[Cite as *State v. Cooke*, 2020-Ohio-2725.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 108824

v. :

DIETRICK COOKE, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: April 30, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-626241-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Brad Meyer, Assistant Prosecuting Attorney, *for appellee.*

Joseph V. Pagano, *for appellant.*

MARY J. BOYLE, P.J.:

{¶ 1} Defendant-appellant, Dietrick Cooke, appeals his guilty plea and sentence. He raises four assignments of error for our review:

> 1. Appellant's plea was not knowing, intelligent, or voluntary where he was not informed that a guilty plea waived his right to assert self-

> defense and his plea was induced by the parties[’] agreement that the court would consider two mitigating factors when imposing sentence.
>
> 2. Appellant’s constitutional rights were violated when the charges were not dismissed when he was not afforded a speedy trial.
>
> 3. The trial court erred by denying appellant’s motion to dismiss based upon self-defense.
>
> 4. The eleven[-]year prison term is contrary to law and is clearly and convincingly not supported by the record.

{¶ 2} Finding no merit to his appeal, we affirm.

I. Procedural History and Factual Background

{¶ 3} Cooke was indicted in February 2018, on three counts, including Count 1, murder in violation of R.C. 2903.02(B), an unclassified felony; Count 2, felonious assault in violation of R.C. 2903.11(A)(1), a second-degree felony; and Count 3, voluntary manslaughter in violation of R.C. 2903.03(A), a first-degree felony.

{¶ 4} The charges arose after the victim in this case, Perry Porter, went to the home of his ex-girlfriend, Lekisha Ross, on February 16, 2018, to confront her after she had gotten back together with Cooke. Cooke was at Ross’s home when Porter arrived. Ross answered the door when Porter knocked, and Porter pushed his way into Ross’s home. When Porter saw Cooke, a fight ensued. Cooke proceeded to beat Porter until he was unconscious in the dining room of the home. Ross’s three minor children witnessed the beating. When Cooke stopped beating Porter, Cooke and Ross’s nephew put Porter in the backyard and called police. Porter was later pronounced dead at the hospital.

{¶ 5} Trial began on the case on May 29, 2019. Before the second day of the trial began, Cooke withdrew his former plea of not guilty and pleaded guilty to Count 3 as charged. As part of the plea deal, the remaining counts were nolled.

{¶ 6} At the plea hearing, the state informed the court:

> We are in agreement that the defendant should receive consideration by the court at the time of sentencing, one, for taking responsibility here, and, two, for taking responsibility and relieving these children of not having to come into court and testify about the events that they witnessed as well. And that those factors will be outlined in our sentencing memorandum to be considered by the court at that time.

{¶ 7} The state further told the court that no other threats or promises had been made to Cooke other than what was placed on the record.

{¶ 8} Defense counsel stated that he agreed with what the state placed on the record. Defense counsel further indicated that he had reviewed Cooke's "trial rights once more," and that Cooke understood them and "was of sound mind."

{¶ 9} Cooke stated that he understood and agreed with what the state and his defense counsel placed on the record. Cooke further told the court in response to its questioning that he was 41 years old, attended "secondary" education, did not have problems reading and writing, was not on probation or parole, did not have any unresolved arrests, was not currently under the influence of drugs or alcohol, was a United States citizen, and was satisfied with his defense counsel's representation. Cooke also told the court that no one threatened or promised him anything that was not placed on the record at the plea hearing and that no one forced him to enter into the plea.

{¶ 10} The trial court then reviewed Cooke's constitutional rights with him and made sure that he understood them and understood that he was waiving those rights by entering into the plea.

{¶ 11} The trial court further explained the potential penalties, including the maximum sentence and fines that were involved with a first-degree felony as well as the duration of postrelease control that he would be subject to and the ramifications for violating it. Additionally, the trial court notified Cooke that he would need to register as a violent offender with the county sheriff once per year for ten years.

{¶ 12} The court then asked Cooke if he understood that the court was not promising to sentence him to any particular sentence and that it could proceed to sentencing immediately after the plea hearing. Cooke stated that he understood.

{¶ 13} Near the end of the colloquy, Cooke pleaded guilty to Count 3, voluntary manslaughter. The court then asked Cooke:

> And, sir, are you in fact guilty, is it true that on or about February 16, 2018, in Cuyahoga County, Ohio, that while under the influence of sudden passion or in a sudden fit of rage, either of which was brought on by serious provocation occasioned by the victim that was reasonably sufficient to incite you into using deadly force, that you did knowingly cause the death of [the victim]?

{¶ 14} Cooke told the court that he was guilty of voluntary manslaughter. Subsequently, the court found that Cooke's plea was knowing, voluntary, and intelligent, accepted Cooke's guilty plea, and found him guilty of voluntary manslaughter. The court also dismissed Counts 1 and 2 at the state's request. Defense counsel and the state told the court that it had complied with Crim.R. 11.

The court then referred Cooke for a presentence investigation report and set a date for the sentencing hearing.

{¶ 15} At the sentencing hearing, the court indicated that it had reviewed the presentence investigation report. Defense counsel stated that he did not have anything to add or delete from the report.

{¶ 16} Defense counsel then explained the events that led to the charges in this case. According to defense counsel:

> This matter * * * arose from an incident on February 16th, 2018, when the decedent, Perry Porter, forced his way into the residence of Lakisha Ross at 10:30 p.m. Mr. Cooke and Ms. Ross were in bed when they heard a knocking at the window. Ms. Ross got up to determine what was going on, and Mr. Porter was at the door. Ms. Ross states that she opened the door just enough to tell Mr. Porter that she would bring his personal belongings to him the next day. And Mr. Porter stuck his foot in the door so that she could not close it, then forced his way into the home, demanding, "Who's in here? Who's in here?"
>
> He pushed Ms. Ross out of the way, and as he approached the bedroom, Mr. Cooke appeared, and Mr. Porter struck him, and they began fighting. First, one on top, and then the other.
>
> The court docket shows that Mr. Porter has had three cases involving felonious assault, two with firearm specifications, one case was dismissed when the victim didn't show up for trial.
>
> Against that background, Mr. Cooke, through his association with Ms. Ross and other family members, had learned that the decedent was jealous, controlling, abusive, and was known to carry a firearm.
>
> So it was understandable that Mr. Cooke was terrified when Mr. Porter forced his way into the residence and struck him. And in that state of mind, fought with the intruder with all of his strength to overcome him, so that he and other members of the household would not be harmed.
>
> While it's true that Mr. Cooke had been told by Mr. Porter at least two times, Mr. Cooke would have testified at trial that if Mr. Porter

> continued to attempt to kick him between his legs during the fight, and that is why he continued to defend himself from injury to Mr. Porter.
>
> Now, Ms. Ross and her family members would have testified at trial that Mr. Porter, after being subdued, appeared to be snoring. And Mr. Cooke, with the assistance of Ms. Ross's nephew, Robert Ross, who is 23 years old, grabbed Mr. Porter and dragged him into the back yard immediately after telephoning the police and notified them of the intrusion.
>
> Your Honor, my client is regretful, and we're all sad, of course, about Mr. Porter losing his life. He was pronounced dead at the hospital some 15 or 20 minutes later. Now, importantly, Mr. Cooke, in fear of his life, exercised his right to a self-defense of others and defense of property during the altercation of Mr. Porter. He deeply regrets the fact that this struggle resulted in the death of Mr. Porter.

{¶ 17} Cooke's mother and sister also spoke to the court. Both expressed remorse to the victim's family. Cooke's sister told the court that Cooke informed their family that he wanted them "to be aware if something were to happen to him, that there was conflict going on between" he and the victim. Cooke's sister stated that Cooke "was genuinely in fear of his life, and he did what he had to do to protect himself." Cooke's mother told the court that Cooke was not perfect, but that he had a "good heart." She asked for leniency because Cooke "did not initiate this incident."

{¶ 18} Cooke also expressed remorse to the victim's family. He stated that he never intended to harm anyone. But Cooke explained that the victim "was hunting" him and Cooke feared the victim. Cooke stated that both he and the victim "played a part in this." Cooke asked for the trial court to "show some mercy" to him.

{¶ 19} The state began by showing the court photos of the victim taken before and after his death. The state also showed the court photos of "a pool of the blood" that Porter had lain in when he was "thrown out of the house like a piece of

trash" as well as photos of blood splatter from the room where Cooke killed him. The state pointed out that all of the splatter was lower than three feet on the wall, which experts would have testified at trial showed "that all of the injuries that caused that blood spatter were inflicted when Mr. Porter was helpless on the ground being beaten by the defendant." The state further told the court:

> The most cooperative witness in this case was Robert Ross. He was the nephew of Lakisha, kind of the apex of this whole situation. He indicated to the police that he tried to pull the defendant off of the victim on three separate times during this altercation, and the defendant just kept going, and he kept hitting him, and he kept striking the victim until he lost consciousness. The defense has stood here today and smeared -- tried to smear the victim and indicate that the he instilled fear in them. At the time of his death, Perry Porter was 5'6" and 137 pounds. In eight days prior to his death, Perry Porter was the one inside of the home at Oriole Avenue with Ross. He and Lakisha Ross called the police at the first sign that the defendant showed up at that residence, eight days prior to dying. Euclid police showed up, and they took the defendant from that location. And then eight days later, when Perry arrived, no one called the police to say there's an intruder outside knocking at the window or through the kitchen, where an argument ensues. Nobody called the police until he had been shoved outside of the house after he was unconscious.
>
> They were less than forthcoming on the phone to 911, pretending they don't know who Perry Porter was at first. It was – they were not forthcoming, other than [Robert] Ross.
>
> I've outlined the defendant's criminal history. He stood here today and said, gee, the victim was known to carry a gun. The defendant is the one who has prior conviction for having weapons under disability; the defendant is the one who has the prior conviction for taking someone's life. Your Honor, this is the second time he is before this court.
>
> The plea offer in the case and what the defendant pled to reflects the mitigatory factors of this circumstance, but in no means diminishes the seriousness of the offense.

{¶ 20} The court indicated that it read the sentencing memorandums and the letters from the victim's family.

{¶ 21} The victim's two sisters spoke to the court. They both expressed that they missed their brother. Both of them also blamed Lakisha Ross. The victim's mother stated that nothing would bring her son back. She asked the court to consider the fact that Cooke beat her son "without mercy" and that he could have stopped, but he did not. The victim's mother further stated that Cooke then threw her son "outside like a piece of trash." The victim's mother said that Lakisha Ross was "a factor in everything" and ruined her life, her family's life, and Cooke's life.

{¶ 22} The court stated that it considered all of the information before it, the principles and purposes of sentencing, and the seriousness and recidivism factors. The court then explained:

> This case is particularly troubling in that, however, Mr. Porter entered the home, at some point the beating became much more than self-defense. And I don't know where this idea of self-defense comes, just because somebody may strike first. Striking back is retaliation for being struck. And this is a prime example of when enough should have been enough, and you should have stopped. The first thing before getting out of the bed should have been to call the police. That should have been the first thing. Being cooperative with the police and telling the truth, that would have been the next thing.
>
> However, inflicting a beating on a person on the ground, 21 separate injuries to Mr. Porter's head alone; multiple contusions; lacerations and hemorrhages; broken and missing teeth; five separate injuries to his neck; three separate fractures; eight separate injuries to his trunk; and his spine broken in two places; multiple rib fractures; lacerations to his heart, his liver and his right kidney indicate the level of your passion as you pled to, which was pure anger.
>
> Your criminal history indicates that this is not a new thing for you. You have at least five prior violent convictions; two prior weapon

> convictions, including your participation in a crime that was resulted in someone's death. Now it's happened again.

{¶ 23} The trial court sentenced Cooke to the maximum of 11 years in prison for voluntary manslaughter. It further notified Cooke that he would be subject to a mandatory period of five years of postrelease control upon his release from prison and the ramifications for violating it. The court also advised him that he would need to register as a violent offender annually for ten years. The court did not impose any fines but ordered Cooke to pay costs. It is from this judgment that Cooke now appeals.

II. Crim.R. 11

{¶ 24} In his first assignment of error, Cooke contends that his plea was not knowing, intelligent, or voluntary because the trial court failed to adequately explain the burdens of establishing self-defense, the application of it, and the castle doctrine to him as well as the fact that he was waiving the issue for purposes of appeal. He further argues that his plea was invalid because he did not receive the benefit of the bargain that the "state would recommend, and the trial court would consider, mitigatory factors when imposing the sentence."

{¶ 25} A defendant's plea must be entered knowingly, intelligently, and voluntarily for the plea to be constitutional under the United States and Ohio Constitutions. *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). "Ohio Crim.R. 11(C) was adopted in order to facilitate a more accurate determination of the voluntariness of a defendant's plea by ensuring an adequate record for review."

State v. Nero, 56 Ohio St.3d 106, 107, 564 N.E.2d 474 (1990). The underlying purpose of Crim.R. 11(C) is to require the trial court to convey certain information to a defendant so that he or she can make a voluntary and intelligent decision regarding whether to plead guilty or no contest. *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981).

{¶ 26} Specifically, Crim.R. 11(C)(2) states:

> In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
>
> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶ 27} Trial courts must strictly comply with the provisions concerning the constitutional rights set forth in Crim.R. 11(C)(2)(c), but they only have to substantially comply with the provisions concerning nonconstitutional rights set forth in Crim.R. 11(C)(2)(a) and (b). *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12. "Substantial compliance means that under the totality of

the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *Nero*, 56 Ohio St.3d at 108, 564 N.E.2d 474.

{¶ 28} Moreover, a defendant who challenges his or her plea on the basis that it was not knowing, intelligent, and voluntary must demonstrate prejudice. *Id*. at 108. A "failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice." *Griggs* at ¶ 12. The test for prejudice is "'whether the plea would have otherwise been made.'" *Id*., quoting *Nero* at 108.

{¶ 29} The standard for reviewing whether the trial court accepted a plea in compliance with Crim.R. 11(C) is de novo. *State v. Tutt*, 2015-Ohio-5145, 54 N.E.3d 619, ¶ 13 (8th Dist.), citing *State v. Spock*, 8th Dist. Cuyahoga No. 99950, 2014-Ohio-606. It requires an appellate court to review the totality of the circumstances and determine whether the plea hearing was in compliance with Crim.R. 11(C). *State v. Cardwell*, 8th Dist. Cuyahoga No. 92796, 2009-Ohio-6827, ¶ 26, citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977).

{¶ 30} Regarding Cooke's arguments with respect to self-defense and the castle doctrine, the Ohio Supreme Court has held that where criminal defendants are represented by counsel, Crim.R. 11(C) does not require trial courts to inform defendants of affirmative defenses that may be available to them prior to accepting their guilty pleas. *State v. Reynolds*, 40 Ohio St.3d 334, 533 N.E.2d 342 (1988), syllabus. Cooke maintains, however, that the trial court's explanation regarding

self-defense and the castle doctrine was inadequate, which therefore prevented him from entering a valid plea. We disagree.

{¶ 31} First, neither Cooke nor the trial court mentioned self-defense or the castle doctrine at Cooke's plea hearing on May 30, 2019. The pages of transcript that Cooke points to actually took place on the morning of the day before the plea hearing. In fact, after the discussion on May 29, 2019, the trial court brought the jury in and voir dire took place for the rest of that day. When the parties appeared before the trial court on the second day of trial the following day, Cooke informed the trial court that he changed his mind and wanted to plead guilty.

{¶ 32} Next, no part of the trial court's explanation of self-defense or the castle doctrine was incorrect. Cooke maintains, however, that the trial court "neglected to inform him" that there would be a presumption that he acted in self-defense and that the prosecution would then have to rebut that presumption. Again, we disagree. The trial court told Cooke at the hearing on May 29, 2019:

> Well, so the castle doctrine has sort of been incorporated into that self-defense defense. You know, the statute says that -- and the jurors will hear if there's evidence of this, if there's evidence that you did act in self-defense, defense of another or defense of a person's residence, your residence. If at the trial, the person who is accused of an offense, that's you, and you used some kind of force against the alleged victim, Mr. Porter, that there was evidence presented that supports that you used the force, self-defense, defense of another or defense of that person's residence that it was a reasonable amount of defense, reasonable amount of force. It's up to the state of Ohio to prove beyond a reasonable doubt that you did not use the force in self-defense, offense of another or defense of that person's residence as the case may be.

{¶ 33} The trial court adequately explained to Cooke that if the defenses were applicable after the evidence was presented at trial, the state would have the burden of proving Cooke did not act in self-defense or in the defense of another or of that person's residence.

{¶ 34} Cooke also argues that the trial court failed to inform him that where the castle doctrine applies, the defendant does not have a duty to retreat. The trial court may not have mentioned that at the May 29, 2019 hearing, but on September 6, 2018, the trial court told Cooke:

> Castle doctrine in general is basically if someone is breaking into your home, you have a right to defend yourself. You don't have to retreat. Whether or not you can beat someone to death that's in your house is a different story and I'm not sure what the facts will be here or not, but at some point defending yourself becomes an assault.

{¶ 35} Moreover, Cooke had a total of three attorneys who represented him at different times throughout the proceedings. At the outset of his case, Cooke had two public defenders representing him. At the September 6, 2018 hearing, however, Cooke informed the trial court that he was dissatisfied with his two public defenders, in part because they would not follow his wishes and assert the castle doctrine for him. The trial court ultimately appointed new counsel for Cooke.

{¶ 36} Cooke further maintains that the trial court failed to advise him that by entering into a guilty plea, he would not be able to argue on appeal that the trial court erred when it denied his motion to dismiss based upon his claim that he acted in self-defense. Cooke acknowledges that Ohio law does not require trial courts to inform defendants that they waive their right to assert an affirmative defense when

they enter a guilty plea, but he nonetheless argues that under the circumstances in this case, the trial court should have. We disagree. Again, Cooke was represented by counsel throughout the proceedings. We therefore see no reason to veer away from well-settled Ohio law.

{¶ 37} Finally, Cooke argues that his plea was invalid because he did not receive the benefit of his plea bargain. At the beginning of his plea hearing, the state told the court that it and Cooke agreed that he "should receive consideration by the court at the time of sentencing" for taking responsibility and for "relieving these children [who witnessed the event] of not having to come into court and testify about the events that they witnessed as well." The state and Cooke, however, did not recommend a jointly agreed-upon sentence to the trial court. The trial court also made sure that Cooke understood at the plea hearing that it was not promising him "any particular sentence."

{¶ 38} At the sentencing hearing, the state outlined what occurred in this case and stated, "The plea offer in the case and what the defendant pled to reflects the mitigatory factors of this circumstance, but in no means diminishes the seriousness of the offense." The trial court stated that it considered all of the information that was presented at the sentencing hearing as well as the principles and purposes of sentencing and the seriousness and recidivism factors. The court then discussed the seriousness of the beating that Cooke inflicted upon the victim. The court also noted that Cooke's previous criminal history included five prior violent convictions, two prior weapons convictions, and participation in a crime that

resulted in someone's death. The court stated, "Now it's happened again." After review, we find no merit to Cooke's assertion that he did not receive the benefit of his bargain.

{¶ 39} Accordingly, Cooke's first assignment of error is overruled.

III. Speedy Trial

{¶ 40} Although Cooke states in his assignment of error that his constitutional right to a speedy trial was violated, he actually challenges his statutory right to a speedy trial as well. In *State v. Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991), however, the Ohio Supreme Court reaffirmed its previous holding that "[a] plea of guilty waives a defendant's right to challenge his or her conviction on statutory speedy trial grounds[.]" *Id.* at the syllabus (applying and following *Montpelier v. Greeno*, 25 Ohio St.3d 170, 495 N.E.2d 581 (1986)). Thus, we will only address Cooke's constitutional argument.

{¶ 41} The right to a speedy trial is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution, made obligatory on the states by the Fourteenth Amendment. The Ohio Constitution, Article I, Section 10, guarantees an accused this same right. *State v. MacDonald*, 48 Ohio St.2d 66, 68, 357 N.E.2d 40 (1976). Although the United States Supreme Court declined to establish the exact number of days within which a trial must be held, it recognized that states may prescribe a reasonable period of time consistent with constitutional requirements. *Barker v. Wingo*, 407 U.S. 514, 523, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

{¶ 42} In examining a constitutional claim on speedy-trial grounds, the statutory time requirements of R.C. 2945.71 to 2945.73 are not relevant; instead, courts should employ the balancing test enunciated by the United States Supreme Court in *Barker*. Under the *Barker* test, courts must consider (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right to a speedy trial; and (4) the prejudice to the defendant. *Id*. at 530-532.

{¶ 43} The first factor, the length of the delay, is the "triggering mechanism" that determines the necessity of inquiry into the other factors. *Barker* at 530. Until there is some delay that is presumptively prejudicial, "there is no necessity for inquiry into the other factors that go into the balance." *Id*. Generally, one year is considered sufficient to trigger the inquiry. *State v. Triplett*, 78 Ohio St.3d 566, 569, 679 N.E.2d 290 (1997), citing *Doggett v. United States*, 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed. 2d 520 (1992), fn 1. In this case, Cooke was arrested and indicted in February 2018. He did not enter into his plea until May 30, 2019. Thus, Cooke met the threshold requirement of delay sufficient to trigger the inquiry.

{¶ 44} The second factor is the state's reason for the delay. The weight assigned to this factor depends on the degree of the government's fault. *Barker*, 407 U.S. at 531, 92 S.Ct. 2182, 33 L.Ed.2d 101. In this case, Cooke moved for a continuance eight times before moving to disqualify his two public defender in July 2018. The trial court warned him at the hearing on his motion on September 6, 2018, that if it granted his request, the proceedings would be delayed even more. Cooke still wished for new counsel. After new counsel was appointed, Cooke again

moved for a continuance at least eight times. The state only moved for a continuance one time when its key witness was not available. Accordingly, we find that most of the delay was due to Cooke's own actions. Although Cooke contends that he did not consent to any of the continuances, he is bound by his counsel's requests for a continuance. *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72, ¶ 33, citing *State v. McBreen*, 54 Ohio St.2d 315, 376 N.E.2d 593 (1978). Cooke further asserts that some of his counsel's requests were not reasonable, but he does not explain which ones were unreasonable or give any explanation as to how or why they were unreasonable. Thus, the second factor under *Barker* weighs heavily against Cooke.

{¶ 45} The third *Barker* factor deals with whether Cooke asserted his right to a speedy trial. In discussing this factor, the *Barker* court explained: "The defendant's assertion of his speedy trial right * * * is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he [or she] was denied a speedy trial." *Id*. at 531-532. Here, Cooke only mentioned the issue of speedy trial at the hearing on September 6, 2018, when the court was addressing his motion to disqualify counsel. He never filed a motion to dismiss based upon lack of speedy trial and never raised the issue to the court a second time. Accordingly, we do not give this factor any weight in Cooke's favor.

{¶ 46} Finally, the last *Barker* factor considers the prejudice to the defendant. Cooke contends that he suffered prejudice from the delay "as he

remained incarcerated throughout the proceedings on a $1,000,000.00 bond [that] prevented him from access to resources outside of the jail, including his ability to investigate and obtain potentially exculpatory evidence[,] and he was precluded from being able to more fully assist in his defense." Cooke's prejudice argument lacks merit, however, because no matter how long the delay, the bond would have still been $1,000,000. Cooke has not affirmatively shown how the delay in this case prejudiced him. Thus, we afford this factor no deference.

{¶ 47} After weighing the *Barker* factors, we find that Cooke's constitutional speedy-trial rights were not violated and overrule his second assignment of error.

IV. Pretrial Motion to Dismiss

{¶ 48} In his third assignment of error, Cooke contends that the trial court erred when it denied his pretrial motion to dismiss based upon self-defense, which he filed in March 2019.

{¶ 49} Cooke waived this argument, however, when he pleaded guilty to voluntary manslaughter. *See State v. Albright*, 8th Dist. Cuyahoga No. 107632, 2019-Ohio-1998, ¶ 36 ("By pleading guilty to voluntary manslaughter and felonious assault, Albright waived his right to claim that his actions were in self-defense."); *State v. Wright*, 8th Dist. Cuyahoga No. 98345, 2013-Ohio-936, ¶ 19 ("By pleading guilty, a defendant waives all appealable orders except for a challenge as to whether the defendant made a knowing, intelligent, and voluntary acceptance of the plea."); *State v. Yodice*, 11th Dist. Lake No. 2001-L-155, 2002 Ohio App. LEXIS 7163 (Dec. 31, 2002), citing *State v. Spates*, 64 Ohio St.3d 269, 272, 595 N.E.2d 351 (1992) ("By

pleading guilty, appellant has waived his right to challenge the court's ruling on his motion to dismiss.").

{¶ 50} Accordingly, we overrule Cooke's third assignment of error.

V. Sentence

{¶ 51} In his fourth assignment of error, Cooke argues that his 11-year sentence was contrary to law and not supported by the record.

{¶ 52} An appellate court must conduct a meaningful review of the trial court's sentencing decision. *State v. Johnson*, 8th Dist. Cuyahoga No. 97579, 2012-Ohio-2508, ¶ 6, citing *State v. Hites*, 3d Dist. Hardin No. 6-11-07, 2012-Ohio-1892. R.C. 2953.08(G)(2) provides that our review of consecutive sentences is not for an abuse of discretion. Instead, an appellate court must "review the record, including the findings underlying the sentence or modification given by the sentencing court." *Id.* at ¶ 7. If an appellate court clearly and convincingly finds either that (1) "the record does not support the sentencing court's findings" under three specific statutes that require findings (which are not relevant in this case), or (2) "the sentence is otherwise contrary to law," then "the appellate court may increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for resentencing." *Id.* The Ohio Supreme Court has further explained:

> We note that some sentences do not require the findings that R.C. 2953.08(G) specifically addresses. Nevertheless, it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court. That is, an

> appellate court may vacate or modify any sentence that is not clearly and convincingly contrary to law only if the appellate court finds by clear and convincing evidence that the record does not support the sentence.

State v. Marcum, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23.

{¶ 53} Cooke contends that the trial court failed to consider the mitigating factors that were part of his plea negotiations when it sentenced him. These two factors were that (1) he was taking responsibility for his actions and (2) because he was taking responsibility, the children who witnessed the beating would not have to testify. The trial court stated at the sentencing hearing, however, that it considered everything that was before it, which included the state's sentencing memorandum. In its sentencing memorandum, the state said, "it should be noted the defendant did accept responsibility by pleading guilty and he did spare the [s]tate of Ohio from having to call 3 minor children to testify to the savage beating they all witnessed." Thus, the trial court considered the two mitigating factors.

{¶ 54} Moreover, during the plea hearing, the trial court made sure that Cooke understood that the maximum penalty for voluntary manslaughter was a first-degree felony with a maximum sentence of 11 years in prison and that it was not promising to impose any particular sentence in exchange for his guilty plea. Therefore, the trial court retained the discretion to sentence Cooke to any sentence within the statutory sentencing guidelines, which for a first-degree felony is between three and eleven years. R.C. 2929.14(A).

{¶ 55} As we recently explained in *State v. McHugh*, 8th Dist. Cuyahoga No. 108372, 2020-Ohio-1024, "a trial court is permitted to impose the maximum sentence for an offense without making any statutory findings, as long as it considers all of the mandatory sentencing provisions." *Id.* at ¶ 17, citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. We noted that "[b]efore *Foster*, this was not the case." *Id.*

{¶ 56} Former R.C. 2929.14(B), enacted by S.B. 2 and in effect prior to the decision in *Foster*, stated:

> [I]f the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, *the court shall impose the shortest prison term authorized for the offense* pursuant to division (A) of this section [setting forth the basic ranges], unless one or more of the following applies:
>
> (1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.
>
> (2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

(Emphasis added.)

{¶ 57} Former R.C. 2929.14(C), also enacted by S.B. 2 and in effect prior to *Foster*, stated in pertinent part:

> [T]he court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense * * * *only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes*, upon certain major drug offenders[,] and upon certain repeat violent offenders.

(Emphasis added.)

{¶ 58} Thus, under S.B. 2, there was a presumption that the minimum sentence should be imposed for offenders who had never been to prison. To impose more than the statutory minimum or the statutory maximum prison sentence, the trial court judge had to make the findings set forth in former R.C. 2929.14(B) and (C).

{¶ 59} In *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, however, the Ohio Supreme Court found that the findings under former R.C. 2929.14(B) and (C) amounted to judicial fact-finding that was unconstitutional because the judge, rather than a jury, made the findings that enhanced a sentence. *Id.* at paragraph one of the syllabus. The Supreme Court determined that such judicial findings violated a defendant's Sixth Amendment right to trial by jury. The Supreme Court's remedy was to sever the offending provisions from the sentencing statutes. *Id.* at paragraph two of the syllabus. Essentially, after severance, the Supreme Court stated that a trial court was free to impose the minimum prison term, the maximum prison term, or anywhere in between the two. *Id.*

{¶ 60} We explained in *McHugh*, 8th Dist. Cuyahoga No. 108372, 2020-Ohio-1024, that "when the General Assembly revived the required consecutive sentencing provision in H.B. 86, which was previously set forth in former R.C. 2929.14(E) and is now in R.C. 2929.14(C)(4), it did not revive former R.C. 2929.14(B) and (C)." *Id.* at ¶ 22. Thus, *Foster* is still good law regarding a trial court's discretion to impose a sentence within the statutory range of an offense as long as it considers the general sentencing guidance statutes, i.e., the purposes and

principles of felony sentencing under R.C. 2929.11 and the seriousness and recidivism factors under R.C. 2929.12. *McHugh* at ¶ 22, citing *Foster*. In doing so, however, the trial court does not need to make findings; "[t]he court is merely to 'consider' the statutory factors." *Id.*, quoting *Foster*.

{¶ 61} Cooke further argues, however, that the trial court failed to properly consider R.C. 2929.11 and 2929.12 when sentencing him. Although Cooke mentions both statutes, he focuses his arguments on R.C. 2929.12, and thus, we will as well.

{¶ 62} R.C. 2929.12 sets forth a nonexhaustive list of factors that the court must consider in relation to the seriousness of the underlying crime and likelihood of recidivism, including "(1) the physical, psychological, and economic harm suffered by the victim, (2) the defendant's prior criminal record, (3) whether the defendant shows any remorse, and (4) any other relevant factors." *State v. Kronenberg*, 8th Dist. Cuyahoga No. 101403, 2015-Ohio-1020, ¶ 26, citing R.C. 2929.12(B) and (D).

{¶ 63} Specifically, Cooke argues that the trial court failed to make any findings under R.C. 2929.12(C), which requires a court to consider factors indicating that the offense is less serious than conduct normally constituting the offense. He contends that "all four of the less serious factors apply in this case." R.C. 2929.12(C) provides:

> The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

{¶ 64} As we explained, however, trial courts are not required to make factual findings on the record under R.C. 2929.11 or 2929.12 before imposing the maximum sentence. *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at paragraph one and two of the syllabus; ¶ 42; *Kronenberg* at ¶ 27. In fact, "[c]onsideration of the factors is presumed unless the defendant affirmatively shows otherwise." *State v. Seith*, 8th Dist. Cuyahoga No. 104510, 2016-Ohio-8302, ¶ 12, citing *State v. Keith*, 8th Dist. Cuyahoga Nos. 103413 and 103414, 2016-Ohio-5234. "[T]his court has consistently recognized that a trial court's statement in the journal entry that it considered the required statutory factors, without more, is sufficient to fulfill its obligations under the sentencing statutes." *Kronenberg* at ¶ 27, citing *State v. Wright*, 8th Dist. Cuyahoga No. 100283, 2014-Ohio-3321.

{¶ 65} Accordingly, although the trial court had to consider R.C. 2929.12(C) when sentencing Cooke, it did not have to make findings on the record when it chose to impose 11 years in prison, which was the maximum sentence for voluntary manslaughter. We note, however, that the trial court did say at the sentencing hearing that it considered all of the information that was before it, the principles and purposes of sentencing, and the seriousness and recidivism factors. It also stated in

the sentencing entry that it considered all required factors under law. The trial court sufficiently established that it considered all required sentencing factors.

{¶ 66} Cooke claims, however, that it was clear from the proceedings that he "acted out of fear and upon a bona fide belief that he was defending himself, his family[,] and his residence" from the victim. He asserts that he acted under strong provocation in committing the offense and that the victim induced the offense when he broke into Ross's home. While these factors normally indicate that an offense is less serious under R.C. 2929.12(C), they do not in this case. Cooke pleaded guilty to voluntary manslaughter instead of murder, and thus, those factors were elements of the offense to which he pleaded guilty.[1] "Therefore, those factors do little, if anything, to show that [Cooke's] conduct was 'less serious' than conduct normally constituting the offense of voluntary manslaughter." *State v. Timpe*, 12th Dist. Clermont No. CA2015-04-034, 2015-Ohio-5033, ¶ 17.

{¶ 67} Cooke also contends that he did not intend to physically harm the victim, which is also a factor under R.C. 2929.12(C) making an offense "less serious." This factor, however, is not supported by the record in this case. Even if we believed that Cooke did not initially intend to cause physical harm to the victim, that changed at some point. As the trial court told Cooke at the sentencing hearing, "[T]his is a prime example of when enough should have been enough, and you should have

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[1] Voluntary manslaughter under R.C. 2903.03(A) provides: "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another or the unlawful termination of another's pregnancy."

stopped." The trial court further described the injuries that Cooke inflicted upon the victim while beating him while he was lying on the ground:

> 21 separate injuries to [the victim's] head alone; multiple contusions; lacerations and hemorrhages; broken and missing teeth; five separate injuries to his neck; three separate fractures; eight separate injuries to his trunk; and his spine broken in two places; multiple rib fractures; lacerations to his heart, his liver and his right kidney indicate the level of your passion as you pled to, which was pure anger.

{¶ 68} Accordingly, we find no merit to Cooke's assertion that he did not intend to cause physical harm to the victim.

{¶ 69} The trial court also considered Cooke's prior criminal history, which it stated included at least five prior violent convictions, two prior weapon convictions, and his "participation in a crime that * * * resulted in someone's death." Cooke had previously been convicted of involuntary manslaughter in 1996. The trial court pointed out, "Now it's happened again."

{¶ 70} Cooke also briefly argues that his sentence was not consistent with sentences imposed on similarly situated offenders. But Cooke failed to raise this argument below and thus, he has waived this issue for purposes of appeal. *State v. Thomas*, 8th Dist. Cuyahoga No. 94335, 2011-Ohio-183, ¶ 23.

{¶ 71} Finally, Cooke argues, citing to *State v. Moore*, 8th Dist. Cuyahoga No. 99788, 2014-Ohio-5135, that the trial court in this case did not engage in a proportionality analysis. *Moore*, however, dealt with the proportionality analysis that is required for consecutive sentencing under R.C. 2929.14(C)(4). Consecutive sentences are not at issue here. *See id*. at ¶ 23 ("Moore's argument, at its core, is

that the record does not support the court's finding that consecutive sentences are not disproportionate to his conduct and to the danger he poses to the public.").

{¶ 72} In sum, the record establishes the trial court considered all of the required factors under R.C. 2929.11 and 2929.12 when sentencing Cooke. The record also supports Cooke's 11-year sentence.

{¶ 73} Accordingly, Cooke's fourth assignment of error is overruled.

{¶ 74} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

EILEEN T. GALLAGHER, A.J., and
RAYMOND C. HEADEN, J., CONCUR