Kinney*, 7th Dist.

No. 18 BE 0011, 2019-Ohio-2704, *rev'd on sentencing*, __ Ohio St.3d __, 2020-Ohio-6822. We review some of the contents of our prior opinion as to the sentencing assignment of error.

{¶14} R.C. 2953.08(A) provides a felony defendant the right to appeal as a matter of right a sentence on certain listed grounds, “except as provided in division (D) * * *.” One of the grounds for appeal listed is: “The sentence is contrary to law.” R.C. 2953.08(A)(4). However, division (D)(3) provides: “A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section.” R.C. 2953.08(D)(3).

{¶15} Although division (A) begins, “In addition to any other right to appeal,” some appellate courts felt constrained to consider the statute as the sole means to appeal a felony sentence due to certain precedent. For instance, the Ohio Supreme Court has observed that R.C. 2953.08(D)(3) “clearly means what it says: such a sentence cannot be reviewed. * * * We agree with the * * * conclusion that a sentence imposed for aggravated murder is not subject to review by a court of appeals.” *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 17-18 (but allowing review of the consecutive nature of a sentence).

{¶16} Thereafter, when a defendant pointed to the introductory language in (A) and argued R.C. 2953.08 was not the sole means to appeal a felony sentence, the Supreme Court concluded: “R.C. 2953.08 specifically and comprehensively defines the parameters and standards—including the standard of review—for felony-sentencing appeals.” *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 18, 21. The *Marcum* Court noted the defendant’s citation to other statutes in an attempt to show there existed other paths to a felony-sentencing appeal which were not limited by the strictures of R.C. 2953.08. *Id.* at ¶ 18. The Court said “these provisions, however, merely give courts the power to hear criminal appeals and do not change the standard of review that applies to such appeals.” *Id.* (and provided R.C. 2505.03 as an example of the statutes which the defendant said could provide a separate right unbound by the limits

in R.C 2953.08).¹

{¶17} Citing this law, Appellant’s sentencing assignment of error began with the premise that appellate review of his sentence was precluded due to R.C. 2953.08(D)(3). He then argued (D)(3) was unconstitutional, citing a statement by a justice of the United States Supreme Court in an Ohio case the Court declined to accept for review. See *Campbell v. Ohio*, ___ U.S. ___, 138 S.Ct. 1059, 200 L.Ed.2d 502 (2018). In that case, a defendant claimed it was unconstitutional for the reviewing court to apply (D)(3) to bar his appellate arguments as to his sentence, but the Ohio Supreme Court declined jurisdiction. *State v. Campbell*, 149 Ohio St.3d 1464, 2017-Ohio-5699, 77 N.E.3d 988. Justice Sotomayor issued a statement along with the United States Supreme Court’s general denial of certiorari, wherein she expressed concern that there may be an Eighth Amendment violation if Ohio’s R.C. 2953.08(D)(3) was interpreted as prohibiting an appeal of a life without parole sentence. The justice pointed out the appellant in *Campbell* failed to frame his meaningful-review argument as an Eighth Amendment issue (and only raised due process and equal protection).

{¶18} Emphasizing this observation, Appellant argued the application of R.C. 2953.08(D)(3) to prohibit a review of his sentence violated the Eighth Amendment and the corresponding provision in the Ohio Constitution (Article I, Section 9). In support, he cited the Eighth Amendment concerns expressed by Justice Sotomayor and quoted her reference to death penalty jurisprudence indicating the importance of a meaningful appellate review of whether the sentence was rendered by a judge who took into account the defendant’s circumstances, was the result of bias, or was imposed in a “freakish” manner. Appellant said his case implicated her concerns due to various mitigating facts he believed the court refused to consider as a result of the court’s unconstitutional bias against him.

{¶19} In reviewing his arguments, we cited the aforementioned statements from *Portsmouth* and *Marcum* and reviewed the principles relied on by Appellant. We concluded R.C. 2953.08(D)(3) was not unconstitutional under the Eighth Amendment or

¹ Although it was in a reply brief, the *Marcum* defendant asserted her appellate “claim was based on a general right to appeal in R.C. 2505.03 and R.C. 2953.02, not on the additional appellate rights contained in R.C. 2953.08.” *Marcum* Reply Brief, 7-10 (6/12/15) (specifying arguments on R.C. 2953.02 and its predecessor).

the corresponding right in the Ohio Constitution. *Kinney*, 7th Dist. No. 18 BE 0011, 2019-Ohio-2704 at ¶ 148-149, citing *State v. Austin*, 7th Dist. Mahoning No. 16 MA 68, 2019-Ohio-1185, ¶ 76-84.² Alternatively, we briefly addressed and rejected Appellant's arguments of bias and his complaints that the trial court's bias led it to ignore mitigating evidence at sentencing. *Kinney*, 7th Dist. No. 18 BE 0011, 2019-Ohio-2704 at ¶ 141-147 (prefacing our review with a statement that Appellant was using the allegations of bias and his mild background to show R.C. 2953.08(D)(3) violated the Eighth Amendment as applied to his case and noting bias at sentencing could be a due process violation).

SUPREME COURT OPINION

{¶20} The Supreme Court agreed to accept Appellant's appeal on one proposition of law alleging: "R.C. 2953.08(D)(3) is unconstitutional both on its face and as applied, as it violates the Ohio Constitution, Article I, Section 9 and the Eighth Amendment to the U.S. Constitution." See *State v. Kinney*, 157 Ohio St.3d 1501, 2019-Ohio-4768, 134 N.E.3d 1229 (accepting jurisdiction on the first proposition of law); Jur. Memo. (8/8/19).

{¶21} On December 22, 2020, the Ohio Supreme Court issued a one-sentence opinion in *Kinney*, stating: "The judgment of the Seventh District Court of Appeals is reversed, and the cause is remanded to that court for further proceedings consistent with our opinion in *State v. Patrick*," __ Ohio St.3d __, 2020-Ohio-6803, __ N.E.3d __ (a case issued the same day). *State v. Kinney*, __ Ohio St.3d __, 2020-Ohio-6822, __ N.E.3d __, ¶ 1. We therefore review the *Patrick* decision.

{¶22} In *Patrick*, the defendant argued his rights under the Eighth Amendment (and the corresponding provision in the Ohio Constitution) were violated when the trial court failed to articulate its consideration of the youth of the juvenile offender as a mitigating factor before imposing a life sentence (even though the life sentence included parole eligibility).

{¶23} After oral argument, the Supreme Court ordered sua sponte briefing on: "The effect, if any, of R.C. 2953.08(D)(3) on this court's and the court of appeals' ability to review appellant's sentence. The parties should address whether that provision denies

² We also rejected and noted a failure of briefing on other sections of the Ohio Constitution cited in the text of the assignment of error but not thereafter specified or addressed in the argument section of the brief. *Kinney*, 7th Dist. No. 18 BE 0011, 2019-Ohio-2704 at ¶ 150-152.

either court subject-matter jurisdiction and, if not, whether it otherwise limits the scope of the appeal here or in the court of appeals.” *State v. Patrick*, ___ Ohio St.3d ___, 2020-Ohio-6803, ___ N.E.3d ___, ¶ 10.

{¶24} After the supplemental briefing, the Supreme Court ruled R.C. 2953.08(D)(3) does not preclude an appeal of a sentence on constitutional grounds. *Id.* at ¶ 1-2, 11, 22 (all seven justices agreed with this holding, and the lead opinion is a majority opinion on the topic of reviewability). The Court emphasized the introductory language in R.C. 2953.08(A), which states the statute is “[i]n addition to any other right to appeal * * *.” *Id.* at ¶ 15. Furthermore, division (D)(3) merely states an aggravated murder or murder sentence “is not subject to review under this section.” In accordance, (D)(3) does not determine whether the sentence is subject to review under another statute. *Id.* at ¶ 17. The Court also said R.C. 2953.08 does not provide the sole right to appeal a sentence because division (E) states, “A sentence appealed under this section shall be consolidated with any other appeal in the case.” *Id.*³

{¶25} The *Patrick* Court then specified that a criminal defendant has a separate right to appeal under R.C. 2953.02, which begins by referring to older capital cases and then states: “in any other criminal case * * * the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals.” *Id.* at ¶ 16; R.C. 2953.02 (and the judgment of the court of appeals involving a constitutional question may be appealed to the Supreme Court as a matter of right). The Court found no conflict between R.C. 2953.02 and R.C. 2953.08. *Id.* at ¶ 17.

{¶26} Next, the right to appeal under R.C. 2953.08(A)(4) was addressed to “see if Patrick’s appeal – a constitutional challenge – is permitted under that statute.” *Id.* at ¶ 18-22. The majority of the Court concluded the “contrary to law” ground in (A)(4) provides a basis for appeal on “whether the trial court followed the statutory sentencing requirements” and “does not describe an appeal taken on constitutional grounds * * *.” *Id.* at ¶ 22. The Court reasoned that if (A)(4) did not describe an appeal on constitutional grounds, then an appeal on constitutional grounds was not an appeal under R.C. 2953.08

³ This was previously believed to refer to consolidation of a state’s appeal and a defendant’s appeal (because a defendant need only file one notice of appeal from the final order which contains the conviction and sentence, regardless of how many statutes he is relying on to initiate or to support his appeal).

and thus (D)(3) does not preclude an appeal of an aggravated murder or murder sentence based on constitutional grounds. *Id.*

{¶27} The Court then proceeded to address the juvenile-defendant's constitutional sentencing argument on whether the Eighth Amendment was violated where a court failed to articulate its consideration of youth as a mitigating factor where the defendant was a juvenile. *Id.* at ¶ 2. This portion of the Court's opinion is not particularly relevant for our purposes as it applied special principles applicable to juveniles. However, *the Court did discuss a disputed sentencing factor in R.C. 2929.12 in addressing the merits of the constitutional sentencing argument raised by the defendant.*

{¶28} The Supreme Court held: the juvenile's age was a relevant sentencing factor under R.C. 2929.12's instruction to consider any other relevant factor; case law on a sentence to life without parole requires the trial court to consider a juvenile offender's youth as a mitigating factor and articulate on the record whether and how it considered the juvenile's youth; a sentence to life with parole triggers the same Eighth Amendment concern for a juvenile as a sentence to life without parole; and a remand to the trial court was required as the record did not demonstrate the trial court considered the juvenile's youth as a mitigating factor. *Patrick*, ___ Ohio St.3d ___, 2020-Ohio-6803 at ¶ 24-48.

REVIEW OF SENTENCING ARGUMENTS AFTER APPLYING *PATRICK*

{¶29} This court addressed Appellant's claims (of unconstitutional bias and the resulting failure to consider mitigating evidence) in rejecting Appellant's argument that the appeal-precluding effects of R.C. 2953.08(D)(3) violated the Eighth Amendment as applied to his particular facts.⁴ The Supreme Court accepted Appellant's appeal on whether R.C. 2953.08(D)(3) was unconstitutional under the Eighth Amendment and the

⁴ Three justices dissented from the remand in *Kinney*, even though they agreed with the decision in *Patrick* that constitutional issues can be reviewed on appeal. One justice dissented to the remand because she would have dismissed the appeal as improvidently accepted. Two justices voted to affirm our judgment, opining the Court was asked whether (D)(3) was unconstitutional, which was a different question than the one presented in *Patrick* (and which was a question this court answered in the negative in *Kinney*). We note the defendant in *Patrick* did argue that if (D)(3) was the only avenue to appeal, then it was an unconstitutional violation of the rights to equal protection, due process, and the rights set forth by Justice Sotomayor in *Campbell*. The *Patrick* Court essentially found the argument on the unconstitutionality of (D)(3) moot after holding R.C. 2953.08 was not the only avenue for the appeal. "Courts decide constitutional issues only when absolutely necessary." *State ex rel. DeBrosse v. Cool*, 87 Ohio St.3d 1, 1999-Ohio-239, 716 N.E.2d 1114 (1999)

corresponding section in the Ohio Constitution and has now ruled that R.C. 2953.08(D)(3) does not preclude this court from reviewing defendant's constitutional sentencing arguments for his aggravated murder conviction.

{¶30} We now reconsider our review of Appellant's sentencing argument under the above-reviewed law. The analysis begins under the Supreme Court holding that Appellant's constitutional sentencing argument is not precluded by R.C. 2953.08(D)(3). Because Appellant has the right to appellate review of his argument under R.C. 2953.02, the prohibition in division (D)(3) of R.C. 2953.08 has no effect to bar the argument he raises to this court. As Appellant's sentencing argument is reviewable under the rationale in *Patrick*, there is no longer a basis for arguing (D)(3) unconstitutionally precludes him from appealing the infliction of a cruel and unusual sentence in violation of the Eighth Amendment. Similar to the circumstances in *Patrick*, there is no need to reach a defendant's argument on the constitutionality of a provision in one statute, division (D)(3) of R.C. 2953.08, where the sentencing argument presented on appeal is being reviewed due to the application of another statute, R.C. 2953.02, which provides him the right to appeal notwithstanding (D)(3). See fn.4 supra, discussing *Patrick*, __ Ohio St.3d __, 2020-Ohio-6803.

{¶31} Although Appellant's arguments were initially set forth in order to contest his perceived inability to appeal his sentence, he simultaneously alleges the Eighth Amendment was violated when he was "condemned to die in prison" by a judge who imposed the sentence arbitrarily, in a "freakish manner," and while refusing to consider the mitigating circumstances due to "judicial bias." Appellant says, "given his background and the circumstances surrounding this terrible tragedy, * * * the trial court's demonstrable animus produced an incomprehensible sentence" of life without parole. He says he was a loving step-father, held a solid job, had no history of substance abuse or mental illness, and had "no real criminal history to speak of" (apparently referring to a statement in a prior assignment of error that he "had one prior criminal matter" from when he was 19 years old). Appellant claims "there is no actual proof that anything about the shooting was pre-planned" and says the court showed bias by comparing him to a "cold calculated assassin" (a phrase used by a detective in interviewing Appellant) and by speculating if

he could do this “to his best friend and someone he loved, then what could he do to his enemy or someone who opposed him?”

{¶32} Bias or prejudice means a hostile feeling or spirit of ill-will or undue favoritism toward a party or attorney where there is the formation of a fixed anticipatory judgment on the part of the judge, as opposed to an open state of mind which will be governed by the law and the facts of the case. *In re Disqualification of Olivito*, 74 Ohio St.3d 1261, 1262, 657 N.E.2d 1361 (1994). The law presumes a judge is unbiased and unprejudiced in the matters over which he presides, and the appearance of bias or prejudice must be compelling in order to overcome this presumption. *Id.* at 1263.

{¶33} To bolster his claim of unconstitutional bias at the sentencing hearing, Appellant alleges the court’s bias was evident in the record earlier in the proceedings, such as at his bond hearing and at a side bar during trial. The bond hearing was held nine months before sentencing. Appellant says the judge spoke “with the volume of delivery excessive” and “disdain dripping” from his voice; however, this cannot be discerned from the record. Appellant criticizes the comments made by the court at the bond hearing, such that he “led a secret dual life” which affected his reliability or that he brought his wife and her daughter to the homicide scene “basically lying through his teeth to his wife and child.”

{¶34} Notably, these observations were made by the trial court in the context of addressing the testimony of five defense witnesses presented in support of Appellant’s bond position that he was a good and dependable person. The trial court was voicing valid concerns pertinent to bond. The allegation of a years-long secret extra-marital affair with a close family friend does relate to Appellant’s reliability and honesty. The allegation of lying to loved ones and bringing his wife and her child to a homicide scene to watch him pretend to find the body is similarly relevant. Both observations also assist in assessing whether the bond witnesses truly knew the defendant as well as they believed, which is related to the question of whether a person is a flight-risk or a danger to others.

{¶35} In addition, if Appellant believed bias was exhibited in these statements made long before trial, he could have filed an affidavit of disqualification in the Supreme Court under R.C. 2701.03(A). See *Beer v. Griffith*, 54 Ohio St.2d 440, 441-442, 377 N.E.2d 775 (1978) (“Since only the Chief Justice or his designee may hear disqualification

matters, the Court of Appeals was without authority to pass upon disqualification or to void the judgment of the trial court upon that basis.”). We have noted that this prohibition has been applied not only to events allegedly indicating bias before and during trial but also to comments at sentencing. *State v. Power*, 7th Dist. Columbiana No. 12 CO 14, 2013-Ohio-4254, ¶ 13-20. There is an exception for comments during trial if a court’s bias influenced the jury. *Id.* at ¶ 21. We have also noted an exception where the court exhibited bias at sentencing which resulted in a constitutional violation, such as a due process violation. See *id.* at ¶ 22, 25 (finding comments “do not come near the level of a due process violation or otherwise constitute reversible sentencing error”), citing, e.g., *State v. Arnett*, 88 Ohio St.3d 208, 218, 724 N.E.2d 793 (2000) (reviewing the appellate court’s opinion that a judge’s religious comment violated due process).

{¶36} As to a comment made by the court at a side bar during trial, an expression of bias is not indicated by Appellant’s allegation that the court allowed the jury to hear the court opine that a defense question was a “total mischaracterization” of testimony. Initially, the court’s comment must be placed in context. Appellant attempted to explain his poor choices after the event by presenting the testimony of a psychiatrist who opined that Appellant experienced Acute Stress Disorder after the shooting. The state responded by presenting an expert who disagreed with the diagnosis.

{¶37} While cross-examining the state’s witness, defense counsel asked, “Are you aware of the fact that the forensic pathologist established that the mechanism of the shooting that you saw in the video could not have happened and produced the wounds in the way that they were described?” (Tr. 1191).

{¶38} The state objected, saying this was “a very broad characterization.” At a side bar, defense counsel suggested that it was relevant to Appellant’s lies told after the event. The state agreed to permit the question. (Tr. 1192).

{¶39} Defense counsel then posed a *different* question, asking: “Are you aware that forensic pathology has determined that the mechanism of the second shot could not have created the wounds that you would have read about in the autopsy report?”

{¶40} The state objected, and the court sustained the objection calling the parties to another side bar. (Tr. 1192). The state said the question was overly broad, a total mischaracterization, and not relevant to this witness.

{¶41} The court said, “The objection is sustained. It’s got nothing to do with this witness, plus it’s a total mischaracterization.” Defense counsel said he did not mischaracterize the testimony and objected to the court saying this in front of the jury. (Tr. 1193). The court replied: “that was not in front of the jury. Now, as you two were walking away, I may have spoken too loud, and I can address the jury right now to correct that.” Defense counsel seemed satisfied. The court then instructed: “If the jury heard any of my comments, my comment may have been a little loud at the end, you will disregard that; do you understand that? Thank you.” (Tr. 1194).

{¶42} We do not believe the court exhibited bias by expressing an opinion on the question as framed the second time, even if performed in an allegedly overloud manner. The court issued a curative instructive in case the jury heard the comment. And, Appellant’s argument does not acknowledge how defense counsel’s question changed on the second rendering. The new version of the question could rationally be considered a mischaracterization. It omitted the clarifying reference to the second shot as *demonstrated by Appellant in the police interview video*. The forensic pathologist did not say the second shot could not have created the wounds that were in the autopsy report. In addition, he provided an opinion on whether the second shot would have created the wound *if* Appellant was standing up *straight* and the victim was on the ground, suggesting Appellant could have been standing in a bent position over the victim as the wound was partial contact.

{¶43} Accordingly, the two pre-sentencing allegations of bias do not bolster Appellant’s argument that he was sentenced by a biased trial judge who displayed additional and unconstitutional animus during the sentencing hearing. Appellant characterizes the court’s comments at sentencing as a “tirade” (stating the court even “yelled” at the prosecutor for making a comment on how to phrase the firearm specification). However, the volume and tone is not evident on the record, and a biased tirade is not indicated from our reading of the sentencing transcript.

{¶44} As sentencing commenced, the court listened to the oral statement presented by a member of the victim’s family. The court agreed with the state’s assurances to the victim’s family that the court considered their letters. The state recommended life without parole, and defense counsel urged the court to provide an

opportunity for parole, pointing out that Appellant was 31 years old with an ability to function in society as demonstrated by the lack of a criminal record and other mitigating factors. A presentence investigation was ordered before sentencing, and the court noted its consideration of this report in the sentencing entry. At defense counsel's urging, the court also agreed to consider the contents of the psychological reports prepared by the psychiatrists who testified at trial.

{¶45} Appellant suggests the court's bias led to the imposition of a sentence of life without parole without considering the sentencing factors or engaging in "a meaningful analysis of relevant mitigating factors" at the sentencing hearing. However, there is no requirement that the trial court set forth an analysis as to the relevant factors in R.C. 2929.12. "[N]either R.C. 2929.11 nor 2929.12 requires a trial court to make any specific factual findings on the record." *State v. Jones*, __ Ohio St.3d __, 2020-Ohio-6729, __ N.E.3d __, ¶ 20, citing *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 31 (the trial court is not required to place findings on the record under R.C. 2929.11); *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000) (the trial court is not required to make findings on the record regarding the seriousness and recidivism factors in R.C. 2929.12).

{¶46} The trial court specifically declared from the bench: "This Court has reviewed the statutes in this matter, 2929.11 and 2929.12. I have reviewed all of the overriding purposes, the principles and the factors of sentencing." (Sent.Tr. 14). The sentencing entry also said the court considered the purposes and principles of sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12.

{¶47} Furthermore, before pronouncing the sentence at the sentencing hearing, the court said it considered defense counsel's arguments. Defense counsel had just explained how the recidivism factors should apply in favor of a life sentence with an opportunity for parole, alleging: there were no prior juvenile adjudications or prior convictions; Appellant led a law-abiding life before this offense; he was not under sanctions when he committed this offense; the circumstances were not likely to recur; there was no demonstrated pattern of substance abuse; and Appellant expressed genuine remorse. See R.C. 2929.12(D)-(E). In addition to considering these statements

by defense counsel, the court also said it recalled the testimony presented in Appellant's favor from the bond hearing and read the psychological reports.

{¶48} The court heard Appellant exercise his right to allocution during which he expressed remorse. Whether to believe his remorse was genuine and a factor making recidivism less likely (or not genuine and a factor making recidivism more likely) was a question for the sentencing judge who heard and saw Appellant's allocution and who presided over the trial. See R.C. 2929.12(D)(5),(E)(5) (speaking of "genuine" remorse). See also *State v. Moore*, 6th Dist. Lucas No. L-17-1291, 2019-Ohio-1032, ¶ 28 ("However, a court is not required to believe that the defendant is remorseful simply because such statements were made at the sentencing hearing. * * * The trial court is in the best position to judge credibility of such statements of remorse.").

{¶49} Considering the seriousness and the circumstances surrounding the offense, the court did not believe the mitigating circumstances outlined by defense counsel outweighed the aggravating circumstances. Regarding the seriousness of the offense, the court referred to its consideration of the evidence presented during the eight days of trial. The court mentioned the various stories told by Appellant after the killing. The trial court's expressed concern about what Appellant would do to an opponent if he did this to a friend was a comment made in the context of addressing the need to protect the public and the likelihood of recidivism. See R.C. 2929.11(A) (protect the public from the offender and others); R.C. 2929.12(E)(4) (less likelihood of recidivism if circumstances not likely to recur and any other relevant factor).

{¶50} This also relates to the factor making an offense more serious if the offender's relationship with the victim facilitated the offense. See R.C. 2929.12(B)(6). The court disclosed in its opinion that Appellant pre-planned the killing, lured the victim home with promises of sex, and ambushed him when he entered the basement garage. This essentially meant the court found certain factors that can mitigate the seriousness of an offense were inapplicable. See R.C. 2929.12(C)(1)-(4) (less serious if the victim induced the offense, the offender acted under strong provocation, the offender did not expect to cause harm, or there were substantial grounds to mitigate the conduct).

{¶51} The jury found Appellant guilty of a purposeful killing with prior calculation and design. Appellant claims the court demonstrated its bias by adopting the state's

“speculative” theory that he may have developed his intent hours before the victim arrived home. The court heard the testimony and watched Appellant’s videotaped statements to the police. It is not reversible error for a sentencing judge, in explaining his sentence, to make critical statements about a defendant’s conduct based upon the facts of the case presented to the court. *Power*, 7th Dist. No. 12 CO 14 at ¶¶ 26-28 (“a judge is encouraged to place a rationale for a sentence on the record, and we cannot reverse every time a judge happens to label the behavior at issue with an adjective that offends” the convicted defendant), citing *State v. Dean*, 127 Ohio St.3d 140, 2010-Ohio-5070, 937 N.E.2d 97, ¶ 49 (critical, disapproving, or even hostile statements ordinarily do not support a bias challenge).

{¶52} Opinions formed by the judge from facts existing in the record are not grounds for a finding of unconstitutional bias unless they display a deep-seated antagonism making fair judgment impossible. *Dean*, 127 Ohio St.3d 140 at ¶ 49, citing *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Whether we review the Eighth Amendment concerns Appellant raises or we review his allegation of a biased refusal to consider mitigating evidence as a due process issue, the portions of the record cited by Appellant do not support a conclusion that the sentencing judge failed to consider the sentencing statutes and imposed an arbitrary or irrational sentence as a result of a deep-seated antagonism.

{¶53} In conclusion, after reviewing appellant’s sentencing assignment of error under the Supreme Court’s *Patrick* holding, we hereby overrule Appellant’s contention that resentencing is required. The record does not demonstrate Appellant was unconstitutionally sentenced to life without parole by a biased judge who failed to consider the relevant sentencing factors. The factors were considered, and the court did not display bias. Accordingly, Appellant’s sentence is affirmed.

Donofrio, P. J., concurs.

D’Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.