IN THE SUPREME COURT OF OHIO

IN RE: L.A.B., A MINOR CHILD	:	Case Nos. 2007-0895 2007-0912
	:	On Appeal from the Summit County Court of Appeals Ninth Appellate District
	:	C.A. Case No. 23309

MERIT BRIEF OF APPELLANT L.A.B.

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A child has the right to counsel at all stages of the proceedings against him. A child's waiver of his right to counsel at a probation revocation hearing should be permitted only upon strict compliance with constitutional safeguards that can ensure such waiver is knowing, intelligent, and voluntary and thus comports with the due process requirements of Article I, Section 16 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. 12

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STATEMENT OF THE CASE AND FACTS

On June 8, 2006, L.A.B., aged 13, appeared in the Summit County Juvenile Court for a probation revocation hearing before a magistrate in case number DL-05-07-3586. (T.pp. 39-49 (S-3)). During the probation revocation portion of the hearing, the magistrate began, saying:

THE COURT:	We are on the record for the matter of [L.A.B.]. Case number is DL 05-07-3586. It is before the court for a preliminary hearing on a probation violation. [L.A.B] is present with his mother and his probation officer, Mr. Sims. [***] Okay. The probation violation indicates that you have violated your probation by not attending YOC on a regular basis and having missed the last three days in a row. Do you understand that?
[L.A.B.]:	Yes.
THE COURT:	All right, [L.A.B.]. You have the right to be represented by a lawyer at any time. If you can't afford a lawyer, I will give you one that you don't have to pay for. Do you understand that?
[L.A.B.]:	Yes.
THE COURT:	Do you want to be represented by a lawyer or do you want to proceed today without a lawyer?
[L.A.B.]:	Without a lawyer.

(T.p. 39.) Then, the magistrate explained L.A.B.'s trial rights and possible maximum penalty, which was a Department of Youth Services commitment "for a minimum period of one year, maximum until you are 21 years old." (T.p. 40 (S-3)). The magistrate continued:

THE COURT:	Understanding those things, [L.A.B.], do you want to admit or do you want to deny the probation violation?
[L.A.B.]:	Admit.
THE COURT:	You understand by doing that, you would give up the right to have an attorney and give up the right to a trial?
[L.A.B.]:	Yes.

(T.p. 41 (S-3)). After the magistrate accepted L.A.B.'s admission to the probation violation, it proceeded directly to disposition. The magistrate did not explain that L.A.B. also had a right to

counsel for disposition, or explain that it was going to proceed directly to disposition; instead, the magistrate informed L.A.B.:

> So I'm going to tell you what, Mr. [L.A.B.]. I'm going to ask you right now why you think I should not send you to the Department of Youth Services today, because I'm going to tell you what, you are not going home. Today is a very sad day for you. The bus to DYS leaves on Monday. ***

(T.p. 42 (S-3)).

During the disposition portion of L.A.B.'s hearing, L.A.B.'s probation officer recommended that L.A.B. "go to intensive probation, [to] see what someone with a lesser caseload can do with him, see if they can work with him." (T.p. 44 (S-3)). Then, L.A.B.'s mother asked the magistrate if she could add her perspective. (T.p. 46 (S-3)). She told the magistrate:

> All this extending his probation, then going to YOC and all that extra, it's not going to help. By him getting locked up in the detention center, the same day he is going to get released, he's going to do the same thing. Enough is enough. We need to be hard on him and send him where he's supposed to go.

(T.p. 46 (S-3)). Further, L.A.B.'s mother did not speak to L.A.B., offer any other dispositional alternatives on his behalf, or object to the magistrate's disposition at any point during his proceeding. (T.pp. 39-49 (S-3)). For disposition, the magistrate sentenced L.A.B. to the Department of Youth Services for a minimum period of one year, maximum to his twenty-first birthday. (T.p. 47 (S-3)). The magistrate did not find that L.A.B. "violated a condition of probation of which the child had, pursuant to Juv.R. 34(C), been notified." See Juv.R. 35(B). Upon the approval of the magistrate's decision, the judge's final decision in this case did not state any findings or procedures pursuant to Juv.R. 35(B), which governs probation revocation hearings. (S-2). The juvenile court's entry indicates that the hearing type that occurred on June 8, 2006 was "Preliminary," an "Adjudication," and a "Disposition." (S-2).

L.A.B., who was not represented by counsel during his proceeding before a magistrate, did not file objections to the magistrate's decision pursuant to Juv.R. 40.[1] And, at no time during L.A.B.'s proceedings did the magistrate inform him of his responsibility to file objections pursuant to Juv.R. 40, or the effect his failure to file objections would have on his ability to appeal his case. Although the court's entry did include a very technical explanation, "THE MAGISTRATE'S DECISION IS APPROVED AND ENTERED AS A MATTER OF RECORD, SUBJECT TO THE RIGHT OF THE PARTY TO FILE WRITTEN OBJECTIONS WITHIN 14 DAYS OF ITS

FILING, PER JUVENILE RULE 40(E)(3)" (S-2), it did not warn that if objections were not filed, the party "shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law..." according to the version of Juv.R. 40 that was in effect at that time.[2]

On July 7, 2006, L.A.B. filed an appeal of his probation violation adjudication and disposition and assigned error to the court's failure to obtain a valid waiver of his right to counsel, to the court's failure to comply with the requirements of Juv.R. 35(B), and to the court's failure to appoint a guardian ad litem to represent his best interests when the record revealed that a strong possibility of a conflict existed between him and his mother.

On March 30, 2007, the Court of appeals issued its opinion in this case. In its opinion, the court stated that Juvenile Rule 35(B), not Juvenile Rule 29, applies to probation revocation hearings. In re L.A.B., Summit App. No. 23309, 2007-Ohio-1479 at ¶7. It found that Juv.R. 35(B)

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[1] At the time of L.A.B.'s proceeding, the requirements for filing objections to the magistrate's decision were found in Juv.R. 40(E)(3)(a-c). Under the version of the rule adopted on July 1 2006, the objections section is found in Juv.R. 40(D)(3)(b)(i)-(iii).

did not require the trial court to apprise L.A.B. "of the possible punishment for his probation violation before he waived his right to counsel," because "Juv.R. 35(B) only requires that the juvenile be apprised of the 'condition of probation' he allegedly violated and the 'grounds on which probation revocation is proposed.'" Id. at ¶12. It concluded that the juvenile court did not err by accepting L.A.B.'s waiver of his right to counsel because the court informed him "of the charge against him, advised [L.A.B.] of his right to counsel and that counsel could be appointed for him if he could not afford it." Id. at ¶14.

As to L.A.B.'s second and third assignments of error, which concerned the juvenile magistrate's failure to follow the requirements of Juv.R. 35(B) and the magistrate's failure to appoint a guardian ad litem to represent his best interests when there was a strong possibility that a conflict existed between him and his mother, the court of appeals found that L.A.B. "failed to object to the magistrate's decisions that culminated in the Probation Violation Order," and that "pursuant to Juv.R. 40(D)(3)(a)[sic[3]] and Civ.R. 53(D)(3)(b), [L.A.B.] could have filed objections to the magistrate's decision within fourteen days after the filing of that decision." Id. at ¶16. The court found that "due to L.A.B.'s "failure to object to the magistrate's decision, he has deprived the trial court of the opportunity to correct the alleged errors in the first instance and has thereby forfeited his right to appeal the findings and conclusions contained in the magistrate's decision." Id. The court noted that an exception to the so-called "forfeiture doctrine" exists if plain error is found, but declined to address L.A.B.'s remaining issues because

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[2] At the time of L.A.B.'s proceeding, the waiver provision was found in Juv.R. 40(E)(3)(d). Unlike the current version of the rule, the former version did not contain the phrase, "Except for a claim of plain error…."

[3] Juv.R. 40(D)(3)(a) provides for the timing; content; and, form, filing, and service of the magistrate's decision. Juv.R. 40(D)(3)(b) provides for the filing of objections to the magistrate's decision.

he "neither argued plain error, nor [did he explain] why we should delve into either of these issues for the first time on appeal." Id. at ¶19.

In its opinion, the court did not address the fact that L.A.B. was not warned about the "forfeiture doctrine" at any time during or after his proceedings and failed to note that the provision for waiver in Juvenile Rule 40 that was in effect at the time of L.A.B.'s hearing did not provide an exception for a "claim of plain error;" instead, it cited to its own precedent in State v. Hairston, Lorain App. No. 05CA008768, 2006-Ohio-4925 at ¶9, this Court's decision in State v. McKee, 91 Ohio St.3d 292, 299, n.3, 2001-Ohio-41 (Cook, J., dissenting), and Criminal Rule 52(B). L.A.B. at ¶19.

L.A.B. filed a motion to certify a conflict with the decision of the Fourth Appellate District in In re Lohr, Monroe App. No. 06 MO 6, 2007-Ohio-1130. On April 18, 2007, the Ninth District Court of Appeals Certified a Conflict of L.A.B.'s question, " Does Juvenile Rule 29 apply to probation violations in juvenile court?"

This Court accepted L.A.B.'s discretionary appeal and certified conflict, consolidated the cases for briefing and argument, and held the cases for the decision in 06-1074, In re C.S. (115 Ohio St.3d 267, 2007-Ohio-4919.) On December 14, 2007, this Court ordered briefing to resume.

ARGUMENT

CERTIFIED QUESTION

Does Juvenile Rule 29 apply to probation revocation hearings in juvenile court?

Yes. "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony...." In re Gault (1967), 387 U.S. 1, 57, 87 S. Ct. 1428 citing Kent v. U.S. (1966), 383 U. S. 541, 554, 86 S. Ct. 1045. Juvenile Rule 35(B) specifically provides some of the ceremony for a proceeding for revocation of probation:

> (B) Revocation of probation. The court shall not revoke probation except after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to Juv. R. 4(A). Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to Juv. R. 34(C), been notified.

Juv.R. 35(B).

But the ceremony provided by 35(B), in and of itself, falls woefully short of providing all of the process that is due to a child in juvenile court. And the limits of Juv.R. 35's protections were evidenced in L.A.B., below—in L.A.B., the Ninth District Court of Appeals found that Juv.R. 35(B) did not require the trial court to apprise L.A.B. "of the possible punishment for his probation violation before he waived his right to counsel," because "Juv.R. 35(B) only requires that the juvenile be apprised of the 'condition of probation' he allegedly violated and the 'grounds on which probation revocation is proposed.'" In re L.A.B., Summit App. No. 23309, 2007-Ohio-1479 at ¶12. The court concluded that the juvenile court did not err by accepting L.A.B.'s waiver of his right to counsel because the court informed him "of the charge against

him, advised [L.A.B.] of his right to counsel and that counsel could be appointed for him if he could not afford it." Id. at ¶14.

But whether Juvenile Rule 29, which provides for the colloquies for waiver of counsel and entry of admission, applies to juvenile probation violation hearings is far from clear. In its opinion below, the court of appeals relied on its decisions in In re Rogers (May 23, 2001), Summit App. No. 20393, In re Motley (1996), 110 Ohio App. 3d 641, 674 N.E.2d 1268, and In re Collins (Sept. 27, 1995), Medina App. No. 2365-M (Dickenson, J., dissenting), and found that only Juv.R. 35(B), and not Juv.R. 29, applies to probation revocation hearings. L.A.B. at ¶7.

Of the three cases cited in the court of appeals' opinion, only Rogers involved a child's waiver of his right to counsel; Motley and Collins involved allegations that the juvenile court erred when it accepted the child's plea. The Eighth and the Twelfth District Courts of Appeals have applied Motley and have found that Juv.R. 35(B), and not Juv.R. 29, applies to probation revocation hearings where a child has alleged improper waiver of counsel. In re Bennett (June 12, 1997), Cuyahoga App. No. 71121; In re J.B., Brown App. Nos. CA2004-09-024, CA2004-09-025, 2005-Ohio-5045.

In Collins, the dissent addressed the allegation of an improper acceptance of the child's plea and noted that although Juvenile Rule 35(B) does not incorporate the requirements of Juv.R. 29(D), it does incorporate the requirements of due process. Collins at *9-10. The Seventh District Court of Appeals, in In re Royal (1999), 132 Ohio App. 3d 496, 725 N.E.2d 685, distinguished Collins where the appellant did not have counsel, notice of the probation violation, or a probation revocation hearing. Following Royal, the Seventh District has recently held that Juvenile Rule 29 does apply to probation revocation hearings and that "a 'meaningful dialogue' must take place between the magistrate or judge and the juvenile at a juvenile probation

revocation proceeding before a waiver of the right to counsel can be considered valid." In re Lohr, Monroe App. No. 06 MO 6, 2007-Ohio-1130, ¶60 and ¶49, See, In re Mulholland, Mahoning App. No. 01-C.A.-108, 2002-Ohio-2213, and Royal, 132 Ohio App. 3d 496.

A child's basic rights to due process and to counsel at every stage of the proceedings is at issue in this case. In L.A.B., the Ninth District Court of Appeals found that there are different constitutional, statutory, and procedural protections for juvenile defendants subject to probation revocation than for juvenile defendants subject to other types of juvenile court hearings. But there are not: a child's rights to counsel and to due process are the same any time he steps into juvenile court. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Section 16 of the Ohio Constitution, Ohio Revised Code Section 2151.352, and Juvenile Rules 3, 4, 29, 35.

Although Juv.R. 35(B) does not specifically refer to Juv.R. 29, the application of Juv.R. 29 to probation revocation hearings honors the applicability and construction of the Juvenile Rules as is provided by Juv.R. 1:

> **(A) Applicability.** These rules prescribe the procedure to be followed in all juvenile courts of this state in all proceedings coming within the jurisdiction of such courts [* * *].
> **(B) Construction.** These rules shall be liberally interpreted and construed so as to effectuate the following purposes:
> (1) to effect the just determination of every juvenile court proceeding by ensuring the parties a fair hearing and the recognition and enforcement of their constitutional and other legal rights;
> (2) to secure simplicity and uniformity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay;
> [* * *]

Juv.R. 1.

Juvenile Rule 29, by its title, applies to adjudicatory hearings. And, a probation violation revocation hearing fits the definition of an "adjudicatory hearing" because Juv.R. 2 provides that

an "'Adjudicatory hearing' [is] a hearing to determine whether a child is a juvenile traffic offender, delinquent, unruly, abused, neglected, or dependent or otherwise within the jurisdiction of the court."

A juvenile court proceeding is initiated by a complaint that "sets forth the allegations that form the basis for juvenile court jurisdiction." Juv.R. 2(F). In L.A.B.'s case, the complaint alleged that L.A.B. "violated his probation by not attending YOC on a regular basis." (Complaint, (S-1)). After a complaint is filed, a juvenile court can conduct a hearing pursuant to Juv.R. 35(B) at which it may find a child delinquent. R.C. 2152.02(F)(2); Juv.R. 2(I). In L.A.B.'s case, the juvenile court found that L.A.B. was charged with a probation violation in violation of R.C. 2152.02, and found L.A.B. "Delinquent" of that charge. (Journal Entry, (S-2)). Under Juv.R. 2(F), a juvenile court determines a child is "delinquent" after an adjudicatory hearing, therefore, because the Summit County Juvenile Court found L.A.B. delinquent, it must have conducted an adjudicatory hearing.

Juvenile Rule 29 provides the basic procedure for conducting an adjudicatory hearing in juvenile court and the foundation for due process during a juvenile delinquency proceeding:

> **(A) Scheduling the hearing**
> [* * *]
> **(B) Advisement and findings at the commencement of the hearing.**
> At the beginning of the hearing, the court shall do all of the following:
> (1) Ascertain whether notice requirements have been complied with and, if not, whether the affected parties waive compliance;
> (2) Inform the parties of the substance of the complaint, the purpose of the hearing, and possible consequences of the hearing, including the possibility that the cause may be transferred to the appropriate adult court under Juv. R. 30 where the complaint alleges that a child fourteen years of age or over is delinquent by conduct that would constitute a felony if committed by an adult;
> (3) Inform unrepresented parties of their right to counsel and determine if those parties are waiving their right to counsel;
> (4) Appoint counsel for any unrepresented party under Juv. R. 4(A) who does not waive the right to counsel;

(5) Inform any unrepresented party who waives the right to counsel of the right: to obtain counsel at any stage of the proceedings, to remain silent, to offer evidence, to cross-examine witnesses, and, upon request, to have a record of all proceedings made, at public expense if indigent.

(C) Entry of admission or denial.

[* * *]

(D) Initial procedure upon entry of an admission.

The court may refuse to accept an admission and shall not accept an admission without addressing the party personally and determining both of the following:

(1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;

(2) The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing.

The court may hear testimony, review documents, or make further inquiry, as it considers appropriate, or it may proceed directly to the action required by division (F) of this rule.

(E) Initial procedure upon entry of a denial.

[* * *]

(F) Procedure upon determination of the issues.

Upon the determination of the issues, the court shall do one of the following:

[* * *]

(2) If the allegations of the complaint, indictment, or information are admitted or proven, do any one of the following, unless precluded by statute:

(a) Enter an adjudication and proceed forthwith to disposition;

[* * *]

(3) Upon request make written findings of fact and conclusions of law pursuant to Civ. R. 52.

[* * *]

Juv.R. 29.

In In re C.S., this Court recently considered the application of Juv.R. 29 to juvenile delinquency proceedings, and found that:

> The juvenile court judge must be guided by Juv.R. 29 in the process of considering a waiver of counsel and in accepting an admission. Juv.R. 29(B) mandates that the juvenile court judge must advise a juvenile, at the commencement of the adjudicatory hearing, of certain rights, including the rights to counsel. Juv.R. 29(D) further mandates that before an admission can be accepted, the juvenile court judge must be satisfied that the admission is

> voluntarily made with the understanding of the nature of the allegations and the consequences of the admission and that by entering the admission, the juvenile is waiving the rights to confront witnesses and challenge evidence, to remain silent, and to introduce his own evidence.

In re C.S., 115 Ohio St.3d 267, 2007-Ohio-4919 at ¶ 111.[4]

When the court of appeals limited its analysis of L.A.B's waiver of his right to counsel to the right provided in Juv.R. 35(B), it concluded that the juvenile court did not err by accepting L.A.B.'s waiver of his right to counsel where the juvenile court informed him only "of the charge against him, advised [him] of his right to counsel[, and advised him]that counsel could be appointed for him if he could not afford it." L.A.B. at ¶14. Further, under Juv.R. 35(B), the court of appeals did not require the juvenile court to apprise L.A.B. "of the possible punishment for his probation violation before he waived his right to counsel," because it found that "Juv.R. 35(B) only requires that the juvenile be apprised of the 'condition of probation' he allegedly violated and the 'grounds on which probation revocation is proposed.'" In re L.A.B., Summit App. No. 23309, 2007-Ohio-1479 at ¶12.

Because the court in L.A.B. declined to apply Juv.R. 29 to L.A.B.'s probation revocation hearing, L.A.B. was denied his full rights to due process under the Juvenile Rules. Therefore, this Court should hold that Juv.R. 29 applies to all adjudicatory hearings in juvenile court—including probation revocation hearings.

[4] In C.S, the juvenile respondent was charged with delinquency counts of theft and of a probation violation.

FIRST PROPOSITION OF LAW

A child has the right to counsel at all stages of the proceedings against him. A child's waiver of his right to counsel at a probation revocation hearing should be permitted only upon strict compliance with constitutional safeguards that can ensure such waiver is knowing, intelligent, and voluntary and thus comports with the due process requirements of Article I, Section 16 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

I. Introduction

Regardless of the forum, the right to counsel in any proceeding in which personal liberty is at stake is a basic requirement of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In re Gault (1967), 387 U.S. 1, 30-31, 87 S. Ct. 1428. "In all criminal prosecutions, the accused shall *** have the assistance of Counsel for his defence." Sixth Amendment to the United States Constitution. In Ohio, "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel." Section 10, Article I of the Ohio Constitution; State v. Martin, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶22. Although juvenile delinquency proceedings are civil proceedings, "[w]hatever their label, juvenile delinquency laws feature inherently criminal aspects that we cannot ignore." State v. Walls, 96 Ohio St.3d 437, 446, 2002-Ohio-5059; 775 N.E.2d 829, ¶26. Therefore, "numerous constitutional safeguards normally reserved for criminal prosecutions are equally applicable to juvenile delinquency proceedings." In re C.S. 115 Ohio St.3d 267, 2007-Ohio-4919 at ¶73, citing Walls at 446. See also Gault at 31-57 and In re Agler (1969), 19 Ohio St.2d 70, 78, 249 N.E.2d 808. Specifically, a child in a juvenile delinquency proceeding "requires the guiding hand of counsel at every step in the proceedings against him." Gault at 36, citing Powell v. Alabama (1932), 287 U.S. 45, 69, 53 S. Ct. 55.

A child's right to counsel at a probation revocation hearing is no less important than his right to counsel at any other stage of the proceedings—especially where the child's liberty is at stake. It follows then, that a child's waiver of his right to counsel at a probation revocation hearing must be as knowing, as intelligent, and as voluntary as it is at any other stage of the proceedings.

II. A child's waiver of counsel at any stage of the proceedings must be knowing, intelligent, and voluntary.

Courts have long recognized that children, who are by their very nature naïve, unsophisticated, less educated, and more dependent upon authority, need special care and help when dealing with the justice system. Haley v. Ohio (1948), 332 U.S. 596, 68 S. Ct. 302; Gallegos v. Colorado (1962), 370 U.S. 49, 82 S. Ct. 1209; John L. v. Adams (1992), 969 F.2d 228. See also C.S. at ¶82 ("A juvenile typically lacks sufficient maturity and good judgment to make good decisions consistently and sufficiently foresee the consequences of his actions."). Therefore, "[t]he juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings and to ascertain whether he has a defense and to prepare and submit it." Id. citing Gault at 36.

This Court has said that R.C. 2151.352 "provides a statutory right to appointed counsel that goes beyond constitutional requirements." C.S at ¶83, citing In re Williams, 101 Ohio St.3d 398, 2004-Ohio-1500, ¶15, citing State ex rel. Asberry v. Payne, 82 Ohio St.3d 44, 46, 1998-Ohio-596. Specifically, children have the right to counsel at all stages of the proceedings in juvenile court. R.C. 2151.352, see Juv. R. 29(B)(5); C.S. at ¶84. Along with the right to counsel as per R.C. 2151.352, Ohio has also incorporated constitutional safeguards regarding a child's right to counsel in its Rules of Procedure. Juv.R. 4(A) provides that "[e]very party shall have the right to be represented by counsel and every [party] the right to appointed counsel if indigent."

Juv.R. 29(B) requires that the court inform unrepresented parties of their right to counsel "[a]t the beginning of the hearing." Juv.R. 29(B)(3). The Juvenile Rules also recognize that, like an adult, a juvenile may waive his right to counsel. Juv.R. 3; Juv.R. 29(B)(3) and (4). See also C.S. at ¶85.

Waiver of a child's constitutional right to counsel must be "an intentional relinquishment or abandonment of a known right." Id. at ¶105, citing State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856, ¶31. To be valid, a juvenile's waiver of the right to counsel must be knowing, intelligent, and voluntary. C.S. at ¶106, citing State v. Gibson (1976), 45 Ohio St.2d 366, 345 N.E.2d 399. Moreover, a juvenile court judge "must scrupulously ensure that the juvenile fully understands, and intentionally and intelligently relinquishes, the right to counsel." C.S. at ¶106, citing Gibson at paragraph two of the syllabus.

This Court also found that "in the discharge of that duty, the judge is to engage in a meaningful dialogue with the juvenile;" and that "[i]nstead of relying solely on a prescribed formula or script for engaging a juvenile during consideration of the waiver, [* * *] the inquisitional approach is more consistent with the juvenile courts' goals, and is best suited to address the myriad factual scenarios that a juvenile judge may face in addressing the question of waiver." C.S. at ¶107 (internal citation omitted).

A court of appeals is to apply a totality-of-the-circumstances test to determine if a valid waiver of the right to counsel has occurred in the juvenile court. Id. at ¶108. To satisfy this test, a court of appeals must determine whether the juvenile court judge considered "the age, intelligence, and education of the juvenile; the juvenile's background and experience generally and in the court system specifically; the presence or absence of the juvenile's parent, guardian, or custodian; the language used by the court in describing the juvenile's emotional stability; and the

complexity of the proceedings." Id. And, in adjudicatory hearings, "the juvenile court judge must be guided by Juv.R. 29 in the process of considering a waiver of counsel and in accepting an admission." Id. at ¶111.

The juvenile court must also comply with certain procedural guidelines, including obtaining a written waiver of counsel in serious cases: "where a juvenile is charged with a serious offense, the waiver of the right to counsel must be made in open court, recorded, and in writing." Id. at ¶109, citing State v. Brooke, 113 Ohio St.3d 199, 2007-Ohio-1533, at paragraph two of the syllabus.

But a child may not waive his right to counsel in juvenile court unless he is represented by his "parent, guardian, or custodian." R.C. 2151.352; C.S. at ¶98 ("If the juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel.").

In this case, L.A.B., aged 13, appeared in the Summit County Juvenile Court for a probation revocation hearing before a magistrate. (T.pp. 39-49 (S-3)). During the probation revocation portion of the hearing, the magistrate began, saying:

THE COURT:	We are on the record for the matter of [L.A.B.]. Case number is DL 05-07-3586. It is before the court for a preliminary hearing on a probation violation. [L.A.B] is present with his mother and his probation officer, Mr. Sims [***] Okay. The probation violation indicates that you have violated your probation by not attending YOC on a regular basis and having missed the last three days in a row. Do you understand that?
[L.A.B.]:	Yes.
THE COURT:	All right, [L.A.B.]. You have the right to be represented by a lawyer at any time. If you can't afford a lawyer, I will give you one that you don't have to pay for. Do you understand that?
[L.A.B.]:	Yes.

THE COURT:	Do you want to be represented by a lawyer or do you want to proceed today without a lawyer?
[L.A.B.]:	Without a lawyer.

(T.p.39 (S-3)). Then, the magistrate explained L.A.B.'s trial rights and possible maximum penalty, which was a Department of Youth Services commitment "for a minimum period of one year, maximum until you are 21 years old." (T.p. 40 (S-3)). The magistrate continued:

THE COURT:	Understanding those things, [L.A.B.], do you want to admit or do you want to deny the probation violation?
[L.A.B.]:	Admit.
THE COURT:	You understand by doing that, you would give up the right to have an attorney and give up the right to a trial?
[L.A.B.]:	Yes.

(T.p. 41 (S-3)). After the magistrate accepted L.A.B.'s admission to the probation violation, it proceeded directly to disposition. The magistrate did not explain that L.A.B. also had a right to counsel for disposition, or explain that it was going to proceed directly to disposition; instead, the magistrate informed L.A.B.:

> So I'm going to tell you what, Mr. [L.A.B.]. I'm going to ask you right now why you think I should not send you to the Department of Youth Services today, because I'm going to tell you what, you are not going home. Today is a very sad day for you. The bus to DYS leaves on Monday. ***

(T.p. 42 (S-3)).

During the disposition portion of L.A.B.'s hearing, L.A.B.'s probation officer recommended that L.A.B. "go to intensive probation, [to] see what someone with a lesser caseload can do with him, see if they can work with him." (T.p. 44 (S-3)). Then, L.A.B.'s mother asked the magistrate if she could add her perspective. (T.p. 46 (S-3)). She told the magistrate:

> All this extending his probation, then going to YOC and all that extra, it's not going to help. By him getting locked up in the detention center, the same day he is going to get released, he's going to do the same thing. Enough is enough. We need to be hard on him and send him where he's supposed to go.

(T.p.46 (S-3)). Further, L.A.B.'s mother did not speak to L.A.B., offer any other dispositional alternatives on his behalf, or object to the magistrate's disposition at any point during his proceeding. (T.pp. 39-49 (S-3)). For disposition, the magistrate sentenced L.A.B. to the Department of Youth Services for a minimum period of one year, maximum to his twenty-first birthday. (T.p. 47 (S-3)).

The application of C.S. to L.A.B.'s waiver of counsel during his probation can lead to only one conclusion: L.A.B. did not validly waive his right to counsel. First, the magistrate did not obtain L.A.B.'s waiver of his right to counsel at all—it simply informed him of his right to counsel and to appointed counsel, if indigent, and asked him whether he wanted a lawyer or wanted to proceed without a lawyer. (T.p.39 (S-3)). L.A.B.'s waiver cannot be considered to be "an intentional relinquishment or abandonment of a known right" where he was not informed of his right to counsel at every stage of the proceedings—including disposition. See C.S. at ¶105, citing Foster at ¶31. And, as will be addressed in the next section, the magistrate did not inform L.A.B. of his responsibility to file objections to the magistrate's decision pursuant to Juv.R. 40 before it allowed L.A.B., a thirteen-year-old child, to represent himself.

Further, the record reveals that the juvenile magistrate failed to consider any of the factors of the totality-of-the-circumstances test (C.S. at ¶108); failed to appoint counsel where L.A.B.'s parent did not advise or counsel L.A.B. about his decision to waive counsel (C.S. at ¶95-102); and, did not obtain a written waiver of L.A.B.'s right to counsel (C.S. at ¶109). But, because the court of appeals limited its waiver-of-counsel analysis to the meager right-to-counsel provisions in Juv.R. 35(B), it found that the juvenile court did not err by accepting L.A.B.'s waiver of his right to counsel. L.A.B. at ¶14.

Now, more than forty years after the U.S. Supreme's Court's landmark decision in Gault, the precise standard for reviewing a child's claim of error regarding his waiver of counsel is certain. C.S. at ¶105-115. And now, as in cases involving adults, there is a strong presumption against waiver of the constitutional right to counsel. Id at ¶105, citing Johnson v. Zerbst (1938), 304 U.S. 458, 464, 58 S. Ct. 1019. Because a child's right to counsel in a probation revocation hearing is as important as his right to counsel at every other stage of the proceedings, his waiver of his right to counsel at a probation revocation hearing cannot stand unless it comports with the standard for waiver issued by this Court in C.S..

Because L.A.B.'s waiver of counsel was not valid, this Court should reverse the decision of the court of appeals and remand the case to the juvenile court.

SECOND PROPOSITION OF LAW

When a child appears in juvenile court before a magistrate, the magistrate's failure to warn the child of the child's responsibility to file objections to the magistrate's decision pursuant to Juvenile Rule 40 before permitting the child to waive his right to counsel is structural error and thus warrants automatic reversal.

I. Introduction

Proposition of Law II concerns a child's waiver of counsel at a probation revocation hearing before a magistrate. For children whose cases are heard before a magistrate in juvenile court, an additional responsibility attaches: unless a party files objections to the magistrate's decision according to Juvenile Rule 40(D)(3)(b), he shall not assign error to the court's adoption of the magistrate's decision on appeal. Accordingly, the assistance of counsel at this stage is especially important because the requirements of Juvenile Rule 40(D)(3)(b) are technical, and the failure to comply with the rule can prove fatal to a child's claims on appeal.

II. The application of Juv.R. 29 to probation revocation hearings would make the appellate process fair for children who have been found to have entered invalid admissions in a hearing before a magistrate.

For children who are represented by counsel at their proceedings before magistrates, their failures to file objections to the magistrate's decision have not prevented courts of appeals from hearing their assigned errors on appeal, because their errors can be considered through a claim of ineffective assistance of counsel. See, e.g., In re Meatchum, Hamilton App. No. C-050-291, 2006-Ohio-4128 at ¶¶30-32; In re D.B., Montgomery App. No. 20979, 2005-Ohio-5583 at ¶¶48-53 ; In re Darvius C., Erie App. No. E-00-064, 2002-Ohio-851 at ¶14.

Children who are not represented by counsel who have not filed objections to the magistrate's decision pursuant to Juv.R. 40 cannot pursue their assignments of error through an ineffective assistance of counsel claim. However, at least two courts of appeals have addressed a

child's claim of invalid waiver of counsel despite the child's failure to file objections to the magistrate's decision. The Fifth District Court of Appeals has found that the child's failure to file objections to the magistrate's decision did not bar her from assigning error on appeal where the court found she had not validly waived her right to an attorney below. In re Kindred, Licking App. No. 04 CA 7, 2004-Ohio-3647 at ¶¶25-26. In L.A.B., the court of appeals found that the juvenile court obtained a valid waiver of L.A.B.'s right to counsel—even though the court did not specifically inform him of his responsibilities pursuant to Juvenile Rule 40—and refused to consider his remaining assignments of error because he did not allege plain error on appeal. L.A.B. at ¶9-20.

But two courts of appeals have found that when a magistrate has failed to substantially comply with Juv.R. 29(D) in accepting a respondent's admission in juvenile court, plain error is presumed; thus, the waiver doctrine of Juv.R. 40 has been found to be inapplicable. See, e.g., In re Tabler, Lawrence App. No. 06CA30, 2007-Ohio-411, In re Etter, Hamilton App. No. C-970510, 134 Ohio App. 3d 484, 493, 731 N.E.2d 694.

Should this Court find that Juv.R. 29 governs all adjudicatory hearings—including probation revocation hearings[5]—it could decline to apply the waiver doctrine of Juv.R. 40 as in Tabler and Etter. The application of Juv.R. 29 to L.A.B.'s case would warrant reversal—especially where the magistrate did not substantially comply with Juv.R. 29(D) when it accepted L.A.B.'s admission and when it did not make the required factual findings and procedural findings concerning L.A.B.'s rights to notice and his opportunity to be heard, as is required by Juv.R. 35(B). But the question remains: What if L.A.B. had entered a valid admission to his probation violation? For children who are unrepresented by counsel before magistrates in

[5] See supra pp. 6-11.

juvenile court, the application of Juv.R. 29 will not, in and of itself, remedy all of the problems that can occur.

III. A child cannot validly waive his right to counsel at the beginning of a hearing before a magistrate unless the magistrate obtains a valid waiver of the child's right to counsel that ensures that the child understands his responsibility to file objections to a magistrate's decision.

In recent years, the waiver of a child's right to counsel in Ohio's juvenile courts has been a far-too-common occurrence. In March 2003, the American Bar Association and Central Juvenile Defender Center, with the assistance of the Juvenile Justice Coalition, Inc., released a study of Ohio's juvenile justice system. Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio, March 2003.[6] In that study, a juvenile court magistrate is quoted as saying, "Sixty to seventy percent of kids waive counsel, and these waivers are not knowing and voluntary." Id. at 25. Of youth interviewed in facilities operated by the Ohio Department of Youth Services, roughly fifteen percent of children housed there had been unrepresented by counsel. Id.

Because children do not always receive the benefit of counsel, this Court's guidance is needed regarding a child's waiver of counsel in a hearing before a magistrate—especially when such a large number of juvenile cases are heard by magistrates. In the Hamilton County Juvenile Court, cases are heard by twenty-six magistrates and only two judges.[7] And in the Montgomery County Juvenile Court, cases are heard by 13 magistrates and two judges.[8]

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[6] http://www.njdc.info/pdf/Ohio_Assessment.pdf

[7] http://www.hamilton-o.org/juvenilecourt/Annual_Report/PDF%202005%20Annual%20Report/2005%20Annual%20Report.PDF, at pp. 32 and 4.

[8] http://www.mcohio.org/revize/montgomery/government/juvenile_court/juvenile_court_organization.html

In L.A.B.'s case, the court of appeals found that the magistrate obtained a valid waiver of L.A.B.'s right to counsel—even though the magistrate did not specifically inform L.A.B. of his responsibilities pursuant to Juvenile Rule 40. L.A.B. at ¶2-14. For children like L.A.B., who do not assert that they want to represent themselves during their proceedings, the court of appeals' holding suggests that they will be held to the level of self-representation—even when they are not warned of the dangers of self-representation. But this Court has held that a defendant who elects to represent himself "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing * * *.'" State v. Johnson, 112 Ohio St.3d 210, 2006-Ohio-6404, at ¶100, quoting Faretta v. California (1975), 422 U.S. 806, 835, 95 S. Ct. 2525, quoting Adams v. United States ex rel. McCann (1942), 317 U.S. 269, 279, 63 S. Ct. 236. And, the United States Supreme Court has held that there is "no material difference" with respect to the constitutional right to counsel between adult and juvenile proceedings. In re Gault (1967), 387 U.S. 1, 36, 87 S. Ct. 1428.

Here, because the magistrate did not conduct a sufficient inquiry regarding L.A.B.'s waiver of his right to counsel that comports with this Court's holdings in C.S., which included the dangers of self-representation before a magistrate in juvenile court, this Court should find that L.A.B.'s waiver of his right to counsel was not valid.

IV. When a magistrate conducts a dispositional hearing, Juv.R. 34(J) requires the magistrate to inform the child of his right to appeal, which includes the requirement that he file objections to the magistrate's decision pursuant to Juv.R. 40. When a magistrate fails to so warn the child, the magistrate commits structural error.

A child in a juvenile delinquency proceeding "requires the guiding hand of counsel at every step in the proceedings against him." Gault at 36, citing Powell v. Alabama (1932), 287 U.S. 45, 69, 53 S. Ct. 55. The step of the proceedings at issue here is the fourteen-day period

after disposition of a juvenile delinquency proceeding, because when a child's proceeding is heard by a magistrate, the child or the child's attorney has fourteen days to file objections to the magistrate's decision. Juv.R. 40(D)(3)(b). The assistance of counsel at this stage is especially important because the requirements of Juv.R. 40(D)(3)(b) are technical, and the failure to comply with the rule can prove fatal to a child's claims on appeal. See L.A.B. at ¶16-19.[9]

In cases where an unrepresented child should assign error to any part of the proceedings—be it a procedural error or the denial of his constitutional rights—that child must indicate to the magistrate that the matter is contested and then file written objections pursuant to the procedure articulated in Juv.R. 40(D)(3)(b), which requires the child to:

1. Request findings of fact and conclusions of law within seven days of the Magistrate's Decision.
2. Submit proposed findings of fact and conclusions of law, if requested by the Magistrate or by local rule.
3. File Objections to the Magistrate's Decision within fourteen days of the filing of the Magistrate's Decision. The Objections would have to be specific and state with particularity the grounds for objection.
4. Request the preparation of the transcript of proceedings and file the transcript with the court within 30 days after filing the objections.
5. Seek leave of court to supplement the objections after the transcript is filed.
6. File Supplemental Objections.

Juv.R. 40(D)(3)(b)(i)-(iii).

[9] Under both the current rule and the former version of the rule that was in effect at the time L.A.B. appeared before the magistrate, the child "shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion" of the magistrate. Juv.R. 40(E)(3)(d) (former); Juv.R. 40(D)(3)(b)(iv). But only the current version of the rule expressly provides an exception for a claim of plain error. 40(D)(3)(b)(iv).

Granted, this Court and various courts of appeals have held that failure to file objections to a magistrate's decision will not entirely preclude appellate review; however, those issues are only reviewed for plain error. In re M.D. (1988), 38 Ohio St.3d 149, 151, 527 N.E.2d 286; In the Matter of Joshua J. Smith, Hancock App. No. 5-01-34, 2002-Ohio-695, ¶6; In re Hall, Summit App. No. 20658, 2002-Ohio-1107, ¶13; In re Harper, Montgomery App. No. 19948, 2003-Ohio-6666, ¶5; In re Etter, at 493; In the Matter of Kevin C., Lucas App. No. L-01-1368, 5, 2002-Ohio-1513, ¶17. Plain error exists when "an error seriously affects the basic fairness, integrity or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." Goldfuss v. Davidson, 79 Ohio St.3d 116, 122-123, 679 N.E.2d 1099.

In L.A.B., the court noted that "before permitting a waiver of counsel, the court has a duty to determine that the relinquishment is of "a fully known right" and is voluntarily, knowingly and intelligently made. L.A.B. at ¶6, quoting Gault at 42. But had the court properly applied this rationale, it would have determined that it is improper to find that a child has knowingly and intelligently waived his right to counsel when the magistrate has not warned the child of his responsibilities under Juvenile Rule 40(D)(3)(b). Unless the magistrate explains the child's responsibilities, the technical requirements in the rule, and what dangers are involved if the child does not know or does not follow the rule, the child cannot fully appreciate the right he is waiving. Further, when a magistrate fails to warn a child of the dangers of proceeding after disposition without representation when an attorney's skills are essential, the magistrate's failure leads to a complete denial of the child's right to counsel during the critical fourteen days after the child's case is disposed.

Juv.R. 29(F) and Juv.R. 34(A) & (J) apply to a disposition hearing in juvenile court because a "'[d]ispositional hearing' means a hearing to determine what action shall be taken

concerning a child who is within the jurisdiction of the court." Juv.R. 2(M). If Juv.R. 29 is found to apply to probation revocation hearings conducted under Juv.R. 35(B), "if the allegations of the complaint [* * *] are admitted or proven" the court can "[e]nter an adjudication and proceed forthwith to disposition." Juv.R. 29(F)(2)(a). Then, pursuant to Juv.R. 34(J), the court has a responsibility to inform the child of his right to appeal. In disposition hearings before magistrates, the information concerning a child's right to appeal must contain an instruction of the responsibility to file objections to the magistrate's decision pursuant to Juv.R. 40(D)(3)(b).

A child who appears without counsel at an adjudication hearing before a magistrate, who has not been informed of his responsibility to file objections to the magistrate's decision and of his right to counsel for purposes of filing objections to the magistrate's decision, would not know that he has a right to counsel at this critical stage of the proceedings. Therefore, a magistrate's failure to obtain an additional and specific knowing, intelligent, and voluntary waiver of the right to counsel for this stage of the proceedings, or failure to appoint counsel for this stage of the proceedings, amounts to a complete denial of counsel.

A complete denial of counsel has been identified as one of very few errors that are so serious that they have been found to "defy analysis by 'harmless error' standards" because they "'affect[] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself.'" State v. Fisher, 99 Ohio St.3d 127, 2003-Ohio-2761, ¶9, quoting Arizona v. Fulminante (1991), 499 U.S. 279, 310, 111 S. Ct. 1246. "Unlike a garden-variety trial error, a structural error 'transcends the criminal process' by depriving a defendant of those 'basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" State v. Drummond, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶271 (Moyer,

C.J., dissenting), quoting United States v. Padilla (C.A.1, 2005), 415 F.3d 211, 219, quoting Rose v. Clark (1986), 478 U.S. 570, 577-578, 106 S. Ct. 3101. Indeed, "the United States Supreme Court has identified structural error in a very limited class of cases, such as the complete denial of counsel, trial by a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, a defective reasonable-doubt instruction, and denial of a public trial." Drummond at ¶271 (emphasis omitted), citing Neder v. United States (1999), 527 U.S. 1, 8, 119 S. Ct. 1827, Johnson v. United States (1997), 520 U.S. 461, 469, 117 S. Ct. 1544.

In L.A.B., despite the complete denial of counsel at the critical stage of the proceedings that followed his dispositional hearing, the court of appeals affirmed the juvenile court's acceptance of L.A.B.'s waiver of his right to counsel. L.A.B. at ¶2-14. Further, citing to its own precedent in State v. Hairston, Lorain App. No. 05CA008768, 2006-Ohio-4925 at ¶9, this Court's decision in State v. McKee, 91 Ohio St.3d 292, 299, n.3, 2001-Ohio-41 (Cook, J., dissenting), and Criminal Rule 52(B), the court of appeals declined to consider L.A.B.'s remaining assignments of error because he "neither argued plain error, nor [did he explain] why we should delve into either of these issues for the first time on appeal." Id. at ¶19.

L.A.B. was not the first time a court of appeals has declined to consider an unrepresented child's assigned errors on appeal when he has failed to file objections to the magistrate's decision pursuant to Juvenile Rule 40, and it is certain not to be the last. Therefore, L.A.B. asks this Court to find that the juvenile court committed structural error when it denied him his right to counsel post-disposition, reverse the decision of the court of appeals, and remand the case to the juvenile court.

CONCLUSION

L.A.B., like all of Ohio's children who appear before a juvenile court, is entitled to counsel at all stages of the proceedings in juvenile court. Juvenile courts are required to respect the strong presumption against a child's waiver of his right to counsel. Therefore, this Court should hold that Juvenile Rule 29 applies to all adjudicatory hearings—including probation revocation hearings, adopt the two propositions of law, reverse the decision of the court of appeals, and remand the case to the juvenile court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Appellant L.A.B.** was forwarded by regular U.S. Mail this 3rd day of March, 2008 to the office of Philip D. Bogdanoff, Assistant Summit County Prosecutor, Safety Building, 53 University Avenue, 7th Floor, Akron, Ohio 44308.

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#273232

IN THE SUPREME COURT OF OHIO

IN RE: L.A.B.,	:	
A MINOR CHILD	:	Case No.
	:	
	:	On Appeal from the Summit
	:	County Court of Appeals
	:	Ninth Appellate District
	:	
	:	C.A. Case No. 23309
	:	

APPENDIX TO

MERIT BRIEF OF APPELLANT L.A.B.

IN THE SUPREME COURT OF OHIO

IN RE: L.A.B., A MINOR CHILD	:	Case No. 07-0895
	:	On Appeal from the Summit County Court of Appeals Ninth Appellate District
	:	C.A. Case No. 23309

NOTICE OF APPEAL OF APPELLANT L.A.B.

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MAY 14 2007
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT L.A.B.

Appellant L.A.B. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. 23309 on March 30, 2007. This case raises substantial constitutional questions, involves a felony, and is of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Notice of Appeal of Appellant L.A.B.** was forwarded by regular U.S. Mail this 14th day of May, 2007 to the office of Philip D. Bogdanoff, Assistant Summit County Prosecutor, Safety Building, 53 University Avenue, 7th Floor, Akron, Ohio 44308.

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COURT OF APPEALS
2007 MAR 30 PM 12:12
SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: L.A.B.

C.A. No. 23309

APPEAL FROM JUDGMENT
ENTERED IN THE
JUVENILE COURT
COUNTY OF SUMMIT, OHIO
CASE No. DL0507003586

DECISION AND JOURNAL ENTRY

Dated: March 30, 2007

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MOORE, Judge.

{¶1} Appellant, L.A.B., appeals the judgment of the Summit County Juvenile Court finding that he had violated the conditions of his probation. We affirm.

I.

{¶2} On May 31, 2006, a complaint was filed in the Summit County Juvenile Court alleging that Appellant had violated his probation by not attending the Youth Outreach Center ("YOC") on a regular basis. On June 8, 2006, Appellant appeared in court before a magistrate. Appellant was accompanied by

his mother but without counsel. Appellant admitted that he had committed a probation violation. The court then asked Appellant whether he wished to be represented by an attorney. Appellant stated that he wished to proceed without counsel. The court then explained Appellant's trial rights and the possible maximum penalty, which consisted of a Department of Youth Services ("DYS") commitment "for a minimum period of one year, maximum until you are 21 years old." Appellant was 13 years old at the time of the hearing. After the court accepted Appellant's admission to the probation violation, it proceeded directly to disposition.

{¶3} During disposition, Appellant's probation officer recommended that Appellant "go to intensive probation, [to] see what someone with a lesser caseload can do with him, see if they can work with him." In addition, Appellant's mother voiced her opinion. She suggested that the court "be hard on him and send him where he's supposed to go." The court sentenced Appellant to the DYS for a minimum period of one year, maximum to his 21st birthday. Appellant timely appealed the court's decision, raising three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT VIOLATED [APPELLANT'S] RIGHT TO COUNSEL AND RIGHT TO DUE PROCESS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION, OHIO REVISED CODE SECTION 2151.352, AND JUVENILE RULES 4 AND 35."

{¶4} In Appellant's first assignment of error, he contends that the trial court violated his right to counsel and right to due process under the U.S. Constitution, Ohio Constitution, R.C. 2151.352 and Juv.R. 4 and 35. We disagree.

{¶5} R.C. 2151.352 codifies a juvenile's right to counsel and states that "[i]f a party appears without counsel, the court shall ascertain whether the party knows of the party's right to counsel and of the party's right to be provided with counsel if the party is an indigent person." Juv.R. 29 governs adjudicatory hearings. Juv.R. 29(B)(3) and (4) state that "[a]t the beginning of the hearing, the court shall do all of the following: (3) [i]nform unrepresented parties of their right to counsel and determine if those parties are waiving their right to counsel; (4) [a]ppoint counsel for any unrepresented party under Juv.R. 4(A) who does not waive the right to counsel[.]" Juv.R. 4 states that "[e]very party shall have the right to be represented by counsel *** if indigent *** when a person becomes a party to a juvenile court proceeding." Juv.R. 35(B) governs revocation of probation and provides that the court may revoke probation only

> "after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to Juv.R. 4(A). Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to Juv.R. 34(C), been notified."

{¶6} A juvenile may waive the right to counsel in most proceedings with permission of the court. Juv.R. 3. However, before permitting a waiver of counsel, the court has a duty to make an inquiry to determine that the

relinquishment is of "a fully known right" and is voluntarily, knowingly and intelligently made. *In re Gault* (1967), 387 U.S. 1, 42. *Gault* established that juveniles facing possible commitment were guaranteed many of the same constitutional rights at the adjudicatory stage as were their adult counterparts, including notification of the right to counsel and the appointment of counsel to indigent juveniles.

{¶7} This Court has held that the provisions of Juv.R. 29 do not apply to probation violation hearings. *In re Rogers* (May 23, 2001), 9th Dist. No. 20393, at *1; *In re Motley* (1996), 110 Ohio App.3d 641, 642; *In re Collins* (Sept. 27, 1995), 9th Dist. No. 2365-M, at *2 (J. Dickinson, dissenting). Rather, we concluded that Juv.R. 35(B) applies to such hearings. Id. To the extent we have previously applied Juv.R. 29 instead of Juv.R. 35 in our review of probation violation hearings, we have erred.

{¶8} In *Rogers*, as in this matter, the juvenile waived the right to counsel and admitted to a probation violation. Upon review, we found that the magistrate more than met the requirements of Juv.R. 35(B) where the magistrate instructed the juvenile of her right to appointed counsel as well as her right to call and cross-examine witnesses. Id. at *2. In *Motley*, 110 Ohio App.3d 641, 642, this Court held that the juvenile court was not required to advise the juvenile that he had a right to present evidence at the probation revocation hearing. Given our holdings in *Rogers* and *Motley*, "and the clear provisions of Juv.R. 35(B), the juvenile court

here was obliged only to advise [Appellant] that [he] had the right to counsel, and if appropriate, to have counsel appointed at the state's expense." *Rogers*, supra, at *2.

{¶9} Reviewing the transcript of the probation violation hearing in the instant case, we find that the magistrate advised Appellant that he was charged with violating his probation by not attending YOC on a regular basis and specifically by missing three days in a row. The magistrate asked Appellant whether he understood that he was so charged. Appellant responded that he did. The magistrate then told Appellant he had a right to be represented by a lawyer and that if he could not afford a lawyer, the court would appoint one to represent him. Appellant indicated he understood these rights. The magistrate then asked Appellant whether he wished to be represented by a lawyer or proceed without one. Appellant stated that he wished to proceed without a lawyer. Appellant's disposition hearing was held immediately thereafter. Having reviewed the record, we find that the trial court complied with Juv.R. 35(B) in the proceeding leading to Appellant's waiver of his right to counsel.

{¶10} Appellant cites *In re William B.*, 163 Ohio App.3d 201, 2005-Ohio-4428, and *In re C.A.C.*, 2d Dist. No. 2005-CA-134-35, 2006-Ohio-4003, in support of his contention that the trial court failed to properly inform him that he had a right to counsel, notwithstanding his intention to admit or deny the charge. He contends that as a result of the trial court's omission, he did not receive a full

and clear explanation of his right to counsel and therefore, could not have validly waived his right to counsel.

{¶11} *C.A.C.* is inapplicable to the within matter as it involved the waiver of counsel at an adjudicatory hearing, not a probation revocation hearing. *William B.* is also distinguishable. Rather than ask William B. whether he wished to waive his right to counsel, the trial court told him that if he wanted his rights, he should deny the probation violation charge. *William B*, supra, at ¶20. The court found that "appellant was advised that in order to be afforded his constitutional rights, including his Sixth Amendment right to counsel, he would have to deny the charges levied against him." Id. at ¶23. Unlike *William B.*, in the trial court's discussion of Appellant's right to counsel, the court did not differentiate between a juvenile who chooses to deny a charge and one who admits the charge. Id.

{¶12} Appellant additionally alleges that he was not informed that he could be sentenced to the DYS until age 21 before he waived his right to counsel. Pursuant to Juv.R. 35(B), the trial court was not required to apprise Appellant of the possible punishment for his probation violation before he waived his right to counsel. Juv.R. 35(B) only requires that the juvenile be apprised of the "condition of probation" he allegedly violated and the "grounds on which revocation is proposed." Moreover, the record reflects that (1) the trial court specifically apprised Appellant of the consequences of violating probation on at least two

previous occasions within four months of this disposition hearing and (2) the trial court informed Appellant of these sanctions before he admitted to this offense.

{¶13} Appellant further contends that the trial court violated his right to counsel by failing to obtain a second waiver of counsel at his disposition hearing. He contends that the trial court's failure to advise him of his right to counsel at the disposition hearing was reversible error, citing this Court's decision in *In re S.J.*, 9th Dist. No. 23058, 2006-Ohio-4467. We discussed the doctrine of "substantial compliance" in *S.J.*, supra, at ¶8, and found that the trial court substantially complied with the requirements for waiving counsel at S.J.'s adjudication hearing and that the juvenile properly waived his right to counsel. At the disposition hearing, held on a different day, however, we found that the trial court erred because it "did not reiterate Appellant's right to counsel during disposition or allow him either to invoke or to waive his right to counsel at that stage." Id. at ¶10. The situation in *S.J.* is distinguishable from the within matter. Appellant's adjudication hearing and disposition hearing were held as part of the same proceedings on the same day.

{¶14} We find that the trial court's colloquy meets the requirements set forth in Juv.R. 35(B) and our holdings in *Rogers*, *Collins* and *Motley*. The trial court informed Appellant of the charge against him, advised Appellant of his right to counsel and that counsel could be appointed for him if he could not afford it.

Therefore, the trial court did not err by accepting Appellant's waiver of his right to counsel. Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE JUVENILE COURT VIOLATED [APPELLANT'S] RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION; AND JUV.R. 35, WHEN IT FAILED TO FOLLOW THE REQUIREMENTS OF JUV.R. 35(B)."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO APPOINT A GUARDIAN AD LITEM FOR [APPELLANT] IN VIOLATION OF OHIO REVISED CODE SECTION 2151.281(A) AND JUVENILE RULE 4(B)."

{¶15} In Appellant's second assignment of error, he contends that the trial court violated his due process rights under federal and state law as well as Juv.R. 35, when the court failed to follow the requirements of Juv.R. 35(B). In Appellant's third assignment of error, he contends that the trial court erred in failing to appoint a guardian ad litem in violation of R.C. 2151.281(A) and Juv.R. 4(B). We disagree.

{¶16} In the instant case, Appellant failed to object to the magistrate's decisions that culminated in the Probation Violation Order. Pursuant to Juv.R. 40(D)(3)(a) and Civ.R. 53(D)(3)(b), Appellant could have filed written objections to the magistrate's decision within fourteen days after the filing of that decision. Absent objections to the magistrate's findings or conclusions, a party shall not

assign as error on appeal the magistrate's findings or conclusions as stated in the decision or "'the court's adoption of any finding of fact or conclusion of law[.]'" (Emphasis omitted.) *Lewis v. Savoia* (Aug. 28, 1996), 9th Dist. No. 17614, at *1, quoting Civ.R. 53(E)(3)(b). See, also, Juv.R. 40(D)(3)(a) and Civ.R. 53(D)(3)(b). Due to Appellant's failure to object to the magistrate's decision, he has deprived the trial court of the opportunity to correct the alleged errors in the first instance and has thereby forfeited his right to appeal the findings and conclusions contained in the magistrate's decision. See *In re Etter* (1998), 134 Ohio App.3d 484, 492, citing *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121. See, also, *Lewis*, supra, at *1; *In re Clayton* (Nov. 9, 2000), 8th Dist. No. 75757, at *6 (O'Donnell, P.J., dissenting).

{¶17} Initially, we must note the distinction between the waiver of an objection and the forfeiture of an objection. Although the terms are frequently used interchangeably, a waiver occurs where a party affirmatively relinquishes a right or an objection at trial; a forfeiture occurs where a party fails to assert a right or make an objection before the trial court in a timely fashion. *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶9, quoting *United States v. Olano* (1993), 507 U.S. 725, 733. Where a party has forfeited an objection by failing to raise it, the objection may still be assigned as error on appeal if a showing of plain error is made. *Hairston* at ¶9, quoting *State v. McKee* (2001), 93 Ohio St.3d 292, 299 fn. 3 (Cook, J., dissenting); Crim.R. 52(B). Where a party

has affirmatively waived an objection, however, the error may not be asserted on appeal even if it does amount to plain error. Id.

{¶18} This Court has applied the above-referenced doctrine where an unrepresented juvenile appeals an issue to which he failed to object in the trial court. In those instances, we have held that the juvenile waived[1] (more specifically "forfeited") his right to object to the magistrate's findings as supported by the hearing transcript. *In re J-M. W.*, 9th Dist. Nos. 23066 & 23144, 2006-Ohio-6156, at ¶¶5-9, citing *In re Stanford*, 9th Dist. No. 20921, 2002-Ohio-3755.

{¶19} An exception to the forfeiture doctrine exists, however, if plain error is found. *Etter*, 134 Ohio App.3d at 492; *Hairston* at ¶9, quoting *State v. McKee* (2001), 93 Ohio St.3d 292, 299 fn. 3 (Cook, J., dissenting); Crim.R. 52(B). Plain error is defined as any error or defect that affects an individual's substantial rights, which is not brought to the attention of the trial court through an objection. Crim.R. 52(B). However, Appellant has neither argued plain error, nor has Appellant explained why we should delve into either of these issues for the first time on appeal. Accordingly, we decline to address these issues. Appellant's second and third assignments of error are overruled.

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[1] We are mindful that this Court has frequently interchanged these terms. See *Hairston*, supra, at ¶9, quoting *Olano*, 507 U.S. at 733.

III.

{¶20} Appellant's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Juvenile Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

DAVID H. BODIKER, Ohio Public Defender, and AMANDA J. POWELL, Assistant State Public Defender, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and PHILIP D. BOGDANOFF, Assistant Prosecuting Attorney, 44308, for Appellee.

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. HORRIGAN
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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

IN RE: L.A.B.

C.A. No. 23309

JOURNAL ENTRY

Appellant has moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on March 30, 2007, and the judgment of the Seventh District Court of Appeals in *In re Lohr*, 7th Dist. No. 06 MO 6, 2007-Ohio-1130. Appellee has not responded to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 596.

Appellant has proposed that a conflict exists between this district and the Seventh District on the following issue:

> Does Juvenile Rule 29 apply to probation revocation hearings in juvenile court?

We find that a conflict of law exists; therefore, the motion to certify is granted.

Judge

Judge

IN RE: CLARENCE BENNETT, A MINOR

NO. 71121

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

1997 Ohio App. LEXIS 2546

June 12, 1997, DATE OF ANNOUNCEMENT OF DECISION

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDING: Civil appeal from Juvenile Court Division of Court of Common Pleas. Case No. 9415962.

DISPOSITION: JUDGMENT: AFFIRMED.

COUNSEL: APPEARANCES:

For plaintiff-appellee: STEPHANIE TUBBS JONES, ESQ., Cuyahoga County Prosecutor, NORMAN E. INCZE, ESQ., Assistant County Prosecutor, 8th Floor Justice Center, 1200 Ontario Street, Cleveland, OH 44113.

For defendant-appellant: JAMES A. DRAPER, ESQ., Cuyahoga County Public Defender, DONALD GREEN, ESQ., Assistant Public Defender, The Marion Bldg., # 307, 1276 West Third Street, Cleveland, OH 44113-1569.

JUDGES: JOHN T. PATTON, JUDGE. NAHRA, P.J., ROCCO, J., CONCUR

OPINION BY: JOHN T. PATTON

OPINION

JOURNAL ENTRY AND OPINION

PATTON, J.,

The juvenile court adjudged juvenile-appellant Clarence Bennett delinquent on a charge of possessing an unloaded handgun on school property. The court placed appellant on probation, subject to nine different conditions. Upon learning that appellant might have violated some of these conditions, it summoned him to a probation revocation hearing. Appellant waived his right to counsel and admitted the probation violations. The court ordered that appellant be institutionalized for an indefinite period. [*2] In this appeal, appellant raises three complaints about the probation revocation procedure.

I

Appellant first complains that the juvenile court improperly persuaded him to forfeit his right to counsel. He argues that he initially indicated a desire to obtain counsel, but despite that indication, the court proceeded to cross-examine him to the point where a trial on the probation revocation would have been futile.

Appellant's argument suffers from a selective recitation of facts. After outlining the nature of the alleged probation violations, the court proceeded to inform appellant of his rights, including the right to counsel. Appellant told the court he wished to have counsel appointed, and the court agreed. At that point, the court stated to the probation officer:

> "Well, why don't you tell me a little bit about how Clarence has been doing here so I can make a decision where he resides until we come back to trial on this decision."

The probation officer detailed the alleged probation violations, which included testing positive for marijuana and alcohol, trespassing, fighting, and violation electronic monitoring. Appellant continued to deny the charges. The court stated: [*3]

> "All right, well, listen. You want your trial. You have your right to trial. We'll come back and we'll do that. In the meantime, you're going to be held in the detention center. Because the report that I had is certainly not suggestive that I should trust you back out on the streets. This is

on a felony of the fourth. We need a remand slip. And then we'll pick a date for coming back into trial.

MASTER BENNETT: Can I change my plea?

THE COURT: Well, you can. You want to change it to an admission?

MASTER BENNETT: An admission?

THE COURT: Yeah. You're admitting that this is now true?

MASTER BENNETT: Some of it is, some of it ain't.

The court only inquired about the nature of the alleged probation violations in order to determine whether it should release appellant or keep him in custody. In fact, after hearing appellant admit some of the alleged violations, the court again asked appellant if he wished to waive counsel. Appellant indicated his desire to waive counsel and the court again reread appellant his rights. We find no impropriety and overrule the first assignment of error.

II

Defendant's second argument is that the juvenile court denied him [*4] the privilege against self-incrimination by failing to inform him of the right to remain silent and by continuing to question him even after he requested counsel. The state argues that the rights applicable to an adjudicatory hearing under *Juv.R. 29* do not apply to probation revocation proceedings under *Juv.R. 35(B)*.

Juv.R. 29 standards for entering admissions do not apply to probation revocation proceedings under *Juv.R. 35(B)*. See *In re Motley (1996), 110 Ohio App. 3d 641, 674 N.E.2d 1268*; *In re Griffin (Sept. 27, 1996), 1996 Ohio App. LEXIS 4299*, Union App. No. 14-96-14, unreported. This district has not ruled on this precise issue, but we agree with those courts that find *Juv.R. 29* procedures for entering admissions do not apply to probation revocation proceedings under *Juv.R. 35(B)*.

A probation revocation proceeding is not a criminal proceeding. *Gagnon v. Scarpelli (1973), 411 U.S. 778, 782, 36 L. Ed. 2d 656, 93 S. Ct. 1756*; *State ex rel. Wright v. Ohio Adult Parole Auth. (1996), 75 Ohio St. 3d 82, 92, 661 N.E.2d 728*. There is no right to a jury trial before probation may be revoked, and the privilege against self-incrimination is not available to a probationer. *Minnesota v. Murphy (1984),* [*5] *465 U.S. 420, 435, fn. 7, 79 L. Ed. 2d 409, 104 S. Ct. 1136*. Grafting the requirements of *Juv.R. 29* onto probation revocation proceedings would improperly elevate those proceedings to the status of a criminal proceeding. Consequently, we find the juvenile court had no duty to apprise appellant of a right to remain silent and his privilege against self-incrimination.

Juv.R. 35(B) states:

> Revocation of probation. The court shall not revoke probation except after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to *Juv.R. 4(A)*. Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to *Juv.R. 34(C)*, been notified.

The only right specifically set forth in *Juv.R. 35(3)* is the right to counsel, and the juvenile court fully apprised appellant of that right. The second assignment of error is overruled.

III

In his final assignment of error, appellant complains the juvenile court erred by entering a general admission to the probation revocation [*6] without first considering that appellant misunderstood the substance of the violations.

We have no difficulty rejecting this argument. The transcript shows that rather than misunderstanding the court's questions, appellant engaged in impertinent behavior in his dialogue with the court. For example, appellant steadfastly denied having run away from home for three days. Upon questioning by the court, appellant admitted he ran away for a week, apparently thinking that it was the number of days, not the act itself, that mattered. He further admitted missing some days of school, but said that he had regularly attended school, under the assumption that going to the school grounds was the same thing as attending classes. Appellant denied missing any scheduled appointments with his probation officer, but admitted he only attended those appointments when the probation officer specifically called to confirm the appointments.

The record does not demonstrate that appellant misunderstood the nature of the alleged probation violations. The juvenile court accurately told appellant he was being

"too cute by half" in trying to justify his lies to the court. We cannot find appellant's impudent behavior [*7] amounted to evidence that he misunderstood the nature of the alleged probation violations. The juvenile court fully explained the nature of the alleged violations before accepting appellant's admission to those violations. This fully satisfied *Juv.R. 35(B)*. The third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Juvenile Court to carry this judgment into execution.

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

NAHRA, P.J.

ROCCO, J., CONCUR

JUDGE

JOHN T. PATTON

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, *22(D)* and *26(A)*; Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App. R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court [*8] of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also *S. Ct. Prac.R. II, Section 2(A)(1)*.

IN RE: JOHN COLLINS, A Minor Child

C.A. NO. 2365-M

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, MEDINA COUNTY

1995 Ohio App. LEXIS 4283

September 27, 1995, Decided

NOTICE:

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT. COUNTY OF MEDINA, OHIO. CASE NO. 94 04 DQ 0960.

DISPOSITION: Judgment affirmed.

COUNSEL: DEAN HOLMAN, Prosecuting Attorney and SHARLENE ZEE, Asst. Prosecuting Attorney, Medina, OH, for Appellee.

JOHN B. CAMERON, Attorney at Law, Medina, OH, for Appellant.

JUDGES: DANIEL B. QUILLIN, P.J., SLABY, J., CONCUR. DICKINSON, J., DISSENTS.

OPINION

DECISION AND JOURNAL ENTRY

Dated: September 27, 1995

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Per Curiam.

John Collins has appealed from a dispositional order of the Medina County Court of Common Pleas, Juvenile Division, that committed him to the legal custody of the Department of Youth Services after he admitted violating his probation for a previous offense. He has argued that the Juvenile Court incorrectly revoked his probation because: (1) it failed to provide him an opportunity to address the court prior to its disposition; and (2) it failed to inform him of the consequences of his admission. [*2] We affirm.

I.

On May 2, 1994, John Collins, a juvenile, admitted in the Medina County Court of Common Pleas, Juvenile Division, that he had committed theft, which, if he would have been an adult, would have been a violation of *Section 2913.02(A)(1) of the Ohio Revised Code.* The Juvenile Court committed him to the Department of Youth Services for a minimum period of 6 months and a maximum period not to exceed his attainment of 21 years of age, but suspended that commitment and placed him on probation.

On July 10, 1994, Mr. Collins was taken into custody because he had allegedly violated a condition of his probation. At a hearing held before the Juvenile Court on July 27, 1994, Mr. Collins admitted the alleged violation, and the court revoked his probation. It modified its previous dispositional order and committed him to the custody of the Department of Youth Services:

> The Court finds that reasonable efforts have been made to prevent the juvenile's removal from the home or to make it possible for the child to return home and that continuation in the home would be contrary to the welfare of the juvenile.
>
> It is therefore ordered by the Court that said John Collins be [*3] committed to the legal custody of the Department of Youth Services for institutionalization in a secure facility for an indefinite term consisting of a minimum period of 6 months and a maximum period not to exceed the juvenile's attainment age of 21 years.

Mr. Collins timely appealed to this Court.

II.

A.

Mr. Collins's first assignment of error is that the Juvenile Court failed to provide him an opportunity to address it prior to its disposition of his alleged probation violation. At the July 27, 1994, hearing, after Mr. Collins admitted that he had violated a condition of his probation, the Juvenile Court stated that it was going to sentence him and asked his attorney "is there anything that you want to say * * * before I do that? His attorney addressed the court on his behalf, specifically requesting that disposition of the probation violation include counseling. Mr. Collins did not ask to address the court himself, nor did he object to the court's failure to ask him if he had anything to say.

Rule 32(A)(1) of the Ohio Rules of Criminal Procedure expressly provides an adult criminal defendant an opportunity "to make a statement in his or her own behalf or present any [*4] information in mitigation of punishment" prior to being sentenced. Mr. Collins has argued that he should have been provided a similar opportunity at his probation violation hearing.

There is no provision in the Ohio Rules of Juvenile Procedure comparable to *Rule 32(A)(1) of the Ohio Rules of Criminal Procedure.* Assuming that Mr. Collins was entitled to address the Juvenile Court, he waived his right to assign its failure to invite him to do so as error by not bringing that failure to its attention at a time when it could have been corrected. See *State v. Peters* (Aug. 22, 1990), Lorain App. No. 89CA004733, unreported at 8. This Court will not consider this issue for the first time on appeal. *Id.* Mr. Collins's first assignment of error is overruled.

B.

Mr. Collins's second assignment of error is that the Juvenile Court violated his right to due process by accepting his admission of the probation violation without explaining to him the consequences of his admission "as required by *Juvenile Rule 29(D).*" Probation revocation hearings are governed, however, by *Rule 35(B) of the Ohio Rules of Juvenile Procedure* which provides:

> *Revocation of Probation* The court shall [*5] not revoke probation except after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to *Juv. R. 4(A)*. Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to *Juv. R. 34(C)*, been notified.

Rule 35(B) does not incorporate the requirements of *Rule 29(D)* into a probation revocation hearing.

Rule 29(D) applies to a juvenile's original admission that he committed an act that would be a crime if committed by an adult. [1] It is comparable to *Rule 11(C)(2) of the Ohio Rules of Criminal Procedure*, which provides that a court shall not accept a guilty or no contest plea in a felony case without informing a defendant that, by entering such a plea, he is waiving certain rights. Although *Rule 29(D)* applies to a juvenile's original admission, it does not apply to an admission that he violated a condition of probation which had been imposed upon him as a result of an earlier admission and finding of delinquency.

1 *Rule 29(D)* provides:

> The court may refuse to accept an admission and shall not accept an admission without addressing the party personally and determining both of the following:
>
> > (1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;
> >
> > (2) The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing.

[*6] Mr. Collins has not cited any statute or rule, and this court is unaware of any, that requires a court to tell a represented juvenile defendant the obvious, *i.e.*, that if he is found guilty of violating his probation, the sentence which had been suspended on the condition that he not violate his probation may be imposed. The expanded due process rights found in *Gagnon v. Scarpelli (1973), 411 U.S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756*, cited by the dissent, do not require it. Most telling, neither Mr. Collins nor his attorney claim that they were not fully aware of the effect of the plea.

Mr. Collins was advised by the trial court at a hearing held on July 19, 1994, of the allegations against him. He was informed that he had the right to appointed counsel. The trial court then instructed him that he could either admit or deny the allegations and that, if he denied them, the court would hold a hearing in which the state would have the burden of proving the allegations and in which he would have the opportunity to cross-examine any witnesses. Mr. Collins requested that counsel be appointed and the trial court entered a denial on his behalf.

At a hearing held on July 27, 1994, [*7] the court was informed that Mr. Collins wished to admit violating his probation. It asked Mr. Collins's attorney whether Mr. Collins "understood that he [would] have a very strong possibility of being sent away for a while," to which the attorney responded "I have explained that to him." The trial court then addressed Mr. Collins personally and asked if he wished to "change [his] plea to one of admission" to which Mr. Collins answered yes. Given the entire record and the limited nature of a probation revocation hearing, the trial court adequately informed Mr. Collins of his procedural and constitutional rights. See *Michigan v. Rial (1976), 399 Mich. 431, 249 N.W.2d 114*. Moreover, Mr. Collins has not argued that he was unaware of the penalty originally imposed upon him or that he was "unaware that probation, in lieu of sentencing, was purely a matter of grace, and not of right." *Rial, 399 Mich. at 437, 249 N.W.2d at 116*. Accordingly, his due process rights were not violated when the trial court accepted his admission that he violated a condition of his probation.

III.

Mr. Collins's assignments of error are overruled. The judgment of the Juvenile Court is affirmed.

[*8] *Judgment affirmed.*

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Medina Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*.

Costs taxed to appellant.

Exceptions.

DANIEL B. QUILLIN

FOR THE COURT

QUILLIN, P. J.

SLABY, J.

CONCUR

DISSENT BY: DICKINSON

DISSENT

DICKINSON, J.

DISSENTS SAYING:

I dissent from the overruling of Mr. Collins's second assignment of error. In *Gagnon v. Scarpelli (1973), 411 U.S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756*, the United States Supreme Court held that, even though an adult probation revocation proceeding is not part of a criminal proceeding, an adult accused of a probation violation is entitled to certain due process protections. Before an adult's probation may be revoked, he is entitled to:

> (a) [*9] written notice of the claimed violations of [probation] * * *; (b) disclosure to the [probationer] * * * of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses * * *; (e) a 'neutral and detached' hearing body * * *; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation] * * *.

Id at 786, 36 L. Ed. 2d at 664, citing *Morrissey v. Brewer, (1972) 408 U.S. 471, 489, 33 L. Ed. 2d 484, 499, 92 S. Ct. 2593*.

A juvenile who comes before a court accused of committing an act that would be a crime if committed by an adult is entitled to certain due process protections. *In re Gault (1967), 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428*. Similarly, just as an adult accused of violating a condition of probation is entitled to certain due process protections, a juvenile accused of violating a condition of probation is also entitled to certain due process protections. A juvenile's protections in such a situation are not necessarily as broad as an adult's.

Although, as noted by the majority, *Rule* [*10] *35(B) of the Ohio Rules of Juvenile Procedure* does not incorporate the requirements of *Rule 29(D)* and make them applicable to a probation revocation hearing, it does incorporate minimum due process rights to which a juvenile accused of violating a condition of his probation is entitled. Those minimum due process rights include the right to a finding that the juvenile has violated a condition of probation of which he had been notified. By admitting a probation violation, the juvenile surrenders his right to a finding that he violated a condition of probation of which he had notice. Inasmuch as such a finding is required by due process, due process also requires that its waiver be intelligently and voluntarily made. See *State v. Ruiz* (Mar. 16, 1994), Summit App. No. 16063, unreported. A juvenile court accepting an admission that a juvenile violated a condition of his probation must engage in a dialogue with the juvenile at the time of that admission to ensure that the juvenile is intelligently and voluntarily waiving his right to a finding that he violated a condition of which he had been notified. In the absence of a juvenile court doing so, prejudice should be assumed. See *State* [*11] *v. Cogar* (Oct. 20, 1993), Summit App. No. 16234, unreported. The juvenile court did not address Mr. Collins for the purpose of ensuring that he understood that he was waiving his right to a finding that he violated a condition of his probation of which he had been notified. Accordingly, I would sustain defendant's second assignment of error.

LEXSEE 2005 OHIO 5583

IN RE: D.B.

C.A. CASE NO. 20979

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY

2005 Ohio 5583; 2005 Ohio App. LEXIS 5049

October 21, 2005, Rendered

PRIOR HISTORY: [**1] (Criminal Appeal from Common Pleas Court). T.C. CASE NO.JC04-2616.

DISPOSITION: D.B.'s second assignment of error overruled. Judgment of trial court affirmed.

COUNSEL: Mathias H. Heck, Jr., Pros. Attorney; Jill R. Sink, Asst. Pros. Attorney, Dayton, Ohio, Attorney for Plaintiff-Appellee.

David H. Bodiker, Public Defender; Molly J. Bruns, Asst. Public Defender, Columbus, Ohio, Attorney for D.B.

JUDGES: GRADY, J. BROGAN, P. J. And FAIN, J., concur.

OPINION BY: GRADY

OPINION

GRADY, J.

[*P1] D.B., a minor child, appeals from his delinquency adjudication and commitment to the Ohio Department of Youth Services by reason of having committed complicity to commit felonious assault, with a firearm specification, and receiving stolen property.

[*P2] On February 5, 2004, Ronald Lasko, a nuclear medicine specialist for Siemens, was staying overnight at the Residence Inn motel in Troy. Lasko's vehicle, a 2004 black Dodge Intrepid with Pennsylvania plate number FDF 2823, was stolen from the parking lot.

[*P3] On February 10, 2004, two off-duty Dayton police officers, Patrick Bucci and Tiffany Conley, were at Starbucks coffee on Brown Street near the University of Dayton. When they left Starbucks, Conley [**2] drove Bucci to where his truck was parked near the alley behind his residence at 1924 Brown Street. The alley runs parallel to Brown Street between Irving and Lowes Street, behind some shops and restaurants. Before they parted company Bucci and Conley kissed. At that moment the black Dodge Intrepid stolen from the Troy motel parking lot came down the alley past the officers. Someone inside the Intrepid yelled, "Can I get next," which was unintelligible to the officers.

[*P4] Bucci exited Conley's vehicle and stood next to the passenger door as he watched the Intrepid continue down the alley, turn around, and come back toward the officers. As the Intrepid passed by Bucci, he spit in the general direction of that vehicle. The Intrepid stopped in front of Conley's vehicle and the driver, identified by both Bucci and Conley as D.B., asked Bucci if he had spit on his car. Not clearly hearing what D.B. had said, Bucci asked D.B. to repeat his remark. D.B. mumbled something Bucci could not understand, and Bucci told D.B. to just keep going.

[*P5] According to one of the other occupants in the Intrepid, Kevin Johnson, Bucci used a racial slur when he told the driver to keep going. [**3] At that point, D.B. opened up his jacket and showed Bucci that he was armed with a silver semi-automatic handgun in a shoulder holster. In response, Bucci drew his gun, pointed it at D.B.'s head and said "You need to get the f-- out of here." The Intrepid then drove off down the alley and turned onto Lowes Street.

[*P6] Bucci walked over to the driver's side of Conley's vehicle and told her what had just happened. Seconds later, Bucci saw the Intrepid reappear where the alley meets Irving Street. The passenger window was rolled down. Bucci saw a muzzle flash and heard a gunshot come from the passenger window of the Intrepid. Bucci heard the bullet whistle past his head. Bucci dove to the ground and heard two more shots fired, one of which made a pinging sound when it struck Conley's vehicle. After the Intrepid sped off, Bucci checked on

Conley, who was not injured, and then Bucci called 911. Evidence crews recovered three spent shell casings and two spent bullets at the scene. One bullet was found on the front seat of Conley's vehicle near where her head was when she dove down onto the passenger seat as the gunshots began.

[*P7] The following day police found the stolen [**4] black Dodge Intrepid driven in the shooting. The left side of the steering column was damaged in a way consistent with the vehicle having been started without a key. D.B.'s fingerprints were found inside the vehicle.

[*P8] On February 15, 2004, Dayton police stopped a vehicle driven by Kevin Johnson for a traffic violation. D.B. was a passenger in the vehicle. Because of furtive movements by the occupants, police searched that vehicle and discovered a loaded 9mm Jennings semi-automatic handgun under the passenger seat where D.B. had been sitting. The gun appeared to have been recently fired. D.B.'s fingerprint was found on the magazine of that gun. Laboratory testing revealed that the gun was used to fire the spent casings and bullets recovered from the shooting scene in the alley near Brown Street.

[*P9] D.B. was charged by a complaint filed in Montgomery County Juvenile Court with being delinquent by reason of having committed two counts of complicity to commit felonious assault, *R.C. 2923.03(A)(2)* and *2903.11(A)(2)*, and one count of receiving stolen property, *R.C. 2913.51(A)*. A firearm specification, [**5] *R.C. 2941.145*, was attached to each count of complicity to commit felonious assault.

[*P10] An adjudicatory hearing was held before a magistrate on May 4, 18, and 20, 2004. At the hearing, D.B. and Kevin Johnson both admitted being present inside the Intrepid during the shooting, but they claimed that Terrance Gay, not D.B., was driving and that Gay fired the shots. Following the hearing D.B. was found delinquent by reason of having committed all of the offenses charged. The magistrate subsequently sentenced D.B. to concurrent terms of commitment to the Ohio Department of Youth Services for a minimum of one year on each count of complicity to commit felonious assault, and six months for receiving stolen property. The magistrate also imposed one additional and consecutive one year term on the firearm specifications, for a total sentence of two years minimum.

[*P11] Defendant timely filed objections to the magistrate's adjudication and disposition. On February 16, 2005, the juvenile court overruled Defendant's objections and adopted the magistrate's decision.

[*P12] Defendant has timely appealed to this court.

FIRST ASSIGNMENT OF ERROR

[**6] [*P13] "THE TRIAL COURT VIOLATED D.B.'S RIGHT TO DUE PROCESS UNDER THE *FIFTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* AND *SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION* WHEN IT ADJUDICATED HIM DELINQUENT OF TWO COUNTS OF FELONIOUS ASSAULT, EACH WITH A FIREARM SPECIFICATION, WHEN THAT FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

[*P14] A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagel (Sept. 6, 1996), Montgomery App. No. 15563, 1996 Ohio App. LEXIS 3843*, unreported. The proper test to apply to that inquiry is the one set forth in *State v. Martin (1983), 20 Ohio App.3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717*:

[*P15]

> "the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered."

Accord: *State v. Thompkins, 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541.*

[*P16] [**7] The credibility of the witnesses and the weight to be given to their testimony is a matter for the trier of facts to resolve. *State v. DeHass (1967), 10 Ohio St.2d 230, 227 N.E.2d 212*. In *State v. Lawson (August 22, 1997), Montgomery App.No. 16288, 1997 Ohio App. LEXIS 3709, at *11*, we observed:

[*P17]

> "because the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within

the peculiar competence of the factfinder, who has seen and heard the witness."

*1997 Ohio App. LEXIS 3709, at *11.*

[*P18] This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley (Oct. 24, 1997), Champaign App. No. 97-CA-03, 1997 Ohio App. LEXIS 4873.*

[*P19] Defendant argues that the finding of delinquency by reason of having committed felonious assault is against [**8] the manifest weight of the evidence because he was merely present at the shooting scene and in close proximity to the actual shooter, and the evidence fails to prove that he aided or abetted the shooting. We disagree.

[*P20] Ohio's complicity statute, *R.C. 2923.03*, provides, in pertinent part:

[*P21] "(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

[*P22] * * *

[*P23] "(2) Aid or abet another in committing the offense."

[*P24] D.B. was found delinquent by reason of having committed felonious assault in violation of *R.C. 2903.11(A)(2)*:

[*P25] "(A) No person shall knowingly do either of the following:

[*P26] * * *

[*P27] "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

[*P28] Knowingly is defined in *R.C. 2901.22(B)*:

[*P29] "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person [**9] has knowledge of circumstances when he is aware that such circumstances probably exist."

[*P30] The State did not claim that D.B. was the person who shot at Officers Bucci and Conley. Rather, the State alleged that D.B. aided and abetted that shooting in two ways: (1) D.B. drove the vehicle used in the shooting and positioned it in such a way that the shooter could fire at the officers, and (2) D.B. possessed the gun used in the shooting and he allowed the shooter to use his gun to shoot at the officers.

[*P31] In *State v. Johnson, 93 Ohio St.3d 240, 2001 Ohio 1336, 754 N.E.2d 796*, the Ohio Supreme Court stated that in order to support a conviction for complicity by aiding and abetting, the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised or incited the principal offender, and that the defendant shared the criminal intent of the principal offender, which may be inferred from the facts and circumstances surrounding the crime.

[*P32] Both Officer Bucci and Officer Conley identified D.B. as the driver of the black Dodge Intrepid, and Bucci testified that D.B. carried a gun. The evidence shows that the Dodge Intrepid was [**10] then a short distance away to where the vehicle was positioned in such a manner that the open passenger window was facing the officers. Shots were then fired from that open passenger window at them. Five days later during a traffic stop, a gun was discovered underneath the passenger seat where Defendant had been sitting. Laboratory analysis confirmed that the gun had been used in this shooting. Defendant's fingerprints were on the magazine of that gun. Clearly, this evidence, if believed, shows that D.B. was not merely present at the scene of the shooting or a mere observer or innocent bystander.

[*P33] In arguing that the evidence fails to demonstrate that he aided and abetted this shooting, D.B. points to his testimony and that of Kevin Johnson, indicating that Terrance Gay was the person driving the Dodge Intrepid that night and Gay is the person who had the gun and shot at the officers. This version of the events conflicts with the testimony of Officers Bucci and Conley. The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts, the trial court here, to resolve. *State v. DeHass, supra.* The trial court [**11] did not lose its way simply because it chose to believe the officers rather than D.B. or his witnesses, which it was entitled to do.

[*P34] D.B. additionally argues that his delinquency adjudication for felonious assault is against the manifest weight of the evidence because the actions of the shooter constitute aggravated assault, not felonious assault. D.B. claims that the shooter acted in a sudden fit of rage after being provoked and taunted by Officer Bucci, who spit in the direction of the Dodge Intrepid, used a racial slur when referring to the driver, and pointed a gun at the head of the driver and told him to "get the f-- out of here." According to D.B., this was serious provocation that was reasonably sufficient to en-

rage the driver and incite him into using deadly force. We are not persuaded.

[*P35] The elements of felonious assault, *R.C. 2903.11*, and aggravated assault, *R.C. 2903.12*, are identical except for the mitigating factor of serious provocation found in aggravated assault. *State v. Deem (1988), 40 Ohio St.3d 205, 533 N.E.2d 294*. That mitigating factor requires that Defendant act under the influence [**12] 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 defendant into using deadly force. *R.C. 2903.12*. Defendant has the burden of proving the mitigating factor by a preponderance of the evidence. *Deem, supra.*

[*P36] In *State v. Shane (1992), 63 Ohio St.3d 630, 590 N.E.2d 272*, the Supreme Court elaborated on what constitutes reasonably sufficient provocation to incite the defendant into using deadly force. First, an objective standard is applied to determine whether the alleged provocation is sufficient to arouse the passions of an ordinary person beyond the power of his or her control. If that objective standard is met, the inquiry shifts to a subjective standard to determine whether the Defendant in the particular case actually was under the influence of sudden passion or in a sudden fit of rage. Ordinarily, words alone will not constitute reasonably sufficient provocation to incite the use of deadly force. *Id.* Neither will past incidents or verbal threats satisfy the test for reasonably sufficient provocation when [**13] there has been sufficient time for cooling off. *State v. Mack, 82 Ohio St.3d 198, 1998 Ohio 375, 694 N.E.2d 1328*. Moreover, fear alone is insufficient to demonstrate sudden passion or fit of rage. *Id.*

[*P37] First, we note that this claim by D.B. is premised upon the proposition that Terrance Gay was the person driving the Dodge Intrepid who had words with Officer Bucci and had the gun and fired shots at the officers. By its verdict, however, it is clear that the trial court disbelieved that version of the events and instead believed Officers Bucci and Conley who indicated that D.B. was the driver and the person who had the gun.

[*P38] Whatever words were exchanged between Officer Bucci and the driver of the Dodge Intrepid, words alone were not reasonably sufficient provocation to incite the use of deadly force. *Shane, supra.* In that regard, we note that Officer Bucci denied using any racial slurs when speaking to the driver. Moreover, it was only after the driver of the Intrepid pulled his coat back and showed Officer Bucci that he was armed with a semi-automatic handgun that Bucci then drew his weapon and pointed it at the driver, in response to a [**14] threat to his and Officer Conley's safety. If anything, it was the driver who provoked Officer Bucci to act as he did. When Bucci told the driver to "get out of here," the driver complied and drove away.

[*P39] At oral argument the State conceded, and we agree, that a defendant who invokes a "serious provocation" claim need not be wholly free of any responsibility for causing the provocation to occur. Nevertheless, for *R.C. 2903.12* to apply, the seriousness of the provocation that occurs must be reasonably sufficient to incite the defendant into using deadly force, and the defendant must actually have acted under the influence of a sudden passion or fit of rage that was provoked by the victim of the deadly force he used. *Shane.*

[*P40] Officer Bucci's two acts that were undisputed and that allegedly caused the shots to be fired -- spitting on the other vehicle and holding a gun to the driver's head -- were, together, seriously provocative. However, before the shots were fired that encounter had concluded and Defendant and his companions left the scene. The trial court could reasonably find that the Defendant failed to meet his burden to show [**15] that when he and his companions returned to the alley and used deadly force that they or the shooter were actually under a sudden passion or fit of rage. Rather, under the circumstances, the court could conclude that they were instead motivated by a strong desire for retribution, which is not a mitigating matter for purposes of *R.C. 2903.12*. Therefore, we cannot find that the juvenile court's rejection of aggravated assault as a lesser included offense was against the manifest weight of the evidence for purposes of Defendant's delinquency adjudication.

[*P41] Lastly, D.B. argues that his finding of delinquency by reason of having committed receiving stolen property is against the manifest weight of the evidence because the evidence does not demonstrate that D.B. knew or had reasonable cause to believe that the Dodge Intrepid he was riding in was stolen. Once again we disagree.

[*P42] D.B. was found delinquent for having violated *R.C. 2913.51(A)*, which provides:

[*P43] "No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained [**16] through commission of a theft offense."

[*P44] Officer Bryant testified that the Dodge Intrepid had a half inch wide crack on the left side of the steering column that was consistent with the vehicle having been started without a key. There was no damage to the ignition and the ignition ring was still intact. Bryant further testified that a person seated in the passenger seat would probably not be able to see the damage to the steering column. Based upon that testimony, and his own

assertion that he was sitting in the passenger seat of the Dodge Intrepid on the night of the shooting, D.B. argues that the evidence does not prove that he knew or had reason to know that the Dodge Intrepid was stolen.

[*P45] As we previously pointed out, the trial court by its verdict rejected the contentions of D.B. and his witness that Terrance Gay, and not D.B., was the driver of the Intrepid and possessed the gun. Instead, the trial court believed the testimony of Officers Bucci and Conley that D.B. was the driver of the Intrepid. Given that evidence, along with other evidence demonstrating that the vehicle had been stolen from the Residence Inn motel in Troy, and that the steering column [**17] was damaged in a way consistent with the vehicle being started without a key, and the fact that D.B.'s possession of that stolen vehicle was completely unexplained, D.B.'s delinquency adjudication based upon receiving stolen property is not against the manifest weight of the evidence.

[*P46] In reviewing this record as a whole we cannot say that the evidence weighs heavily against a conviction, that the trial court lost its way, or that a manifest miscarriage of justice has occurred. D.B.'s delinquency adjudication for having committed complicity to commit felonious assault and receiving stolen property is not against the manifest weight of the evidence.

[*P47] D.B.'s first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

[*P48] "D.B. WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE *SIXTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* AND, *ARTICLE I, SECTIONS 10* AND *16* OF THE OHIO CONSTITUTION."

[*P49] In order to demonstrate ineffective assistance of trial counsel, Defendant must demonstrate that counsel's performance was deficient and fell below an objective standard of reasonable representation, [**18] and that Defendant was prejudiced by counsel's performance; that is, there is a reasonable probability that but for counsel's unprofessional errors, the result of Defendant's trial or proceeding would have been different. *Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; State v. Bradley (1989), 42 Ohio St.3d 136; 538 N.E.2d 373.*

[*P50] Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of reasonable assistance. *Id.* Moreover, hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel. *Id.*

[*P51] Defendant first argues that his trial counsel's performance was deficient because counsel failed to object to the magistrate's delinquency adjudication and the issues raised during that adjudication, thereby precluding appellate review of those matters. See: *Juv.R. 40(E)(3)(d).*

[*P52] A review of this record clearly demonstrates that D.B.'s trial counsel did timely file [**19] objections and later supplemental objections to the magistrate's decision, raising the issues now presented in D.B.'s first assignment of error in this appeal. We further note, as the State points out in its brief, that D.B. fails to identify what specific objection to the magistrate's decision his trial counsel should have but did not raise. Only after the State pointed this fact out in its brief did D.B. then claim, in his reply brief, that his trial counsel should have objected to his delinquency adjudication for receiving stolen property, based on the weight of the evidence probative of the charge.

[*P53] That issue, whether D.B.'s delinquency adjudication for receiving stolen property is against the manifest weight of the evidence, was raised and addressed by this court as part of the first assignment of error, we concluded that the court's decision was not against the manifest weight of the evidence. Accordingly, D.B. has failed to demonstrate prejudice resulting from counsel's failure to raise this specific issue in his objections to the magistrate's decision.

[*P54] Next, D.B. contends that his trial counsel performed deficiently because he failed to secure the [**20] testimony of a favorable defense witness, or at least request a continuance in order to try and locate that witness. Charley Connors, the witness, was subpoenaed by the defense but failed to appear at trial.

[*P55] In a statement made to police, Connors indicated that he saw the black Dodge Intrepid drive by him on the night of the shooting, but he was unable to identify any of the occupants or even say how many occupants were inside that vehicle. All Connors could say was that the driver and passenger were both young black males, and the driver had on all black and the passenger wore a red knit hat.

[*P56] Contrary to D.B.'s assertion, Connors' clothing description does not corroborate Kevin Johnson's and D.B.'s testimony or bolster their credibility because they both testified that the hat D.B. wore was brown. Defense counsel indicated to the trial court that as a tactical matter he did not desire a continuance of the trial already in progress in order to try and locate Connors, who was apparently now somewhere in New Jersey.

[*P57] We are satisfied from the evidence that Connors' testimony would have been only marginally helpful to the defense, if at all. Connors' [**21] statement concerning the clothing worn by the vehicle's occupants was somewhat inconsistent with the testimony of Kevin Johnson and D.B., but did not discredit in any way the identification or testimony by Officers Bucci and Conley. Clearly, we cannot say on the state of this record that but for defense counsel's failure to secure the testimony of this witness, there exists a reasonable probability that the court would not have found D.B. delinquent for having committed felonious assault. Ineffective assistance of counsel has not been demonstrated.

[*P58] Finally, D.B. claims that his counsel performed deficiently because he failed to impeach Officers Bucci and Conley with information contained in their personnel files that demonstrates police misconduct. According to D.B., this evidence would have greatly diminished the credibility of the officers.

[*P59] First, we note that the record in this case does not demonstrate that such material even exists. There is simply no evidence regarding what is contained in the personnel files of Officer Bucci or Officer Conley, much less that there is information alleging misconduct in the performance of their official duties. Second, [**22] such extrinsic evidence would not have been admissible in any event, and could not even be inquired into on cross-examination of the officers unless the matter was probative of the officer's character for truthfulness. See: *Evid.R. 608(B)*; *State v. Penland (1998), 132 Ohio App.3d 176, 724 N.E.2d 841*. Defense counsel did what the rules of evidence allow him to do; cross-examine Officers Bucci and Conley regarding the appropriateness of their conduct in this particular case and whether that conduct complies with police department rules and regulations. No deficient performance by defense counsel has been demonstrated and ineffective assistance of counsel has not been established.

[*P60] D.B.'s second assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, P. J. And FAIN, J., concur.

In the Matter of Darvius C.

Court of Appeals No. E-00-064

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, ERIE COUNTY

2002 Ohio 851; 2002 Ohio App. LEXIS 826

March 1, 2002, Decided

PRIOR HISTORY: [*1] Trial Court No. 00F165.

DISPOSITION: Juvenile court's adjudication of delinquency was affirmed.

COUNSEL: Kevin J. Baxter, Erie County Prosecuting Attorney, and Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Thomas M. Dusza, for appellant.

JUDGES: Peter M. Handwork, J., James R. Sherck, J., Mark L. Pietrykowski, P.J., CONCUR.

OPINION BY: Peter M. Handwork

OPINION

DECISION AND JUDGMENT ENTRY

HANDWORK, J. This is an appeal from judgments of the Erie County Court of Common Pleas, Juvenile Division, adjudicating Darvius C. a delinquent child and ordering him to perform community service, to be on probation and to attend counseling and sex offender therapy. Because we find that there is no showing of ineffective assistance of counsel or of plain error, we affirm the judgment of the trial court.

This case began when a complaint was filed in the Erie County Court of Common Pleas, Juvenile Division, alleging that Darvius had committed the offense of gross sexual imposition, a violation of *R.C. 2907.05(A)(4)*, against a ten year old female victim. Darvius denied the accusations, and a hearing was held before a magistrate to decide whether Darvius was a delinquent child.

At the hearing, the ten year old victim, her older brother [*2] and her mother all testified as witnesses called by the state. Darvius took the stand and testified on his own behalf. The pictures presented through the testimony of the state's witnesses and through the testimony of Darvius of events that took place on a playground in Sandusky, Ohio on August 29, 2000 between Darvius and the ten year old victim were dramatically different.

The magistrate found the testimony of the state's witnesses more credible. The magistrate therefore issued a decision with factual findings that Darvius had grabbed the victim's breast area and buttocks for the purpose of sexual gratification. The magistrate made the legal conclusion that Darvius's behavior met the elements of the crime of gross sexual imposition and ruled that Darvius is a delinquent child.

Darvius did not file any objections to the magistrate's decision, and the trial court adopted the decision in a subsequent judgment entry. After a dispositional hearing, the court ordered Darvius to perform community service, to be on probation, to attend counseling with his parents and to have sex offender therapy. Following the dispositional rulings, Darvius filed this appeal.

Darvius has presented two [*3] assignments of error for consideration on appeal. The two assignments of error are:

"I. THE TRIAL COURT ERRED IN FINDING APPELLANT A DELINQUENT CHILD AS SAID DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE DECISION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

"II. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOLLOWING THE ADJUDICATION IN THIS MATTER."

The state argues that Darvius cannot prevail on either assignment of error because the issues he now at-

tempts to raise on appeal were waived. The state cites to *Juv.R. 30(E)(3)* which provides:

"(3) Objections

"(a) Time for filing. Within fourteen days of the filing of a magistrate's decision, a party may file written objections to the decision. If any party timely files objections, any other party also may file objections not later than ten days after the first objections are filed. If a party makes a request for findings of fact and conclusions of law under *Civ.R. 52*, the time for filing objections begins to run when the magistrate files a decision including findings of fact and conclusions of law.

"(b) Form of objections. Objections shall be specific and state with particularity the grounds [*4] of objection. If the parties stipulate in writing that the magistrate's findings of fact shall be final, they may only object to errors of law in the magistrate's decision. Any objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of the evidence if a transcript is not available. A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule."

The state says that Darvius's assignments of error both relate to the findings of fact and conclusions of law contained in the magistrate's decision that Darvius is a delinquent juvenile, so the arguments related to the assignments of error were waived for appeal.

Our own review of the record confirms that no objections were filed to the magistrate's decision in this case. Therefore, pursuant to *Juv.R. 40(E)(3)(b)*, Darvius is precluded from directly challenging on appeal the trial court's adoption of the findings of fact and conclusions of law from the magistrate's decision. See, also, *In the matter of: Masadies W. (June 21, 1995), 1995 Ohio App. LEXIS 2672*, [*5] Allen App. No. 1-94-73, unreported. Accordingly, absent a showing of ineffective assistance of counsel or plain error, the arguments now presented by Darvius were waived for appeal.

Darvius has acknowledged, in his discussion of his second assignment of error: "According to *Juvenile Rule 40*, any issue raised on appeal must be objected to at the trial court level." He contends, however, that when his trial counsel failed to file objections to the magistrate's decision finding him delinquent, they rendered ineffective assistance of counsel.

As to whether the outcome of his case would have been different if his counsel had filed the necessary objections, he says:

"Appellant would assert that this requirement is met in that it is pure conjecture and guesswork to predict what the trial court would have done with Appellant's objections to the Magistrate's Decision. Therefore, in order to afford Appellant all opportunities provide him with the benefit of doubt, it must be presumed in this instance that the results would have been different."

The two-part test for ineffective assistance of counsel announced by the United States Supreme Court in *Strickland v. Washington (1984), 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052*, [*6] and adopted by the Supreme Court of Ohio as the standard to be used when considering a claim of ineffective assistance of counsel, *State v. Bradley (1989), 42 Ohio St.3d 136, 137, 538 N.E.2d 373*, has not been met in this case. The two-part test for ineffective assistance of counsel requires: (1) a showing that "counsel's performance was deficient"; and (2) a showing that "the deficient performance prejudiced the defense." *Strickland v. Washington, 466 U.S. at 687.*

While Darvius has presented a convincing argument to show that the first part of the test was arguably met (*i.e.* that his trial counsel's performance was deficient because the failure to file objections to the magistrate's decision waived all arguments relating to the finding of delinquency for appeal) he has not presented any argument to show that the second part of the test for ineffective assistance of counsel was met in this case. He asks this court to presume that his case was prejudiced, rather than arguing facts or law to show that his case was in fact prejudiced. This court cannot make an assumption of prejudice.

To the extent that this court could construe Darvius's arguments [*7] in his first assignment of error, (that his conviction is not supported by the sufficiency of the evidence and that his conviction is against the manifest weight of the evidence), as an assertion that his case was prejudiced by his trial counsel's failure to object to the magistrate's decision, thereby meeting the second part of the test for ineffective assistance of counsel, we have reviewed the evidence in question. Darvius is correct when he asserts that there were discrepancies in the testimony of the ten year old victim and her older brother.

For instance, the brother testified to only one incident he saw of Darvius grabbing at the breast and buttocks regions of the ten year old victim. The victim testified to three separate incidents.

Darvius is also correct that his own testimony was in direct contrast to the testimony of the ten year old victim and her brother. When Darvius testified, he completely denied ever touching the ten year old, other than in self-defense to stop her from grabbing or kicking him in the groin area.

The magistrate was in the best position to judge the credibility of the witnesses. *State v. Cord (Nov. 22, 2000), 2000 Ohio App. LEXIS 5453*, Summit App. No. 20057, unreported. [*8] This court will not reverse a credibility determination on appeal. If believed, the testimony of the brother regarding one incident that he witnessed of Darvius grabbing the victim's breast and buttocks areas, while pushing the victim against a pole on the playground and holding the victim's hands behind her back and the pole, was sufficient to meet the elements required to show gross sexual imposition. If believed, the testimony of the victim regarding two other incidents that would constitute gross sexual imposition were cumulative. The magistrate specified belief of the testimony given by the victim and the victim's brother, so the finding of delinquency was supported by the sufficiency of the evidence. See *State v. Thompkins (1997), 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541.*

Likewise, because the state's witnesses were judged credible, and because their testimony showed that all the elements of gross sexual imposition were met, the finding of delinquency in this case was not against the manifest weight of the evidence. *Id.* Accordingly, there is no showing of prejudice to Darvius's case caused by his trial counsel's failure to file objections to the magistrate's [*9] decision, and the test for ineffective assistance of counsel is not met in this case. In addition, there is no basis for this court to find plain error. See *State v. Craft (1977), 52 Ohio App.2d 1, 7, 367 N.E.2d 1221.*

The first and second assignments of error are not well- taken. The judgment of the Erie County Court of Common Pleas, Juvenile Division, is affirmed. Darvius is ordered to pay the court costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27.* See, also, *6th Dist.Loc.App.R. 4*, amended 1/1/98.

Peter M. Handwork, J.

James R. Sherck, J.

Mark L. Pietrykowski, P.J.

CONCUR.

LEXSEE 2002 OHIO 1107

IN RE: JOHN HALL

C.A. No. 20658

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT COUNTY

2002 Ohio 1107; 2002 Ohio App. LEXIS 1051

March 13, 2002, Decided

PRIOR HISTORY: [*1] APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO. CASE No. 01 06 3745.

DISPOSITION: Trial court's judgment was reversed and cause was remanded.

COUNSEL: WARNER MENDENHALL, Attorney at Law, Akron, Ohio, for appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, Akron, Ohio, for appellee.

JUDGES: DONNA J. CARR, Judge. BATCHELDER, J. CONCURS, SLABY, P. J. DISSENTS.

OPINION BY: DONNA J. CARR

OPINION

DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

Appellant, John Hall ("Hall"), appeals the decision of the Summit County Court of Common Pleas, Juvenile Division. This Court reverses.

I.

On June 12, 2001, a complaint was filed in juvenile court alleging that Hall was delinquent pursuant to *R.C. 2151.02*. The complaint charged Hall with arson in violation of *R.C. 2909.03(A)(1)*. The record reflects that Hall was on probation at the time of the alleged arson. Present at the adjudication hearing before a magistrate were Hall, his mother and his probation officer. At the adjudication hearing, Hall entered an admission [*2] to the arson and probation violation charges. On June 20, 2001, the judge accepted the magistrate's decision and found Hall to be a delinquent child pursuant to *R.C. 2151.02*. The court committed him to the custody of the Ohio Department of Youth Services for an indefinite term consisting of a minimum period of six (6) months and a maximum period not to exceed Hall's attainment of the age of twenty-one (21) years.

This appeal followed.

II.

ASSIGNMENT OF ERROR

APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO ADHERE TO THE REQUIREMENTS OF *JUV.R. 29*.

In his sole assignment of error, Hall argues that the trial court violated his due process rights by failing to follow *Juv.R. 29*. This Court agrees.

Juv.R. 29(D) governs adjudicatory hearings and provides that:

The court *** shall not accept an admission without addressing the party personally and determining both of the following:

(1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;

(2) The party understands that by entering an admission the party is waiving the right to challenge [*3] the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing.

This rule places an affirmative duty upon the juvenile court. Prior to accepting an admission, the juvenile court must personally address the actual party before the court and determine that the party understands the nature of the allegations and the consequences of entering the admission.

An admission in a juvenile proceeding pursuant to *Juv.R. 29(D)* is analogous to a guilty plea made by an adult pursuant to *Crim.R. 11(C)*. *In re Christopher R. (1995), 101 Ohio App.3d 245, 247, 655 N.E.2d 280*; *In re Jenkins (1995), 101 Ohio App.3d 177, 179-180, 655 N.E.2d 238*. Both rules require respective trial courts to make careful inquiries in order to insure that the admission or guilty plea is entered voluntarily, intelligently and knowingly. *In re Flynn (1995), 101 Ohio App.3d 778, 781, 656 N.E.2d 737*.

Strict adherence to the procedures imposed by these rules is not constitutionally mandated; however, courts have interpreted them as requiring substantial compliance with their provisions. See *State v. Billups (1979), 57 Ohio St.2d 31, 38, 385 N.E.2d 1308*; [*4] *In re Christopher R., 101 Ohio App.3d at 247-248*; *In re Jenkins, 101 Ohio App.3d at 179-180*. If the juvenile court fails to substantially comply with *Juv.R. 29(D)*, the adjudication must be reversed so that the minor "may plead anew." *In re Christopher R., 101 Ohio App.3d at 248*, quoting *In re Meyer (Jan. 15, 1992), 1992 Ohio App. LEXIS 109*, Hamilton App. Nos. C-910292, C-910404 and C-9101568, unreported.

It is undisputed that Hall did not file any written objections to the magistrate's decision. *Juv.R. 40(E)(3)(b)* states "[a] party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule." However, an exception to this waiver exists if plain error is found. *In re Etter (1998), 134 Ohio App.3d 484, 492, 731 N.E.2d 694*.

Plain error is defined as any error or defect that affects an individual's substantial rights, which is not brought to the attention of the trial court through an objection. *Crim.R. 52(B)*. Although the doctrine of plain error is rooted in criminal law, the Supreme Court of Ohio has recognized the application [*5] of the plain error doctrine in civil cases under very exceptional and rare circumstances. *Goldfuss v. Davidson (1997), 79 Ohio St.3d 116, 122-123, 679 N.E.2d 1099*. In a civil proceeding, plain error involves the exceptional circumstances where the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself. *Etter, 134 Ohio App.3d at 492*. Accordingly, this Court embraces a plain error analysis to allow for correction of an error that was arguably not properly preserved for appellate review in the case of a juvenile adjudication.

In the present case, the court accepted Hall's admission without determining if Hall understood the possible consequences of entering the admission. The court reviewed the nature of the charges, the right to an attorney, the right to remain silent, the right to challenge the state's witnesses and evidence and the right to introduce evidence at the hearing. After reviewing these rights, the court asked Hall to admit or deny the charges. Hall entered an admission to the arson and probation violation charges.

The court then engaged in a discussion with [*6] Hall's probation officer regarding the timeline for a recommendation from the staff involved in Hall's case. At the end of the hearing, the following discussion occurred:

THE COURT: *** Do you have any questions, John?

MR. HALL: No.

THE COURT: You know it is a Felony 4, so on this charge alone I could commit you to the Department of Youth Services for a minimum of six months. Do you understand that?

MR. HALL: Yes.

THE COURT: Okay.

Upon consideration of the entire record of the proceedings before the juvenile court in this case, this Court finds that the juvenile court, in accepting Hall's admission to the charge of arson, did not substantially comply with the requirements of *Juv.R. 29(D)*. [1] As the language of the rule indicates, the juvenile court is required to comply with both paragraphs (1) and (2) before accepting the party's admission. Accordingly, the juvenile court's failure to comply with the requirements of *Juv.R. 29(D)* rises to the level of plain error. Hall's assignment of error is sustained.

1 On appeal, appellee relies on *In re Jackson (Nov. 14, 2001), 2001 Ohio App. LEXIS 5074*, Summit App. No. 20647, unreported, for the proposition that a juvenile's failure to attempt to withdraw his admission results in waiver of any error on appeal. In *In re Jackson*, this Court held:

> Specifically, the court questioned Appellant concerning his awareness of the charge against him, the possible penalties stemming from his admission, and the rights that he would be waiving by entering an admission. As such, the court did not err by accepting Appellant's admission. We further note that Appellant did not attempt to

withdraw and/or vacate his prior admission to the offense. Courts have held that failure to request a withdrawal of an admission waives any error on appeal.

This Court's analysis in *In re Jackson* resulted in a finding that the trial court did not err; the fact that the majority opinion also chose to discuss the issue of waiver is merely dicta.

[*7] III.

Having sustained Hall's assignment of error, the judgment of the juvenile court is reversed and the cause remanded for proceedings consistent with this opinion.

Judgment reversed and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to appellee.

Exceptions.

DONNA J. CARR

FOR THE COURT

BATCHELDER, J.

CONCURS

DISSENT BY: SLABY

DISSENT

SLABY, P. J. DISSENTS SAYING:

I respectfully dissent. The majority finds that the trial court accepted [*8] Hall's admission without determining whether he understood the possible consequences of entering the admission, contrary to the requirement contained in *Juv.R. 29(D)(1)*. However, the record indicates that the trial court substantially complied with *Juv.R. 29(D)(1)*. Therefore, I would affirm the judgment of the trial court.

As stated by the majority, juvenile courts must substantially comply with the provisions of *Juv.R. 29(D)*. *In re West (1998), 128 Ohio App.3d 356, 359, 714 N.E.2d 988*. The issue is not whether the judge strictly complied with rote, but whether the parties adequately understood their rights and the effect of their admissions. *Id.* There is compliance with *Juv.R. 29(D)(1)* when a juvenile court, prior to accepting an admission, personally informs a juvenile defendant of the potential penalty associated with the offense giving rise to the allegation of delinquency. See *In re Doyle (1997), 122 Ohio App.3d 767, 773, 702 N.E.2d 970*; *In re Hendrickson (1996), 114 Ohio App.3d 290, 293, 683 N.E.2d 76*.

A review of the transcript of proceedings in this case reveals that Hall was aware of the consequences of his admission. [*9] Significantly, the juvenile court ensured that Hall understood the potential penalty, which he faced in making an admission to the charge of arson, and that he understood exactly what he was admitting to having done. Furthermore, the court gave Hall the opportunity to have any questions answered. Therefore, having observed Hall, who was present in court with his mother, and determining that he understood the consequences of the admission, the juvenile court substantially complied with *Juv.R. 29(D)(1)*. In light of this determination, there was no plain error present in this case. Consequently, I would find that Hall waived his ability to raise this issue on appeal, due to his failure to file objections to the magistrate's decision as required by *Juv.R. 40(E)(3)(b)*.

LEXSEE 2003 OHIO 6666

IN RE: MARKITA HARPER

C.A. Case No. 19948

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY

2003 Ohio 6666; 2003 Ohio App. LEXIS 5962

December 12, 2003, Rendered

PRIOR HISTORY: [**1] (Appeal from Common Pleas Court, Juvenile Division). T.C. Case No. A 2003-3543-01.

DISPOSITION: Judgment affirmed.

COUNSEL: MATHIAS H. HECK, JR., Prosecuting Attorney, By: JOHNNA M. SHIA, Assistant Prosecuting Attorney, Dayton, Ohio, Attorneys for Plaintiff-Appellee.

J. ALLEN WILMES, Dayton, Ohio, Attorney for Defendant-Appellant, Markita Harper.

JUDGES: GLASSER, J.* FAIN, P.J., and YOUNG, J., concur. (Hon. George M. Glasser, Retired from the Sixth Appellate District, Sitting by Assignment of the Chief Justice of the Supreme Court of Ohio).

OPINION BY: GLASSER

OPINION

GLASSER, J. (By Assignment)

[*P1] Markita Harper, a minor, appeals from the trial court's adoption of a magistrate's decision finding her delinquent and ordering her committed to the Department of Youth Services for a minimum of six months.

[*P2] Harper advances two assignments of error on appeal. First, she contends the trial court erred in failing to appoint a guardian ad litem to assist her. Second, she claims the trial court accepted her admission to the allegations against her without ensuring that the [**2] admission was voluntary under *Juv.R. 29(D)*. Upon review, we conclude that Harper has waived all but plain error because she failed to file objections to the magistrate's decision. We also find no plain error in the failure to appoint a guardian ad litem or in the acceptance of her admission. Accordingly, we will affirm the judgment of the trial court.

I.

[*P3] The record reflects that thirteen-year-old Harper was charged with delinquency for bringing a knife to school. She and her mother subsequently appeared with counsel for an April 30, 2003, preliminary conference before a magistrate. At the outset, the magistrate informed Harper of various rights and explained the possible dispositional alternatives that she faced. The State then made a plea offer, which called for Harper to admit the charge in the complaint and a separate charge in exchange for the non-prosecution of other offenses. The magistrate again identified various rights that Harper would give up by entering an admission to the complaint, and she expressed her desire to do so. Harper then indicated that she was entering the admission of her own free will because she was responsible. The magistrate accepted the [**3] admission and plea agreement. The matter proceeded directly to the dispositional phase and, after hearing argument, the magistrate ordered Harper committed to the Department of Youth Services for no less than six months. That same day, the trial court adopted the magistrate's decision, as permitted by *Juv.R. 40(E)(4)(c)*. This timely appeal followed.

II.

[*P4] Before addressing the merits of Harper's arguments, we note that her failure to file objections to the magistrate's decision limits the scope of our review. Under *Juv.R. 40(E)(3)(a)*, a party must file written objections to a magistrate's decision within fourteen days. Furthermore, *Juv.R. 40(E)(3)(b)* provides that "[a] party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule." In addition, a trial court's immediate adoption of a

magistrate's decision does not obviate the need for filing objections. Rather, under *Juv.R. 40(E)(4)(c)*, "the court may adopt a magistrate's decision and enter judgment without waiting for timely objections by the parties, but the filing of timely written objections [**4] shall operate as an automatic stay of execution of that judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered."

[*P5] The upshot of the foregoing rules is that absent objections to a magistrate's decision, a juvenile waives his or her ability to raise assignments of error related to that decision. "The waiver under *Juv.R. 40(E)(3)(b)* embodies the long-recognized principle that the failure to draw the trial court's attention to possible error, by objection or otherwise, when the error could have been corrected, results in a waiver of the issue for purposes of appeal." *In re Etter (1998), 134 Ohio App.3d 484, 492, 731 N.E.2d 694.* We note, however, that the waiver rule has been tempered in two limited ways. First, even absent objections, *Juv.R. 40(E)(4)(a)* obligates a trial court to ensure that there is no "error of law or other defect on the face of the magistrate's decision." Second, this court has allowed a party to raise "plain error" on appeal even when no objections were filed in juvenile court. See, e.g., *In re Martin (Aug. 27, 1999), Montgomery App. Nos. 17432, 17461, 17464, 1999 Ohio App. LEXIS 3999.*

[*P6] In the present [**5] case, the waiver rule applies because Harper did not file objections to the magistrate's decision finding her delinquent and ordering her committed to the Department of Youth Services. In addition, we have reviewed the magistrate's decision, and we find no apparent "error of law or other defect" on its face. Neither of the issues Harper raises on appeal is disclosed by a review of the magistrate's decision.

[*P7] The only remaining question is whether Harper has demonstrated plain error, which exists when an error "seriously affects the basic fairness, integrity or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson, 79 Ohio St.3d 116, 122-123, 1997 Ohio 401, 679 N.E.2d 1099.* With regard to the failure to appoint a guardian ad litem, Harper notes that Ohio law requires such an appointment when the interests of a child and parent conflict. See *Juv.R. 4(B)(2); R.C. § 2151.281(A).* She then points out that her mother asked the magistrate to order treatment for her daughter, whereas Harper told the magistrate that she desired commitment to the Department of Youth [**6] Services. According to Harper, this disagreement constituted a conflict of interest that required the magistrate to appoint a guardian ad litem.

[*P8] Having reviewed the record, we find no error at all in the failure to appoint a guardian ad litem. The transcript of proceedings below reveals no anger or tension between Harper and her mother. The only point of disagreement was that Harper's mother, acting out of an apparent desire to help her daughter, requested a more lenient disposition than Harper herself sought. Although Harper preferred commitment to the Department of Youth Services, the record does not reflect a situation in which the magistrate plainly erred by failing to appoint a guardian ad litem on the basis of a conflict of interest.

[*P9] Finally, we find no plain error in the magistrate's acceptance of Harper's admission to the charge in the complaint. Harper argues that the magistrate violated *Juv.R. 29(D)*, which provides that a court shall not accept an admission without establishing that the juvenile (1) makes the admission "voluntarily with understanding of the nature of the allegations and consequences of the admission" and (2) understands that the admission [**7] constitutes a wavier of "the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing."

[*P10] Harper admits that the magistrate at least substantially complied with the second part of the foregoing rule. She contends, however, that the magistrate failed to ensure a voluntary admission. In support, Harper cites the following facts: (1) the magistrate failed to inform her of her right to counsel; (2) she appeared at the conference with substitute counsel; (3) she did not have a guardian ad litem; and (4) the magistrate asked leading questions when discussing her admission. In our view, these facts fail to demonstrate plain error in the acceptance of Harper's admission.

[*P11] With regard to the right to counsel, the transcript does not support the State's claim that the magistrate informed Harper of this right. Indeed, the magistrate did not specifically tell her that she had a right to counsel. Although provisions such as *Juv.R. 29(B)(3)* require a court to inform unrepresented parties of their right to counsel at the outset of an adjudicatory hearing, Harper appeared at the April 30, 1999, conference [**8] and entered her admission with the assistance of counsel. We find no plain error in the magistrate's failure to inform Harper of her right to have something that she already had obtained. [1] Likewise, we find no plain error stemming from the fact that Harper appeared with substitute counsel who was filling in for her regular attorney. The record does not reveal any prejudice to Harper as a result of the change in counsel. Harper's argument about the absence of a guardian ad litem is equally unpersuasive. As noted above, no guardian ad litem was required under the circumstances. Finally, the magistrate's manner of inquiry did not constitute plain error. On a few occasions, the magistrate made a statement to Harper and

then said, "Is that correct?" These statements concerned Harper's understanding of the circumstances of her offense, the consequences of an admission, and the voluntariness of her acceptance of responsibility. In each instance, Harper agreed with the magistrate's statement without any apparent hesitation, confusion, or misgivings. As a result, we cannot say that the magistrate's manner of inquiry constituted plain error.

1 Parenthetically, we note that the similar requirements of *Crim.R. 11(C)* only obligate a court to inform an *unrepresented* defendant of his right to counsel before accepting a guilty plea. See *Crim.R. 11(C)(1)*.

[**9] III.

[*P12] Based on the reasoning and citation of authority set forth above, we overrule Harper's assignments of error and affirm the judgment of the Montgomery County Common Pleas Court, Juvenile Division.

FAIN, P.J., and YOUNG, J., concur.

LEXSEE 2005 OHIO 5045

IN RE: J.B.

CASE NOS. CA2004-09-024, CA2004-09-025

COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, BROWN COUNTY

2005 Ohio 5045; 2005 Ohio App. LEXIS 4563

September 26, 2005, Decided

PRIOR HISTORY: [**1] APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS, JUVENILE DIVISION. Case Nos. 2004-2004 and 2004-2313.

COUNSEL: Joseph M. Worley, Georgetown, OH, for appellant.

Thomas F. Grennan, Brown County Prosecuting Attorney, Mary McMullen, Georgetown, OH, for appellee.

JUDGES: YOUNG, J. WALSH, P.J., and BRESSLER, J., concur.

OPINION BY: YOUNG

OPINION

(Accelerated Calendar)

YOUNG, J.

[*P1] This is an accelerated appeal [1] in which appellant, J.B., appeals his adjudication in the Clermont County Court of Common Pleas, Juvenile Division, as a delinquent by reason of receiving stolen property, and the dispositional order of the Brown County Court of Common Pleas, Juvenile Division, committing him to the Ohio Department of Youth Services ("DYS") after he admitted violating his probation in another case.

1 Pursuant to Loc.R. 6(A), we have sua sponte assigned this appeal to the accelerated calendar.

[*P2] On July 19, 2004, at a hearing before the Clermont County Juvenile Court, appellant was adjudicated a delinquent after [**2] he admitted to the charge of receiving stolen property. The disposition of that case was referred to the Brown County Juvenile Court. On August 3, 2004, appellant was brought before the Brown County Juvenile Court for the disposition in the receiving stolen property case, and for a probation violation in another case. Appellant admitted violating his probation and the court committed him to the custody of DYS on both cases for a period of no less than six months and not extending beyond his 21st birthday.

[*P3] Appellant's first assignment of error [2] contends that the Clermont County Juvenile Court violated *Juv.R. 29(B)* when it accepted appellant's admission to the charge of receiving stolen property without determining whether appellant was waiving his right to an attorney. The record supports this contention, and the state concedes that the Clermont County Juvenile Court at no time either asked appellant whether he wanted to waive his right to an attorney or secured a written waiver of counsel from appellant. Appellant's first assignment of error is therefore sustained.

2 We note that appellant's appellate brief raises two issues rather than two assignments of error as required under Loc.R. 11. We construe appellant's issues as assignments of error.

[**3] [*P4] Appellant's second assignment of error contends that the Brown County Juvenile Court erred by failing to adhere to the requirements of *Juv.R. 29(B)* and *(D)* at the probation revocation hearing. The assignment of error is overruled on the ground that *Juv.R. 29* does not apply to probation violation hearings. Rather, *Juv.R. 35* applies to such hearings. See *In re Motley (1996), 110 Ohio App.3d 641, 674 N.E.2d 1268*; *In re Rogers (May 23, 2001), Summit App. No. 20393, 2001 Ohio App. LEXIS 2284. Juv.R. 35(B)* states that a juvenile court may revoke probation only "after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to *Juv.R. 4(A)*." After reviewing the transcript of the probation violation hear-

ing, we find that the Brown County Juvenile Court complied with *Juv.R. 35*.

[*P5] The Clermont County Juvenile Court's finding of delinquency by reason of receiving stolen property is reversed, appellant's admission [**4] to that charge is vacated, and the cause is remanded to the trial court for further proceedings according to law and consistent with this opinion. The Brown County Juvenile Court's revocation of appellant's probation after he admitted violating his probation is affirmed.

WALSH, P.J., and BRESSLER, J., concur.

LEXSEE 2004 OHIO 3647

IN RE: CRYSTAL KINDRED A MINOR CHILD

Case No. 04 CA 7

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, LICKING COUNTY

2004 Ohio 3647; 2004 Ohio App. LEXIS 3281

July 2, 2004, Date of Judgment Entry

PRIOR HISTORY: [**1] CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Juvenile Division. Case No. A-2003- 1028.

DISPOSITION: Reversed and remanded.

COUNSEL: For Plaintiff-Appellee: ROBERT BECKER, ERIN WELCH, Newark, Ohio.

For Defendant-Appellant: DAVID H. BODIKER, MILLY J. BRUNS, Columbus, Ohio.

JUDGES: Hon. John W. Wise, P. J., Hon. Julie A. Edwards, J., Hon. John F. Boggins, J. Wise, P. J. Boggins, J., concurs. Julie A. Edwards, J., concurs separately.

OPINION BY: John W. Wise

OPINION

Wise, P. J.

[*P1] Appellant Crystal Kindred is before the court upon her claim that she was denied the right to counsel by the trial court's failure to appoint counsel on her behalf or obtain a valid waiver of counsel. The following facts give rise to this appeal.

[*P2] On December 10, 2003, appellant was charged with one count of theft. Appellant stole credit cards in violation of *R.C. 2152.02(F)*. Appellant appeared, for an arraignment before a magistrate, on that same day. The magistrate continued the arraignment upon appellant's father's request for an attorney. Although appellant requested a court-appointed attorney, her request was denied because their household income exceeded [**2] the minimum required by law.

[*P3] On December 19, 2003, the trial court conducted appellant's arraignment. The magistrate indicated, on the record, that appellant was not entitled to a court-appointed attorney.

[*P4] Appellant stated that she wanted to proceed, without counsel, and subsequently admitted to the charge of theft. The magistrate imposed court costs and committed appellant to the Department of Youth Services for a term consisting of a minimum of six months. Appellant did not file objections to the magistrate's decision. The trial court adopted the magistrate's decision on December 22, 2003.

[*P5] Appellant timely filed a notice of appeal and sets forth the following assignment of error for our consideration:

[*P6] "I. THE TRIAL COURT VIOLATED CRYSTAL KINDRED'S RIGHT TO COUNSEL AND DUE PROCESS UNDER THE *FIFTH, SIXTH,* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION, OHIO REVISED CODE SECTION 2151.352* AND *JUVENILE RULES 4 AND 29.*"

I

[*P7] In her sole assignment of error, appellant maintains the trial court violated her right to counsel and due process. [**3] We agree.

[*P8] Appellant sets forth two arguments in support of her assignment of error. First, appellant contends she has a statutory right to counsel pursuant to *R.C. 2151.352.* This statute provides, in pertinent part:

[*P9] "A child * * * is entitled to representation by legal counsel at all stages of the proceedings under this chapter or *Chapter 2152. of the Revised Code* and if, as an indigent person, any such person is unable to employ counsel, to have counsel provided for the person pursuant to *Chapter 120. of the Revised Code.* * * * Counsel

must be provided for a child not represented by the child's parent, guardian, or custodian. * * *"

[*P10] We agree that *R.C. 2151.352* establishes this right. Further, Juv.*R. 4(A) and Juv.R. 29(B)* also establishes a juvenile's right to counsel. *Juv.R. 4(A)* provides as follows:

[*P11] "**(A) Assistance of counsel**

[*P12] "Every party shall have the right to be represented by counsel and every child, * * * the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. * * *"

[*P13] [**4] *Juv.R. 29(B)* also provides a right to counsel and states, in pertinent part:

[*P1] [*P14] "(B) Advisement and findings at the commencement of the hearing

[*P15] "At the beginning of the hearing, the court shall do all of the following:

"* * *"

[*P16] "(3) Inform unrepresented parties of their right to counsel and determine if those parties are waiving their right to counsel;

[*P17] "(4) Appoint counsel for any unrepresented party under *Juv.R. 4(A)* who does not waive the right to counsel;

[*P18] "(5) Inform any unrepresented party who waives the right to counsel of the right: to obtain counsel at any stage of the proceedings, to remain silent, to offer evidence, to cross-examine witnesses, and, upon request, to have a record of all proceedings made, at public expense if indigent."

"* * *"

[*P19] Therefore, pursuant to *R.C. 2151.352*, Juv.*R. 4(A) and Juv.R. 29(B)*, appellant was entitled to appointed counsel provided she did not knowingly waive this right.

[*P20] Second, in support of her sole assignment of error, appellant contends the record establishes she did not waive her right to counsel. We have [**5] reviewed the record in this matter and conclude appellant did not knowingly, intelligently and voluntarily waive this right. Although a juvenile may waive his or her right to counsel, the trial court is required to make a sufficient inquiry to determine whether the defendant did so knowingly, intelligently and voluntarily. *In re Johnson (1995), 106 Ohio App.3d 38, 41, 665 N.E.2d 247.* The trial court is required to give close scrutiny to factors such as the juvenile's age, emotional stability, mental capacity, and prior criminal experience. Id.

[*P21] In the case sub judice, the record indicates the trial court failed to conduct a sufficient inquiry, with appellant, to determine whether appellant knowingly, intelligently and voluntarily waived her right to counsel. At the arraignment conducted on December 19, 2003, the trial court made the following comment concerning appellant's right to counsel:

[*P22] "THE COURT: Crystal, we're here today for purposes of a continued arraignment; this matter having been postponed to allow you to apply for a court appointed attorney. That application was filed. You do not qualify for a court appointed attorney and your application was [**6] denied. Do you wish to go forward with your hearing today without an attorney?

[*P23] "MS. KINDRED: Yes, Your Honor." Tr. Dec. 19, 2003, at 2.

[*P24] We find this colloquy insufficient to establish a knowing, intelligent and voluntary waiver of counsel because it does not establish whether appellant understood the nature of the right to counsel that she would be waiving. Also, there is no indication the trial court considered the factors mentioned above.

[*P25] Finally, we will address the state's argument that appellant waived the issue raised on appeal by not filing any objections to the magistrate's decision. In support of this argument, the state cites our decision in *In re Harris, Richland App. No. 01CA60, 01CA61, 2002 Ohio 2474.* In the *Harris* case, we declined to address the merits of a juvenile's appeal on the basis that the juvenile failed to file objections to the magistrate's decision.

[*P26] We decline to apply the *Harris* decision to the facts of this case because *Harris* did not involve the issue of a juvenile's right to counsel. Rather, in *Harris*, the juvenile had legal representation throughout the legal proceedings [**7] and failed to file objections to the magistrate's decision. However, in the matter currently before the court, appellant did not have the benefit of counsel and did not knowingly waive counsel. Therefore, we decline to apply our decision in *Harris* to the facts of this case.

[*P27] Accordingly, appellant's sole assignment of error is sustained.

[*P28] For the foregoing reasons, the judgment of the Court of Common Pleas, Juvenile Division, Licking County, Ohio, is hereby reversed and remanded for further proceedings consistent with this opinion.

By: Wise, P. J.

Boggins, J., concurs.

Edwards, J., concurs separately.

CONCUR BY: JULIE A. EDWARDS

CONCUR

EDWARDS, J., CONCURRING OPINION

[*P29] I concur with the majority as to its disposition of this case. I write separately only to make explicit what I find to be implicit in the majority's analysis. If non-indigent parents of a child refuse to provide counsel for that child and that child wants to be represented by counsel, that child is indigent and the court must appoint counsel. Any waiver of counsel by such child must be done with clear knowledge of what counsel can do for the child as well as the fact that [**8] counsel will be provide at no cost to the child.

Judge Julie A. Edwards

LEXSEE 2007 OHIO 1479

IN RE: L.A.B.

C. A. No. 23309

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT COUNTY

2007 Ohio 1479; 2007 Ohio App. LEXIS 1385

March 30, 2007, Decided

SUBSEQUENT HISTORY: Discretionary appeal allowed by, Stay granted by *In re L.A.B., 114 Ohio St. 3d 1478, 2007 Ohio 3699, 870 N.E.2d 731, 2007 Ohio LEXIS 1725 (2007)*
Certification granted by *In re L.A.B., 114 Ohio St. 3d 1476, 2007 Ohio 3699, 870 N.E.2d 729, 2007 Ohio LEXIS 1760 (2007)*
Later proceeding at *In re L.A.B., 2007 Ohio 6659, 2007 Ohio LEXIS 3336 (Ohio, Dec. 14, 2007)*
Later proceeding at *In re L.A.B., 2007 Ohio 6659, 2007 Ohio LEXIS 3338 (Ohio, Dec. 14, 2007)*

PRIOR HISTORY: [**1] APPEAL FROM JUDGMENT ENTERED IN THE JUVENILE COURT, COUNTY OF SUMMIT, OHIO. CASE No. DL0507003586.

DISPOSITION: Judgment affirmed.

COUNSEL: DAVID H. BODIKER, Ohio Public Defender, and AMANDA J. POWELL, Assistant State Public Defender, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and PHILIP D. BOGDANOFF, Assistant Prosecuting Attorney, for Appellee.

JUDGES: CARLA MOORE. WHITMORE, P. J., DICKINSON, J., CONCUR.

OPINION BY: CARLA MOORE

OPINION

DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MOORE, Judge.

[*P1] Appellant, L.A.B., appeals the judgment of the Summit County Juvenile Court finding that he had violated the conditions of his probation. We affirm.

I.

[*P2] On May 31, 2006, a complaint was filed in the Summit County Juvenile Court alleging that Appellant had violated his probation by not attending the Youth Outreach Center ("YOC") on a regular basis. On June 8, 2006, Appellant appeared in court before a magistrate. Appellant was accompanied by his mother but without counsel. Appellant admitted that he had committed a probation violation. The court then asked Appellant [**2] whether he wished to be represented by an attorney. Appellant stated that he wished to proceed without counsel. The court then explained Appellant's trial rights and the possible maximum penalty, which consisted of a Department of Youth Services ("DYS") commitment "for a minimum period of one year, maximum until you are 21 years old." Appellant was 13 years old at the time of the hearing. After the court accepted Appellant's admission to the probation violation, it proceeded directly to disposition.

[*P3] During disposition, Appellant's probation officer recommended that Appellant "go to intensive probation, [to] see what someone with a lesser caseload can do with him, see if they can work with him." In addition, Appellant's mother voiced her opinion. She suggested that the court "be hard on him and send him where he's supposed to go." The court sentenced Appellant to the DYS for a minimum period of one year, maximum to his 21st birthday. Appellant timely appealed the court's decision, raising three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT VIOLATED [APPELLANT'S] RIGHT TO COUNSEL AND RIGHT TO DUE PROCESS UNDER THE [**3] *FIFTH, SIXTH,* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION, OHIO REVISED CODE SECTION 2151.352,* AND *JUVENILE RULES 4* AND *35*."

[*P4] In Appellant's first assignment of error, he contends that the trial court violated his right to counsel and right to due process under the U.S. Constitution, Ohio Constitution, *R.C. 2151.352* and *Juv.R. 4* and *35*. We disagree.

[*P5] *R.C. 2151.352* codifies a juvenile's right to counsel and states that "[i]f a party appears without counsel, the court shall ascertain whether the party knows of the party's right to counsel and of the party's right to be provided with counsel if the party is an indigent person." *Juv.R. 29* governs adjudicatory hearings. *Juv.R. 29(B)(3)* and (4) state that "[a]t the beginning of the hearing, the court shall do all of the following: (3) [i]nform unrepresented parties of their right to counsel and determine if those parties are waiving their right to counsel; [**4] (4) [a]ppoint counsel for any unrepresented party under *Juv.R. 4(A)* who does not waive the right to counsel[.]" *Juv.R. 4* states that "[e]very party shall have the right to be represented by counsel *** if indigent *** when a person becomes a party to a juvenile court proceeding." *Juv.R. 35(B)* governs revocation of probation and provides that the court may revoke probation only

> "after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to *Juv.R. 4(A)*. Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to *Juv.R. 34(C)*, been notified."

[*P6] A juvenile may waive the right to counsel in most proceedings with permission of the court. *Juv.R. 3*. However, before permitting a waiver of counsel, the court has a duty to make an inquiry to determine that the relinquishment is of "a fully known right" [**5] and is voluntarily, knowingly and intelligently made. *In re Gault (1967), 387 U.S. 1, 42, 87 S. Ct. 1428, 18 L. Ed. 2d 527. Gault* established that juveniles facing possible commitment were guaranteed many of the same constitutional rights at the adjudicatory stage as were their adult counterparts, including notification of the right to counsel and the appointment of counsel to indigent juveniles.

[*P7] This Court has held that the provisions of *Juv.R. 29* do not apply to probation violation hearings. *In re Rogers (May 23, 2001), 9th Dist. No. 20393, 2001 Ohio App. LEXIS 2284, at *3*; *In re Motley (1996), 110 Ohio App.3d 641, 642, 674 N.E.2d 1268*; *In re Collins (Sept. 27, 1995), 9th Dist. No. 2365-M, 1995 Ohio App. LEXIS 4283, at *5* (J. Dickinson, dissenting). Rather, we concluded that *Juv.R. 35(B)* applies to such hearings. Id. To the extent we have previously applied *Juv.R. 29* instead of *Juv.R. 35* in our review of probation violation hearings, we have erred.

[*P8] In *Rogers,* as in this matter, the juvenile waived the right to counsel and admitted to a probation violation. Upon review, we found that the magistrate more than met the requirements [**6] of *Juv.R. 35(B)* where the magistrate instructed the juvenile of her right to appointed counsel as well as her right to call and cross-examine witnesses. *2001 Ohio App. LEXIS 2284, at *4*. In *Motley, 110 Ohio App.3d 641, 642, 674 N.E.2d 1268*, this Court held that the juvenile court was not required to advise the juvenile that he had a right to present evidence at the probation revocation hearing. Given our holdings in *Rogers* and *Motley,* "and the clear provisions of *Juv.R. 35(B)*, the juvenile court here was obliged only to advise [Appellant] that [he] had the right to counsel, and if appropriate, to have counsel appointed at the state's expense." *Rogers, supra, 2001 Ohio App. LEXIS 2284, at *4*.

[*P9] Reviewing the transcript of the probation violation hearing in the instant case, we find that the magistrate advised Appellant that he was charged with violating his probation by not attending YOC on a regular basis and specifically by missing three days in a row. The magistrate asked Appellant whether he understood that he was so charged. Appellant responded that he did. The magistrate then told Appellant he had a right to be represented by a lawyer and that if he could [**7] not afford a lawyer, the court would appoint one to represent him. Appellant indicated he understood these rights. The magistrate then asked Appellant whether he wished to be represented by a lawyer or proceed without one. Appellant stated that he wished to proceed without a lawyer. Appellant's disposition hearing was held immediately thereafter. Having reviewed the record, we find that the trial court complied with *Juv.R. 35(B)* in the proceeding leading to Appellant's waiver of his right to counsel.

[*P10] Appellant cites *In re William B., 163 Ohio App.3d 201, 2005 Ohio 4428, 837 N.E.2d 414*, and *In re C.A.C., 2d Dist. No. 2005-CA-134-35, 2006 Ohio 4003*, in support of his contention that the trial court failed to properly inform him that he had a right to counsel, notwithstanding his intention to admit or deny the charge. He contends that as a result of the trial court's omission, he did not receive a full and clear explanation of his right to counsel and therefore, could not have validly waived his right to counsel.

[*P11] *C.A.C.* is inapplicable to the within matter as it involved the waiver of counsel at an adjudicatory hearing, [**8] not a probation revocation hearing. *William B.* is also distinguishable. Rather than ask William B. whether he wished to waive his right to counsel, the trial court told him that if he wanted his rights, he should deny the probation violation charge. *William B, supra, at P20*. The court found that "appellant was advised that in order to be afforded his constitutional rights, including his *Sixth Amendment* right to counsel, he would have to deny the charges levied against him." *Id. at P23*. Unlike *William B.*, in the trial court's discussion of Appellant's right to counsel, the court did not differentiate between a juvenile who chooses to deny a charge and one who admits the charge. Id.

[*P12] Appellant additionally alleges that he was not informed that he could be sentenced to the DYS until age 21 before he waived his right to counsel. Pursuant to *Juv.R. 35(B)*, the trial court was not required to apprise Appellant of the possible punishment for his probation violation before he waived his right to counsel. *Juv.R. 35(B)* only requires that the juvenile be apprised of the "condition of probation" he allegedly violated and the [**9] "grounds on which revocation is proposed." Moreover, the record reflects that (1) the trial court specifically apprised Appellant of the consequences of violating probation on at least two previous occasions within four months of this disposition hearing and (2) the trial court informed Appellant of these sanctions before he admitted to this offense.

[*P13] Appellant further contends that the trial court violated his right to counsel by failing to obtain a second waiver of counsel at his disposition hearing. He contends that the trial court's failure to advise him of his right to counsel at the disposition hearing was reversible error, citing this Court's decision in *In re S.J., 9th Dist. No. 23058, 2006 Ohio 4467*. We discussed the doctrine of "substantial compliance" in *S.J., supra, at P8*, and found that the trial court substantially complied with the requirements for waiving counsel at S.J.'s adjudication hearing and that the juvenile properly waived his right to counsel. At the disposition hearing, held on a different day, however, we found that the trial court erred because it "did not reiterate Appellant's right to counsel during disposition or allow [**10] him either to invoke or to waive his right to counsel at that stage." *Id. at P10*. The situation in *S.J.* is distinguishable from the within matter. Appellant's adjudication hearing and disposition hearing were held as part of the same proceedings on the same day.

[*P14] We find that the trial court's colloquy meets the requirements set forth in *Juv.R. 35(B)* and our holdings in *Rogers, Collins* and *Motley*. The trial court informed Appellant of the charge against him, advised Appellant of his right to counsel and that counsel could be appointed for him if he could not afford it. Therefore, the trial court did not err by accepting Appellant's waiver of his right to counsel. Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE JUVENILE COURT VIOLATED [APPELLANT'S] RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE *FIFTH* AND *FOURTEENTH AMENDMENTS* TO THE UNITED STATES CONSTITUTION; *ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION*; AND *JUV.R. 35*, WHEN IT FAILED TO FOLLOW THE REQUIREMENTS OF *JUV.R. 35(B)*."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT [**11] COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO APPOINT A GUARDIAN AD LITEM FOR [APPELLANT] IN VIOLATION OF *OHIO REVISED CODE SECTION 2151.281(A)* AND *JUVENILE RULE 4(B)*."

[*P15] In Appellant's second assignment of error, he contends that the trial court violated his due process rights under federal and state law as well as *Juv.R. 35*, when the court failed to follow the requirements of *Juv.R. 35(B)*. In Appellant's third assignment of error, he contends that the trial court erred in failing to appoint a guardian ad litem in violation of *R.C. 2151.281(A)* and *Juv.R. 4(B)*. We disagree.

[*P16] In the instant case, Appellant failed to object to the magistrate's decisions that culminated in the Probation Violation Order. Pursuant to *Juv.R. 40(D)(3)(a)* and *Civ.R. 53(D)(3)(b)*, Appellant could have filed written objections to the magistrate's decision within fourteen days after the filing of that decision. Ab-

sent objections to the magistrate's findings or conclusions, a party shall not assign [**12] as error on appeal the magistrate's findings or conclusions as stated in the decision or "'the court's adoption of any finding of fact or conclusion of law[.]'" (Emphasis omitted.) *Lewis v. Savoia (Aug. 28, 1996), 9th Dist. No. 17614, 1996 Ohio App. LEXIS 3597, at *3*, quoting *Civ.R. 53(E)(3)(b)*. See, also, *Juv.R. 40(D)(3)(a)* and *Civ.R. 53(D)(3)(b)*. Due to Appellant's failure to object to the magistrate's decision, he has deprived the trial court of the opportunity to correct the alleged errors in the first instance and has thereby forfeited his right to appeal the findings and conclusions contained in the magistrate's decision. See *In re Etter (1998), 134 Ohio App.3d 484, 492, 731 N.E.2d 694*, citing *Goldfuss v. Davidson (1997), 79 Ohio St.3d 116, 121, 1997 Ohio 401, 679 N.E.2d 1099*. See, also, *Lewis, supra, 1996 Ohio App. LEXIS 3597, at *5-6*; *In re Clayton (Nov. 9, 2000), 8th Dist. No. 75757, 2000 Ohio App. LEXIS 5213, at *15-16* (O'Donnell, P.J., dissenting).

[*P17] Initially, we must note the distinction between the waiver of an objection and the forfeiture of an objection. Although the terms are frequently used interchangeably, a waiver occurs where a party affirmatively relinquishes a right [**13] or an objection at trial; a forfeiture occurs where a party fails to assert a right or make an objection before the trial court in a timely fashion. *State v. Hairston, 9th Dist. No. 05CA008768, 2006 Ohio 4925, at P9*, quoting *United States v. Olano (1993), 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508*. Where a party has forfeited an objection by failing to raise it, the objection may still be assigned as error on appeal if a showing of plain error is made. *Hairston at P9*, quoting *State v. McKee (2001), 91 Ohio St. 3d 292, 299 fn. 3, 2001 Ohio 41, 744 N.E.2d 737* (Cook, J., dissenting); *Crim.R. 52(B)*. Where a party has affirmatively waived an objection, however, the error may not be asserted on appeal even if it does amount to plain error. Id.

[*P18] This Court has applied the above-referenced doctrine where an unrepresented juvenile appeals an issue to which he failed to object in the trial court. In those instances, we have held that the juvenile waived [1] (more specifically "forfeited") his right to object to the magistrate's findings as supported by the hearing transcript. *In re J-M. W., 9th Dist. Nos. 23066 & 23144, 2006 Ohio 6156, at PP5-9*, [**14] citing *In re Stanford, 9th Dist. No. 20921, 2002 Ohio 3755*.

1 We are mindful that this Court has frequently interchanged these terms. See *Hairston, supra, at P9*, quoting *Olano, 507 U.S. at 733*.

[*P19] An exception to the forfeiture doctrine exists, however, if plain error is found. *Etter, 134 Ohio App.3d at 492*; *Hairston at P9*, quoting *State v. McKee (2001), 91 Ohio St.3d 292, 299 fn. 3* (Cook, J., dissenting); *Crim.R. 52(B)*. Plain error is defined as any error or defect that affects an individual's substantial rights, which is not brought to the attention of the trial court through an objection. *Crim.R. 52(B)*. However, Appellant has neither argued plain error, nor has Appellant explained why we should delve into either of these issues for the first time on appeal. Accordingly, we decline to address these issues. Appellant's second and third assignments of error are overruled.

III.

[**15] [*P20] Appellant's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Juvenile Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to Appellant.

CARLA MOORE

FOR THE COURT

WHITMORE, P. J.

DICKINSON, J.

CONCUR

LEXSEE 2007 OHIO 1130

IN THE MATTER OF: ROBERT L. LOHR, A Delinquent Child

CASE NO. 06 MO 6

COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT, MONROE COUNTY

2007 Ohio 1130; 2007 Ohio App. LEXIS 1046

March 7, 2007, Decided

PRIOR HISTORY: [**1] CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas, Juvenile Division of Monroe County, Ohio. Case No. 33462.

DISPOSITION: Reversed and Remanded.

COUNSEL: For Plaintiff-Appellee: Atty. L. Kent Riethmiller, Monroe County Prosecutor, Woodsfield, Ohio.

For Defendant-Appellant: Atty. David H. Bodiker, Ohio Public Defender, Atty. Amanda J. Powell, Assistant State Public Defender, Office of the Ohio Public Defender, Columbus, Ohio.

JUDGES: Hon. Cheryl L. Waite, Hon. Gene Donofrio, Hon. Joseph J. Vukovich. Donofrio, J., concurs. Vukovich, J., concurs.

OPINION BY: Cheryl L. Waite

OPINION

WAITE, J.

[*P1] Juvenile Appellant Robert L. Lohr appeals the decision of the Monroe County Court of Common Pleas, Juvenile Division, finding him in violation of his probation and imposing the terms of his prior delinquency disposition. His prior delinquency adjudication in 2002 arose from a charge of forcible rape, which was reduced to an admission to the charge of gross sexual imposition. He was placed in the care of the Department of Youth Services (DYS) for a minimum of six months to a maximum which will be reached on the date he attains age 21. The penalty was suspended and Appellant was placed on [**2] probation. Numerous probation revocation proceedings were initiated at different times within a three year period. Appellant contends that he was not properly afforded his right to an attorney at both the adjudication and dispositional phases of the most recent probation revocation proceeding. He also argues that the court failed to timely notify him of the basis for the probation revocation and failed to explain the consequences of his admission of the violation.

[*P2] Appellee contends that Appellant has been through numerous probation revocation hearings arising from the 2002 delinquency adjudication and had been previously advised of his right to counsel at least seven times. Appellee also points out that Appellant's guardian ad litem, his custodian, and members of the DYS were at the hearing to assist him. Appellee concludes that, under the circumstances, Appellant waived the right to counsel. Appellee's arguments are not persuasive. No matter how many times Appellant has been through the probation revocation process, the court was required to make it clear that he had a right to assistance of counsel, and any waiver of that right must be equally clear from the record. The [**3] judgment of the trial court and Appellant's admission are hereby vacated, and the case is remanded for further proceedings.

PRIOR HISTORY OF THE CASE

[*P3] On June 7, 2002, Appellant was charged with delinquency based on an alleged forcible rape. The charge arose from events that occurred on June 6, 2002, in which Appellant was accused of engaging in oral sex with a five-year old boy. Appellant was eleven years old when the incident took place.

[*P4] Counsel was appointed, and on July 25, 2002, Appellant admitted to the reduced charge of gross sexual imposition.

[*P5] On August 13, 2002, the Monroe County Court of Common Pleas, Juvenile Division, ordered Appellant to be detained in the custody of the Department

of Youth Services for a period of not less than six months up to a maximum which will be reached on the date Appellant attains age 21. The court also ordered Appellant to submit to drug/alcohol and mental health assessments, to obtain counseling, to perform 500 hours of public service work, to pay a fine of $ 1,200 or further public service work if the fine could not be paid, and to pay court costs within 30 days. The sentence was suspended and Appellant [**4] was placed on probation until age 21 and committed to Oakview Juvenile Rehabilitation Center.

[*P6] On October 3, 2002, Appellant was charged with violating his probation due to possession of drugs in school. He was arraigned on October 3, 2002. He appeared without counsel, and at the arraignment he admitted to the probation violation.

[*P7] On October 24, 2002, another motion to revoke probation was filed due to Appellant's failure to obey rules at Oakview Juvenile Rehabilitation Center. A hearing was held on November 6, 2002, at which Appellant was advised of his right to counsel. He waived the right to counsel and admitted to the probation violation. The court proceeded to disposition and ordered that Appellant be placed in the care of the Monroe County Department of Job and Family Services for placement at New Horizon Youth Center.

[*P8] On March 23, 2003, a motion to revoke probation was filed for failure to follow the rules at New Horizon Youth Center. A hearing was held on April 4, 2003, at which Appellant was not represented by counsel, and there is no indication that he was told of his right to counsel. The court found that Appellant violated his probation [**5] based on 20 incident reports from New Horizon Youth Center. Disposition was postponed to a later date.

[*P9] Other motions to revoke probation were filed on October 27, 2003, and November 24, 2003. A hearing was held on November 21, 2003, at which Appellant was advised of his right to counsel. He waived that right and admitted to the probation violation. Disposition occurred immediately, and Appellant was ordered to serve 16 days in detention.

[*P10] On January 20, 2004, yet another motion to revoke probation was filed, alleging that Appellant assaulted Brian Warrington, an employee of New Horizon Youth Center. Appellant tried to stab Mr. Warrington with a pencil, and there are indications that he also bit another staff member in the face. Appellant was arraigned the same day, and counsel was appointed. On February 2, 2004, Appellant, with counsel, admitted to assault and criminal damaging, and the court immediately reimposed the original punishment from August 13, 2002, ordering Appellant to be committed to the Department of Youth Services for a period of not less than six months and a maximum set at the date Appellant reaches age 21. On March 4, 2004, Appellant filed [**6] an appeal to this Court.

[*P11] On March 10, 2004, the trial court held a hearing to determine if Appellant should be granted judicial release. Appellant appeared with counsel. The court filed a journal entry the same day granting Appellant judicial release and transferring custody of Appellant to the Monroe County Department of Job and Family Services.

[*P12] On March 15, 2004, the court filed a judgment entry more fully explaining the terms of judicial release and probation. The first requirement of probation was that Appellant obey all state and local laws. There were a total of 13 terms of probation listed in the judgment entry.

[*P13] On March 30, 2004, Appellant filed a motion to dismiss the pending appeal. This Court dismissed the appeal on April 26, 2004.

[*P14] On July 1, 2004, the state filed a motion to revoke probation because Appellant ran away from his residential placement and resisted arrest. A hearing was held on July 8, 2004. Appellant was advised of his right to counsel. He waived the right, and admitted to the probation violation. The court held a dispositional hearing on July 19, 2004. The court ordered Appellant to continue in the custody [**7] of the Monroe County Department of Job and Family Services, and placed him under community control until May 21, 2009.

[*P15] On June 15, 2005, the court filed a journal entry reviewing Appellant's case. The entry noted that Appellant was doing much better in complying with the rules at the Certified Ohio Boys Residential Academy ("C.O.B.R.A."), and had no derogatory incident reports for two months. The court stated that the projected date for Appellant's permanent adoption was January 1, 2008. The court continued the prior case plan. Then, on July 14, 2005, the court filed another review update, and terminated Appellant's placement with C.O.B.R.A. and found that he was not ready for adoption because he was undisciplined and violent.

[*P16] On December 5, 2005, Appellant's probation officer filed another motion to revoke probation because he failed to follow school rules and was disrespectful to his foster parents. This motion was later withdrawn, but another motion followed on January 3, 2006, stating that Appellant left his public service work without permission and that his whereabouts were unknown. A hearing was held on the same day, and Appellant again waived his right [**8] to counsel and admitted to the charge. On January 23, 2006, the trial court filed its dis-

position order. Appellant was taken out of foster care and was sent to a treatment facility in Kokomo, Indiana.

[*P17] On May 1, 2006, another motion to revoke probation was filed, stating that Appellant was charged with two counts of auto theft in Indiana; Class D felonies according to Indiana law. The court held a hearing on June 2, 2006. Present were Appellant, his probation officer, two members of the Monroe County Department of Job & Family Services, and his guardian ad litem. The transcript of the hearing is part of the record. The hearing was presided over by a visiting judge from Harrison County. The following dialog took place:

[*P18] "THE COURT: * * * Robert, did you receive a copy of the motion to revoke probation?

[*P19] "THE JUVENILE: No, Sir.

[*P20] "THE COURT: Then I will read it to you at this time.

[*P21] "Now comes the undersigned and hereby moves the Court to revoke the probation of Robert Lohr as the juvenile has been adjudicated a delinquent in Howard County, Indiana for two charges of auto theft, being charged class D felonies if committed by [**9] an adult.

[*P22] "So the basis for the revocation is your delinquency actions out of the State of Indiana.

[*P23] "Do you have any other questions for what you're being charged, sir?

[*P24] "THE JUVENILE: No, Sir.

[*P25] "THE COURT: Okay. At this point, sir, you have the right to have an attorney - you can do this two ways.

[*P26] "You can admit to this charge at this point or you can request a full hearing on this matter, have an attorney present who can cross examine witnesses and go forward.

[*P27] "Which way would you like to proceed, sir?

[*P28] "THE JUVENILE: I admit.

[*P29] "THE COURT: You want to admit at this time?

[*P30] "THE JUVENILE: Yes.

[*P31] "THE COURT: You understand that by entering an admission, you will be waiving all your trial rights of cross examination, right of appeal and so forth.

[*P32] "Has anybody promised you anything or is anybody forcing you to enter this admission?

[*P33] "THE JUVENILE: No, sir.

[*P34] "THE COURT: Do you understand that by entering this admission, the Court has a full range of sentencing possibilities including a DYS commitment?

[*P35] "THE JUVENILE: [**10] Yes.

[*P36] "THE COURT: Knowing all of this, do you still wish to enter an admission at this time?

[*P37] "THE JUVENILE: Yes.

[*P38] "THE COURT: Okay. The Court will accept your admission as knowingly made, voluntarily made and understandably made, being you know what the allegation is against you, you know what your rights are; and you know what the maximum potential penalties could be." (Tr., pp. 3-5.)

[*P39] Appellant was fifteen years old at the time this hearing took place. Later in the hearing, Appellant told the judge he had been involved with various counseling programs, had mental evaluations, and was on medication. Appellant described problems he had had in each detention or placement center. He stated that he liked the C.O.B.R.A. program the best.

[*P40] After the court accepted the admission, it proceeded to the disposition phase. The Court's judgment entry, filed on June 2, 2006, reimposed the commitment to the DYS that was originally imposed on August 13, 2002, for a minimum period of six months to a maximum at age 21. The judgment entry was corrected nunc pro tunc on June 22, 2006, to make a clerical correction concerning time that Appellant [**11] had already spent in detention.

[*P41] Appellant filed this timely appeal on June 29, 2006, and appellate counsel has been appointed.

ASSIGNMENTS OF ERROR

[*P42] "THE TRIAL COURT VIOLATED ROBERT LOHR'S RIGHT TO COUNSEL AND RIGHT TO DUE PROCESS UNDER THE *FIFTH*, *SIXTH*, AND *FOURTEENTH AMENDMENTS* TO THE UNITED STATES CONSTITUTION, *ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION*, *OHIO REVISED CODE SECTION 2151.352*, AND *JUVENILE RULES 4* AND *35*."

[*P43] "THE JUVENILE COURT VIOLATED ROBERT LOHR'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE *FIFTH* AND *FOURTEENTH AMENDMENTS* TO THE UNITED STATES CONSTITUTION; *ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION*; AND *JUV.R. 35*, WHEN IT FAILED TO FOLLOW THE REQUIREMENTS OF *JUV.R. 35(B)*."

[*P44] "ROBERT LOHR'S ADMISSION TO HIS PROBATION VIOLATION WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT, IN VIOLATION OF THE *FIFTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 10* AND *16 OF THE OHIO CONSTITUTION, JUVENILE RULE 29*, AND *35(B)*."

[*P45] The appeal alleges a variety of errors in the hearing held on June 2, 2006, in which Appellant admitted to the commission of a probation violation [**12] and which led to his return to the DYS. The arguments are somewhat intermingled, and therefore, the assignments of error will be treated together.

[*P46] Appellant first argues that he was not properly afforded the right to counsel prior to the point that the court accepted his admission. As Appellant correctly states, juvenile delinquency defendants are generally entitled to counsel at all stages of the proceedings against them. *R.C. § 2151.352*; *Juv.R. 4*; *In re Gault (1967), 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527*; *State ex rel. Asberry v. Payne (1998), 82 Ohio St.3d 44, 48, 1998 Ohio 596, 693 N.E.2d 794*. This case involves juvenile probation revocation proceedings rather than an initial determination of delinquency. Some courts have held that the formal procedures used in adult probation revocation proceedings do not necessarily apply to juvenile probation revocation hearings. See, e.g., *In re Burton (Aug. 14, 1997), 8th Dist. 70141, 1997 Ohio App. LEXIS 3676*. Nevertheless, *Juv.R. 35(B)* specifically states:

[*P47] "(B) **Revocation of probation.** The court shall not revoke probation except after a hearing at which the child shall be present and apprised of the grounds [**13] on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to *Juv. R. 4(A)*. Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to *Juv. R. 34(C)*, been notified."

[*P48] In addition, *R.C. § 2151.352* states, in pertinent part: "A child * * * is entitled to representation by legal counsel at all stages of the proceedings under this chapter or *Chapter 2152. of the Revised Code*."

[*P49] This Court has held a number of times that a "meaningful dialogue" must take place between the magistrate or judge at juvenile probation revocation proceedings before a waiver of the right to counsel can be considered valid. *In re Mulholland, 7th Dist. No. 01-C.A.-108, 2002 Ohio 2213*; *In re Royal (1999), 132 Ohio App.3d 496, 725 N.E.2d 685*. The dialog that took place in this case cannot be called meaningful, and appears to be misleading as to the right to counsel. After the judge told Appellant he had a right to an attorney, he then said: "[Y]ou can do this two ways. You can admit to this charge at this point [**14] or you can request a full hearing on this matter, have an attorney present who can cross examine witnesses and go forward." (Tr., p. 4.) On reading the court's statement it does appear that Appellant could believe he was offered the right to an attorney if he wanted a full hearing with witnesses, but not if he merely wanted to admit to the charge. This interpretation would be clearly incorrect, because Appellant was permitted to have counsel whether he admitted to the charge or not. *R.C. § 2151.352* and *Juv.R. 35*, do not "differentiate between a child who chooses to deny a charge and a child who admits to a charge" with respect to the child's right to counsel. *In re William B., 163 Ohio App.3d 201, 2005 Ohio 4428, 837 N.E.2d 414, P23*.

[*P50] Even if the trial judge's statement was not an outright misstatement but is viewed more as an ambiguous or unclear statement of the law regarding the right to counsel, it is axiomatic that ambiguities, particularly ambiguities of law, in criminal and in juvenile proceedings are generally resolved in the defendant's favor. *State v. Carr, 167 Ohio App.3d 223, 2006 Ohio 3073, 854 N.E.2d 571, P4*; *State v. Simpson, 148 Ohio App.3d 221, 2002 Ohio 3077, 772 N.E.2d 707, P21*. [**15]

[*P51] Appellee argues that Appellant had been through the probation revocation procedure many times before and knew what it meant to waive his right to an attorney and to admit to the revocation charges. Appellee also contends that other people were present to assist Appellant at the hearing, including his custodian, a representative of the DYS, and his guardian ad litem. It is true that a juvenile's prior experience with the juvenile justice system may be a factor in determining whether a waiver of counsel is valid. See, e.g., *In re Griffin (Sept. 27, 1996), 3rd Dist. No. 14-96-14, 1996 Ohio App. LEXIS 4299*. Appellee acknowledges though, that there are other important factors for the trial court to consider and that, "[t]he trial court is required to give close scrutiny to factors such as the juvenile's age, emotional stability, mental capacity, and prior criminal experience," before accepting a juvenile's waiver of counsel as valid. See *In re Kindred, 5th Dist. No. 04 CA 7, 2004 Ohio 3647, P20*, cited by Appellee. The trial court did not give "close scrutiny" to any of these factors, and in fact, made no inquiry at all. The trial court then appears to incorrectly explain to Appellant [**16] that he only had the right to counsel if he wanted a full hearing with witnesses, and proceeded to ask Appellant how he wanted to proceed. Appellant responded by saying "I admit" rather than by stating that he was waiving his right to counsel. (Tr., p. 4.) The record simply does not reflect any valid and recognizable waiver of the right to counsel.

[*P52] Furthermore, the procedural history of this case is not particularly consistent with respect to Appellant's right to counsel. The record reflects that many pro-

bation revocation hearings took place. For some hearings, counsel was automatically appointed. At other times, there seems to have been no mention at all of the right to counsel. Sometimes Appellant was asked to waive the right, and sometimes not. There is no consistent pattern. Even an adult would have had a difficult time deciphering how and when the right to counsel would apply from one hearing to the next.

[*P53] The record reflects that Appellant was not properly afforded his right to counsel, and that his waiver of counsel was not knowingly and intelligently made. Therefore, his admission to the probation violation and the juvenile court's judgment must be [**17] vacated.

[*P54] Although Appellant's denial of counsel argument gives us a sufficient basis for allowing him to withdraw his admission to the probation violation, he presents a number of other arguments that merit some comment. First, Appellant contends that the court was required to notify him of the condition of probation that was violated, pursuant to *Juv.R. 35(B)*. The court informed Appellant that he had been adjudicated delinquent in Indiana for two charges of auto theft and that the Indiana delinquency action was the basis for revocation of probation. Appellant is correct that the judge did not actually describe any condition of probation that was violated. The only conditions of probations found in the record are listed in the March 15, 2004, judgment entry. One of the conditions is that Appellant must obey "all State and Local laws." This is presumably the condition that he disobeyed. Obviously, committing a felony in Indiana is a violation of state law, and would be a probation violation. Although it probably would have been preferable for the trial court to simply state the specific condition of probation that was violated, the record does indicate that Appellant understood [**18] or should have understood the nature of the probation violation.

[*P55] Appellant next argues that the trial court failed to explain the consequences of admitting to the charge, as required by *Juv.R. 29(D)*, which states:

[*P56] "(D) **Initial procedure upon entry of an admission.** The court may refuse to accept an admission and shall not accept an admission without addressing the party personally and determining both of the following:

[*P57] "(1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;

[*P58] "(2) The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing."

[*P59] *Juv.R. 29(D)* requires that a juvenile admission be done voluntarily, with full knowledge of the nature of the allegation and the consequences of the admission, including that the admission waives the right to confront witnesses and evidence, to remain silent, and to introduce evidence in the juvenile's favor. Although the rule does not specifically [**19] require an explanation of the maximum penalty that could be imposed, it is generally accepted that the trial court's explanation of the "consequences" of the admission must include some discussion of the possible penalties. *In re Hendrickson (1996), 114 Ohio App.3d 290, 293, 683 N.E.2d 76*; *In re Keck (Aug. 14, 1997), Cuyahoga App. No. 71074, 1997 Ohio App. LEXIS 3674*. Finally, the juvenile court must substantially comply with *Juv.R. 29(D)* for the admission to be valid. *In re Graham, 147 Ohio App.3d 452, 2002 Ohio 2407, 770 N.E.2d 1123, P10*.

[*P60] Appellant is aware that *Juv.R. 29* is the rule that generally covers the initial adjudication of delinquency, and that it does not specifically refer to probation revocation proceedings. Appellant acknowledges that at least one court, the Ninth District Court of Appeals, has held that *Juv.R. 29* does not apply to juvenile probation revocation proceedings. *In re Beechler (1996), 115 Ohio App.3d 567, 685 N.E.2d 1257*. Nevertheless, we have applied *Juv.R. 29* to probation revocation proceedings in two recent cases, namely, *In re Royal*, a 1999 case, and *In re Mulholland*, a 2002 case, both of which were cited [**20] above, and we will apply *Juv.R. 29* in this case.

[*P61] In the instant case, Appellant was informed that he would be waiving his right to cross-examination and his right to an appeal (which Appellant did not actually waive). (Tr., p. 4.) The court did not mention that Appellant was waiving the right to present evidence and call witnesses, or the right to remain silent, which are both expressly mentioned in *Juv.R. 29(D)*. As far as the possible penalties involved, the court stated that it had the "full range of sentencing possibilities including a DYS commitment." (Tr., p. 5.) The court did not explain that Appellant could be held in the custody of DYS until his 21st birthday. A juvenile judge may know what the "full range" of penalties means, but a 15-year-old boy who is unrepresented by counsel and who is taking medication for behavioral problems might not know, regardless of how many times he has been through the probation revocation process. Although this argument might not be strong enough to warrant reversal on its own, it certainly bolsters Appellant's overall argument that reversible error occurred at the June 7, 2006, hearing.

[*P62] There is at least one reversible [**21] error arising from the trial court's colloquy with Appellant regarding his waiver of counsel and his admission to the

probation violation. For the reasons explained above, we sustain his three assignments of error. Appellant's admission is withdrawn and vacated, and the judgment of adjudication and disposition is also vacated. The case is hereby remanded to the juvenile court for further proceedings consistent with this Opinion.

Donofrio, J., concurs.

Vukovich, J., concurs.

LEXSEE 2006 OHIO 4128

IN RE: MARIO MEATCHEM

APPEAL NO. C-050291

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

2006 Ohio 4128; 2006 Ohio App. LEXIS 4054

August 11, 2006, Date of Judgment Entry on Appeal

NOTICE:

[**1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: Criminal Appeal From: Hamilton County. TRIAL NO. 04-12284.

DISPOSITION: Reversed and Cause Remanded.

HEADNOTES

BURGLARY/B&E/TRESPASS

SYLLABUS

Because a person other than an accomplice of the defendant was not present or likely to be present for the purposes of *R.C. 2911.12(A)(2)*, there was insufficient evidence to convict the defendant of second-degree burglary: A person who checks in on his residence a few times a week is not present or likely to be present within the meaning of the statute.

Third-degree burglary as defined in *R.C. 2911.12(A)(3)* is a lesser-included offense of burglary under *R.C. 2911.12(A)(2)*: Because the state proved all the elements of third-degree burglary beyond a reasonable doubt, the defendant should have been adjudicated delinquent for burglary as defined in *R.C. 2911.12(A)(3)*.

COUNSEL: Joseph T. Deters, Hamilton County Prosecuting Attorney, and James Michael Keeling [**2] , Assistant Prosecuting Attorney, for Appellee, the State of Ohio,

Elizabeth R. Miller, for Appellant, Mario Meatchem.

JUDGES: MARK P. PAINTER, Judge. HILDEBRANDT, P.J., and GORMAN, J., concur.

OPINION BY: MARK P. PAINTER

OPINION

DECISION.

MARK P. PAINTER, Judge.

[*P1] Defendant-appellant Mario Meatchem was adjudicated delinquent for burglary [1] and now argues that (1) there was insufficient evidence, as a matter of law, to adjudicate him delinquent for burglary; (2) the adjudication was against the manifest weight of the evidence; and (3) his trial counsel was ineffective for failing to present adequate objections to the magistrate's decision.

1 *R.C. 2911.12(A)(2).*

[*P2] Because no person other than Meatchem's accomplices was "present or likely to be present" for the purposes of *R.C. 2911.12(A)(2)*, we hold that there was insufficient evidence to find Meatchem guilty of second-degree burglary. But third-degree burglary as defined [**3] in *R.C. 2911.12(A)(3)* is a lesser-included offense of burglary under *R.C. 2911.12(A)(2)*. [2] Because the state proved all the elements of third-degree burglary beyond a reasonable doubt, we reverse the delinquency adjudication and remand the cause to the trial court for an adjudication of delinquency based on burglary as defined in *R.C. 2911.12(A)(3)*.

2 See *State v. Brown (April 28, 2000), 1st Dist. No. C-980907, 2000 Ohio App. LEXIS 1820.*

I. Getting High and Breaking into a Neighbor's House

[*P3] Christopher Madden lived with his family in Blue Ash, Ohio. During the summer months of each year, Madden and his children camped in New Rich-

mond. They did not live in the Blue Ash house at all during the summer. Since Madden worked in Montgomery (which is a neighboring municipality), he would stop by and check the house a few times a week. Unfortunately for Madden, a neighborhood juvenile, Steffan Donnellon, knew that Madden and his family [**4] did not reside in the house during the summer.

[*P4] Donnellon initially met Meatchem the morning of the burglary at a neighborhood carwash. Donnellon stated that he and his friends had been listening to music and talking about marijuana when Meatchem had approached them about where he could "get a half ounce." Donnellon testified that he had told Meatchem to join them, because he knew where they could get "some weed."

[*P5] Donnellon, Meatcham, and three other boys-Matt Trost, Joseph McDermitt, and Demetris Hall-then went to Donnellon's house to smoke marijuana, drink Hennessey, and listen to music. Donnellon testified that the boys had decided to break into Madden's house because they had been "bored."

[*P6] All the boys except Trost entered the Madden house in the early afternoon by breaking down a dog door. The boys took video games and some stereo equipment the first time they entered the house.

[*P7] But the break-in did not go unnoticed. A neighbor saw the boys enter and contacted Madden and the police. When the police arrived, the boys had already fled to Donnellon's house.

[*P8] When Trost rejoined the boys later in the afternoon, he wanted to [**5] enter the Madden house as well. So the boys entered through the dog door again, this time searching for a safe. But the neighbor again saw the boys enter the house and called the police. This time, the police arrived in time and caught four of the boys as they left the residence-Donnellon, Trost, Hall, and McDermitt. The police did not search the house, and Meatchem was not apprehended.

[*P9] When questioned, the four boys described Meatchem as an accomplice, but did not know his name, since they had just met him only hours earlier. Each described Meatchem, and the police went to the carwash and gas station where the boys had met him. The gas station's manager recalled a young man fitting Meatchem's description as someone who had earlier harassed one of his salesclerks.

[*P10] When Meatchem returned to the gas station a few days later, the manager called the police. The police then learned Meatchem's name and address and placed his picture in a photo lineup. All the boys who were shown the lineup identified Meatchem as the person who had been with them during the burglary.

[*P11] Meatchem denied the boys' allegations and claimed that he had never entered Madden's [**6] house. Instead, Meatchem asserted that he knew Donnellon and Trost only through a pick-up football game he had joined at a local park. Meatchem also asserted that he could not have committed the burglary because he had attended Southern Ohio College at night. He testified that Lori Colbert, his brother's girlfriend, drove him to class every day. She corroborated his account by testifying that she could not recall his missing any days of school.

[*P12] The trial court found Donnellon and Trost's testimony to be more credible and adjudicated Meatchem delinquent based on the crime of burglary in violation of *R.C. 2911.12(A)(2)*, a second-degree felony. Meatchem was then committed to the Department of Youth Services for a minimum term of one year and a maximum term that would end on his 21st birthday.

II. Sufficiency of the Evidence

[*P13] In his first assignment of error, Meatchem argues there was insufficient evidence as a matter of law to convict him of burglary in violation of *R.C. 2911.12(A)(2)*. Meatchem contends that the state failed to produce sufficient evidence to prove an essential element of burglary as [**7] a second-degree felony-namely, that a person other than one of his accomplices had been "present or likely to be present" at the time of the offense.

[*P14] Under *R.C. 2911.12(A)(2)*, "No person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense."

[*P15] When reviewing the sufficiency of the evidence, we must examine the evidence in the light most favorable to the state and determine whether that evidence could have convinced any rational trier of fact that the essential elements of the crime had been proved beyond a reasonable doubt. [3]

3 See *State v. Jenks (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.*

[**8] [*P16] Thus, the issue before this court is whether any person other than an accomplice of Meatchem was present or likely to be present at Madden's house. To determine whether people were present or likely to be present under *R.C. 2911.12(A)(2)*, a defendant's knowledge about habitation is not material. "The issue is not whether the burglar subjectively believed that persons were likely to be there, but whether it

was objectively likely." [4] The significant inquiry is the "probability or improbability of actual occupancy which in fact exists at the time of the offense, determined by all the facts surrounding the occupancy." [5] Merely showing that people dwelled in the residence is insufficient. Instead, the state must adduce specific evidence that people were present or likely to be present. [6] And as the Ohio Supreme Court has stated, "Where the state proves that an occupied structure is a permanent dwelling house which is regularly inhabited, that the occupying family was in and out on the day in question, and that such house was burglarized when the family was temporarily absent, the state has presented sufficient evidence to support a charge of [burglary [**9] under *R.C. 2911.12(A)(2)*]." [7]

4

See *State v. Cravens (June 25, 1999), 1st Dist. No. C-980526, 1999 Ohio App. LEXIS 2873.* See, also, *State v. Brown (Apr. 28, 2000), 1st Dist. No. C-980907, 2000 Ohio App. LEXIS 1820.*

5 Id., citing *State v. Durham (1976), 49 Ohio App.2d 231, 239, 360 N.E.2d 743.*

6 Id., citing *State v. Fowler (1983), 4 Ohio St.3d 16, 18-19, 4 Ohio B. 14, 445 N.E.2d 1119.*

7 Id., citing *State v. Kilby (1977), 50 Ohio St.2d 21, 361 N.E.2d 1336, paragraph one of the syllabus.*

[*P17] "Likely" means more likely than not. That is, there must be a greater than 50% percent likelihood that someone will be in the dwelling at the time of the burglary.

[*P18] The burden is on the state to prove every element of the offense. At Meatchem's trial, there was scant testimony on this issue.

[*P19] Madden and his children did not live in their house during the summer. Instead, they camped in New Richmond. Madden worked in a neighborhood near [**10] the house and testified that he would check on the house a "few times a week." Checking on a house a few times a week for a few minutes cannot constitute being "present or likely to be present" under *R.C. 2911.12.* We do not even know if anyone was "likely to be present" even if Madden and his family were not camping all summer. For example, if the children were always in school and Madden was always at work at a certain time, the case would be similar to *State v. Brown,* [8] where we held that when the homeowner worked all day, and there was no evidence that he regularly came home during the day, the state had failed to prove that a person was likely to be present.

8 *(Apr. 28, 2000), 1st Dist. No. C-980907, 2000 Ohio App. LEXIS 1820.*

[*P20] We, therefore, hold that the state failed to present sufficient evidence to support a conviction for burglary in violation of *R.C. 2911.12(A)(2).*

III. Lesser-Included Offense

[*P21] Nevertheless, we note that *R.C. 2911.12(A)(3)* [**11] sets forth a lesser-included offense to the one for which Meatchem was charged in this case. Under *R.C. 2911.12(A)(3)*, "No person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense."

[*P22] The Ohio Supreme Court has constructed a three-prong test to determine whether a criminal offense is a lesser-included offense of another: "(1) the offense carries a lesser penalty than the other; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to prove the commission of the lesser offense." [9]

9 See *State v. Barnes, 94 Ohio St.3d 21, 25-26, 2002 Ohio 68, 759 N.E.2d 1240,* citing *State v. Deem (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph three of the syllabus.*

[**12] [*P23] As we have noted, *R.C. 2911.12(A)(3)* defines burglary as trespassing in an occupied structure by force, stealth, or deception with the purpose to commit in the structure any criminal offense. Thus, *R.C. 2911.12(A)(3)* omits the one element on which the state had failed to present sufficient evidence in this case-the presence or likely presence of someone other than an accomplice of the offender. Because burglary as defined in *R.C. 2911.12(A)(2)* cannot be committed without also having committed the lesser offense set forth in *R.C. 2911.12(A)(3)*, there was sufficient evidence to adjudicate Meatchem delinquent as to the lesser offense of burglary.

[*P24] When the evidence shows that a defendant is not guilty of the degree of the crime for which he was convicted, but is guilty of a lesser-included offense, a court may, instead of granting a new trial, modify the conviction. [10] Accordingly, we reverse Meatchem's adjudication as delinquent for a violation of *R.C. 2911.12(A)(2)*, and we remand to the trial court with

instructions to enter an adjudication [**13] of delinquency based on the lesser-included offense of burglary in violation of *R.C. 2911.12(A)(3)*. Meatchem's first assignment of error is thus sustained.

10

See *Crim.R. 33(A)(4)*. See, also, *State v. Harris (1996), 109 Ohio App.3d 873, 876, 673 N.E.2d 237.*

IV. Manifest Weight

[*P25] In his second assignment of error, Meatchem argues that his adjudication was against the manifest weight of the evidence. We recast this assignment of error as a challenge to the balance struck by the juvenile court in weighing the evidence supporting a conviction for burglary in violation of *R.C. 2911.12(A)(3)*.

[*P26] A review of the manifest weight of the evidence puts the appellate court in the role of a "thirteenth juror." [11] We must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage [**14] of justice. [12] A new trial should be granted only in exceptional cases, where the evidence weighs heavily against conviction. [13]

11 See *State v. Thompkins, 78 Ohio St.3d 380, 387, 1997 Ohio 52, 678 N.E.2d 541.*

12 Id., citing *Tibbs v. Florida (1982), 457 U.S. 31, 42, 102 S. Ct. 2211, 72 L. Ed. 2d 652.*

13 Id.

[*P27] *R.C. 2911.12(A)(3)* proscribes trespassing in an occupied structure by force, stealth, or deception, with a purpose to commit a crime.

[*P28] Donnellon and Trost testified that, with Meatchem, they had broken into Madden's house through the dog door and had stolen video games and stereo equipment. Madden confirmed in his testimony that the boys had not had his permission to be in his house and had stolen video games and stereo equipment.

[*P29] Meatchem claimed that he had not broken into Madden's house and had instead been at class at Southern Ohio College. But our review of the record does not persuade [**15] us that the trial court lost its way and created a manifest miscarriage of justice in concluding that the state had met its burden of proving those elements of burglary set forth in *R.C. 2911.12(A)(3)*. Accordingly, we overrule Meatchem's second assignment of error.

V. Ineffective Assistance

[*P30] Meatchem's third assignment of error challenges the effectiveness of his trial counsel in failing to file proper objections to the magistrate's decision.

[*P31] In *Strickland v. Washington*, the United States Supreme Court enunciated the two-prong standard for evaluating claims of ineffective assistance of counsel. [14] The defendant must show that counsel's representation fell below an objective standard of reasonableness, overcoming a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. [15] And the defendant must show that counsel's performance prejudiced the defense so as to have deprived the defendant of a fair trial. [16] To prove prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings [**16] would have been different." [17]

14 See *Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674.*

15 *Id. at 687-688.*

16 Id.

17 *Id. at 694.*

[*P32] In this case, Meatchem's trial counsel filed objections to the magistrate's decision with the trial court and challenged the decision as against the manifest weight of the evidence, but not the sufficiency of the evidence. Because we have addressed both the manifest weight of the evidence and the sufficiency of the evidence in this appeal, trial counsel's failure to raise it in the form of an objection to the magistrate's decision cannot be said to have been prejudicial. Thus, we overrule Meatchem's third assignment of error.

[*P33] The judgment of the juvenile court is reversed, and this case is remanded for further proceedings in accordance with the terms of this decision.

Judgment reversed and cause remanded.

HILDEBRANDT, P.J., and [**17] **GORMAN, J.,** concur.

LEXSEE 2002 OHIO 2213

IN RE: DONALD MULHOLLAND, A MINOR CHILD

CASE NO. 01-C.A.-108

COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT, MAHONING COUNTY

2002 Ohio 2213; 2002 Ohio App. LEXIS 2229

April 30, 2002, Decided

PRIOR HISTORY: [**1] CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas, Juvenile Division of Mahoning County, Ohio. Case Nos. 00JA1347, 99JA1228.

DISPOSITION: Juvenile court's judgment was reversed and cause was remanded.

COUNSEL: For Plaintiff-Appellee State of Ohio: Atty. Paul J. Gains, Mahoning County Prosecutor, Atty. Janice T. O'Halloran, Assistant Prosecuting Attorney, Youngstown, Ohio.

For Defendant-Appellant Donald Mulholland: Atty. David H. Bodiker, State Public Defender, Atty. Janine Salloum Ashanin, Assistant State Public Defender, Ohio Public Defender's Office, Columbus, Ohio.

JUDGES: Hon. Cheryl L. Waite, Hon. Gene Donofrio, Hon. Mary DeGenaro. Donofrio and DeGenaro, JJ., concur.

OPINION BY: Cheryl L. Waite

OPINION

WAITE, J.

[*P1] This delayed appeal arises from a judgment of the Mahoning County Court of Common Pleas, Juvenile Division, revoking Appellant's probation for a previous juvenile delinquency adjudication. For the following reasons, and because both the Appellant and the Appellee agree as to the proper outcome of this appeal, we reverse the trial court's judgment and remand this case for further proceedings.

[*P2] Throughout all the events and proceedings leading up to this appeal, Appellant was a [**2] juvenile.

[*P3] On November 3, 1999, Appellant Donald Mulholland, was adjudicated delinquent in two cases involving theft in violation of *R.C. § 2913.02*, a fifth degree felony if committed by an adult, and aggravated robbery in violation of *R.C. § 2911.01*, a first degree felony if committed by an adult. These cases were prosecuted in the Mahoning County Court of Common Pleas, Juvenile Division, and were designated as Case Nos. 99 JA 1228 (dealing with the theft charge) and 99 JA 1229 (dealing with the aggravated robbery charge). In a December 15, 1999, judgment entry, Appellant was sentenced to commitment to the Department of Youth Services ("DYS") for six months on the theft charge and three years on the aggravated robbery charge. Both sentences were suspended and Appellant was placed on probation.

[*P4] On October 20, 2000, Appellant was adjudicated delinquent on one count of breaking and entering in violation of *R.C. § 2911.13*, a fifth degree felony if committed by an adult, and one count of criminal damaging in violation of *R.C. § 2909.06* [**3] , a second degree misdemeanor if committed by an adult. (10/26/00 J.E.). These charges were prosecuted under Case No. 00 JA 1347.

[*P5] The dispositional hearing in Case No. 00 JA 1347 was begun on November 14, 2000, and eventually concluded, after a number of continuances, on December 20, 2000. Additionally, Appellant was adjudicated delinquent on new charges of menacing at the November 14, 2000, hearing. These menacing charges were prosecuted under Case. No. 00 JA 2013.

[*P6] On December 20, 2000, Appellant was sentenced to DYS for six months on count one (breaking and entering) in Case No. 00 JA 1347. (12/21/00 J.E.) The sentence was suspended in lieu of residential treatment at Northeast Ohio Regional Center for Adolescent Treatment ("N.O.R.C.A.T.") in Niles, Ohio. Appellant

was sentenced to 90 days of detention on count two (criminal damaging) in Case No. 00 JA 1347. Appellant was also sentenced to 180 days of detention on Case. No. 00 JA 2013, with the sentence suspended in lieu of admission to N.O.R.C.A.T.

[*P7] On January 17, 2001, a Complaint for Violation of Probation was filed against Appellant in Case No. 00 JA 1347. The complaint alleged [**4] that Appellant violated his probation by walking away from N.O.R.C.A.T. without getting prior permission from the court. A hearing on the probation violation was held before a magistrate that same day. Appellant and his mother signed a waiver of right to recorded hearing, a waiver of right to speedy trial, and a waiver of counsel. On the waiver of counsel form, Appellant also put a checkmark in the space indicating that he was pleading guilty to the charge.

[*P8] The magistrate accepted Appellant's guilty plea and set the dispositional hearing to be held before a magistrate on January 22, 2001. At the hearing, the magistrate ordered that Appellant's six-month suspended sentence in Case. No. 00 JA 1347 be reimposed. (1/22/01 Tr., 8). The magistrate also found Appellant guilty of a probation violation in Case No. 99 JA 1228, and ordered that his six-month suspended sentence in that case be reimposed, to be served consecutively to the sentence in Case No. 00 JA 1347. (1/22/01 Tr., 8-9). The decision to revoke probation in Case No. 99 JA 1228 appears to have been a *sua sponte* order of the magistrate, because the record does not indicate that Appellant was ever charged with [**5] a probation violation in Case. No. 99 JA 1228. The Court of Common Pleas, Juvenile Division, adopted the magistrate's decision on January 24, 2001.

[*P9] Appellant filed this delayed appeal on June 6, 2001. This Court granted leave to file a delayed appeal on July 25, 2001.

[*P10] Appellant and Appellee agree that the third assignment of error is dispositive of this appeal. Appellant's third assignment of error asserts:

[*P11] THE TRIAL COURT VIOLATED DONALD MULHOLLAND'S RIGHT TO COUNSEL UNDER THE *DUE PROCESS CLAUSE OF THE FIFTH, SIXTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION,* ***R.C. 2151.352***, AND *JUV.R. 4*, AND *JUV.R. 29* WHEN IT FAILED TO MAKE A RECORD IN VIOLATION OF *JUV.R. 37* AND *JUV.R. 40 (A-3)(A-6)(A-25)(A-26)* (Tr.3, p.2-10).

[*P12] Appellant contends that a juvenile has a right to the assistance of counsel during delinquency proceedings. Appellant argues that this right is both statutory and constitutional, citing *R.C. 2151.352, Juv.R. 4* and *29, In re Gault (1967), 387 U.S. 1*, and *In re Agler (1969), 19 Ohio St.2d 70.* [**6]

[*P13] Appellant points out that *Juv.R. 35(B)* specifically grants a juvenile the right to assistance of counsel as part of probation revocation proceedings:

[*P14] "(B) Revocation of probation

[*P15] "The court shall not revoke probation except after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. *The parties shall have the right to counsel* and the right to appointed counsel where entitled pursuant to *Juv. R. 4(A)*. Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to *Juv. R. 34(C)*, been notified." (Emphasis added.)

[*P16] Appellant contends that the only evidence in the record tending to support a finding that he waived his right to counsel in Case No. 00 JA 1347 is a checkmark on a preprinted "waiver of counsel" form signed by himself and his mother. Appellant asserts that there is no evidence at all of any waiver of the right to counsel in the probation revocation hearing involving Case No. 99 JA 1228. Furthermore, Appellant argues that the January 18, 2001, Magistrate's Order, in [**7] which Appellant was found guilty of the probation violation in Case No. 00 JA 1347, states that he did *not* waive his right to assistance of counsel:

[*P17] "2. Subject child, after first being advised of all procedural and constitutional rights, including the right to counsel and a continuance herein, *asserts said rights* and ADMITS the allegation as it appears in the complaint." (Emphasis added.)

[*P18] Appellant argues that a trial court may only accept a waiver of the right to counsel after it makes a, "sufficient inquiry to determine whether the defendant fully understands and intelligently relinquishes that right." *State v. Gibson (1976), 45 Ohio St.2d 366*, paragraph two of syllabus. Appellant argues that the record does not and cannot support a finding that the trial court made a sufficient inquiry into the waiver of counsel because the court failed to make a record of the January 17, 2001, hearing. Appellant asserts that, in spite of his waiver of the right to have the hearing recorded, the court was required by *Juv.R. 37(A)* and *40(D)(2)* to record the hearing. Appellant concludes that any alleged waiver of counsel is not supported [**8] by the record and that the January 24, 2001, Judgment Entry should be vacated.

[*P19] Appellee agrees that there were errors committed in the revocation of Appellant's probation in

both Case No. 99 JA 1228 and Case No. 00 JA 1347. First, Appellee argues that Appellant had no prior notice of probation revocation proceedings in Case No. 99 JA 1228, as required by *Juv.R. 35*. The record confirms Appellee's argument.

[*P20] Second, Appellee agrees that the preprinted waiver of counsel form is insufficient, in and of itself, to support a determination that Appellant properly waived his right to counsel. Appellee cites to this Court's recent holding in *In re Royal (1999), 132 Ohio App.3d 496*: "A waiver form is not a valid substitute for the court's duty to personally address the juvenile." *Id. at 505*. The pertinent facts surrounding *In re Royal* are almost identical to the facts of the matter now under review. *In re Royal* involved a probation revocation hearing in a juvenile delinquency case, held before a magistrate, in which the juvenile and his mother signed a preprinted "waiver of counsel" form. There was nothing else in [**9] the record indicating that a meaningful dialogue had taken place between the court and juvenile regarding the waiver of the right to counsel. Our holding in *In re Royal* is patently applicable to the facts of the matter before us.

[*P21] Based on the arguments of both parties in this case, we sustain Appellant's third assignment of error. There is no evidence that Appellant was properly notified that he was being prosecuted for a probation violation in Case No. 99 JA 1228, and no evidence that he waived his right to counsel during those proceedings. Both of these rights are established by *Juv.R. 35(B)*. See *In re Royal, supra, at 508*. Furthermore, as we held in *In re Royal*, a mere checkmark on a preprinted "waiver of counsel" form, by itself, is insufficient to establish that a meaningful dialogue has taken place establishing a knowing, voluntary and intelligent waiver of the right to counsel. *Id. at 505*. Therefore, there is insufficient support in the record that Appellant properly waived his right to counsel in Case No. 00 JA 1347 as well.

[*P22] For these reasons, we reverse the January 24, 2001, Judgment Entry of the [**10] Mahoning County Court of Common Pleas, Juvenile Division, which adopted the January 24, 2001 Magistrate's Decision and remand this case for further proceedings according to law and consistent with this Opinion.

Donofrio and DeGenaro, JJ., concur.

IN RE: FAWN ROGERS

C.A. NO. 20393

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT COUNTY

2001 Ohio App. LEXIS 2284

May 23, 2001, Decided

PRIOR HISTORY: [*1] APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO. CASE NO. 99 10 4110.

DISPOSITION: Judgment affirmed.

COUNSEL: MARTHA L. HOM, Attorney at Law, Akron, Ohio, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and PHILIP D. BOGDANOFF, Assistant Prosecuting Attorney, Akron, Ohio, for Appellee.

JUDGES: WILLIAM R. BAIRD. BATCHELDER, P. J., WHITMORE, J. CONCUR.

OPINION BY: WILLIAM R. BAIRD

OPINION

DECISION AND JOURNAL ENTRY

Dated: May 23, 2001

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BAIRD, Judge.

Fawn Rogers appeals the decision of the Summit County Court of Common Pleas, Juvenile Division, which revoked Rogers' probation and returned her to detention, following a hearing on a probation violation. This court affirms.

Fawn Rogers was charged in juvenile court with two counts of rape of her two cousins. On October 27, 1999, Fawn Rogers admitted to the two counts of rape. On January 26, 2000, the juvenile court committed Rogers to the Department of Youth Services ("DYS"), but suspended the commitment and imposed conditions of probation on her. On February 22, 2000, Rogers' [*2] probation officer filed a probation violation and a hearing was held on the same date. On February 27, 2000, the juvenile court committed Rogers to the custody of DYS for a term from one year up to a maximum term not to exceed her twenty-first birthday on September 30, 2003. However, on August 30, 2000, the court granted Rogers' request for early release, effective October 31, 2000. Conditions of probation were imposed, and on November 16, 2000, Rogers' probation officer filed a complaint of probation violation.

At a hearing on the second probation violation, Rogers was advised of her constitutional rights, including the right to appointed counsel, if appropriate. Rogers waived the right to counsel and admitted to the probation violation. On November 21, 2000, the court revoked probation and re-committed Rogers to DYS for the same term imposed in February.

Rogers filed the instant appeal, arguing that the court erred by failing to adhere to the requirements of *Juv.R. 29* at the probation revocation hearing.

Juv. R. 29(B) requires the court to: inform the juvenile of the substance of the complaint, the purpose of the hearing, and the consequences of the hearing; inform an unrepresented [*3] juvenile of the right to counsel; determine if the juvenile waives the right to counsel; inform the juvenile of the right: to obtain counsel at any stage of the proceedings, to remain silent, to offer evidence, to cross-examine witnesses, and, upon request, to have a record of all proceedings made, at public expense if indigent; and appoint counsel if the right to counsel is not waived.

Rogers concedes that at the magistrate's hearing on the probation violation, the magistrate informed her of all her rights, pursuant to *Juv.R. 29*, but she asserts that the

magistrate did not thoroughly probe whether Rogers' waiver of the various rights was made knowingly.

This court has held that the provisions of *Juv.R. 29* do not apply to probation violation hearings. *In re Motley (1996), 110 Ohio App. 3d 641, 642, 674 N.E.2d 1268.* Rather, we concluded that *Juv.R. 35(B)* applies to such hearings. *Id. Juv.R. 35(B)* provides that the court may revoke probation only after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to [*4] *Juv. R. 4(A)*. Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to *Juv. R. 34(C)*, been notified.

This court concluded in *Motley* that the juvenile court was not required to advise the juvenile that he had a right to present evidence at the hearing. *Motley, 110 Ohio App. 3d at 642.* Given our holding in *Motley* and the clear provisions of *Juv.R. 35(B)*, the juvenile court here was obliged only to advise Rogers that she had the right to counsel, and if appropriate, to have counsel appointed at state's expense.

Reviewing the transcript of the probation violation hearing in the instant case, we find that the magistrate advised Rogers:

You have the right to an attorney. If you cannot afford an attorney, the court will appoint you an attorney at no cost to you. An attorney, of course, is somebody that knows the law, can investigate what happened, and give you advice and recommendations on how to proceed, and if it's necessary, to have a trial or to represent you at a trial. As I stated, that if you can't afford an attorney, you get one for free, the court will appoint you one.

[*5] The magistrate then went on to list numerous other rights, including the right to remain silent and the right to call and cross-examine witnesses. At the end of this recitation, the magistrate asked Rogers if she had any questions about her rights. Rogers stated that she understood her rights and that she did not want an attorney. Rogers also stated that she admitted the probation violation, and that she was waiving her rights "knowingly, intelligently and voluntarily."

The magistrate's locution more than meets the requirements outlined in *Juv.R. 35(B)* and our holding in *Motley*. Rogers' assignment of error is meritless and it is overruled.

The judgment of the trial court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the County of Summit, Court of Common Pleas, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27.*

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals [*6] at which time the period for review shall begin to run. *App.R. 22(E).*

Costs taxed to Appellant.

Exceptions.

WILLIAM R. BAIRD

FOR THE COURT

BATCHELDER, P. J.

WHITMORE, J.

CONCUR

LEXSEE 2007 OHIO 411

IN THE MATTER OF JAMES TABLER, ALLEGED DELINQUENT CHILD.

Case No. 06CA30

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, LAWRENCE COUNTY

2007 Ohio 411; 2007 Ohio App. LEXIS 366

January 29, 2007, Released

DISPOSITION: [**1] JUDGMENT REVERSED AND CAUSE REMANDED.

COUNSEL: David H. Bodiker, Ohio Public Defender, and Molly J. Bruns, [1] Assistant State Public Defender, Columbus, Ohio, for Appellant.

1 Attorney Bruns also lists her name as "Molly J. McAnespie" on the cover page of her appellate brief. We have used the last name that appears on her certificate of service.

J.B. Collier, Jr., Prosecuting Attorney, and Kevin J. Waldo, Assistant Prosecuting Attorney, Ironton, Ohio, for Appellee.

JUDGES: Harsha, J. and Kline, J., Concur in Judgment and Opinion. BY: Matthew W. McFarland, Presiding Judge.

OPINION BY: Matthew W. McFarland

OPINION

DECISION AND JUDGMENT ENTRY

McFarland, P.J.:

[*P1] James Tabler appeals the trial court's judgment adjudicating him a delinquent child for trafficking in crack cocaine, in violation of *R.C. 2925.03*, a first degree felony if committed by an adult. He argues: (1) the trial court erred by failing to appoint a guardian ad litem; (2) the trial court failed to comply with *Juv.R. 29(D)*; (3) the trial court erred by failing to hold a hearing to determine whether he could pay the financial sanctions the court imposed and by failing [**2] to consider community service in lieu of the financial sanctions; and (4) he did not receive effective assistance of counsel. We find Tabler's second argument dispositive of this appeal. The trial court did not substantially comply with *Juv.R. 29(D)*. Instead, it relied upon Tabler's counsel's statement that counsel reviewed the rights Tabler waived by admitting the charge. The court did not personally engage Tabler in a colloquy to ascertain whether he voluntarily, knowingly, and intelligently waived his rights. Thus, we vacate Tabler's admission and commitment, reverse the trial court's judgment, and remand so that Tabler may plead anew.

[*P2] On July 11, 2006, Tabler appeared in court with his mother and counsel for adjudication. The magistrate asked counsel if he "had the opportunity to discuss with James his rights before the court and the nature of the charge and possible consequences if the complaint is found to be true." Counsel responded affirmatively, and the following colloquy ensued:

> "Magistrate: Would you waive further reading of those issues on record.?
>
> [Attorney] Payne: Yes we would.
>
> Magistrate: James before I ask you whether [**3] the complaints are true or not you understand that that is step two in this process and there can be no promises made to you as to what the dispositional orders will be.
>
> James Tabler: Yes.
>
> Magistrate: You fully understand what the possible consequences are [and] realize that anything in between there all the way up to the maximum consequences could be ordered which in this case could be DYS all the way up to age twenty-one?
>
> James: Yes.

Magistrate: Mr. Payne as to the case of delinquency and trafficking in drugs a first degree felony does your client wish to enter an admission or denial?

[Attorney] Payne: Admission.

Magistrate: James are you wishing to say that the complicity to trafficking in drugs is true?

James Tabler: True.

Magistrate: Is anybody making you tell me that today?

James Tabler: No.

Magistrate: Thank you very much. James I have before me a waiver form that has your signature on it. Did you have time and opportunity to discuss this with your attorney?

James Tabler: Yes.

Magistrate: Are you wanting me to accept your admission for both cases today?

James Tabler: Yes."

[*P3] The magistrate then asked Tabler's mother if she thought Tabler [**4] fully understood what was occurring. The mother stated: "yes and I hope that he will get some drug rehabilitation because he is in dyer [sic] need for it. That's what the complicity was for." The magistrate asked the mother if she wished for the magistrate to accept Tabler's admission. The mother stated "yes."

[*P4] After the hearing, the magistrate filed Tabler's waiver form and an entry. The waiver form stated that the court advised Tabler "of the charges against [him], the penalty provided by law, and of [his] rights under the Constitution." The form stated that he understood that he has (1) "[t]he right to a trial with representation of counsel," (2) "[t]he right to face those who accuse me", (3) "[t]hat I cannot be required to testify or to make any statement against myself", and (4) "[t]he right to compulsory process for obtaining witnesses in my behalf." The form then stated: "Fully understanding these rights guaranteed me by the Constitution[,] I hereby waive them in writing and admit to the allegations in the complaint."

[*P5] The second half of the waiver form consisted of the magistrate's "entry," in which she found that Tabler was advised of [**5] all his constitutional rights and that he voluntarily, intelligently, and knowingly waived them. The court also found that he understood the nature of the charges and the consequences of his plea.

[*P6] On July 13, 2006, the magistrate entered a decision finding Tabler to be a delinquent child. The magistrate noted that Tabler's counsel advised that he had informed Tabler of his rights and that counsel further stated that he waived "any further reading." The trial court's adoption of the magistrate's decision appears at the bottom of the page and states: "The Court having made an independent analysis of the issues and the applicable law hereby approves and adopts the Magistrate's recommendations and orders it be entered as Judgment as matter of record." Neither party filed any objections.

[*P7] The trial court subsequently ordered Tabler to be committed to the Department of Youth Services for a minimum of one year to the maximum of age 21 and ordered him to pay $ 104 for court costs and $ 500 in fines.

[*P8] Tabler timely appealed the court's judgment and assigns the following errors:

[*P9] I. THE JUVENILE COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO APPOINT [**6] A GUARDIAN AD LITEM IN VIOLATION OF *R.C. 2151.281(A)* AND *JUV.R. 4(B)*.

[*P10] II. JAMES TABLER'S ADMISSION TO COMPLICITY TO COMMIT DRUG TRAFFICKING WAS NOT KNOWING, VOLUNTARY, AND INTELLIGENT, IN VIOLATION OF THE *FIFTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 10* AND *16 OF THE OHIO CONSTITUTION*, AND *JUVENILE RULE 29*.

[*P11] III. THE TRIAL COURT ERRED WHEN IT FAILED TO HOLD A HEARING TO DETERMINE WHETHER JAMES TABLER, A JUVENILE, WAS ABLE TO PAY THE SANCTION IMPOSED BY THE JUVENILE COURT AND WHEN IT FAILED TO CONSIDER COMMUNITY SERVICE IN LIEU OF THE FINANCIAL SANCTIONS IN VIOLATION OF *R.C. 2152.20*.

[*P12] IV. JAMES TABLER WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE *SIXTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* AND *ARTICLE I, SECTIONS 10* AND *16 OF THE OHIO CONSTITUTION*.

I

[*P13] Because we find Tabler's second assignment of error dispositive of this appeal, we address it first. In his second assignment of error, Tabler contends that the trial court erred by accepting [**7] his admission when he did not knowingly, voluntarily, and intelligently enter his admission. He argues that the court failed to substantially comply with *Juv.R. 29(D)*. In particular, he asserts that the court failed to inform him of (1) the nature of the allegations, (2) the possible consequences of admitting the complaint, and (3) the rights he waived by admitting the charge. Tabler notes that he signed a waiver form and that his attorney advised the magistrate that he informed Tabler of his rights, but asserts that neither the waiver form nor his counsel's representation alleviates the magistrate of the duty to personally address the juvenile and to ascertain that he is voluntarily, knowingly, and intelligently waiving his rights.

[*P14] Initially, we note that Tabler failed to object to the magistrate's decision or to the procedure the court used in accepting Tabler's admission. And, in fact, his counsel waived any discussion of the rights Tabler waived by admitting the charge. *Juv.R. 40(D)(3)(b)(i)* [2] requires a party to file written objections to a magistrate's decision within fourteen days. *Juv.R. 40(D)(3)(b)(iv)* [**8] provides that "[a] party shall not assign as error on appeal the court's adoption of any finding of fact or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under *Juv.R. 40(D)(3)(a)(ii)*, unless the party has objected to that finding or conclusion as required by *Juv.R. 40(D)(3)(b)*." Thus, absent objections to a magistrate's decision, a juvenile waives his ability to raise assignments of error related to that decision. See *In re Harper, Montgomery App. No. 19948, 2003 Ohio 6666*. "The waiver under [former] *Juv.R. 40(E)(3)(b)* embodies the long-recognized principle that the failure to draw the trial court's attention to possible error, by objection or otherwise, when the error could have been corrected, results in a waiver of the issue for purposes of appeal." *In re Etter (1998), 134 Ohio App.3d 484, 492, 731 N.E.2d 694.*

2 On July 1, 2006, *Juv.R. 40* was amended and *Juv.R. 40(E)* was deleted. The provisions of former *Juv.R. 40(E)* are now incorporated into *Juv.R. 40(D)*. Because the magistrate conducted Tabler's adjudication after July 1, 2006, we apply the July 1, 2006 amendments to the rule.

[**9] [*P15] However, the waiver rule is tempered in two ways. See *In re Harper, Montgomery App. No. 19948, 2003 Ohio 6666, at P5*. First, Juv.R. 40(D)(4)(c) obligates a trial court to ensure that there is no "error of law or other defect on the face of the magistrate's decision." Second, appellate courts may recognize plain error. See id. We have previously recognized that a court's failure to substantially comply with *Juv.R. 29(D)* constitutes plain error. See *In re Elliott, Washington App. Nos. 03CA65 and 03CA66, 2004 Ohio 2770, at P17.*

[*P16] *Juv.R. 29(D)* prohibits a court from accepting a juvenile's admission unless the court personally addresses the juvenile and determines both that (1) "[t]he party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission; and (2) "[t]he party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing." The rule places [**10] an affirmative duty upon the juvenile court to personally address the juvenile before the court and determine that the juvenile, and not merely the attorney, understands the nature of the allegations and the consequences of entering the admission. *In re Beechler (1996), 115 Ohio App.3d 567, 571, 685 N.E.2d 1257*. The court must "conduct an on-the-record discussion to determine whether the admission is being entered knowingly and voluntarily." *In re West (1998), 128 Ohio App.3d 356, 359, 714 N.E.2d 988.*

[*P17] The best way to ensure compliance with *Juv.R. 29(D)* is for the court "to use the language of the rule, '* * * carefully tailored to the child's level of understanding, stopping after each right and asking whether the child understands the right and knows that he is waiving it by entering an admission.'" *In re Royal (1999), 132 Ohio App.3d 496, 504, 725 N.E.2d 685*, quoting *In re Miller (1997), 119 Ohio App.3d 52, 58, 694 N.E.2d 500.*

[*P18] The failure of the juvenile court to substantially comply with the requirements of *Juv.R. 29* constitutes prejudicial [**11] error that requires a reversal of the adjudication in order to permit the party to plead anew. *Beechler, 115 Ohio App.3d at 572*; *In re Christopher R. (1995), 101 Ohio App.3d 245, 248, 655 N.E.2d 280*. "'Substantial compliance means that under the totality of the circumstances, the [juvenile] subjectively understands the implications of his plea and the rights he is waiving.'" *West, 128 Ohio App.3d at 359*, quoting *State v. Nero (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474*. Additionally, when "a trial court fails to inform a [juvenile] of one of his or her critical constitutional rights * * * that failure is per se prejudicial." *In re Onion (1998), 128 Ohio App.3d 498, 503, 715 N.E.2d 604* (citations omitted). We conduct a de novo review to determine whether a trial court substantially complied with *Juv.R. 29(D)*. *In re Elliot, Washington App. Nos. 03CA65 and 03CA66, 2004 Ohio 2770, at P17.*

[*P19] "'Representations by the defendant's attorney that the defendant understood the rights waived and

the consequences of his plea, are not sufficient to demonstrate [**12] a knowing and voluntary waiver.'" *In re Flynn (1995), 101 Ohio App.3d 778, 783, 656 N.E.2d 737*, quoting *In re McKenzie (1995), 102 Ohio App. 3d 275, 277, 656 N.E.2d 1377*. Additionally, "[a] waiver form is not a valid substitute for the court's duty to personally address the juvenile." *In re Royal (1999), 132 Ohio App.3d 496, 504, 725 N.E.2d 685*.

[*P20] In *Flynn*, for example, the appellate court found that the juvenile court failed to substantially comply with *Juv.R. 29(D)* when it relied upon counsel's representations that the juvenile understood the rights he waived by admitting the allegation. In *Flynn*, the referee asked the juvenile if his counsel had advised him of all his rights. The juvenile's counsel responded affirmatively. The referee then asked if the juvenile had any questions, if he was aware that by entering an admission there would be no trial, if he was threatened or promised anything in order to gain his admission, and if the complaint against him was accurate. The juvenile responded affirmatively, and the referee accepted his admission.

[*P21] The appellate court found that [**13] Flynn understood the charges, but that the juvenile court did not adequately explain the rights the juvenile waived by entering the admission. The *Flynn* court found that the juvenile's counsel's statement that he explained the juvenile's rights to him was not sufficient to demonstrate a knowing waiver because the court itself must address the juvenile. The appellate court found the court's colloquy fell "short of apprising appellant of his rights pursuant to *Juv.R. 29(D)*." *Id. at 783*. The court also rejected the argument that a waiver form could substitute for the court's duty to personally address the juvenile: "[A]lthough the appellant also signed a form in which he waived his rights, this does not constitute a substitute for the court's duty to address the appellant." *Id. at 783* (citations omitted).

[*P22] Similarly, in *McKenzie*, the appellate court found that the court failed to comply with *Juv.R. 29(D)* when it did not personally address the juvenile to determine if he understood the consequences of his admission and the rights waived. The court determined that the prosecutor's statements that the juvenile discussed [**14] the admission with his attorney and the attorney's concurrence in the prosecutor's representation did not sufficiently demonstrate compliance with *Juv.R. 29(D)*.

[*P23] In *Onion*, the court held that the juvenile's attorney's recitation of the rights waived was not sufficient to demonstrate that the court complied with *Juv.R. 29(D)*. The court noted that the following colloquy occurred:

"[Appellant's Counsel]: * * * At this point, the Defendant would, in fact, enter a plea of Guilty to Count 1 as indicated by the prosecutor. I have advised the Defendant that by entering a plea he could be sent to a youth services correction facility for a period of up to [a] minimum period of one year, to a maximum period not to exceed the date of his 21st birthday.

I have advised him that he has a right to a trial, that he has a right to confront his witnesses and to subpoena witnesses on his own behalf. He has talked this over with his mother and I believe it to be a voluntary admission.

The Court: All right. Ricky, you realize what your attorney has just said?

[Appellant]: Yes, I do.

The Court: Do you understand all of those [**15] things?

[Appellant]: Yes, I do.

The Court: Do you realize that you will not have a trial by entering this plea?

[Appellant]: Yes, I do.

The Court: And you are giving up all of those rights that go with a trial that have been mentioned to you?

[Appellant]; Yes, I do.

The Court: Has anyone forced you to plead guilty to this case?

[Appellant]: No.

The Court: Has anyone promised you anything for saying True to this case? * * * Has anyone brought any undue pressure on you to say guilty?

[Appellant]: No.

The Court: You are saying guilty because these allegations in the complaint are true?

[Appellant]: Yes, I am.

The Court: And you are not doing so, I know, because you want to, but you are doing so because they are true; is that correct?

[Appellant]: Yes."

The court then accept the juvenile's admission.

[*P24] The appellate court found the trial court failed to substantially comply with *Juv.R. 29(D)*. The court explained: "Although the trial court did ask appellant if he realized or understood what his attorney had just said following the attorney's recitation of some of the rights enumerated in *Juv.R. 29(D)(2)* [**16] , the trial court never specifically recited each right or asked whether appellant understood each right." *Id. at 501.*

[*P25] In the case at bar, just as in *Flynn*, *McKenzie*, and *Onion*, the magistrate did not personally engage Tabler in a colloquy and address each of the rights he waived by entering an admission. See, also, *West* (finding that the trial court did not substantially comply with *Juv.R. 29(D)* when it failed to discuss the rights the juvenile waived by entering an admission). As we stated, supra, the juvenile court must personally address the juvenile and must discuss, on-the-record, the rights the juvenile waives by admitting the charge. Here, the magistrate could not simply rely upon Tabler's counsel's statement that he advised Tabler of his rights. Furthermore, the magistrate could not rely upon Tabler's written waiver form. See *Royal, supra.* Instead, the magistrate should have personally asked Tabler if he waived the rights enumerated in *Juv.R. 29(D)*. The court's failure to substantially comply with *Juv.R. 29(D)* constitutes prejudicial, plain error.

[*P26] [**17] Because we have concluded that the court failed to substantially comply with *Juv.R. 29(D)* by failing to ascertain that Tabler waived his rights, we need not address Tabler's remaining arguments that the court failed to determine whether he understood the nature of the allegations and the consequences of entering an admission.

[*P27] Accordingly, we sustain Tabler's second assignment of error.

II

[*P28] Our disposition of Tabler's second assignment of error renders his remaining assignments of error moot. Therefore, we need not address them. See *App.R. 12(A)(1)(c)*.

[*P29] Accordingly, we vacate Tabler's admission and commitment, reverse the trial court's finding of delinquency, and remand to the trial court so that Tabler may plead anew.

JUDGMENT REVERSED AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND THE CAUSE REMANDED and that the Appellant recover of Appellee 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 Lawrence County Common Pleas Court, Juvenile [**18] Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Harsha, J. and Kline, J.: Concur in Judgment and Opinion.

For the Court,

BY:

Matthew W. McFarland

Presiding Judge

NOTICE TO COUNSEL

Pursuant to *Local Rule No. 14*, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

LEXSEE 2002 OHIO 695

IN THE MATTER OF: JOSHUA J. SMITH, A MINOR CHILD

CASE NUMBER 5-01-34

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, HANCOCK COUNTY

2002 Ohio 695; 2002 Ohio App. LEXIS 764

February 22, 2002, Date of Judgment Entry

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Juvenile Division.

DISPOSITION: Juvenile court's adjudication of delinquency was affirmed.

COUNSEL: DAVID H. BODIKER, Ohio Public Defender, Lisa Fields Thompson, Columbus, OH, For Appellant, Joshua J. Smith.

ROBERT A. FRY, Prosecuting Attorney, K.C. Collette, Findlay, OH, For Appellee, State of Ohio.

JUDGES: HADLEY, J. SHAW, P.J., and WALTERS, J., concur.

OPINION BY: HADLEY

OPINION

HADLEY, J. Appellant, Joshua J. Smith, a fifteen year old, appeals his adjudication as a delinquent child in the Hancock County Court of Common Pleas, Juvenile Division. For the reasons that follow, we affirm the decision of the trial court.

On April 10, 2001, a complaint in delinquency was filed in the juvenile court alleging that the appellant had violated *R.C. 2907.02(A)(1)(b)*, Rape, a felony of the first degree if committed by an adult. The complaint alleged that the appellant, then fourteen years of age, inserted his finger into the vagina of his sister, a three year old child. An initial hearing on the complaint was held on May 10, 2001, at which time the appellant requested the assistance of counsel. The matter was continued to June 11, 2001 when the appellant appeared [*2] in court with counsel and entered a denial to the charge.

On June 18, 2001, the appellant, appearing with counsel, admitted to the charge and was adjudicated delinquent. The court ordered the appellant to undergo a psychological evaluation through the Toledo Court Diagnostic Center before his dispositional hearing. On July 31, 2001, the court reviewed the report in the presence of the appellant, his mother, and his attorney and ordered that the appellant be committed to the Department of Youth Services ("DYS").

The appellant now appeals and asserts the following four assignments of error:

ASSIGNMENT OF ERROR NO. I

The trial court committed plain error and violated Joshua J. Smith's rights as guaranteed by the *Fifth* and *Fourteenth Amendments to the United States Constitution* and *Article I, Sections 10* and *16 of the Ohio Constitution* by failing to obtain a plea that was given knowingly, intelligently, and voluntarily.

The appellant asserts that the trial court committed plain error through its failure to comply with *Juv.R. 29* in obtaining an admission from the appellant that was not knowing, intelligent, and voluntary. Specifically, the appellant contends that the court [*3] twice failed to comply with *Juv.R. 29(B)* by failing to explain the purpose and consequences of the hearings. Generally, when an appellant has failed to preserve an alleged error by raising an objection, his right to challenge it is waived. [1] We, therefore, review the issue for plain error. [2]

1 *In re Williams (1997), 116 Ohio App. 3d 237, 240, 687 N.E.2d 507.*

2 *Id.*; *Crim.R. 52(B)* provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

In *Reichert v. Ingersoll,* [3] the Ohio Supreme Court stated:

Implementation of the plain-error doctrine is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. The plain-error doctrine permits correction of judicial proceedings when error is clearly apparent on the face of the record and is prejudicial to the appellant. Although the plain-error doctrine is a principle applied almost exclusively [*4] in criminal cases, this court has stated that the doctrine may also be applied in civil causes, even if the party seeking invocation of the doctrine failed to object * * * if the error complained of 'would have a material adverse affect on the character and public confidence in judicial proceedings.' * * * (Citations omitted.)

3 (1985), *18 Ohio St. 3d 220, 223, 480 N.E.2d 802.*

To prevail under the plain error standard, an appellant must show that the outcome of the case would have been different but for the error alleged. [4]

4 *Williams, 116 Ohio App. 3d at 241; State v. Waddell (1996), 75 Ohio St. 3d 163, 661 N.E.2d 1043.*

We begin our analysis with the *Due Process Clause of the Fourteenth Amendment to the United States Constitution* which announces, in pertinent part, that no state shall deprive any person [*5] of liberty without due process of law. The United States Supreme Court has cautioned that this guarantee applies to adults as well as children. [5] Consequently, state juvenile court proceedings must meet fair treatment standards and satisfy the Due Process requirements of the Fourteenth Amendment. [6] State juvenile courts must comply with *Juv.R. 29* to ensure minors their due process rights and fairness to which they are constitutionally entitled. [7]

5 *Bellotti v. Baird (1979), 443 U.S. 622, 633, 61 L. Ed. 2d 797, 99 S. Ct. 3035; In re Gault (1967), 387 U.S. 1, 13, 18 L. Ed. 2d 527, 87 S. Ct. 1428.*

6 *Bellotti, supra, 443 U.S. at 634;* also see *Breed v. Jones (1975), 421 U.S. 519, 528-529, 44 L. Ed. 2d 346, 95 S. Ct. 1779; McKeiver v. Pennsylvania (1970), 403 U.S. 528, 531, 29 L. Ed. 2d 647, 91 S. Ct. 1976.*

7 *In re Miller (1997), 119 Ohio App. 3d 52, 57, 694 N.E.2d 500.*

At the beginning of an adjudicatory hearing, *Juv.* [*6] *R. 29(B)* requires the court to do the following:

(1) Ascertain whether notice requirements have been complied with and, if not, whether the affected parties waive compliance;

(2) Inform the parties of the substance of the complaint, the purpose of the hearing, and possible consequences of the hearing * * *.

Determining whether a party's admission complies with *Juv.R. 29* is analogous to deciding whether a criminal defendant's guilty plea complies with *Crim.R. 11.* [8] The record is reviewed for substantial compliance with *Juv.R. 29.* [9] The question is not whether the judge strictly complied with the wording of the statute, but whether the defendant understood his rights and the effect of his admission. [10]

8 *In re Clark (2001), 141 Ohio App. 3d 55, 59, 749 N.E.2d 833; In re West (1998), 128 Ohio App. 3d 356, 359, 714 N.E.2d 988.*

9 *Id.*

10 *Id.; State v. Nero (1990), 56 Ohio St. 3d 106, 564 N.E.2d 474.*

On May 10, 2001, the appellant's initial court [*7] appearance, the court read the charges against him, reading first the language of the statute followed by a plain English description of the criminal act. The court then asked the appellant's mother if she had received a copy of the complaint, and she responded that she and Joshua had received a copy. The court then asked the appellant if he understood why he was in court. Joshua replied in the affirmative. Before proceeding further, the court informed the appellant that he had a right to be represented by an attorney. When Joshua stated that he wanted an attorney, the court halted the proceedings and referred the appellant to the Public Defender's Office.

The trial court substantially complied with the requirements of *Juv.R. 29(B)* in all respects but one in the May 10th hearing. The court ascertained that the parties had notice. [11] The court also informed the parties of the substance of the complaint and asked whether the appellant understood the purpose of the hearing. [12] The trial court did not inform the parties of the possible consequences of the hearing. However, in light of the fact that the proceedings went no further once the appellant requested counsel, the court's failure [*8] to enlighten the appellant of the hearing's possible consequences is harmless error. We have previously stated that "errors of constitutional dimension do not necessarily require a reversal of criminal convictions if the reviewing court can confidently determine from the entire record that the

error was harmless beyond a reasonable doubt." [13] Our review of the trial transcript reveals that the appellant was not prejudiced in any manner by the court's May 10th failure to review the hearing's possible consequences.

11 *Juv.R. 29(B)(1).*

12 *Juv.R. 29(B)(2).*

13 *State v. Dailey, 2000 Ohio App. LEXIS 1968* (May 9, 2000), Hancock App. No. 5-99-56, unreported, citing *Chapman v. California (1967), 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824,* and *Delaware v. Van Arsdall (1986), 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431.*

The appellant also contends that the trial court failed to explain the purpose and consequences of the June 11, 2001 hearing. The court stated that they were there on a complaint [*9] alleging an "F1 offense," and asked Joshua's trial counsel to make an appearance on the record. The court then asked the defendant's counsel if he was prepared to make a formal plea. Before the consequences of the hearing were explained, a denial was entered to the charge.

The state offers a different version of the facts on June 11, 2001, in which the court, addressing the appellant before the plea was entered, states: "This is what they call a felony in the first degree. This is about as serious an offense as one can get." After thoroughly reading the June 11, 2001 transcript, we conclude that this exchange never took place. Nevertheless, we conclude that the appellant was aware of the purpose of the hearing from his previous visit to the court.

On June 18, 2001, Joshua entered an admission to the charge against him. At the beginning of the proceedings the court stated that they were there on a first degree felony and asked Joshua if he understood the crime he was going to be admitting to. He replied, "molesting my sister." The appellant asserts that his admission was invalid based upon the court's failure to substantially comply with *Juv.R. 29.*

Upon an entry of an admission, [*10] *Juv.R. 29(D)* requires the trial court to address the party and determine both of the following:

(1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;

(2) The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing.

The court may hear testimony, review documents, or make further inquiry, as it considers appropriate * * *.

The appellant states that *after* accepting Josh's plea, the court explained the rights he would be giving up. On the contrary, the trial court ascertained that Josh's plea was entered into voluntarily *before* accepting his plea. The appellant informed the court that he would be entering an admission. The court then asked a series of questions to evaluate the voluntariness of his admission and the minor's awareness of the consequences. Josh was asked if he understood that by admitting to the crime, he was giving up his right to a trial; if he understood what a trial is; if he understood that he was giving up his right to [*11] question witnesses; if he understood that he would have a right to testify and present his case or to remain silent; if he understood that he had the right to call his own witnesses into court; if he understood that, if the case went to trial, he would be innocent until the prosecution proved his guilt; and, if he understood the seriousness of the offense and that he could be sentenced to the custody of the Department of Youth Services, who could keep him until his 21st birthday. To every one of these questions Joshua answered in the affirmative. Finally, when asked if his attorney answered all of his questions, he, again, replied yes.

The trial court then stated:

Okay. Okay, well, I'll find then that your plea has been voluntarily entered then. I'll accept your admission.

Based on the foregoing exchange, we find that the appellant has not proven plain error. Therefore, the appellant's first assignment of error is overruled.**ASSIGNMENT OF ERROR NO. II**

Joshua J. Smith was denied his right to due process of law as guaranteed by the *Fifth* and *Fourteenth Amendments to the United States Constitution*, and *Article I, Section 16 of the Ohio Constitution* in that he was adjudicated [*12] delinquent while incompetent to stand trial.

Under his second assignment of error, the appellant alleges that he was denied due process of law because the trial court failed to make a determination as to his competency prior to adjudication. The appellant's trial counsel, prior to entering a plea of admission, never raised the issue of Joshua's competency, nor did he object to the fairness of the proceedings in light of Joshua's diminished mental capacity. Because the appellant failed to preserve the error by raising an objection, we will review the issue for plain error. [14]

14 *Williams, 116 Ohio App. 3d at 240.*

Deep-seated notions of due process stressed by the United States Supreme Court and the Supreme Court of

Ohio require that an incompetent criminal defendant may not be tried or convicted of a crime. [15] Although Josh is not a criminal defendant, "the right not to be tried while incompetent" is as fundamental to juvenile proceedings as it is to criminal trials of adults. [16]

15 *Pate v. Robinson (1966), 383 U.S. 375, 15 L. Ed. 2d 815, 86 S. Ct. 836*; *State v. Berry (1995), 72 Ohio St. 3d 354, 359, 650 N.E.2d 433*, reconsideration denied, *73 Ohio St. 3d 1428*, certiorari denied, *516 U.S. 1097*.

[*13]

16 *Williams, 116 Ohio App. 3d 237, 241, 687 N.E.2d 507*.

The Fourteenth Amendment test for competency to stand trial is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." [17] Pursuant to *R.C. 2945.37(G)*, in a court of common pleas, there is a presumption that a defendant is competent to stand trial unless the defendant demonstrates by a preponderance of the evidence that "because of his present mental condition he is incapable of understanding the nature and objective of the proceedings against him or of presently assisting in his defense." A juvenile court may order a mental examination following the filing of the complaint "where a party's legal responsibility for * * * the party's competence to participate in the proceedings is an issue." [18] "While *Juv.R. 32(A)(4)* provides that the court may order a mental examination where competency is in issue, no statutory standard [*14] has been enacted to guide competency determinations in juvenile proceedings." [19] This court, however, has concluded that the adult competency standard of *R.C. 2945.37* should apply equally to juveniles provided that juveniles are assessed by juvenile rather than adult norms. [20]

17 *Dusky v. United States (1960), 362 U.S. 402, 4 L. Ed. 2d 824, 80 S. Ct. 788*.

18 *Juv.R. 32(A)(4)*.

19 *Williams, 116 Ohio App. 3d at 242*.

20 *State v. Settles, 1998 Ohio App. LEXIS 4973* (Sept. 30, 1998), Seneca App. No. 13-97-50, unreported. See, also, *Williams, 116 Ohio App. 3d 237, 687 N.E.2d 507*.

Prior to the dispositional hearing, the trial court ordered Joshua to undergo a psychological evaluation for assistance in determining his placement. JRC was considered a possible placement but concerns were expressed as to whether they would accept him. It was mentioned that their program involves a lot of reading and Joshua's reading ability was below average. Therefore, [*15] Joshua was referred to the Court Diagnostic & Treatment Center where he was given a psychological evaluation. Dr. Forgac, the psychologist conducting the evaluation, concluded that "it would be safe to assume that Josh's functioning falls within the upper range of mild mental retardation to the lower range of borderline intellectual functioning."

Although there are circumstances under which a detailed inquiry into a juvenile's mental competency would be warranted, the United States Supreme Court has held that mental retardation does not necessarily preclude competency or relinquishment of jurisdiction. [21] This is a decision which must be left to the juvenile court to decide after observing the child's demeanor and how well the child appears to understand the proceedings. [22]

21 See *Penry v. Lynaugh (1989), 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934*.

22 See *In Re Jones, 2000 Ohio App. LEXIS 1753* (April 13, 2000), Gallia App. No. 99 CA 4, unreported.

In the present case, the trial court evidently concluded [*16] that the appellant understood the rights that were recited to him and the significance of their waver. Having read the transcript ourselves, we find nothing that would indicate the contrary. We cannot say that appellant has shown that he was incompetent to waive his rights and enter a plea of admission. Therefore, the appellant has not shown plain error. The appellant's second assignment of error is without merit.

ASSIGNMENT OF ERROR NO. III

The trial court erred when it failed to enter a disposition on the record in Joshua J. Smith's presence at the conclusion of the dispositional hearing in violation of the *Fifth* and *Fourteenth Amendments to the United States Constitution, Article I, Section 16 of the Ohio Constitution*, and *Crim.R. 43*.

Under the third assignment of error, the appellant contends that the trial court failed to inform him of the minimum and maximum commitment that he was to receive at DYS and thus failed to sentence him on the record in open court. As a result, the appellant argues that Joshua's rights with respect to *Crim.R. 43* have been violated. We disagree.

Crim.R. 43 requires that the accused be present at every stage of the trial. The record shows [*17] that the appellant was present at all four hearings. In fact, with the exception of the initial hearing where the appellant

appeared without representation, the appellant was present with an attorney. His mother was also present at all four hearings.

The appellant leads off his third assignment of error arguing that he was not present at sentencing. The appellant later concedes, however, that though he was present at the dispositional hearing, the trial court failed to inform him of the terms of his sentence. Yet, twice the trial court explained the seriousness of the crime and the sentence to the appellant prior to the final hearing. On June 11th, when Josh entered an initial plea of denial, the court explained that he was being charged with a felony of the first degree and that, if convicted, the "Department of Youth Services would have the right to keep you until age 21, but could not release you sooner than one year without the court's consent." One week later, the trial court reiterated the consequences of admitting to a first degree felony, if committed by an adult. The trial court stated:

One of the things that the court could do would be to permanently commit you to the custody [*18] of the Ohio Department of Youth Services. That's the agency that runs institutions for delinquent youth. And if you were committed to their custody they would have the right to keep you until your 21st birthday, but cannot release you sooner than one year without the court's consent.

The court then accepted Josh's plea of admission. At the disposition hearing, the trial court informed Josh, with his attorney and mother present, that it was "going to go ahead and make the commitment to the Department of Youth Services."

In light of the above facts, we find that the trial court sentenced the appellant in open court and advised him of the minimum and maximum sentences. Therefore, the appellant's third assignment of error is overruled.

ASSIGNMENT OF ERROR NO. IV

Joshua J. Smith was denied effective assistance of counsel as guaranteed by the *Sixth* and *Fourteenth Amendments to the United States Constitution* and *Article I, Section 16 of the Ohio Constitution.*

For his final assignment of error, the appellant asserts that he was denied effective assistance of counsel when his trial counsel failed to request to withdraw Joshua's admission to the charges and request a competency [*19] evaluation and hearing. A showing of ineffective assistance of counsel requires a defendant to show that his trial counsel was deficient and that such deficiency prejudiced the defense. [23] In a criminal case, the failure to file a motion, in and of itself, is not *per se* ineffective assistance of counsel. [24] A defendant must prove that counsel was deficient for failing to make certain motions and that such motions had a reasonable probability of success. [25] Similarly, the appellant must show that his trial counsel was deficient for failing to make the aforementioned requests and that such requests had a reasonable likelihood of success.

23 *Strickland v. Washington (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052.*

24 See *State v. Vires (1970), 25 Ohio App. 2d 70, 266 N.E.2d 245; State v. Madrigal (2000), 87 Ohio St. 3d 378, 389, 721 N.E.2d 52; Kimmelman v. Morrison (1986), 477 U.S. 365, 384, 91 L. Ed. 2d 305, 106 S. Ct. 2574.*

25 *State v. Sheppard (2001), 91 Ohio St. 3d 329, 330, 744 N.E.2d 770.*

[*20] The appellant contends that defense counsel was put on notice that Joshua was a low-functioning individual before the disposition hearing. At the adjudication hearing on June 18th, the court held a discussion about possible placement for Joshua and the issue of his IQ score was raised. The court questioned whether JRC would take him because of his limited reading ability. Thus, as previously mentioned in the second assignment of error, the court ordered him to undergo a psychological evaluation. Joshua received a mental age score of 10.0 years when he was almost fourteen years, ten months old and had an estimated IQ score of 69. Dr. Forgac noted that Joshua responded to his questions, his speech was spontaneous, and he remained attentive and cooperative. Dr. Forgac's report also indicates that Joshua apparently knew the difference between right and wrong because the first time the police questioned him he lied about touching his sister.

In addition to Dr. Forgac's analysis of the appellant, the trial judge also had the opportunity to speak with Joshua and ascertain whether he understood the offense for which he was being charged and the significance of entering a plea of admission. [*21] If the trial judge observed that Joshua lacked the competency to enter the admission, he had a legal and ethical duty to vacate the plea or to inquire as to Josh's understanding of the proceedings. The trial judge did not so find.

The only time Joshua's competency was raised was when the time came to decide his placement. Despite his low-level learning capacity, all of the evidence before us indicates that Joshua was cognizant of the events unfolding before him during each of the hearings. Therefore, we conclude that his trial counsel was not deficient for failing to request to withdraw Joshua's admission to the charges and request a competency evaluation and hearing.

Accordingly, the appellant's fourth assignment of error is overruled.

Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

SHAW, P.J. and WALTERS, J., concur.

LEXSEE 2002 OHIO 1513

In the Matter of Kevin C.

Court of Appeals No. L-01-1368

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, LUCAS COUNTY

2002 Ohio 1513; 2002 Ohio App. LEXIS 1458

March 29, 2002, Decided

PRIOR HISTORY: [*1] Trial Court No. 01087649-01.

DISPOSITION: Judgment reversed.

COUNSEL: David H. Bodiker, State Public Defender, and Janine Salloum Ashanin, Assistant Public Defender, for appellant.

Julia R. Bates, Lucas County Prosecuting Attorney, and Melissa Wagner, Assistant Prosecuting Attorney, for appellee.

JUDGES: Peter M. Handwork, J., James R. Sherck, J., Richard W. Knepper, J., CONCUR.

OPINION BY: Peter M. Handwork

OPINION

DECISION AND JUDGMENT ENTRY

HANDWORK, J. This is an appeal from two separate judgments of the Lucas County Court of Common Pleas, Juvenile Division, that Kevin C. is a delinquent child because he committed acts on two separate occasions that would constitute rape, a violation of *R.C. 2907.02* if committed by an adult. Because we find plain error in the acceptance of an admission that the record shows was not knowing, intelligent and voluntary, we reverse the adjudication and disposition orders of the trial court and remand this case for further proceedings.

Kevin C. has presented four assignments of error for consideration on appeal. The assignments of error are:

"ASSIGNMENT OF ERROR NO.I

KEVIN [C.'S] [*2] ADMISSION WAS NOT KNOWING, INTELLIGENT AND VOLUNTARY, IN VIOLATION OF THE *FIFTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 10* AND *16 OF THE OHIO CONSTITUTION*, AND *JUVENILE RULE 29*.(T.p. 18-25; T.p. 30).

"ASSIGNMENT OF ERROR NO.II

KEVIN [C.] WAS DENIED DUE PROCESS OF LAW AS GUARANTEED BY THE *FIFTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION*, AND *ARTICLE I. SECTION 16 OF THE OHIO CONSTITUTION* WHEN THE JUVENILE COURT ADJUDICATED HIM DELINQUENT WITHOUT DETERMINING HIS COMPETENCY.(T.p. 16-30)(Exhibit '1').

"ASSIGNMENT OF ERROR NO.III

KEVIN [C.] WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE *SIXTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* AND *ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION*.(T.p. 16-30).

"ASSIGNMENT OF ERROR NO.IV

KEVIN [C.] WAS DENIED HIS RIGHT TO NOTICE AND DUE PROCESS OF LAW AS GUARANTEED BY THE *FIFTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION*, AND *ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION* WHEN THE JUVENILE COURT COMMITTED HIM TO A SECOND TERM IN THE DEPARTMENT OF YOUTH SERVICES AND SUSPENDED SAID COMMITMENT.(T.p. 41)(Exhibit '4')."

Before we consider [*3] the arguments relating to the assignments of error, we first consider the argument raised by the state that Kevin has waived all arguments

on "the substantive charge" on appeal because he failed to object to the magistrate's rulings in the trial court.

The state premises its waiver argument on *Juv.R. 40(E)(3)* which provides:

"(3) *Objections*

"(a) *Time for filing.* Within fourteen days of the filing of a magistrate's decision, a party may file written objections to the decision. If any party timely files objections, any other party also may file objections not later than ten days after the first objections are filed. If a party makes a request for findings of fact and conclusions of law under *Civ.R. 52*, the time for filing objections begins to run when the magistrate files a decision including findings of fact and conclusions of law.

"(b) *Form of objections.* Objections shall be specific and state with particularity the grounds of objection. If the parties stipulate in writing that the magistrate's findings of fact shall be final, they may only object to errors of law in the magistrate's [*4] decision. Any objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of the evidence if a transcript is not available. *A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule.*" (Emphasis added).

Kevin responds that this court has jurisdiction to consider all of the issues he raises in this appeal because the magistrate in the trial court filed a decision only, and never filed separate findings of fact and conclusions of law. Kevin says that the necessity to raise objections to a magistrate's ruling in the trial court in order to preserve issues for review on appeal only arises if a magistrate files findings of fact and conclusions of law.

The rule followed by Ohio courts is that the failure to object, pursuant to *Juv.R. 40*, to a finding of fact or conclusion of law from a magistrate's decision, "generally results in waiver of any related issues on appeal." *In the* [*5] *Matter of: Albert Montgomery (Mar. 30, 2000), 2000 Ohio App. LEXIS 1300*, Franklin App. No. 99AP-749, unreported. However, appellate courts are not prevented from exercising discretion to address plain error just because no objections were filed to a magistrate's decision. *Id.* The Supreme Court of Ohio has held that an appellate court may exercise its discretion to raise plain error in juvenile cases that involve "constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it." *In re M.D. (1988), 38 Ohio St.3d 149, 527 N.E.2d 286*, syllabus. See, also, *In re Etter (1998), 134 Ohio App.3d 484, 491-493, 731 N.E.2d 694*; *In re Dwayne Johnson (Dec. 11, 2000), 2000 Ohio App. LEXIS 5776*, Butler App. Nos. CA2000-03-041, CA 2000-05-073, unreported. (plain error is the exception to waiver rule contained in *Juv.R. 40(E)(3)(b)*).

[*6] A plain error is an:

"Obvious error prejudicial to a defendant, neither objected to nor affirmatively waived by him, which involves a matter of great public interest having substantial adverse impact on the integrity of and the public's confidence in judicial proceedings. The error must be obvious on the records, palpable, and fundamental, and in addition it must occur in exceptional circumstances where the appellate court acts in the public interest because the error affects 'the fairness, integrity or public reputation of judicial proceedings. ' (Footnotes omitted.)" *State v. Craft (1977), 52 Ohio App.2d 1, 7, 367 N.E.2d 1221*, (quoting *United States v. Atkinson (1936), 297 U.S. 157, 160, 80 L. Ed. 555, 56 S. Ct. 391.*

As the Tenth District Court of Appeals noted when it concluded that an appellate court can raise plain error in a juvenile case where no objections to a magistrate's report were filed in the trial court pursuant to *Juv.R. 40*:

"Blind enforcement of the procedural rule at issue would essentially result in a determination that attorneys who fail to represent indigent minors diligently [*7] have the power to deprive their clients of appellate review of delinquency adjudications which can cause the minors to be institutionalized for years. The due process problems inherent with enforcing the rule are readily apparent, especially in the context of juvenile court proceedings where the right to a jury trial and other procedural rights guaranteed to adults are radically curtailed." *In the Matter of: Albert Montgomery* (Mar. 30, 2000), Franklin App. No. 99AP-749, unreported.

We therefore find that we have jurisdiction to consider whether there was any plain error in this case.

The record shows that Kevin was accused, in four separate complaints filed in the Lucas County Court of Common Pleas, Juvenile Division on March 8, 2001, of four separate acts that would constitute rape if committed by an adult. On March 15, 2001, counsel for Kevin filed a motion asking the juvenile court to order a psychological examination of Kevin. Kevin's counsel indicated to the juvenile court that he had "reason to believe that the juvenile's competency to stand trial and/or his legal responsibility is suspect due to his mental state."

On March 23, 2001, proceedings were conducted by [*8] a magistrate in the juvenile court in which Kevin admitted to two counts of rape. The state dismissed the other two counts of rape. Kevin's trial counsel withdrew the motion for a psychological evaluation of his client.

The magistrate subsequently filed two decisions and judgment entries that are under consideration in this appeal.

The decisions and judgment entries consisted of forms completed by the magistrate in which he indicated that Kevin admitted to a total of two counts of rape. The magistrate found Kevin a delinquent child as to each admission.

In the first magistrate's decision and judgment entry at issue here, the magistrate put x's in boxes that appeared before the following statements:

"Committed to the legal custody of the Ohio Department of Youth Services for institutionalization for an indefinite term and "for a minimum period of (1) year to age 21 in secure facility per *O.R.C. 2151.355(A)(5)*."

In the second form magistrate's decision and judgment entry now under consideration, the magistrate put x's in boxes that appeared before the following statements:

"Committed to the legal custody of the Ohio Department of Youth Services [*9] for institutionalization for an indefinite term and "for a minimum period of (1) year to age 21 in secure facility per *O.R.C. 2151.355(A)(5)*.

"Stay on ODYS commitment to age 21 or longer on condition of no violation of court order, probation or any law."

Kevin has appealed from the juvenile court's adoption of each of the above described magistrate's decisions and judgment entries.

We have considered the issues raised in the first three assignments of error together to determine whether plain error occurred. We find for the following reasons that plain error did occur.

Juv.R. 29(D) provides, in pertinent part:

"The court may refuse to accept an admission and shall not accept an admission without addressing the party personally and determining both of the following:

"(1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;

"(2) The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain [*10] silent, and to introduce evidence at the adjudicatory hearing."

This court has explained the effect of the provisions of *Juv.R. 29(D)(1),(2)* as follows:

"Ohio courts have held that in a delinquency case, an admission is similar to a guilty plea made by an adult pursuant to a *Crim.R. 11(C)*, in that it constitutes 'a waiver of rights to challenge the allegation [in the complaint].' (Citation omitted). While there appears to be no reported Ohio cases which set forth the standard by which to measure a trial court's compliance with *Juv.R. 29(D)* in accepting an admission in a delinquency case, other courts of appeals have considered this issue and, similarly analogizing to *Crim.R. 11(C)* proceedings, held that the applicable standard for the trial court's acceptance of an admission is substantial compliance with the provisions of *Juv.R. 29(D)*, without which the adjudication must be reversed 'so that the juvenile may plead anew.' (Citations omitted)." *In re Christopher R. (1995), 101 Ohio App.3d 245, 247-248, 655 N.E.2d 280.*

[*11] The main question on appeal is whether the juvenile understood his rights and the effect of his admissions when he made the admissions. *In the Matter of: Joshua J. Smith (Feb. 22, 2002), 2002 Ohio App. LEXIS 764*, Hancock App. No. 5-01-34, unreported.

Our review of the proceedings in this case leads to the inescapable conclusions that: (1) the magistrate failed to adequately address Kevin in this case to ensure that Kevin was making admissions knowingly, intelligently and voluntarily; and (2) that the record does not support a ruling that Kevin did enter his admissions knowingly, intelligently and voluntarily. For instance, the magistrate began by asking Kevin if he understood there were still two rape counts pending against Kevin and that he had the right to have a trial on those charges. To both of the magistrate's initial questions Kevin answered "Yes, sir." The magistrate then asked: "Do you know what a trial is?" Kevin replied: "No, sir." The magistrate then explained:

"A trial is where if you wanted one, the Prosecuting Attorney sitting here at the table would have to prove that you committed rape and it would [*12] be proven by her calling witnesses to testify against you. They would take the stand, be sworn in, your lawyer would have the right to question and cross examine and confront those witnesses at a trial.

"You would also have the right to subpoena and call witnesses to testify on your own behalf. You also, of course, have the right to remain silent. That means you wouldn't have to say anything because the burden is on the State to prove beyond a reasonable doubt that you committed two counts of rape."

The magistrate made no attempt to ascertain whether Kevin understood his explanations of Kevin's rights. Instead, he continued on as follows:

"It's my understanding, according to your lawyer, that you wish to give up your rights to have a trial and your right to remain silent and tell the Court what you did and admit to the two rape charges, is that correct? Is that what you want to do?"

Kevin answered: "Yes, sir. "

The prosecutor then asked the magistrate to amend the complaints to reflect that Kevin was thirteen, not fourteen when the alleged events took place. The magistrate granted the request. The following exchange then took place between the magistrate and Kevin:

"THE [*13] COURT: Kevin, is anyone making you or forcing you to admit to these charges today? Is anyone making you do it? You have to answer.

"JUVENILE: No, sir.

"THE COURT: You're doing it because you want to?

"JUVENILE: No, sir."

The magistrate did not ask Kevin what he meant by the negative response to the question about whether he wanted to admit the charges. Instead, he went on with further questions regarding whether Kevin understood that the charges to which he was entering admissions were felonies and regarding the sentences the trial court could impose for the charges.

The magistrate then asked the prosecutor to continue the voir dire of Kevin. The prosecutor began asking Kevin if he admitted that certain facts regarding the events that led to the charges against him were true. The following exchange took place:

"Q. Kevin, in January of 2001, how old were you, please?

"A. Thirteen.

"Q. Okay. And on -- in that -- within that month did you have anal intercourse with [the victim]?

"A. No, ma'am.

"Q. Did you put your penis in [the victim's] anus?

"A. No, ma'am."

Kevin's trial counsel then asked for a moment off the record, and the transcript contains a notation that [*14] he had an off-the-record attorney, client discussion.

When the record was resumed, the magistrate asked if

Kevin was confused by the terminology the prosecutor was using in the voir dire, and Kevin's trial counsel answered that he "believed so." The questioning then resumed and the following exchanges took place:

"Q. Once again, Kevin, for the record, on January of 2001, how old were you, please?

"A. Thirteen.

"Q. Okay. An on and within that month, did you place your penis within [the victim's] butt?

"A. Yes, sir -- I mean, yes, ma'am.

"Q. And this took place within Toledo, Lucas County?

"A. Uh-huh.

"Q. Once again in January of 2001, how old were you please?

"A. Thirteen.

"Q. And so a separate occasion from that within which we just spoke, on another occasion, on a second occasion -- on a different time, did you in fact place your penis in [the victim's] butt again?

"A. What do you mean by that?

"Q. Okay, you did it once. Did you do it again on a different day?

"(Whereupon off-the-record attorney, client discussion was held.)

"A. No, ma'am. It only happened the first. That's what he was actually trying to say. But I did it the second time.

"Q. You did do it [*15] a second time? I'm sorry, you have to say it out loud for the record.

"A. Yes, ma'am.

"Q. I'm sorry, what?

"A. Yes, ma'am.

"Q. And this took place within Toledo, Lucas County?

"A. Yes, ma'am."

The magistrate asked no further questions of Kevin to clarify the conflicting answers Kevin had just given. Instead, the magistrate asked how old the victim was, and Kevin answered that the victim was eleven years old.

The magistrate then made a statement that he was satisfied that Kevin's admissions were "knowingly and intelligently and voluntarily made." The magistrate found Kevin "to be delinquent of two counts of rape."

Next, the magistrate asked the state for a recommendation regarding disposition. The state answered that

it believed an assessment of Kevin needed to be made. A discussion ensued regarding how long it would take for the assessment to be made and for proceedings to resume to sentence Kevin. Kevin asked the magistrate how long it would be before he was sentenced. The magistrate answered at least two weeks, but how much longer than two weeks he did not know. Kevin expressed concern about having to remain in custody during that time and his counsel asked if Kevin [*16] could be released to his mother's home pending sentencing.

After making further inquiries to determine if Kevin was a candidate for release pending sentencing, the magistrate said to Kevin:

"THE COURT: Okay. Kevin, in part, because of your prior record, which involves a sex offense.

"JUVENILE: Yes, sir.

"THE COURT: And because of your new case also involves a sex offense, the Court is going to make the decision that you have to be held at this point, okay.

"I may have held you even if you didn't have the prior. Because you do have this prior it's almost imperative that the Court hold you, okay? So anyway, what we're going to do is have you go with the deputy. Your mom is going to get the date. At some point your attorney and your mom will let you know what the date is for the disposition, okay? Do you have any questions?

"JUVENILE: Yes, I do.

"THE COURT: Uhum.

"JUVENILE: If you all don't sentence me, how long will it be to have a trial thing?

"THE COURT: What was the question, Mr. Bergman? I couldn't hear him.

"MR. BERGMAN: I will address his questions, Judge. I will talk to him upstairs.

"THE COURT: All right. If there's nothing else, then this hearing is adjourned and [*17] Kevin is to be returned to detention at this point. Thank you.

When the exchanges above are viewed as a whole, it is clear that the magistrate had an obligation to make further inquiry of Kevin at several points during the proceedings before the magistrate could fully ascertain whether Kevin actually understood what his rights were, that he was knowingly, intelligently and voluntarily waiving those rights, and that he even understood what the facts were to which he was entering an admission. Kevin exhibited confusion throughout the proceedings, and his closing question shows that he did not even understand that after he entered admissions to the charges, no trial would be held. On the basis of this record, we find plain error with regard to the magistrate's finding that Kevin made his admissions knowingly, intelligently and voluntarily.

Because this finding of plain error requires the reversal of the finding of delinquency and the dispositional order and the remand of this case for further proceedings, we need not consider the remaining issues raised by Kevin regarding whether he received ineffective assistance of counsel, whether he should have been evaluated for competency prior [*18] to the entry of his admissions and whether the trial court committed error when it entered and stayed a second dispositional order without informing Kevin of the order in open court. The judgment of the Lucas County Court of Common Pleas, Juvenile Division, is reversed and this case is remanded for further proceedings consistent with this decision. The state is ordered to pay the court costs of this appeal.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27*. See, also, *6th Dist.Loc.App.R. 4*, amended 1/1/98.

Peter M. Handwork, J.

James R. Sherck, J.

Richard W. Knepper, J.

CONCUR.

LEXSEE 2006 OHIO 4925

STATE OF OHIO, Appellee v. SAM HAIRSTON, III, Appellant

C. A. No. 05CA008768

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, LORAIN COUNTY

2006 Ohio 4925; 2006 Ohio App. LEXIS 4886

September 25, 2006, Decided

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Hairston, 2007 Ohio 724, 2007 Ohio LEXIS 388 (Ohio, Feb. 28, 2007)*

PRIOR HISTORY: [**1] APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS. COUNTY OF LORAIN, OHIO. CASE No. 02 CR 061788.

DISPOSITION: Judgment affirmed in part, and vacated in part.

COUNSEL: JOHN P. PARKER, Attorney at Law, Cleveland, Ohio, for Appellant.

DENNIS WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, Elyria, Ohio, for Appellee.

JUDGES: EDNA J. BOYLE. WHITMORE, P. J., CONCURS. CARR, J., CONCURS IN JUDGMENT ONLY.

OPINION BY: EDNA J. BOYLE

OPINION

DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BOYLE, Judge.

[*P1] Appellant, Sam Hairston, III, aka Charles Williams, appeals from the conviction judgment entry entered in the Lorain County Court of Common Pleas. This Court affirms in part and vacates in part.

I.

[*P2] On November 14, 2002, the Lorain County Grand Jury indicted Appellant as follows: Count One, aggravated murder, in violation of *R.C. 2903.01(B)*, with a firearm specification, as defined in *R.C. 2923.11*, an unspecified felony; Count Two, aggravated murder, in violation of *R.C. 2903.01(A)* [**2] , with a firearm specification, as defined in *R.C. 2923.11* and a witness specification, pursuant to *R.C. 2929.04(A)(8)*, an unspecified felony; Count Three, aggravated murder, in violation of *R.C. 2903.01(A)*, with a firearm specification, as defined in *R.C. 2923.11* and a detection specification, pursuant to *R.C. 2929.04(A)(3)*, an unspecified felony; and Count Four, aggravated robbery, in violation of *R.C. 2911.01(A)(1)*, with a firearm specification, as defined in *R.C. 2923.11*, a first-degree felony.

[*P3] These charges arose from an illicit drug deal in the early morning hours of January 29, 1991. Richard Dawson and his friend, Richard Movrin, were patrons at a local bar on the evening of January 28, 1991. While at the bar, Mr. Movrin saw another friend of his, Richard Newson. When it was time to leave, Mr. Newson asked for a ride to his girlfriend's house in Wilkes Villas. Mr. Dawson drove, while Mr. Movrin sat in the front passenger seat and Mr. Newson was in the backseat. Unbeknownst to Mr. Dawson, [**3] Mr. Movrin had solicited Mr. Newson for crack cocaine.

[*P4] Upon dropping Mr. Newson off at Wilkes Villas, he quickly returned to the backseat of the car with two other men, Appellant and David Hollis. While in the car, Mr. Hollis produced a gun and fatally shot Mr. Movrin in the back. The three men then exited the backseat and went around to the back of a building. There Appellant allegedly shot Mr. Newson in the face for fear that Mr. Newson would not keep quiet about the prior events. In the meantime, Mr. Dawson drove Mr. Movrin to the hospital where he expired. Mr. Hollis remained in the Lorain County area following these incidents, while Ap-

pellant left the area. Appellant was eventually found in a Massachusetts prison under the assumed name, Charles Williams.

[*P5] On November 3, 2004, Appellant was arraigned and pled not guilty. The matter proceeded to a capital jury trial on June 6, 2005. The trial court granted a *Crim.R. 29* motion with respect to Count One, thereby reducing the original charge of aggravated murder to involuntary manslaughter. The jury found Appellant guilty of Count Two, aggravated murder with a firearm and witness specification [**4] and Count Three, aggravated murder with a firearm specification. Appellant was found not guilty on the remaining counts and specifications. As a guilty finding under a witness specification (*R.C. 2929.04(A)(8)*) involves the possibility of capital punishment, the trial court proceeded with the mitigation phase to determine Appellant's sentence. See *R.C. 2929.03(C)(2)(b)* and *R.C. 2929.04*. The jury returned a sentence of life imprisonment with parole eligibility after serving thirty years. The trial court sentenced Appellant to a total of thirty-three years in prison [1] and ordered Appellant to pay restitution for Mr. Newson's medical and funeral expenses.

1 Thirty years for Count Two and Specification Two and an additional mandatory three years for the firearm specification on Count Two. There was no sentence on Count Three as it merged into Count Two.

[*P6] Appellant timely appealed his conviction, asserting fourteen assignments [**5] of error for review. For ease of review, we will combine some of the assignments of error.

II.

A.

First Assignment of Error

"THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO A PUBLIC TRIAL AS GUARANTEED BY THE *SIXTH* AND *FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION* AND *ARTICLE I, SECTIONS 10* AND *16 OF THE OHIO CONSTITUTION*[.]"

[*P7] In his first assignment of error, Appellant alleges two errors. First, Appellant contends that he was denied the right to a public trial as the trial court closed the courtroom during closing arguments. Appellant submits it was plain error for the trial court to close the courtroom. Further, Appellant argues his trial counsel was ineffective as they did not object to the trial court closing the courtroom for closing arguments. We disagree with both arguments.

1. Plain Error

[*P8] "[T]he right to a public trial is not absolute and an order barring spectators from observing a portion of an otherwise public trial does not necessarily introduce error of constitutional dimension." *State v. Whitaker, 8th Dist. No. 83824, 2004 Ohio 5016, at P11.* The right to a public trial, along with all constitutional [**6] rights, may be forfeited due to the failure to timely assert the right. *Peretz v. United States (1991), 501 U.S. 923, 936, 111 S. Ct. 2661, 115 L. Ed. 2d 808*, quoting *Yakus v. United States. (1944), 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834*. Ordinarily, to preserve a trial court error for appeal, an objection must be timely raised to the trial court, where the purported error may be corrected, or else the objection is forfeited; it may not be raised for the first time on appeal. *United States v. Olano (1993), 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508*. See, also, *State v. McKee (2001), 91 Ohio St.3d 292, 299 fn. 3, 2001 Ohio 41, 744 N.E.2d 737* (Cook, J., dissenting). See, e.g., *State v. Geiger, 9th Dist. No. 22073, 2004 Ohio 7189, at P12*; *State v. Riley, 9th Dist. No. 21852, 2004 Ohio 4880, at P27*; *State v. Dent, 9th Dist. No. 20907, 2002 Ohio 4522, at P6.*

[*P9] There is a fine distinction between the terms waiver and forfeiture as applied to the preservation of objections for appeal. *McKee, 91 Ohio St.3d at 299 fn. 3* (Cook, J., dissenting). "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment [**7] or abandonment of a known right.'" *Olano, 507 U.S. at 733*, quoting *Johnson v. Zerbst (1938), 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461*. Unfortunately,

> "courts have so often used [waiver and forfeiture] interchangeably that it may be too late to introduce precision. Nevertheless, the distinction retains some significance in the context of *Crim.R. 52(B)*. A right that is waived in the true sense of that term cannot form the basis of any claimed error under *Crim.R. 52(B)*. On the other hand, mere forfeiture does not extinguish a claim of plain error under *Crim.R. 52(B)*." (Internal quotations and citations omitted.) *McKee, 91 Ohio St.3d at 299 fn. 3* (Cook, J., dissenting).

[*P10] In this matter, Appellant's trial counsel did not make any statements or objections during Appellee's request to close the courtroom during closing arguments. Appellant's failure to make an objection resulted in a forfeiture of his objection regarding the closing of the courtroom in violation of his right to a public trial. See *Levine v. United States (1960), 362 U.S. 610, 618-19, 80 S. Ct. 1038, 4 L. Ed. 2d 989.* [**8] Accordingly, Appellant's forfeiture allows him the possibility for appellate review via a claim of plain error.

[*P11] However, Appellant's brief does not adequately present a claim of plain error under his first assignment of error. Appellant's brief makes a conclusory statement that plain error occurred, but does not provide this Court with any reasoning in support of this position. The appellant bears the burden of affirmatively demonstrating the error on appeal and substantiating his or her arguments in support. *App.R. 16(A)(7)*; Loc.R. 7(A)(7). See *Figley v. Corp, 9th Dist. No. 04CA0054, 2005 Ohio 2566, at P8.* Moreover, it is not the duty of this Court to develop an argument in support of an assignment of error, even if one exists. *State v. Tanner, 9th Dist. No. 04CA0062-M, 2005 Ohio 998, at P24*; *Prince v. Jordan, 9th Dist. No. 04CA008423, 2004 Ohio 7184, at P40*; *Klausman v. Klausman, 9th Dist. No. 21718, 2004 Ohio 3410, at P29.* Accordingly, as Appellant failed to develop his plain error argument, we do not reach the merits and decline to address this argument.

2. Ineffective Assistance [**9] of Counsel

[*P12] Additionally under the first assignment of error, Appellant alleges his trial counsel were ineffective as they failed to object to the trial court closing the courtroom during closing arguments. Specifically, Appellant feels that if his trial counsel would have objected, there either would not have been a violation of his right to public trial and/or the issue would have been preserved for appeal. Appellant argues this failure constitutes ineffective assistance of counsel. We disagree.

[*P13] The *Sixth Amendment to the United States Constitution* guarantees a criminal defendant the effective assistance of counsel. *McMann v. Richardson (1970), 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763.* To prevail on a claim of ineffective assistance of counsel, Appellant must meet the two-prong test established in *Strickland v. Washington, (1984), 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674.*

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment.* Second, the defendant must show that the deficient performance [**10] prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

[*P14] The failure to object to an error may be justified as a trial tactic and thus does not sustain a claim of ineffective assistance of counsel. *State v. Gumm (1995), 73 Ohio St.3d 413, 428, 1995 Ohio 24, 653 N.E.2d 253*; *State v. Windham, 9th Dist. No. 05CA0033, 2006 Ohio 1544, at P24*, quoting *State v. Taylor, 9th Dist. No. 01CA007945, 2002 Ohio 6992, at P76.* Strategic trial decisions are left to the deference of trial counsel and are not to be second-guessed by appellate courts. *State v. Carter (1995), 72 Ohio St.3d 545, 558, 1995 Ohio 104, 651 N.E.2d 965.*

[*P15] The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith (1985), 17 Ohio St.3d 98, 100, 17 Ohio B. 219, 477 N.E.2d 1128.* "Ultimately, the reviewing court must decide whether, in light of all the circumstances, the challenged act or omission fell outside the wide range of professionally competent assistance." [**11] *State v. DeNardis (Dec. 29, 1993), 9th Dist. No. 2245, 1993 Ohio App. LEXIS 6474 at *5*, citing *Strickland, 466 U.S. at 689.* Furthermore, an attorney properly licensed in Ohio is presumed competent. *State v. Lott (1990), 51 Ohio St.3d 160, 174, 555 N.E.2d 293.*

[*P16] In demonstrating prejudice, the defendant must prove that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373*, paragraph three of the syllabus. Further, an appellate court need not analyze both prongs of the *Strickland* test if it finds that Appellant failed to prove either. *State v. Ray, 9th Dist. No. 22459, 2005 Ohio 4941, at P10.*

[*P17] Although either step in the process may be dispositive, we will address the deficiency question first in this analysis, based on the particular error Appellant asserts in his first assignment of error. Appellant alleges his trial counsel was deficient for failing to object to the trial court closing the courtroom for closing arguments. However, as a matter of law, an attorney's decision as to whether or not to object at certain times [**12] during trial is presumptively considered a trial tactic or strategy that we will not disturb. *State v. Downing, 9th Dist. No. 22012, 2004 Ohio 5952, at P23*, citing *State v. Fisk, 9th*

Dist. No. 21196, 2003 Ohio 3149, at P9; *State v. Phillips (1995), 74 Ohio St.3d 72, 85, 1995 Ohio 171, 656 N.E.2d 643*. Accordingly, Appellant has failed to meet his burden of proof regarding how his trial counsel's performance was deficient.

[*P18] Further, Appellant failed to show how trial counsel's failure to object to closing the courtroom would have resulted in a different trial verdict. In an effort to preserve decorum and exercise control of the courtroom, the trial court merely limited the ingress and egress of persons during the closing arguments. See *E.W. Scripps Co. v. Fulton (1955), 100 Ohio App. 157, 168, 72 Ohio Law Abs. 430, 125 N.E.2d 896*. No one was excluded from the courtroom. See *State v. Cottrell, 8th Dist. No. 81356, 2003 Ohio 5806, at P24-25*. Anyone who wished to observe closing arguments was permitted in the courtroom as long as they were seated before arguments began. See id. The courtroom was closed in an effort to prevent distractions to the jury, so that [**13] they could listen to the closing arguments without interruptions. Appellant does not address how this affected the trial result. Instead, Appellant focuses on how the failure to object affects his issues on appeal. This argument attempts to show the effect on the appeal, but does not prove that there is a "reasonable probability that, ***, the *result of the trial* would have been different." (Emphasis added.) *Bradley, 42 Ohio St.3d 136, 538 N.E.2d 373*, paragraph three of the syllabus.

[*P19] Appellant's charges do not rise to the level of ineffective assistance of counsel. See *Strickland, 466 U.S. at 687*. Accordingly, this assignment of error is overruled.

B.

Second Assignment of Error

> "THE APPELLANT'S GRAND AND PETIT JURY'S [sic] UNDER REPRESENTATION [sic] OF AFRICAN[-]AMERICANS AND HISPANIC AMERICANS WAS IN VIOLATION OF THE *SIXTH* AND *FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION*."

[*P20] Appellant's second assignment of error alleges that minorities were underrepresented in the grand and petit juries involved in this matter. Contrary to his assignment of error, Appellant's brief only addresses the petit venire. Appellant [**14] specifically points out that there were only two African-Americans and no Hispanic Americans in the venire of fifty-six potential jurors who responded to the call for petit jury duty. Appellant claims that the process utilized in producing the petit venire systematically excluded minorities, and thus an unfair cross-section resulted. We disagree.

1. Grand Jury

[*P21] While Appellant's captioned assignment of error includes underrepresentation in the grand jury, Appellant's brief does not present any arguments regarding the grand jury. The appellant bears the burden of affirmatively demonstrating the error on appeal and substantiating his or her arguments in support. *App.R. 16(A)(7)*; Loc.R. 7(A)(7). See *Figley at P8*. Moreover, it is not the duty of this Court to develop an argument in support of an assignment of error, even if one exists. *Tanner at P24*; *Prince at P40*; *Klausman at P29*. Accordingly, as Appellant failed to develop his underrepresentation of the grand jury argument, we do not reach the merits and decline to address this argument.

2. Petit Jury

[*P22] Appellant asserts his petit jury venire did not represent a [**15] fair cross-section of the population of Lorain County and thus he was denied his right to an impartial jury under the *Sixth* and *Fourteenth Amendments of the United States Constitution*. Accordingly, Appellant argues that the trial court "should have struck the venire and assembled a new one that fairly represented the community."

[*P23] The United States Supreme Court has held that petit jury selections are subject to the provisions of the *Sixth* and *Fourteenth Amendments of the United States Constitution*. *State v. Fulton (1991), 57 Ohio St.3d 120, 122-23, 566 N.E.2d 1195*, citing *Duncan v. Louisiana (1968), 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491*. A material aspect of the Sixth Amendment right to a jury trial includes "the selection of a petit jury from a representative cross[-]section of the community." (Internal quotations omitted.) *Fulton, 57 Ohio St.3d at 123*, quoting *Taylor v. Louisiana (1975), 419 U.S. 522, 528, 95 S. Ct. 692, 42 L. Ed. 2d 690*. However, "[there is] no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Fulton, 57 Ohio St.3d at 123*, quoting *Taylor, 419 U.S. at 538*. [**16]

> "In order to establish a violation of the fair representative cross-section of the community requirement for a petit jury array under the *Sixth* and *Fourteenth Amendments to the United States Constitution*, a defendant must prove: (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires

> from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the representation is due to systematic exclusion of the group in the jury-selection process." *Fulton, 57 Ohio St.3d 120, 566 N.E.2d 1195*, paragraph two of the syllabus, citing *Duren v. Missouri (1979), 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579.*

[*P24] In this case, Appellant cannot establish a violation of the *Sixth Amendment* fair representation cross-section of the community requirement as he failed to present any evidence as the second and third prongs. The parties do not dispute that African-Americans and Hispanic Americans are distinctive groups in Lorain County. However, as to the second prong, Appellant failed to "demonstrate the percentage of the community made up of the group [**17] alleged to be underrepresented." *Fulton, 57 Ohio St.3d at 123*, citing *Duren, 439 U.S. at 364*. The trial court suggested to Appellant that the "African-American community takes up about eight percent of Lorain County, and *** the Latino community picks up about six percent of the Lorain County population." However, Appellant cannot rely on the trial court's estimates as Appellant bears the burden of providing the trial court with evidence of the demographic makeup of Lorain County. But Appellant did not provide the trial court with any evidence and instead based his argument on "[w]hatever the percentage is." Appellant's failure to provide demographic or statistical analysis as to the percentage of African-Americans and Hispanic Americans is fatal to his claim of denial of his right to an impartial jury.

[*P25] Further, Appellant failed to establish the third prong as he did not present any evidence that the lack of African-Americans and Hispanic Americans on his jury venire was due to systematic exclusion of these groups in the jury selection process. The crux of Appellant's argument in his brief was that the trial court improperly required [**18] a finding of intent to discriminate. However, that argument is not dispositive of the issue raised by Appellant.

[*P26] At the trial court, Appellant argued that the creation of the jury venire based solely on voter rolls was systematically excluding African-Americans and Hispanic Americans and thus the venire should be formed from the registered drivers of Lorain County. The trial court points out Appellant's failure to provide any evidence, thus resulting in a conclusory statement.

> "[The trial court] can't assume [Appellant is] right until [he] give[s] [the trial court] some sort of statistics that would indicate that the fact of the utilization of the elector rolls underrepresents people of either a certain ethnic background or a racial background."

Nor, did Appellant provide the trial court with any statistical data to show the alleged continuous exclusion of the minorities in the venire over a length of time. See *Duren, 439 U.S. at 366*. "[U]nderrepresentation on a single venire is not systematic exclusion." (Emphasis omitted.) *State v. McNeill (1998), 83 Ohio St. 3d 438, 444, 1998 Ohio 293, 700 N.E.2d 596.*

[*P27] Additionally, the United [**19] States Supreme Court granted the States "much leeway in [the] application [of the fair cross-section principle]. The States remain free to prescribe relevant qualifications for their jurors." *Fulton, 57 Ohio St.3d at 123*, quoting *Taylor, 419 U.S. at 538*. The Ohio Supreme Court has held that,

> "the use of voter registration rolls as exclusive sources for jury selections is constitutional and does not systematically, [or] intentionally, exclude any [economic, social, religious, racial, political and geographical group of the community]." (Internal quotations omitted.) *State v. Moore (1998), 81 Ohio St.3d 22, 28, 1998 Ohio 441, 689 N.E.2d 1*, quoting *State v. Johnson (1972), 31 Ohio St.2d 106, 114, 285 N.E.2d 751.*

Further, *R.C. 2313.08(B)* permits each county to compile its jury list either (1) exclusively from the list of electors certified by the county board of elections, or (2) from that list, combined with the list of licensed drivers certified by the Registrar of Motor Vehicles.

[*P28] The jury commissioners in Lorain County have the discretionary authority to include drivers, with qualified licenses issued [**20] in Lorain County, to the pool of jurors. *State v. Szakal (May 29, 1985), 9th Dist. No. 3794, 1985 Ohio App. LEXIS 7856 at *3*. However, Lorain County has elected to utilize the elector list solely. In this case, the trial court repeatedly advised Appellant as to the procedure employed by the jury commissioners in forming the jury pools. Prospective jurors in Lorain County are picked at random, "like a lottery system, ***, by the computer" thus, eliminating the chance of systematic exclusion of any group. Despite

the trial court's repeated requests to Appellant to "present some evidence that there was something done either by the Jury Commissioners or [the] Board of Elections or by the court representatives to restrict the number of those of African-American descent," Appellant never presented any evidence and failed the third prong under *Duren.*

[*P29] While the trial court provided information establishing compliance with the Ohio statute and the federal constitution, Appellant failed to present any evidence that the use of the voter rolls systematically excluded African-Americans and Hispanic Americans. The single occurrence of underrepresentation in Appellant's jury venire was insufficient [**21] to support his claim of systematic exclusion. Additionally, Appellant failed to provide evidence regarding the demographic composition of Lorain County. Accordingly, Appellant's Sixth Amendment challenge must fail.

[*P30] The *Fulton* court further stated that

> "[a] defendant may also reasonably bring a federal equal protection challenge to the selection and composition of the petit jury by adducing statistical evidence which shows a significant discrepancy between the percentage of a certain class of people in the community and the percentage of that class on the jury venires, which evidence tends to show discriminatory purpose, an essential element of such cases." *Fulton, 57 Ohio St.3d at 123-24.*

Again, Appellant did not provide any statistical data to show the "underrepresentation [of a distinct group] over a significant period of time" or "expose[] the selection procedure as susceptible of abuse or racially partial." *McNeill, 83 Ohio St.3d at 444*, citing *Fulton, 57 Ohio St.3d at 122-24.* Accordingly, Appellant's Fourteenth Amendment challenge also fails.

[*P31] Due to Appellant's repeated failures [**22] to support his argument with statistical data, the trial court did not err in denying his motion to strike the jury and to establish a new venire containing registered drivers. Accordingly, Appellant's assignment of error as to the petit jury is overruled.

[*P32] Appellant's second assignment of error is overruled.

C.

Third Assignment of Error

> "COUNSEL'S FAILURE TO REQUEST AN INVESTIGATOR AND/OR OBTAIN AN INVESTIGATOR WAS INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FEDERAL CONSTITUTION AND PREJUDICE MUST BE PRESUMED UNDER THE UNIQUE FACTS OF THIS CASE."

[*P33] In his third assignment of error, Appellant alleges his trial counsel was ineffective as they failed to request funding to hire an investigator. The underlying events of this matter occurred twelve years prior to the indictment. Appellant claims "[t]he [S]tate had absolutely no physical or scientific evidence" and "relied entirely on the testimony of two 'eyewitnesses.'" Appellant argues his trial counsel should have hired an investigator to probe the eyewitnesses' background and to search for other favorable eyewitness accounts.

[*P34] Further, Appellant argues trial counsel should have [**23] hired an investigator to gather "the necessary data to support the claims that the grand and petit juries violated the *Sixth* and *Fourteenth Amendments.*" Appellant argues the failure to hire an investigator violated the ABA guidelines, prejudice is presumed, and ineffective assistance of counsel established. We disagree.

[*P35] In *Strickland,* the United States Supreme Court determined that "counsel has a duty to make reasonable investigations" and the "particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *466 U.S. at 691.* Further, the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases specifies that counsel has an obligation to conduct a "thorough and independent investigation[]" in capital cases. (2003), *31 Hofstra L.Rev. 913, 1015.*

[*P36] The *Strickland* holding and the American Bar Association's Guidelines only require trial counsel to perform a reasonable investigation, not to hire an investigator. Appellant's assignment of error only argues trial counsel's [**24] failure to *hire an investigator,* not trial counsel's failure to investigate. An attorney's decision not to hire an investigator does not equate to a failure to investigate and result in ineffective assistance of counsel. See *State v. Scott (Sept. 29, 1988), 10th Dist. No. 88AP-346, 1988 Ohio App. LEXIS 3993, at *15*; *State v. Suttles (Feb. 27, 1995), 4th Dist. No. 94CA9, 1995 Ohio App. LEXIS 789, at *6-7.* Accordingly, the failure to hire an investigator, for both the underlying case and for issues

concerning the jury venire, is an insufficient basis for deficient performance.

[*P37] Appellant's third assignment of error is overruled.

D.

Fourth Assignment of Error

"THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON 'RESIDUAL DOUBT' OR ALLOWING COUNSEL TO ARGUE 'RESIDUAL DOUBT' IN VIOLATION OF THE *SIXTH, EIGHTH* AND *FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.*"

[*P38] In his fourth assignment of error, Appellant alleges the trial court prevented him from arguing and did not instruct the jury regarding residual doubt as a mitigating factor in this case. Appellant claims the jury may have recommended a lesser sentence had they been instructed on the application of residual doubt. We disagree.

[**25] [*P39] Residual doubt is "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'" *State v. McGuire (1997), 80 Ohio St.3d 390, 402, 1997 Ohio 335, 686 N.E.2d 1112*, quoting *Franklin v. Lynaugh (1988) 487 U.S. 164, 188, 108 S. Ct. 2320, 101 L. Ed. 2d 155* (O'Connor, J., concurring). Residual doubt "has nothing to do with the nature and circumstances of the offense or the history, character, and background of the offender." *McGuire, 80 Ohio St.3d at 403*, citing *State v. Watson (1991), 61 Ohio St. 3d 1, 19, 572 N.E.2d 97* (Resnick, J., dissenting).

[*P40] There is no federal or state constitutional right of a defendant to introduce residual doubt evidence during the mitigation phase. *Oregon v. Guzek (2006), 546 U.S. 517, 126 S.Ct. 1226, 1231-32, 163 L. Ed. 2d 1112*, citing *Franklin, 487 U.S. at 174*; *State v. Green (2000), 90 Ohio St.3d 352, 360, 2000 Ohio 182, 738 N.E.2d 1208*. Accordingly, it is up to the states to set their own parameters regarding mitigating evidence, including residual doubt. *Guzek, 126 S.Ct. at 1232*.

[*P41] In *McGuire, 80 Ohio St.3d 390, 1997 Ohio 335, 686 N.E.2d 1112*, syllabus, the Ohio Supreme Court [**26] determined "residual doubt is not an acceptable mitigating factor under *R.C. 2929.04(B)*," as it is irrelevant to determining a defendant's sentence. Accordingly, a defendant may not argue to the jury, nor may the trial court instruct the jury regarding residual doubt. *Id. at 403*.

[*P42] Appellant's fourth assignment of error urging us to remand for resentencing is overruled.

E.

Fifth Assignment of Error

"THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A MOTION FOR MISTRIAL WHEN THE STATE'S PRIMARY EYEWITNESS TESTIFIED HE PASSED A POLYGRAPH WITH RESPECT TO WHO SHOT THE NAMED VICTIM IN THE APPELLANT'S CONVICTION."

[*P43] In Appellant's fifth assignment of error, he argues the trial court abused its discretion by denying his motion for mistrial. Appellant's motion for mistrial was based upon the State's eyewitness, David Hollis', unexpected comments regarding his polygraph test taken in relation to his trial. Appellant argues that the trial court's curative jury instruction was inadequate, and a mistrial was the only appropriate remedy. We disagree.

[*P44] The decision whether to grant or deny a motion for mistrial [**27] "lies within the sound discretion of the trial court" and will not be reversed absent a showing of abuse of discretion. *State v. Garner (1995), 74 Ohio St.3d 49, 59, 1995 Ohio 168, 656 N.E.2d 623*, citing *State v. Glover (1988), 35 Ohio St.3d 18, 19, 517 N.E.2d 900*; *State v. Widner (1981), 68 Ohio St.2d 188, 190, 429 N.E.2d 1065*. An abuse of discretion is more than an error of law or judgment, but rather, it is a finding that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140*. Under this standard of review, an appellate court may not merely substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd. (1993), 66 Ohio St.3d 619, 621, 1993 Ohio 122, 614 N.E.2d 748*.

[*P45] "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected; this determination is made at the discretion of the trial court." *State v. Reynolds (1988), 49 Ohio App.3d 27, 33, 550 N.E.2d 490*. The granting of a mistrial is necessary only when a fair trial in no longer possible. *State v. Franklin (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1*, [**28] citing *Illinois v. Somerville (1973), 410 U.S. 458, 462-63, 93 S. Ct. 1066, 35 L. Ed. 2d 425*.

[*P46] In Ohio, the existence and results of a polygraph are admissible in a criminal trial to corroborate or impeach testimony *only* when the both sides stipulate to their admissibility. *State v. Souel (1978), 53 Ohio St.2d 123, 372 N.E.2d 1318*, syllabus. Appellant claims the Appellee's primary eyewitness unexpectantly blurted out during cross-examination that he had taken a polygraph. Appellant explains that the existence of the polygraph was unknown to him and thus the parties had not stipulated to its use in the trial. As there was no stipulation to using the polygraph, Appellant contends the polygraph was inadmissible and its presentation to the jury was so prejudicial that the trial court's subsequent curative instruction was inadequate to repair the damage. Thus, Appellant argues that he was unable to receive a fair trial.

[*P47] While Appellant makes valid arguments regarding the polygraph, it is important to note the sequence of events surrounding this alleged irregularity. Appellant learned of the polygraph during his cross-examination of Mr. Hollis. Upon Mr. Hollis' initial disclosure [**29] of the polygraph, Appellant pressed on with a line of questioning directly related to the polygraph.

> Q: When did you come to acknowledge to the police, to the authorities, that you were the man who killed Mr. Ricky Movrin?
>
> A: When I took a lie detector test and didn't pass it.
>
> Q: When did you do that?
>
> A: I don't know.
>
> * * *
>
> Q: And you were scheduled to go to trial, correct?
>
> A: Yes.
>
> Q: But you took a lie detector test and flunked?
>
> A: I took a lie detector test and flunked the part of Movrin, not the part about Newson; just Movrin, so, you know.
>
> Q: Now, speaking of lie detector tests?
>
> A: Yeah.
>
> Q: You told the police that you could beat them anyway, right?
>
> A: I thought I could.

After the specific polygraph questions, Appellant continued questioning Mr. Hollis about the events of the evening in question and then concluded his cross-examination.

[*P48] Appellee then began its re-direct examination of Mr. Hollis by following up on the Appellant's polygraph questions.

> Q: And, on cross-examination, you responded to [Appellant's trial counsel] that you flunked the polygraph test with regard to Movrin? [**30]
>
> [Appellant's Trial Counsel]: Objection, Your Honor.
>
> Q: What does that mean?
>
> [Appellant's Trial Counsel]: Objection, Your Honor.

This was the first, and only, question by Appellee regarding the polygraph. Upon hearing this question, Appellant, for the first time, objected and moved for a mistrial.

[*P49] At the sidebar, Appellee argued that Appellant opened the door on the polygraph issue during his cross-examination and Appellee should be allowed to re-direct on the issue. Appellant strongly disagreed by stating that he "did not open the door. [Mr. Hollis] blurted it out. It was a set-up." The trial court did not feel that Appellant had intentionally "opened the door" with its initial question, nor had Appellee failed to control the witness. Instead, the trial court felt that Mr. Hollis would "say[] whatever he darn well pleased." Thereupon, the trial court sustained Appellant's objection, overruled Appellant's motion for mistrial, and issued an instruction to the jury to disregard any testimony regarding polygraphs.

[*P50] While Appellant may not have intentionally opened the door regarding the polygraph, Appellant further delved into the [**31] polygraph issue by asking five additional questions directed solely to the polygraph. Instead of immediately stopping the polygraph issue and moving to strike or for a mistrial, Appellant inquired further and developed Mr. Hollis' testimony regarding the polygraph. Further, Appellant waited to object and move for a mistrial until the close of his cross-examination, and when Appellee began re-directing on the issue. Not only is Appellant's motion for mistrial untimely, it is also invited error. Invited error prohibits a party from "tak[ing] advantage of an error which he himself invited or induced the trial court to make." *Lester v.*

Leuck (1943), 142 Ohio St. 91, 50 N.E.2d 145, syllabus. See, also, *Fostoria v. Ohio Patrolmen's Benevolent Assoc., 106 Ohio St.3d 194, 2005 Ohio 4558, 833 N.E.2d 720, at P12-13*; *Kayser v. Lorain Cty. Bd. of Elections (Aug. 7, 1996), 9th Dist. No. 95CA006308, 1996 Ohio App. LEXIS 3309, at *6*; *State v. Brintzenhofe (May 12, 1999), 9th Dist. No. 18924, 1999 Ohio App. LEXIS 2159, at *10*; *Akron v. Fowler, 9th Dist. No. 21327, 2003 Ohio 2844, at P9.*

[*P51] Appellant's decision to wait to move for a mistrial until after his further cross-examination about the polygraph is an error [**32] Appellant invited, and will not be corrected. Accordingly, we cannot find that the trial court abused its discretion in denying Appellant's motion for mistrial.

[*P52] Appellant's fifth assignment of error is overruled.

F.

Sixth Assignment of Error

> "THE STATE COMMITTED A BRADY AND KYLES VIOLATION WHEN IT FAILED TO DISCLOSE THE RESULTS OF THE LIE DETECTOR TEST ADMINISTERED TO DAVID HOLLIS[.]"

[*P53] In his sixth assignment of error, Appellant alleges Appellee failed to disclose the existence and results of a polygraph of David Hollis, Appellee's primary eyewitness. Appellant contends Appellee's case would have been weaker and he could have controlled Mr. Hollis' testimony to prevent the polygraph information from being presented to the jury. It is Appellant's position that Appellee's failure to disclose the polygraph information are *Brady* and *Kyles* violations, which resulted in an unfair trial. We disagree.

[*P54] A defendant has a constitutional right of access to evidence. *State v. South, 162 Ohio App. 3d 123, 2005 Ohio 2152, 832 N.E.2d 1222, at P10*, citing *State v. Benson, 152 Ohio App.3d 495, 2003 Ohio 1944, 788 N.E.2d 693, at P10.* [**33] In *Brady v. Maryland (1963), 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215*, the United States Supreme Court held that the prosecution's suppression of evidence that is favorable to the defendant violates his due process rights if the evidence is material to guilt or punishment, regardless of the prosecution's intentions. See, also, *State v. Johnston (1988), 39 Ohio St.3d 48, 60, 529 N.E.2d 898.* Evidence is "material" if there is a "reasonable probability," that, had the prosecution disclosed the evidence, the result of the trial would have been different. *United States v. Bagley (1985), 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481.* The United States Supreme Court has qualified this definition, stating that a "reasonable probability" of a different trial result is demonstrated by showing that the prosecution's suppression of the evidence "undermine[d] [the] confidence in the outcome of the trial." *Kyles v. Whitley (1995), 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490*, citing *Bagley, 473 U.S. at 678*; *Johnston, 39 Ohio St.3d 48, 529 N.E.2d 898*, paragraph five of the syllabus.

[*P55] It is important to note, however, that a mere possibility that undisclosed evidence *might have helped* the [**34] defense or *might have changed* the trial outcome is insufficient to establish "materiality" under the *Brady* standard. *United States v. Agurs (1976), 427 U.S. 97, 109-110, 96 S. Ct. 2392, 49 L. Ed. 2d 342*, overruled in part on other grounds. A reversal is not warranted when a mere "combing of the prosecutors' files after the trial disclosed evidence possibly useful to the defense but not likely to have changed the verdict." *Giglio v. United States (1972), 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104*, quoting *United States v. Keogh (C.A.2, 1968), 391 F.2d 138, 148.* Ultimately, the relevant question becomes whether in the absence of the evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles, 514 U.S. at 434.*

[*P56] Both the United States Supreme Court and the Ohio Supreme Court have held that polygraph tests performed on *witnesses* do not need to be disclosed or turned over during discovery. *Wood v. Bartholomew (1995), 516 U.S. 1, 5, 116 S. Ct. 7, 133 L. Ed. 2d 1*; *State v. Davis (1991), 62 Ohio St.3d 326, 342, 581 N.E.2d 1362.* See *D'Ambrosio v. Bagley, 2006 U.S. Dist. LEXIS 12794, at *76, No. 1:00CV2521 (N.D. Ohio Mar. 24 2006).* [**35] This is due to the fact that polygraph results are highly unreliable and thus, do not fall within the category of scientific tests under *Crim.R. 16. State v. Diaz, 9th Dist. No. 02CA008069, 2003 Ohio 1132, P37.* See, also, *State v. Buhrman (Sept. 12, 1997), 2d Dist. No. 96CA145, 1997 Ohio App. LEXIS 4093, at *24.*

[*P57] In this case, the only polygraph administered was upon Mr. Hollis, Appellee's witness. Since polygraphs of witnesses are not discoverable, there are no *Brady* or *Kyles* violations for Appellee's failure to disclose Mr. Hollis' polygraph.

[*P58] Appellant's sixth assignment of error is overruled.

G.

Seventh Assignment of Error

"THE TRIAL COURT, OVER OBJECTION OF THE APPELLANT, INSTRUCTED THE JURY ON FLIGHT IN VIOLATION OF THE *DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION* WHEN THERE WAS NOT SUFFICIENT EVIDENCE OF FLIGHT."

[*P59] Appellant's seventh assignment of error alleges the trial court's jury instruction regarding flight was inappropriate because the record lacked sufficient evidence for the charge. Appellant contends the trial court's flight instruction was error [**36] warranting a new trial. We disagree.

[*P60] The decision as to whether a particular jury instruction is sufficiently supported by evidence is reviewed for an abuse of discretion. *State v. Wolons (1989), 44 Ohio St.3d 64, 541 N.E.2d 443*, paragraph two of the syllabus. A review of the record establishes that the flight instruction was properly supported by testimonial evidence. Mr. Hollis testified that after the events on January 29, 1991, he did not see Appellant the day after the shooting, the next week, the next month, or the next year, even though they were friends and hung out with the same crowd. Further, Detective Baker testified that he was assigned to do the follow-up investigation in 2002 in which they were still searching for Appellant. Detective Baker explained that Appellant was found in Massachusetts under the assumed name of Charles E. Williams. These facts were not contradicted during the trial and thus are sufficient to support a jury instruction regarding flight. See *State v. Davilla, 9th Dist. No. 03CA008413, 2004 Ohio 4448, at P15*. Accordingly, we do not find that the trial court abused its discretion. Further, Appellant did not suffer any [**37] prejudice from the flight instruction, as Appellant was found not guilty on the detection specification (*R.C. 2929.04(A)(3)*) under Count Three.

[*P61] Appellant's seventh assignment of error is overruled.

H.

Eighth Assignment of Error

"THE TRIAL COURT COMMITTED PLAIN ERROR UNDER *CRIM[.]R[.] 52* AND TRIAL COUNSEL WAS INEFFECTIVE UNDER THE FEDERAL CONSTITUTION WHEN THE ALTERNATE JURORS WERE ALLOWED TO BE IN THE JURY DELIBERATION ROOM WHILE THE JURY WAS DECIDING THE APPELLANT'S GUILT."

[*P62] In his eighth assignment of error, Appellant alleges two errors. First, Appellant alleges that the trial court committed plain error in requiring the two alternate jurors to sit in on the deliberations during the guilt phase, but not to participate. Further, Appellant argues his trial counsel was ineffective as they did not object to the alternate jurors being present in the jury deliberations of the guilt phase. We disagree with both contentions.

1. Plain Error

[*P63] The United States Supreme Court has held that it is error to permit alternate jurors to participate in jury deliberations; however, the error does not always [**38] necessarily rise to the level of plain error. [2] *Olano, 507 U.S. at 737*. See, also, *State v. Murphy (2001), 91 Ohio St.3d 516, 533, 2001 Ohio 112, 747 N.E.2d 765*. As discussed above, there is distinction between forfeiture and waiver in regards to preservation of issues for appeal and the application of plain error analysis. *Id. at 733*; *McKee, 91 Ohio St.3d at 299 fn. 3* (Cook, J., dissenting). Forfeiture occurs when no objection is made, while waiver requires the "intentional relinquishment or abandonment of a known right." *Olano, at 733*, quoting *Zerbst, 304 U.S. at 464*. Plain error analysis is only available in the instance of a forfeiture. *McKee, 91 Ohio St.3d at 299 fn.3* (Cook, J., dissenting).

2 We note that *R.C. 2313.37* and *Crim.R. 24(G)(1)* require alternate jurors to be discharged once the case is submitted to the jury for deliberations. Thus, it is clearly an error to not discharge the alternates and instead require them to sit in on the deliberations, but not participate. *Murphy, 91 Ohio St.3d at 531*.

However, in capital cases, alternate jurors are not to be discharged until after the jury retires to deliberate regarding the penalty phase. Crim.R. 24(G)(2). Accordingly, an alternate juror may not be present nor participate in the deliberations for the guilt phase. *Murphy, 91 Ohio St.3d at 532*. Instead, the trial court should retain the alternate jurors and continue to instruct them with the same rules and admonitions until such time as they are discharged. *State v. Reiner (2000), 89 Ohio St.3d 342, 351, 2000 Ohio 190, 731 N.E.2d 662*. Thus, it is error to have the alternate jurors present and not participating in the guilt phase. See *Murphy, supra*. However, based upon our discussion below, we are unable to address this error by the trial court.

[**39] [*P64] In the instant case, Appellant's trial counsel initially objected by stating that "[they] would prefer not to have [the alternate jurors] in the jury room." However, trial counsel then changed their position and waived their earlier objection by stating "[they] think it is important that [the alternate] jurors sit in with the deliberation during the first portion of the trial." Trial counsel's subsequent statement is a waiver: it was an affirmation of Appellant's desire to intentionally relinquish his prior objection and agree to the alternate jurors being present in the jury room during deliberations. As this is a waiver in the true sense, Appellant has failed to preserve this issue for appeal and we are precluded from applying the *Crim.R. 52(B)* analysis.

2. Ineffective Assistance of Counsel

[*P65] Additionally under the eighth assignment of error, Appellant alleges his trial counsel was ineffective as they failed to continue their objection, and eventually acquiesced, to the alternate jurors being present in deliberations. We disagree.

[*P66] As explained above, trial counsel's decision to object, not to object (forfeiture) [**40] and/or to waive an objection are viewed as trial tactic and do not validate a claim of ineffective assistance of counsel. *Gumm, 73 Ohio St.3d at 428*; *Downing at P23*, citing *Fisk at P9*; *Phillips, 74 Ohio St.3d at 85*. Trial counsel's strategic decisions are given great deference and will not be scrutinized by appellate courts. *Carter, 72 Ohio St.3d at 558*. Accordingly, Appellant failed to prove how his trial counsel were deficient, because their waiver of the objection regarding the alternate jurors is considered trial tactic. Further, Appellant failed to establish how he was prejudiced by having the alternate jurors present during the jury deliberations as there was no evidence of the alternate jurors disobeying the trial court's instruction or that their presence chilled deliberations. See *Murphy, 91 Ohio St.3d at 540*; *State v. Braden, 98 Ohio St.3d 354, 2003 Ohio 1325, 785 N.E.2d 439, at P52*.

[*P67] Appellant's charges do not rise to the level of ineffective assistance of counsel. See *Strickland, 466 U.S. at 687*. The eighth assignment of error is overruled.

I.

Ninth Assignment [**41] **of Error**

"TRIAL COUNSEL WAS INEFFECTIVE UNDER THE FEDERAL CONSTITUTION WHEN THEY FAILED TO PRESENT AVAILABLE TESTIMONY THAT THE NAMED VICTIM IN THE APPELLANT'S CONVICTION WAS HIS STEP[-]BROTHER."

[*P68] In his ninth assignment of error, Appellant alleges his trial counsel were ineffective as they failed to call Appellant's brother, Ronald Hairston, as a witness during the trial phase. In fact, trial counsel did not present any evidence or call any witnesses during the trial phase. Instead, trial counsel called Appellant's brother to testify during the mitigation phase only. Appellant claims his brother's testimony at the mitigation phase should have been presented at the trial phase because "it would have cast reasonable doubt on the state's case." We disagree.

[*P69] As addressed above, tactical decisions by trial counsel cannot form the basis for a claim of ineffective assistance of counsel. See e.g., *Windham at P24*, quoting *Taylor at P76*; *State v. Bradford, 9th Dist. No. 22441, 2005 Ohio 5804, at P27*; *State v. Brown (1995), 38 Ohio St.3d 305, 319, 528 N.E.2d 523*. This Court has repeatedly held that "[d]ecisions regarding the [**42] calling of witnesses are within the purview of defense counsel's trial tactics." *State v. Pordash, 9th Dist. No. 05CA008673, 2005 Ohio 4252, at P21*, quoting *State v. Ambrosio, 9th Dist. No. 03CA008387, 2004 Ohio 5552, at P10*. Trial counsel's strategic decision to not pursue every possible angle is not ineffective assistance of counsel. *Brown, 38 Ohio St.3d at 319*. Accordingly, trial counsel's failure to call Appellant's brother as a witness during the trial phase is a tactical decision. Thus, Appellant has failed to establish deficient counsel.

[*P70] Additionally, Appellant's attempt to establish prejudice is nothing more than mere speculation that his brother's testimony would have created reasonable doubt. Speculation is insufficient to establish prejudice. *Downing at P27*, citing *State v. Stalnaker, 9th Dist. No. 21731, 2004 Ohio 1236, at P8-10*.

[*P71] Accordingly, Appellant's contention does not rise to the level of ineffective assistance of counsel. See *Strickland, 466 U.S. at 687*. The ninth assignment of error is overruled.

J.

Tenth Assignment of Error

"THERE [**43] IS INSUFFICIENT EVIDENCE UNDER JACKSON V. VIRGINIA THAT THE HOMICIDE WAS DONE WITH 'PRIOR CALCULATION AND DESIGN' RATHER THAN ONLY PURPOSELY AND THE WEIGHT OF THE EVIDENCE SUPPORTS ONLY A MURDER CONVICTION."

Eleventh Assignment of Error

"THERE IS INSUFFICIENT EVIDENCE UNDER JACKSON V. VIRGINIA TO SUSTAIN THE HOMICIDE CONVICTION AND THE WEIGHT OF THE EVIDENCE SUPPORTS THE HOMICIDE CONVICTION." [sic]

Twelfth Assignment of Error

"THERE IS INSUFFICIENT EVIDENCE UNDER JACKSON V. VIRGINIA TO SUSTAIN THE CAPITAL SPECIFICATION UNDER *R.C. 2929[.]04(A)(8)* AND THE WEIGHT OF THE EVIDENCE SUPPORT[S] THE CONVICTION FOR THE CAPITAL SPECIFICATION." [sic]

[*P72] Appellant's tenth, eleventh, and twelfth assignments of error all allege that his conviction of aggravated murder, with a capital specification, was not supported by sufficient evidence and was against the manifest weight of the evidence. Further, Appellant alleges there was insufficient evidence and the weight of the evidence does not support prior calculation and design. We disagree with each of Appellant's contentions.

[*P73] "The legal concepts of sufficiency of the evidence and weight of the [**44] evidence are both quantitatively and qualitatively different." *State v. Thompkins (1997), 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541*, paragraph two of the syllabus. As a matter of appellate review, they involve different means and ends. See *id. at 386-89*. They also invoke different inquiries with different standards of review. Id.; *State v. Smith (1997), 80 Ohio St.3d 89, 113, 1997 Ohio 355, 684 N.E.2d 668*. The difference, in the simplest sense, is that sufficiency tests the burden of production while manifest weight tests the burden of persuasion. *Thompkins, 78 Ohio St.3d at 390* (Cook, J., concurring).

[*P74] Sufficiency is a question of law. *Thompkins, 78 Ohio St.3d at 386*; *Smith, 80 Ohio St.3d at 113*. If the State's evidence was insufficient as a matter of law, then on appeal, a majority of the panel may reverse the trial court. *Thompkins, 78 Ohio St.3d at paragraph three of the syllabus*, citing *Sec. 3(B)(3), Art. IV, Ohio Constitution*. Because reversal for insufficiency is effectively an acquittal, retrial is prohibited by double jeopardy. *Thompkins, 78 Ohio St.3d at 387*, citing *Tibbs v. Florida (1982), 457 U.S. 31, 47, 102 S. Ct. 2211, 72 L. Ed. 2d 652*. [**45] Under this construct, the State has failed its burden of production, and as a matter of due process, the issue should not even have been presented to the jury. *Thompkins, 78 Ohio St.3d at 386*; *Smith, 80 Ohio St.3d at 113*.

[*P75] In a sufficiency analysis, an appellate court presumes that the State's evidence is true (i.e., both believable and believed), but questions whether the evidence produced satisfies each of the elements of the crime. *Thompkins, 78 Ohio St.3d at 390* (Cook, J., concurring). "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks (1991), 61 Ohio St.3d 259, 574 N.E.2d 492*, paragraph two of the syllabus, citing *Jackson v. Virginia (1979), 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560*. This standard requires no exhaustive review of the record, no comparative weighing of competing evidence, and no speculation as to the credibility of any witnesses. Instead, the appellate court [**46] "view[s] the evidence in a light most favorable to the prosecution." Id. "[T]he weight to be given the evidence and the credibility of witnesses are primarily for the trier of the facts." *State v. DeHass (1967), 10 Ohio St.2d 230, 227 N.E.2d 212*, paragraph one of the syllabus.

[*P76] Manifest weight is a question of fact. *Thompkins, 78 Ohio St.3d at 387*. If the trial court's judgment was against the manifest weight of the evidence, then an appellate panel may reverse the trial court. Id. In the special case of a jury verdict, however, the panel must be unanimous in order to reverse. *Id. at paragraph four of the syllabus*, citing *Sec. 3(B)(3), Art. IV, Ohio Constitution*. Because reversal on manifest weight grounds is not a question of law, it is not an acquittal but instead is akin to a deadlocked jury from which retrial is allowed. *Id. at 388*, citing *Tibbs, 457 U.S. at 42*. Under this construct, the appellate panel "sits as [the] 'thirteenth juror' and disagrees with the jury's resolution of the conflicting testimony," finding that the State has failed its burden of persuasion. Id.

[*P77] When a defendant asserts his conviction [**47] is against the manifest weight of the evidence,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten (1986), 33 Ohio App.3d 339, 340, 515 N.E.2d 1009*.

"A court reviewing questions of weight is not required to view the evidence in a light most favorable to the prosecution, but may consider and weigh all of the evidence produced at trial." *Thompkins, 78 Ohio St.3d at 390* (Cook, J., concurring). This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *Otten, 33 Ohio App.3d at 340.*

[*P78] In application, this may be stated as a "[c]ourt will not overturn a judgment based solely on the fact that the jury preferred one version of the testimony over the other." *State v. Lee, 158 Ohio App.3d 129, 2004 Ohio 3946, P15, 814 N.E.2d 112,* [**48] quoting *State v. Hall (Sept. 20, 2000), 9th Dist. No. 19940, 2000 Ohio App. LEXIS 4334 at *12.* Nor is a conviction "against the manifest weight of the evidence merely because there is conflicting evidence before the trier of fact." *State v. Urbin, 148 Ohio App.3d 293, 2002 Ohio 3410, P26, 772 N.E.2d 1239,* quoting *State v. Haydon (Dec. 22, 1999), 9th Dist. No. 19094, 1999 Ohio App. LEXIS 6174, at *18.* Moreover, a conviction may withstand evidence that is susceptible to some plausible theory of innocence. *State v. Figueroa, 9th Dist. No. 22208, 2005 Ohio 1132, at P7,* citing *Jenks, 61 Ohio St.3d at 273.*

[*P79] Finally, although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction was supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *State v. Roberts (Sept. 17, 1997), 9th Dist. No. 96CA006462, 1997 Ohio App. LEXIS 4255 at *5.* "Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Lee at P18,* citing *Cuyahoga Falls v. Scupholm (Dec. 13, 2000), 9th Dist. Nos. 19734 and 19735, 2000 Ohio App. LEXIS 5797, at *7.* [**49] Accord *Urbin at P31.* In the present case, manifest weight is dispositive on each of Appellant's assignments of error.

1. Prior Calculation and Design

[*P80] In 1974, the General Assembly reclassified first-degree murder as aggravated murder and added the more stringent element, "prior calculation and design." *State v. Cotton (1978), 56 Ohio St.2d 8, 10-11, 381 N.E.2d 190; R.C. 2903.01(A).* "[T]he phrase 'prior calculation and design' *** indicate[s] studied care in planning or analyzing the means of the crime as well as a scheme encompassing the death of the victim." *State v. Taylor (1997), 78 Ohio St.3d 15, 19, 1997 Ohio 243, 676 N.E.2d 82.* "Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves, but they must amount to more than momentary deliberation." *Taylor v. Mitchell (N.D. Ohio 2003), 296 F.Supp. 2d 784, 820.* While a few fleeting moments of deliberation or instantaneous deliberations are inadequate to support prior calculation and design, "a prolonged period of deliberation is [also] unnecessary." *Mitchell, 296 F.Supp. 2d at 821,* [**50] quoting *State v. Quinones (Oct. 14, 1982), 8th Dist. No. 44463, 1982 Ohio App. LEXIS 11970 at *26; Cotton, 56 Ohio St.2d 8, 381 N.E.2d 190,* at paragraph two of the syllabus. However, the Ohio Supreme Court has not developed a bright-line test for finding prior calculation and design. *State v. Jones (2001), 91 Ohio St.3d 335, 345, 2001 Ohio 57, 744 N.E.2d 1163.*

[*P81] Instead, the existence of prior calculation and design is determined on a case-by-case analysis of the facts and evidence. *Jones, 91 Ohio St.3d at 345.* In *State v. Jenkins (1976), 48 Ohio App.2d 99, 102, 355 N.E.2d 825,* the Eighth District Court of Appeals set out three factors to consider in determining the applicability of prior calculation and design: 1) whether the accused and victim knew each other, and if so, was that relationship strained; 2) whether the accused gave thought or preparation to choosing the murder weapon or murder site; and 3) whether the killing was drawn out or an instantaneous eruption of events.

[*P82] Due to the lack of a bright-line test for prior calculation and design, Ohio courts have expanded the factors to include: 1) "whether the defendant at any time expressed an intent to kill"; 2) whether [**51] "there was a break or interruption in the encounter, giving time for reflection"; 3) "whether the defendant displayed a weapon from the outset"; 4) "whether the defendant retrieved a weapon during the encounter"; 5) "the extent to which the defendant pursued the victim"; and 6) "the number of shots fired." *Mitchell, 296 F.Supp. 2d. at 821-22.* All of these factors need to be weighed in concert with the totality of the circumstances surrounding the murder. *Jenkins, 48 Ohio App.2d at 102.*

[*P83] At the trial and in his brief, Appellant argues that the killing of Mr. Newson occurred instantaneously in relation to the killing of Mr. Movrin, thus there was no prior calculation or design by Appellant. This position is directly opposed to Appellee's position, supported by testimony, that Mr. Newson's murder was not instantaneous and involved prior calculation and design. Based on a review of the record, this Court finds it reasonable that the jury could have believed the testimony and evidence proffered by the State regarding prior calculation and design.

[*P84] Mr. Hollis was with Appellant at the time of the murders in this case, and in fact [**52] pled guilty to the murder of Mr. Movrin. As part of his plea, Mr. Hollis

agreed to testify against Appellant regarding the events surrounding January 29, 1991. According to Mr. Hollis' testimony, after shooting Mr. Movrin, Appellant, Mr. Hollis and Mr. Newson exited the backseat of the car. Mr. Newson fled from the car to the street corner, while Mr. Hollis and Appellant stood outside the car discussing whether or not to kill Mr. Dawson, the driver of the car. During this exchange, Appellant took the gun from Mr. Hollis. Mr. Hollis was able to persuade Appellant not to kill Mr. Dawson, as the killing of Mr. Movrin was an accident and Mr. Dawson did not turn around and get a look at them.

[*P85] While they were still standing by the car, Appellant then told Mr. Hollis that they had to kill Mr. Newson, their friend. Mr. Hollis again tried to convince Appellant that it was not necessary to kill Mr. Newson. They discussed it "back and forth about two or three times." Appellant told Mr. Hollis to call Mr. Newson, who was still standing on the corner, over to them. Mr. Newson approached Appellant and Mr. Hollis, and the three of them began to walk towards the back of an apartment building. [**53] Mr. Hollis was walking a few feet in front of Appellant and Mr. Newson when he heard Appellant tell Mr. Newson "you know I love you, man" and then a gunshot. Mr. Hollis turned to see Mr. Newson fall to the ground. Appellant testified that the gun used to kill Mr. Newson was a .38 caliber revolver that required a "pretty strong pull on [the] trigger to make the gun fire."

[*P86] Ms. Wilson, another State's witness, testified that from her apartment window, she saw Appellant shoot Mr. Newson. Appellant and Mr. Newson were behind the apartment building when Appellant turned toward Mr. Newson, raised his gun, and shot Mr. Newson in the head.

[*P87] Further, the county coroner testified that upon his inspection of Mr. Newson's body, he found stippling around the gunshot wound. Stippling is indicative of a "close gunshot wound." However, the coroner was unable to verify the exact distance between the gun and Mr. Newson.

[*P88] Based upon the transcript, there was evidence that Appellant told Mr. Hollis of his intent to kill Mr. Newson, Appellant retrieved the gun from Mr. Hollis in order to shoot Mr. Newson, and Appellant pursued Mr. Newson by calling him over and then [**54] shooting him. Further, the record demonstrates that the killing of Mr. Newson was not instantaneous and that there were more than a few moments between Mr. Movrin and Mr. Newson's deaths. Appellant and Mr. Hollis got out of the car and stood there while they first debated whether to kill Mr. Dawson. Then, Appellant and Mr. Hollis discussed two or three times whether or not to kill Mr. Newson. Appellant then called Mr. Newson over and walked with him before he raised his weapon and shot him. Appellant clearly had time to reflect on his decision to kill Mr. Newson.

[*P89] The facts supporting prior calculation and design in this case are similar to the facts in *State v. Goodwin (1999), 84 Ohio St.3d 331, 1999 Ohio 356, 703 N.E.2d 1251*. In *Goodwin*, the defendant fatally shot a store owner while robbing the store. *Id. at 331*. The Ohio Supreme Court found that there was sufficient evidence to find prior calculation and design due to the fact that the defendant placed his gun to the forehead of a cooperative and unresisting victim. *Id. at 344*. This action required thought on the defendant's part to place the gun at the victim's forehead and additional time to pull the [**55] trigger, thus the killing was not spur-of-the-moment. Id. Similarly, Mr. Newson was not resisting or fleeing from Appellant. Instead, they were walking next to each other when Appellant stopped, turned toward Mr. Newson, raised his weapon to Mr. Newson's face, and pulled the tight trigger. A review of the totality of the circumstances, establishes that Appellant had sufficient time and reflection and engaged in acts rising to the level of prior calculation and design.

[*P90] Based on our review of the entire record, we cannot conclude that the jury lost its way and created a manifest miscarriage of justice. *Thompkins, 78 Ohio St.3d at 387*. Rather, we find it reasonable that the jury believed the State's version of the events, disbelieved Appellant and convicted him accordingly. See *Lee at P15*, quoting *Hall, 2000 Ohio App. LEXIS 4334 at *12*. We conclude that the conviction is not against the manifest weight of the evidence.

[*P91] Having found that Appellant's conviction was not against the manifest weight of the evidence, we also conclude that there was sufficient evidence to support the jury's verdict in this case with respect to the offense. See *Roberts*, supra.

[*P92] [**56] Appellant's tenth assignment of error is overruled.

2. Aggravated Murder

[*P93] Appellant was convicted of aggravated murder, in violation of *R.C. 2903.01(A)*, which states, "No person shall purposely, and with prior calculation and design, cause the death of another." Appellant challenges the evidence presented by Mr. Hollis and Ms. Wilson. Appellant argues these witnesses lack credibility as they gave inconsistent statements during the ten year investigation. Additionally, Appellant questions Mr. Hollis' credibility based on his criminal background. Further, Appellant points to the lack of physical and/or sci-

entific evidence in support of the aggravated murder conviction being against the manifest weight.

[*P94] Based on a review of the record, this Court finds it reasonable that the jury could have believed the testimony and evidence proffered by the State regarding aggravated murder. The jury heard testimony from the State's eight witnesses: three eyewitnesses, a coroner, and four police officers / detectives. However, the defense did not present any witnesses or evidence during the trial phase.

[*P95] Mr. Hollis was the State's primary [**57] witness as he was present during Mr. Newson's shooting. As discussed above, Mr. Hollis testified as to the sequence of events and discussions following his shooting of Mr. Movrin to Appellant's shooting of Mr. Newson. As we concluded above, the record substantiates a finding of prior calculation and design. While Mr. Hollis did not directly see Appellant shoot Mr. Newson, he heard the gunshot, he saw the gun in Appellant's hand and then he saw Mr. Newson fall to the ground after the gun was fired. The coroner determined Mr. Newson's cause of death to be a gunshot wound to the head.

[*P96] Ms. Wilson also testified that from her front bedroom window she witnessed Appellant, Mr. Hollis and Mr. Newson exit the car. Ms. Wilson then went to a bedroom in the rear of her apartment, where she watched the three men walk behind an apartment building. There she saw Appellant turn, raise his gun, and shoot Mr. Newson in the face.

[*P97] At trial, the appellant argued that the State's evidence, particularly Mr. Hollis' and Ms. Wilson's testimony, was inconsistent and simply not worthy of belief. While Appellant pointed out Mr. Hollis' and Ms. Wilson's inconsistencies between their prior [**58] statements and their trial testimony, this is a matter for the jury to weigh the witnesses' credibility. Mr. Hollis explained that his prior statements were not in fact statements, but hypotheticals; thus, preventing the statements from being used against him. Appellant portrayed Mr. Hollis' statements as a game of cat and mouse. Appellant also attempted to discredit Mr. Hollis' testimony by pointing out that Mr. Hollis had a lengthy history of committing felony robberies and would talk to the police whenever he wanted to make a deal for leniency. Tactically, Appellant's attempts to attack the credibility of the State's witnesses appear ineffective.

[*P98] In his appellate brief, the appellant offers no alternative explanation or cogent theory to reconcile the State's testimony regarding the aggravated murder of Mr. Newson by Appellant. Instead, he merely insists that the State's evidence is unbelievable because of Mr. Hollis' and Ms. Wilson's inconsistent statements during the investigation and Mr. Hollis' criminal background. This was a point worth arguing to the jury, and the jurors were obligated to assess the evidence critically, under the strict beyond a reasonable doubt [**59] standard. However, on appeal, this Court assesses the evidence liberally, considering whether "the evidence weighs [so] heavily against the conviction" that the necessary conclusion is that "the jury clearly lost its way and created *** a manifest miscarriage of justice." *Thompkins, 78 Ohio St.3d at 387.*

[*P99] The jury in this case had the opportunity to view the witnesses and adjudge their credibility and was entitled to believe the witnesses' testimony. See *State v. DeHass (1967), 10 Ohio St.2d 230, 227 N.E.2d 212*, paragraph one of the syllabus. Therefore, we must give deference to the jurors' judgment, as matters of credibility are primarily for the trier of fact. See *State v. Lawrence (Dec. 1, 1999), 9th Dist. No. 98CA007118, 1999 Ohio App. LEXIS 5624 at *19.*

[*P100] Based on our thorough review of the entire record, we conclude that Appellant's criticisms of the State's evidence in this case are inadequate to prove that the jury lost its way and created a manifest miscarriage of justice. *Thompkins, 78 Ohio St.3d at 387.* Accordingly, we find that Appellant's conviction for aggravated murder was not against the manifest weight of the evidence.

[*P101] [**60] Further, having found that Appellant's conviction was not against the manifest weight of the evidence, we also conclude that there was sufficient evidence to support the jury's verdict in this case with respect to aggravated murder. See *Roberts,* supra.

[*P102] Appellant's eleventh assignment of error is overruled.

3. Capital Specification *R.C. 2929.04(A)(8)*

[*P103] In addition to aggravated murder, Appellant was also convicted of a related witness specification violation under *R.C. 2929.04(A)(8)*, which carries the death penalty. *R.C. 2929.04(A)(8)* states,

> "(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to *2941.14 of the Revised Code* and proved beyond a reasonable doubt:
>
> ***
>
> "(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the

> aggravated murder was not committed during the commission, attempted commission, or flight immediately [**61] after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding."

[*P104] Based on a review of the record, this Court finds it reasonable that the jury could have believed the testimony and evidence proffered by the State regarding the witness specification.

[*P105] Mr. Hollis testified that he and Appellant had a discussion outside of the car regarding whether or not it was necessary to kill Mr. Newson. Mr. Hollis tried, unsuccessfully, to dissuade Appellant by pointing out that Mr. Newson grew up with them in the neighborhood and that he was cool and would not say anything to anyone. However, Appellant felt it was necessary to kill Mr. Newson because he had witnessed the murder of Mr. Movrin. Appellant believed Mr. Newson could, and would, identify Appellant and Mr. Hollis as being involved in Mr. Movrin's death.

[*P106] Appellant and Mr. Hollis' discussion regarding whether or not to kill Mr. Newson occurred outside the car, after the shooting of Mr. Movrin. The commission of the [**62] first crime, Mr. Movrin's murder, was complete. Thus, Mr. Newson's murder was not during the commission of Mr. Movrin's murder.

[*P107] While Appellant and Mr. Hollis were talking by the car, Mr. Newson was standing away from them on a street corner. After their discussion, Mr. Hollis, at Appellant's instruction, called Mr. Newson over to them. The three men joined together and walked behind an apartment building. It is there that Appellant shot Mr. Newson. The three men joined together from different locations and were *walking*. Accordingly, each of the men's actions between Mr. Movrin's murder and Mr. Newson's murder is not indicative of fleeing from the original murder scene.

[*P108] At the trial and in his brief, Appellant argues that the killing of Mr. Newson occurred during the commission, attempted commission or flight immediately after the offense Mr. Newson witnessed and thus the witness specification is not applicable. This position contradicts the trial testimony that Mr. Newson's death occurred as a separate crime and not during the flight from Mr. Movrin's murder.

[*P109] Based on our review of the entire record, we cannot conclude that the jury lost [**63] its way and created a manifest miscarriage of justice. *Thompkins, 78 Ohio St.3d at 387*. Rather, we find it reasonable that the jury believed the State's version of the events, disbelieved Appellant and convicted him accordingly. See *Lee at P15*, quoting *Hall, 2000 Ohio App. LEXIS 4334 at *12*. We conclude that the conviction is not against the manifest weight of the evidence.

[*P110] Having found that Appellant's conviction was not against the manifest weight of the evidence, we also conclude that there was sufficient evidence to support the jury's verdict in this case with respect to the witness specification of *R.C. 2929.04(A)(8)*. See *Roberts, supra*.

[*P111] Appellant's twelfth assignment of error is overruled.

K.

Thirteenth Assignment of Error

> "THE TRIAL COURT ERRED IN ORDERING THE APPELLANT TO PAY THE MEDICAL AND FUNERAL EXPENSES OF THE VICTIM[.]"

[*P112] Appellant's thirteenth assignment of error contests the trial court's imposition of restitution for medical and funeral bills for the victim, Mr. Newson. Appellant argues the restitution order should be vacated as the trial court was not permitted to order restitution [**64] without documentary or testimonial evidence substantiating the amount of restitution.

[*P113] Appellee concedes that the restitution order should be vacated, but for different reasons. Appellee points out that the law in 1991 did not permit the trial court to impose restitution for medical and funeral bills in a conviction of aggravated murder.

[*P114] Upon review, we do not find any statutes in existence in 1991 that permitted an order of restitution in an aggravated murder conviction. As both parties agree that the restitution order should be vacated, Appellant's thirteenth assignment of error is sustained.

L.

Fourteenth Assignment of Error

> "THE CUMULATIVE ERRORS DEPRIVED THE APPELLANT OF DUE PROCESS UNDER THE *FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION*."

[*P115] In his fourteenth assignment of error, Appellant alleges that all the errors in this case, even if harmless, must not be reviewed in isolation, but together. Appellant concludes by claiming that the cumulative effect of all the alleged errors has deprived him of a fair trial and sentencing hearing. We disagree.

[*P116] Upon our review of the record and all of Appellant's assignment [**65] of errors, we find that there were not multiple errors and Appellant received a fair trial. See *State v. Bryan, 101 Ohio St.3d 272, 2004 Ohio 971, 804 N.E.2d 433, at P211*; *State v. Brinkley, 105 Ohio St.3d 231, 2005 Ohio 1507, 824 N.E.2d 959 at P158*. "[T]here can be no such thing as an error-free, perfect trial, and *** the Constitution does not guarantee such a trial." *State v. Hill (1996), 75 Ohio St.3d 195, 212, 1996 Ohio 222, 661 N.E.2d 1068*, quoting *United States v. Hasting (1983), 461 U.S. 499, 508-9, 103 S. Ct. 1974, 76 L. Ed. 2d 96*. Moreover, "errors cannot become prejudicial by sheer weight of numbers." (Internal quotations omitted.) *Hill, 75 Ohio St.3d at 212*.

[*P117] Appellant's fourteenth assignment of error is overruled.

III.

[*P118] Appellant's assignments of error one through twelve and fourteen are overruled. Appellant's thirteenth assignment of error is sustained. The judgment of Lorain County Court of Common Pleas is affirmed in part and vacated in part. The trial court's restitution order is vacated, and the remainder of Appellant's sentence remains undisturbed.

Judgment affirmed in part, and vacated in part.

The Court finds that there were reasonable grounds [**66] for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed equally to both parties.

EDNA J. BOYLE

FOR THE COURT

WHITMORE, P. J.

CONCURS

CARR, J.

CONCURS IN JUDGMENT ONLY

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

HISTORY: 1912 constitutional convention, am. eff. 1-1-13
1851 constitutional convention, adopted eff. 9-1-1851

LEXSTAT ORC 2151.352

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FEBRUARY 12, 2008 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH FEBRUARY 20, 2008 ***

TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2151. JUVENILE COURT
DISTRICT DETENTION HOMES

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ORC Ann. 2151.352 (2008)

§ 2151.352. Right to counsel

A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120. of the Revised Code except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2), (3), (9), (10), (11), (12), or (13); (B)(2), (3), (4), (5), or (6); (C); (D); or (F)(1) or (2) of *section 2151.23 of the Revised Code*. If a party appears without counsel, the court shall ascertain whether the party knows of the party's right to counsel and of the party's right to be provided with counsel if the party is an indigent person. The court may continue the case to enable a party to obtain counsel, to be represented by the county public defender or the joint county public defender, or to be appointed counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

Section 2935.14 of the Revised Code applies to any child taken into custody. The parents, custodian, or guardian of a child taken into custody, and any attorney at law representing them or the child, shall be entitled to visit the child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of the hearing.

Any report or part of a report concerning the child, which is used in the hearing and is pertinent to the hearing, shall for good cause shown be made available to any attorney at law representing the child and to any attorney at law representing the parents, custodian, or guardian of the child, upon written request prior to any hearing involving the child.

HISTORY:

133 v H 320 (Eff 11-19-69); 136 v H 164 (Eff 1-13-76); 148 v S 179, § 3. Eff 1-1-2002; 150 v H 95, § 1, eff. 9-26-03; 151 v H 66, § 101.01, eff. 9-29-05.

LEXSTAT ORC ANN. 2152.02

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TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2152. DELINQUENT CHILDREN; JUVENILE TRAFFIC OFFENDERS

Go to the Ohio Code Archive Directory

ORC Ann. 2152.02 (2008)

§ 2152.02. Definitions

As used in this chapter:

(A) "Act charged" means the act that is identified in a complaint, indictment, or information alleging that a child is a delinquent child.

(B) "Admitted to a department of youth services facility" includes admission to a facility operated, or contracted for, by the department and admission to a comparable facility outside this state by another state or the United States.

(C) (1) "Child" means a person who is under eighteen years of age, except as otherwise provided in divisions (C)(2) to (6) of this section.

(2) Subject to division (C)(3) of this section, any person who violates a federal or state law or a municipal ordinance prior to attaining eighteen years of age shall be deemed a "child" irrespective of that person's age at the time the complaint with respect to that violation is filed or the hearing on the complaint is held.

(3) Any person who, while under eighteen years of age, commits an act that would be a felony if committed by an adult and who is not taken into custody or apprehended for that act until after the person attains twenty-one years of age is not a child in relation to that act.

(4) Any person whose case is transferred for criminal prosecution pursuant to *section 2152.12 of the Revised Code* shall be deemed after the transfer not to be a child in the transferred case.

(5) Any person whose case is transferred for criminal prosecution pursuant to *section 2152.12 of the Revised Code* and who subsequently is convicted of or pleads guilty to a felony in that case, and any person who is adjudicated a delinquent child for the commission of an act, who has a serious youthful offender dispositional sentence imposed for the act pursuant to *section 2152.13 of the Revised Code*, and whose adult portion of the dispositional sentence is invoked pursuant to *section 2152.14 of the Revised Code*, shall be deemed after the transfer or invocation not to be a child in any case in which a complaint is filed against the person.

(6) The juvenile court has jurisdiction over a person who is adjudicated a delinquent child or juvenile traffic offender prior to attaining eighteen years of age until the person attains twenty-one years of age, and, for purposes of that jurisdiction related to that adjudication, a person who is so adjudicated a delinquent child or juvenile traffic offender shall be deemed a "child" until the person attains twenty-one years of age.

(D) "Chronic truant" means any child of compulsory school age who is absent without legitimate excuse for absence from the public school the child is supposed to attend for seven or more consecutive school days, ten or more school days in one school month, or fifteen or more school days in a school year.

(E) "Community corrections facility," "public safety beds," "release authority," and "supervised release" have the same meanings as in *section 5139.01 of the Revised Code.*

(F) "Delinquent child" includes any of the following:

(1) Any child, except a juvenile traffic offender, who violates any law of this state or the United States, or any ordinance of a political subdivision of the state, that would be an offense if committed by an adult;

(2) Any child who violates any lawful order of the court made under this chapter or under Chapter 2151. of the Revised Code other than an order issued under *section 2151.87 of the Revised Code*;

(3) Any child who violates division (C) of section 2907.39, division (A) of section 2923.211 [2923.21.1], or division (C)(1) or (D) of *section 2925.55 of the Revised Code*;

(4) Any child who is a habitual truant and who previously has been adjudicated an unruly child for being a habitual truant;

(5) Any child who is a chronic truant.

(G) "Discretionary serious youthful offender" means a person who is eligible for a discretionary SYO and who is not transferred to adult court under a mandatory or discretionary transfer.

(H) "Discretionary SYO" means a case in which the juvenile court, in the juvenile court's discretion, may impose a serious youthful offender disposition under *section 2152.13 of the Revised Code.*

(I) "Discretionary transfer" means that the juvenile court has discretion to transfer a case for criminal prosecution under division (B) of *section 2152.12 of the Revised Code.*

(J) "Drug abuse offense," "felony drug abuse offense," and "minor drug possession offense" have the same meanings as in *section 2925.01 of the Revised Code.*

(K) "Electronic monitoring" and "electronic monitoring device" have the same meanings as in *section 2929.01 of the Revised Code.*

(L) "Economic loss" means any economic detriment suffered by a victim of a delinquent act or juvenile traffic offense as a direct and proximate result of the delinquent act or juvenile traffic offense and includes any loss of income due to lost time at work because of any injury caused to the victim and any property loss, medical cost, or funeral expense incurred as a result of the delinquent act or juvenile traffic offense. "Economic loss" does not include non-economic loss or any punitive or exemplary damages.

(M) "Firearm" has the same meaning as in *section 2923.11 of the Revised Code.*

(N) "Juvenile traffic offender" means any child who violates any traffic law, traffic ordinance, or traffic regulation of this state, the United States, or any political subdivision of this state, other than a resolution, ordinance, or regulation of a political subdivision of this state the violation of which is required to be handled by a parking violations bureau or a joint parking violations bureau pursuant to Chapter 4521. of the Revised Code.

(O) A "legitimate excuse for absence from the public school the child is supposed to attend" has the same meaning as in *section 2151.011 [2151.01.1] of the Revised Code.*

(P) "Mandatory serious youthful offender" means a person who is eligible for a mandatory SYO and who is not transferred to adult court under a mandatory or discretionary transfer.

(Q) "Mandatory SYO" means a case in which the juvenile court is required to impose a mandatory serious youthful offender disposition under *section 2152.13 of the Revised Code.*

(R) "Mandatory transfer" means that a case is required to be transferred for criminal prosecution under division (A) of *section 2152.12 of the Revised Code.*

(S) "Mental illness" has the same meaning as in *section 5122.01 of the Revised Code.*

(T) "Mentally retarded person" has the same meaning as in *section 5123.01 of the Revised Code.*

(U) "Monitored time" and "repeat violent offender" have the same meanings as in *section 2929.01 of the Revised Code.*

(V) "Of compulsory school age" has the same meaning as in *section 3321.01 of the Revised Code.*

(W) "Public record" has the same meaning as in *section 149.43 of the Revised Code.*

(X) "Serious youthful offender" means a person who is eligible for a mandatory SYO or discretionary SYO but who is not transferred to adult court under a mandatory or discretionary transfer.

(Y) "Sexually oriented offense," "juvenile offender registrant," "child-victim oriented offense," "tier I sex offender/child-victim offender," "tier II sex offender/child-victim offender," "tier III sex offender/child-victim offender," and "public registry-qualified juvenile offender registrant" have the same meanings as in *section 2950.01 of the Revised Code.*

(Z) "Traditional juvenile" means a case that is not transferred to adult court under a mandatory or discretionary transfer, that is eligible for a disposition under *sections 2152.16, 2152.17, 2152.19,* and *2152.20 of the Revised Code,* and that is not eligible for a disposition under *section 2152.13 of the Revised Code.*

(AA) "Transfer" means the transfer for criminal prosecution of a case involving the alleged commission by a child of an act that would be an offense if committed by an adult from the juvenile court to the appropriate court that has jurisdiction of the offense.

(BB) "Category one offense" means any of the following:

(1) A violation of *section 2903.01* or *2903.02 of the Revised Code*;

(2) A violation of *section 2923.02 of the Revised Code* involving an attempt to commit aggravated murder or murder.

(CC) "Category two offense" means any of the following:

(1) A violation of *section 2903.03, 2905.01, 2907.02, 2909.02, 2911.01,* or *2911.11 of the Revised Code*;

(2) A violation of *section 2903.04 of the Revised Code* that is a felony of the first degree;

(3) A violation of *section 2907.12 of the Revised Code* as it existed prior to September 3, 1996.

(DD) "Non-economic loss" means nonpecuniary harm suffered by a victim of a delinquent act or juvenile traffic offense as a result of or related to the delinquent act or juvenile traffic offense, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

HISTORY:

148 v S 179, § 3 (Eff 1-1-2002); 149 v S 3 (Eff 1-1-2002); 149 v H 400. Eff 4-3-2003; 149 v H 490, § 1, eff. 1-1-04; 150 v S 5, § 1, eff. 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 151 v S 53, § 1, eff. 5-17-06; 151 v H 23, § 1, eff. 8-17-06; 152 v S 10, § 1, eff. 1-1-08.

LEXSTAT OHIO JUV R 1

OHIO RULES OF COURT SERVICE
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*** RULES CURRENT THROUGH JANUARY 1, 2008 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 19, 2007 ***

Ohio Rules Of Juvenile Procedure

Ohio Juv. R. 1 (2007)

Rule 1. Scope of rules: applicability; construction; exceptions

(A) Applicability.

These rules prescribe the procedure to be followed in all juvenile courts of this state in all proceedings coming within the jurisdiction of such courts, with the exceptions stated in subdivision (C).

(B) Construction.

These rules shall be liberally interpreted and construed so as to effectuate the following purposes:

(1) to effect the just determination of every juvenile court proceeding by ensuring the parties a fair hearing and the recognition and enforcement of their constitutional and other legal rights;

(2) to secure simplicity and uniformity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay;

(3) to provide for the care, protection, and mental and physical development of children subject to the jurisdiction of the juvenile court, and to protect the welfare of the community; and

(4) to protect the public interest by treating children as persons in need of supervision, care and rehabilitation.

(C) Exceptions.

These rules shall not apply to procedure (1) Upon appeal to review any judgment, order, or ruling; (2) Upon the trial of criminal actions; (3) Upon the trial of actions for divorce, annulment, legal separation, and related proceedings; (4) In proceedings to determine parent-child relationships, provided, however that appointment of counsel shall be in accordance with *Rule 4(A) of the Rules of Juvenile Procedure*; (5) In the commitment of the mentally ill and mentally retarded; (6) In proceedings under *section 2151.85 of the Revised Code* to the extent that there is a conflict between these rules and *section 2151.85 of the Revised Code.*

When any statute provides for procedure by general or specific reference to the statutes governing procedure in juvenile court actions, procedure shall be in accordance with these rules.

HISTORY: Amended, eff 7-1-91; 7-1-94; 7-1-95.

LEXSTAT OHIO JUV. R. 2

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*** RULES CURRENT THROUGH JANUARY 1, 2008 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 19, 2007 ***

Ohio Rules Of Juvenile Procedure

Ohio Juv. R. 2 (2007)

Rule 2. Definitions

As used in these rules:

(A) "Abused child" has the same meaning as in *section 2151.031 of the Revised Code.*

(B) "Adjudicatory hearing" means a hearing to determine whether a child is a juvenile traffic offender, delinquent, unruly, abused, neglected, or dependent or otherwise within the jurisdiction of the court.

(C) "Agreement for temporary custody" means a voluntary agreement that is authorized by *section 5103.15 of the Revised Code* and transfers the temporary custody of a child to a public children services agency or a private child placing agency.

(D) "Child" has the same meaning as in *sections 2151.011* and *2152.02 of the Revised Code.*

(E) "Chronic truant" has the same meaning as in *section 2151.011 of the Revised Code.*

(F) "Complaint" means the legal document that sets forth the allegations that form the basis for juvenile court jurisdiction.

(G) "Court proceeding" means all action taken by a court from the earlier of (1) the time a complaint is filed and (2) the time a person first appears before an officer of a juvenile court until the court relinquishes jurisdiction over such child.

(H) "Custodian" means a person who has legal custody of a child or a public children's services agency or private child-placing agency that has permanent, temporary, or legal custody of a child.

(I) "Delinquent child" has the same meaning as in *section 2152.02 of the Revised Code.*

(J) "Dependent child" has the same meaning as in *section 2151.04 of the Revised Code.*

(K) "Detention" means the temporary care of chi'ldren in restricted facilities pending court adjudication or disposition.

(L) "Detention hearing" means a hearing to determine whether a child shall be held in detention or shelter care prior to or pending execution of a final dispositional order.

(M) "Dispositional hearing" means a hearing to determine what action shall be taken concerning a child who is within the jurisdiction of the court.

(N) "Guardian" means a person, association, or corporation that is granted authority by a probate court pursuant to Chapter 2111 of the Revised Code to exercise parental rights over a child to the extent provided in the court's order and subject to the residual parental rights of the child's parents.

(O) "Guardian ad litem" means a person appointed to protect the interests of a party in a juvenile court proceeding.

(P) "Habitual truant" has the same meaning as in *section 2151.011 of the Revised Code.*

(Q) "Hearing" means any portion of a juvenile court proceeding before the court, whether summary in nature or by examination of witnesses.

(R) "Indigent person" means a person who, at the time need is determined, is unable by reason of lack of property or income to provide for full payment of legal counsel and all other necessary expenses of representation.

(S) "Juvenile court" means a division of the court of common pleas, or a juvenile court separately and independently created, that has jurisdiction under Chapters 2151 and 2152 of the Revised Code.

(T) "Juvenile judge" means a judge of a court having jurisdiction under Chapters 2151 and 2152 of the Revised Code.

(U) "Juvenile traffic offender" has the same meaning as in *section 2151.021 of the Revised Code.*

(V) "Legal custody" means a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.

(W) "Mental examination" means an examination by a psychiatrist or psychologist.

(X) "Neglected child" has the same meaning as in *section 2151.03 of the Revised Code.*

(Y) "Party" means a child who is the subject of a juvenile court proceeding, the child's spouse, if any, the child's parent or parents, or if the parent of a child is a child, the parent of that parent, in appropriate cases, the child's custodian, guardian, or guardian ad litem, the state, and any other person specifically designated by the court.

(Z) "Permanent custody" means a legal status that vests in a public children's services agency or a private child-placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of any and all parental rights, privileges, and obligations, including all residual rights and obligations.

(AA) "Permanent surrender" means the act of the parents or, if a child has only one parent, of the parent of a child, by a voluntary agreement authorized by *section 5103.15 of the Revised Code*, to transfer the permanent custody of the child to a public children's services agency or a private child-placing agency.

(BB) "Person" includes an individual, association, corporation, or partnership and the state or any of its political subdivisions, departments, or agencies.

(CC) "Physical examination" means an examination by a physician.

(DD) "Planned permanent living arrangement" means an order of a juvenile court pursuant to which both of the following apply:

(1) The court gives legal custody of a child to a public children's services agency or a private child-placing agency without the termination of parental rights;

(2) The order permits the agency to make an appropriate placement of the child and to enter into a written planned permanent living arrangement agreement with a foster care provider or with another person or agency with whom the child is placed.

(EE) "Private child-placing agency" means any association, as defined in *section 5103.02 of the Revised Code* that is certified pursuant to *sections 5103.03* to *5103.05 of the Revised Code* to accept temporary, permanent, or legal custody of children and place the children for either foster care or adoption.

(FF) "Public children's services agency" means a children's services board or a county department of human services that has assumed the administration of the children's services function prescribed by Chapter 5153 of the Revised Code.

(GG) "Removal action" means a statutory action filed by the superintendent of a school district for the removal of a child in an out-of-county foster home placement.

(HH) "Residence or legal settlement" means a location as defined by *section 2151.06 of the Revised Code.*

(II) "Residual parental rights, privileges, and responsibilities" means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, including but not limited to the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support.

(JJ) "Rule of court" means a rule promulgated by the Supreme Court or a rule concerning local practice adopted by another court that is not inconsistent with the rules promulgated by the Supreme Court and that is filed with the Supreme Court.

(KK) "Serious youthful offender" means a child eligible for sentencing as described in *sections 2152.11* and *2152.13 of the Revised Code.*

(LL) "Serious youthful offender proceedings" means proceedings after a probable cause determination that a child is eligible for sentencing as described in *sections 2152.11* and *2152.13 of the Revised Code.* Serious youthful offender proceedings cease to be serious youthful offender proceedings once a child has been determined by the trier of fact not to be a serious youthful offender or the juvenile judge has determined not to impose a serious youthful offender disposition on a child eligible for discretionary serious youthful offender sentencing.

(MM) "Shelter care" means the temporary care of children in physically unrestricted facilities, pending court adjudication or disposition.

(NN) "Social history" means the personal and family history of a child or any other party to a juvenile proceeding and may include the prior record of the person with the juvenile court or any other court.

(OO) "Temporary custody" means legal custody of a child who is removed from the child's home, which custody may be terminated at any time at the discretion of the court or, if the legal custody is granted in an agreement for temporary custody, by the person or persons who executed the agreement.

(PP) "Unruly child" has the same meaning as in *section 2151.022 of the Revised Code.*

(QQ) "Ward of court" means a child over whom the court assumes continuing jurisdiction.

HISTORY: Amended, eff 7-1-94; 7-1-98; 7-1-01; 7-1-02.

LEXSTAT OHIO JUV. R. 3

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Ohio Rules Of Juvenile Procedure

Ohio Juv. R. 3 (2007)

Rule 3. Waiver of rights

A child's right to be represented by counsel at a hearing conducted pursuant to *Juv. R. 30* may not be waived. Other rights of a child may be waived with the permission of the court.

HISTORY: Amended, eff 7-1-94.

LEXSTAT OHIO JUV. R. 4

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Ohio Rules Of Juvenile Procedure

Ohio Juv. R. 4 (2007)

Rule 4. Assistance of counsel; guardian ad litem

(A) Assistance of counsel.

Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.

(B) Guardian ad litem; when appointed.

The court shall appoint a guardian ad litem to protect the interests of a child or incompetent adult in a juvenile court proceeding when:

(1) The child has no parents, guardian, or legal custodian;

(2) The interests of the child and the interests of the parent may conflict;

(3) The parent is under eighteen years of age or appears to be mentally incompetent;

(4) The court believes that the parent of the child is not capable of representing the best interest of the child.

(5) Any proceeding involves allegations of abuse or neglect, voluntary surrender of permanent custody, or termination of parental rights as soon as possible after the commencement of such proceeding.

(6) There is an agreement for the voluntary surrender of temporary custody that is made in accordance with *section 5103.15 of the Revised Code*, and thereafter there is a request for extension of the voluntary agreement.

(7) The proceeding is a removal action.

(8) Appointment is otherwise necessary to meet the requirements of a fair hearing.

(C) Guardian ad litem as counsel.

(1) When the guardian ad litem is an attorney admitted to practice in this state, the guardian may also serve as counsel to the ward providing no conflict between the roles exist[s].

(2) If a person is serving as guardian ad litem and as attorney for a ward and either that person or the court finds a conflict between the responsibilities of the role of attorney and that of guardian ad litem, the court shall appoint another person as guardian ad litem for the ward.

(3) If a court appoints a person who is not an attorney admitted to practice in this state to be a guardian ad litem, the court may appoint an attorney admitted to practice in this state to serve as attorney for the guardian ad litem.

(D) Appearance of attorneys.

An attorney shall enter appearance by filing a written notice with the court or by appearing personally at a court hearing and informing the court of said representation.

(E) Notice to guardian ad litem.

The guardian ad litem shall be given notice of all proceedings in the same manner as notice is given to other parties to the action.

(F) Withdrawal of counsel or guardian ad litem.

An attorney or guardian ad litem may withdraw only with the consent of the court upon good cause shown.

(G) Costs.

The court may fix compensation for the services of appointed counsel and guardians ad litem, tax the same as part of the costs and assess them against the child, the child's parents, custodian, or other person in loco parentis of such child.

HISTORY: Amended, eff 7-1-76; 7-1-94; 7-1-95; 7-1-98.

LEXSTAT OHIO JUV. R. 29

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Ohio Rules Of Juvenile Procedure

Ohio Juv. R. 29 (2007)

Rule 29. Adjudicatory hearing

(A) Scheduling the hearing.

The date for the adjudicatory hearing shall be set when the complaint is filed or as soon thereafter as is practicable. If the child is the subject of a complaint alleging a violation of a section of the Revised Code that may be violated by an adult and that does not request a serious youthful offender sentence, and if the child is in detention or shelter care, the hearing shall be held not later than fifteen days after the filing of the complaint. Upon a showing of good cause, the adjudicatory hearing may be continued and detention or shelter care extended.

The prosecuting attorney's filing of either a notice of intent to pursue or a statement of an interest in pursuing a serious youthful offender sentence shall constitute good cause for continuing the adjudicatory hearing date and extending detention or shelter care.

The hearing of a removal action shall be scheduled in accordance with *Juv. R. 39(B)*.

If the complaint alleges abuse, neglect, or dependency, the hearing shall be held no later than thirty days after the complaint is filed. For good cause shown, the adjudicatory hearing may extend beyond thirty days either for an additional ten days to allow any party to obtain counsel or for a reasonable time beyond thirty days to obtain service on all parties or complete any necessary evaluations. However, the adjudicatory hearing shall be held no later than sixty days after the complaint is filed.

The failure of the court to hold an adjudicatory hearing within any time period set forth in this rule does not affect the ability of the court to issue any order otherwise provided for in statute or rule and does not provide any basis for contesting the jurisdiction of the court or the validity of any order of the court.

(B) Advisement and findings at the commencement of the hearing.

At the beginning of the hearing, the court shall do all of the following:

(1) Ascertain whether notice requirements have been complied with and, if not, whether the affected parties waive compliance;

(2) Inform the parties of the substance of the complaint, the purpose of the hearing, and possible consequences of the hearing, including the possibility that the cause may be transferred to the appropriate adult court under *Juv. R. 30* where the complaint alleges that a child fourteen years of age or over is delinquent by conduct that would constitute a felony if committed by an adult;

(3) Inform unrepresented parties of their right to counsel and determine if those parties are waiving their right to counsel;

(4) Appoint counsel for any unrepresented party under *Juv. R. 4(A)* who does not waive the right to counsel;

(5) Inform any unrepresented party who waives the right to counsel of the right: to obtain counsel at any stage of the proceedings, to remain silent, to offer evidence, to cross-examine witnesses, and, upon request, to have a record of all proceedings made, at public expense if indigent.

(C) Entry of admission or denial.

The court shall request each party against whom allegations are being made in the complaint to admit or deny the allegations. A failure or refusal to admit the allegations shall be deemed a denial, except in cases where the court consents to entry of a plea of no contest.

(D) Initial procedure upon entry of an admission.

The court may refuse to accept an admission and shall not accept an admission without addressing the party personally and determining both of the following:

(1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;

(2) The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing.

The court may hear testimony, review documents, or make further inquiry, as it considers appropriate, or it may proceed directly to the action required by division (F) of this rule.

(E) Initial procedure upon entry of a denial.

If a party denies the allegations, the court shall:

(1) Direct the prosecuting attorney or another attorney-at-law to assist the court by presenting evidence in support of the allegations of a complaint;

(2) Order the separation of witnesses, upon request of any party;

(3) Take all testimony under oath or affirmation in either question-answer or narrative form; and

(4) Determine the issues by proof beyond a reasonable doubt in juvenile traffic offense, delinquency, and unruly proceedings; by clear and convincing evidence in dependency, neglect, and abuse cases, and in a removal action; and by a preponderance of the evidence in all other cases.

(F) Procedure upon determination of the issues.

Upon the determination of the issues, the court shall do one of the following:

(1) If the allegations of the complaint, indictment, or information were not proven, dismiss the complaint;

(2) If the allegations of the complaint, indictment, or information are admitted or proven, do any one of the following, unless precluded by statute:

(a) Enter an adjudication and proceed forthwith to disposition;

(b) Enter an adjudication and continue the matter for disposition for not more than six months and may make appropriate temporary orders;

(c) Postpone entry of adjudication for not more than six months;

(d) Dismiss the complaint if dismissal is in the best interest of the child and the community.

(3) Upon request make written findings of fact and conclusions of law pursuant to *Civ. R. 52*.

(4) Ascertain whether the child should remain or be placed in shelter care until the dispositional hearing in an abuse, neglect, or dependency proceeding. In making a shelter care determination, the court shall make written finding of facts with respect to reasonable efforts in accordance with the provisions in *Juv. R. 27(B)(1)* and to relative placement in accordance with *Juv. R. 7(F)(3)*.

HISTORY: Amended, eff 7-1-76; 7-1-94; 7-1-98; 7-1-01; 7-1-04.

LEXSTAT OHIO JUV. R. 34

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Ohio Rules Of Juvenile Procedure

Ohio Juv. R. 34 (2007)

Rule 34. Dispositional hearing

(A) Scheduling the hearing.

Where a child has been adjudicated as an abused, neglected, or dependent child, the court shall not issue a dispositional order until after it holds a separate dispositional hearing. The dispositional hearing for an adjudicated abused, neglected, or dependent child shall be held at least one day but not more than thirty days after the adjudicatory hearing is held. The dispositional hearing may be held immediately after the adjudicatory hearing if all parties were served prior to the adjudicatory hearing with all documents required for the dispositional hearing and all parties consent to the dispositional hearing being held immediately after the adjudicatory hearing. Upon the request of any party or the guardian ad litem of the child, the court may continue a dispositional hearing for a reasonable time not to exceed the time limit set forth in this division to enable a party to obtain or consult counsel. The dispositional hearing shall not be held more than ninety days after the date on which the complaint in the case was filed. If the dispositional hearing is not held within this ninety day period of time, the court, on its own motion or the motion of any party or the guardian ad litem of the child, shall dismiss the complaint without prejudice.

In all other juvenile proceedings, the dispositional hearing shall be held pursuant to *Juv. R. 29(F)(2)(a)* through (d) and the ninety day requirement shall not apply. Where the dispositional hearing is to be held immediately following the adjudicatory hearing, the court, upon the request of any party, shall continue the hearing for a reasonable time to enable the party to obtain or consult counsel.

(B) Hearing procedure.

The hearing shall be conducted in the following manner:

(1) The judge or magistrate who presided at the adjudicatory hearing shall, if possible, preside;

(2) Except as provided in division (I) of this rule, the court may admit evidence that is material and relevant, including, but not limited to, hearsay, opinion, and documentary evidence;

(3) Medical examiners and each investigator who prepared a social history shall not be cross-examined, except upon consent of all parties, for good cause shown, or as the court in its discretion may direct. Any party may offer evidence supplementing, explaining, or disputing any information contained in the social history or other reports that may be used by the court in determining disposition.

(C) Judgment.

After the conclusion of the hearing, the court shall enter an appropriate judgment within seven days. A copy of the judgment shall be given to any party requesting a copy. In all cases where a child is placed on probation, the child shall receive a written statement of the conditions of probation. If the judgment is conditional, the order shall state the conditions. If the child is not returned to the child's home, the court shall determine the school district that shall bear the cost of the child's education and may fix an amount of support to be paid by the responsible parent or from public funds.

(D) Dispositional orders.

Where a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

(1) Place the child in protective supervision;

(2) Commit the child to the temporary custody of a public or private agency, either parent, a relative residing within or outside the state, or a probation officer for placement in a certified foster home or approved foster care;

(3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody;

(4) Commit the child to the permanent custody of a public or private agency, if the court determines that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines that the permanent commitment is in the best interest of the child;

(5) Place the child in a planned permanent living arrangement with a public or private agency if the agency requests the court for placement, if the court finds that a planned permanent living arrangement is in the best interest of the child, and if the court finds that one of the following exists:

(a) The child because of physical, mental, or psychological problems or needs is unable to function in a family-like setting;

(b) The parents of the child have significant physical, mental or psychological problems and are unable to care for the child, adoption is not in the best interest of the child and the child retains a significant and positive relationship with a parent or relative;

(c) The child is sixteen years of age or older, has been counseled, is unwilling to accept or unable to adapt to a permanent placement and is in an agency program preparing the child for independent living.

(E) Protective supervision.

If the court issues an order for protective supervision, the court may place any reasonable restrictions upon the child, the child's parents, guardian, or any other person including, but not limited to, any of the following:

(1) Ordering a party within forty-eight hours to vacate the child's home indefinitely or for a fixed period of time;

(2) Ordering a party, parent, or custodian to prevent any particular person from having contact with the child;

(3) Issuing a restraining order to control the conduct of any party.

(F) Case plan.

As part of its dispositional order, the court shall journalize a case plan for the child. The agency required to maintain a case plan shall file the case plan with the court prior to the child's adjudicatory hearing but not later than thirty days after the earlier of the date on which the complaint in the case was filed or the child was first placed in shelter care. The plan shall specify what additional information, if any, is necessary to complete the plan and how the information will be obtained. All parts of the case plan shall be completed by the earlier of thirty days after the adjudicatory hearing or the date of the dispositional hearing for the child. If all parties agree to the content of the case plan and the court approves it, the court shall journalize the plan as part of its dispositional order. If no agreement is reached, the court, based upon the evidence presented at the dispositional hearing and the best interest of the child, shall determine the contents of the case plan and journalize it as part of the dispositional order for the child.

(G) Modification of temporary order.

The department of human services or any other public or private agency or any party, other than a parent whose parental rights have been terminated, may at any time file a motion requesting that the court modify or terminate any order of disposition. The court shall hold a hearing upon the motion as if the hearing were the original dispositional hearing and shall give all parties and the guardian *ad litem* notice of the hearing pursuant to these rules. The court, on its own motion and upon proper notice to all parties and any interested agency, may modify or terminate any order of disposition.

(H) Restraining orders.

In any proceeding where a child is made a ward of the court, the court may grant a restraining order controlling the conduct of any party if the court finds that the order is necessary to control any conduct or relationship that may be detrimental or harmful to the child and tend to defeat the execution of a dispositional order.

(I) Bifurcation; Rules of Evidence.

Hearings to determine whether temporary orders regarding custody should be modified to orders for permanent custody shall be considered dispositional hearings and need not be bifurcated. The Rules of Evidence shall apply in hearings on motions for permanent custody.

(J) Advisement of rights after hearing.

At the conclusion of the hearing, the court shall advise the child of the child's right to record expungement and, where any part of the proceeding was contested, advise the parties of their right to appeal.

HISTORY: Amended, eff 7-1-94; 7-1-96; 7-1-02.

LEXSTAT OHIO JUV. R. 35

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Ohio Rules Of Juvenile Procedure

Ohio Juv. R. 35 (2007)

Rule 35. Proceedings after judgment

(A) Continuing jurisdiction; invoked by motion.

The continuing jurisdiction of the court shall be invoked by motion filed in the original proceeding, notice of which shall be served in the manner provided for the service of process.

(B) Revocation of probation.

The court shall not revoke probation except after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to *Juv. R. 4(A)*. Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to *Juv. R. 34(C)*, been notified.

(C) Detention.

During the pendency of proceedings under this rule, a child may be placed in detention in accordance with the provisions of Rule 7.

HISTORY: Amended, eff 7-1-94.

LEXSTAT OHIO JUV. R. 40

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Ohio Rules Of Juvenile Procedure

Ohio Juv. R. 40 (2007)

Rule 40. Magistrates

(A) Appointment.

The court may appoint one or more magistrates who shall be attorneys at law admitted to practice in Ohio. A magistrate appointed under this rule also may serve as a magistrate under *Crim. R. 19*. The court shall not appoint as a magistrate any person who has contemporaneous responsibility for working with, or supervising the behavior of, children who are subject to dispositional orders of the appointing court or any other juvenile court.

(B) Compensation.

The compensation of magistrates shall be fixed by the court, and no part of the compensation shall be taxed as costs.

(C) Authority.

(1) *Scope.* To assist juvenile courts of record and pursuant to reference under *Juv. R. 40(D)(1)*, magistrates are authorized, subject to the terms of the relevant reference, to do any of the following:

(a) Determine any motion in any case, except a case involving the determination of a child's status as a serious youthful offender;

(b) Conduct the trial of any case that will not be tried to a jury, except the adjudication of a case against an alleged serious youthful offender;

(c) Upon unanimous written consent of the parties, preside over the trial of any case that will be tried to a jury; except the adjudication of a case against an alleged serious youthful offender;

(d) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule.

(2) *Regulation of proceedings.* In performing the responsibilities described in *Juv. R. 40(C)(1)*, magistrates are authorized, subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the efficient performance of those responsibilities, including but not limited to, the following:

(a) Issuing subpoenas for the attendance of witnesses and the production of evidence;

(b) Ruling upon the admissibility of evidence;

(c) Putting witnesses under oath and examining them;

(d) Calling the parties to the action and examining them under oath;

(e) When necessary to obtain the presence of an alleged contemnor in cases involving direct or indirect contempt of court, issuing an attachment for the alleged contemnor and setting the type, amount, and any conditions of bail pursuant to *Crim. R. 46*;

(f) Imposing, subject to *Juv. R. 40(D)(8)*, appropriate sanctions for civil or criminal contempt committed in the presence of the magistrate.

(D) Proceedings in Matters Referred to Magistrates

(1) *Reference by court of record.*

(a) *Purpose and method.* A court may, for one or more of the purposes described in *Juv. R. 40(C)(1)*, refer a particular case or matter or a category of cases or matters to a magistrate by a specific or general order of reference or by rule.

(b) *Limitation.* A court may limit a reference by specifying or limiting the magistrate's powers, including but not limited to, directing the magistrate to determine only particular issues, directing the magistrate to perform particular responsibilities, directing the magistrate to receive and report evidence only, fixing the time and place for beginning and closing any hearings, or fixing the time for filing any magistrate's decision on the matter or matters referred.

(2) *Magistrate's order; motion to set aside magistrate's order.*

(a) *Magistrate's order.*

(i) *Nature of order.* Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.

(ii) *Form, filing, and service of magistrate's order.* A magistrate's order shall be in writing, identified as a magistrate's order in the caption, signed by the magistrate, filed with the clerk, and served on all parties or their attorneys.

(iii) *Magistrate's order include.* A magistrate's order includes any of the following:

(A) Pretrial proceedings under *Civ. R. 16*;

(B) Discovery proceedings under *Civ. R. 26* to *37*, *Juv. R. 24*, and *Juv. R.25*;

(C) Appointment of an attorney or guardian ad litem pursuant to *Juv. R. 4* and *Juv. R.29(B)(4)*;

(D) Taking a child into custody pursuant to *Juv. R. 6*;

(E) Detention hearings pursuant to *Juv. R. 7*;

(F) Temporary orders pursuant to *Juv. R. 13*;

(G) Extension of temporary orders pursuant to *Juv. R. 14*;

(H) Summons and warrants pursuant to *Juv. R. 15*;

(I) Preliminary conferences pursuant to *Juv. R. 21*;

(J) Continuances pursuant to *Juv. R. 23*;

(K) Deposition orders pursuant to *Juv. R. 27(B)(3)*;

(L) Orders for social histories, physical and mental examinations pursuant to *Juv. R. 32*;

(M) Proceedings upon application for the issuance of a temporary protection order as authorized by law;

(N) Other orders as necessary to regulate the proceedings.

(b) *Motion to set aside magistrate's order.* Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

(3) *Magistrate's decision; objections to magistrate's decision.*

(a) *Magistrate's decision.*

(i) *When required.* Subject to the terms of the relevant reference, a magistrate shall prepare a magistrate's decision respecting any matter referred under *Juv. R. 40(D)(1)*.

(ii) *Findings of fact and conclusions of law.* Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.

(iii) *Form; filing, and service of magistrate's decision.* A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under *Juv. R. 40(D)(3)(a)(ii)*, unless the party timely and specifically objects to that factual finding or legal conclusion as required by *Juv. R. 40(D)(3)(b)*.

(b) *Objections to magistrate's decision.*

(i) *Time for filing.* A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by *Juv. R. 40(D)(4)(e)(i)*. If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

(ii) *Specificity of objection.* An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

(iii) Objection to magistrate's factual finding; transcript or affidavit. An objection to a factual finding, whether or not specifically designated as a finding of fact under *Juv. R. 40(D)(3)(a)(ii)*, shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

(iv) *Waiver of right to assign adoption by court as error on appeal.* Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under *Juv. R. 40(D)(3)(a)(ii)*, unless the party has objected to that finding or conclusion as required by *Juv. R. 40(D)(3)(b)*.

(4) *Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.*

(a) *Action of court required.* A magistrate's decision is not effective unless adopted by the court.

(b) *Action on magistrate's decision.* Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.

(c) *If no objections are filed.* If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.

(d) *Action on objections.* If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

(e) *Entry of judgment or interim order by court.* A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.

(i) *Judgment.* The court may enter a judgment either during the fourteen days permitted by *Juv. R. 40(D)(3)(b)(i)* for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days permitted by *Juv. R. 40(D)(3)(b)(i)* for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.

(ii) *Interim order.* The court may enter an interim order on the basis of a magistrate's decision without waiting for or ruling on timely objections by the parties where immediate relief is justified. The timely filing of objections does not stay the execution of an interim order, but an interim order shall not extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown.

(5) *Extension of time.* For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision.

(6) *Disqualification of a magistrate.* Disqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.

(7) *Recording of proceedings before a magistrate.* Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court.

(8) *Contempt in the presence of a magistrate.*

(a) *Contempt order.* Contempt sanctions under *Juv. R. 40(C)(2)(f)* may be imposed only by a written order that recites the facts and certifies that the magistrate saw or heard the conduct constituting contempt.

(b) *Filing and provision of copies of contempt order.* A contempt order shall be filed and copies provided forthwith by the clerk to the appropriate judge of the court and to the subject of the order.

(c) *Review of contempt order by court; bail.* The subject of a contempt order may by motion obtain immediate review by a judge. A judge or the magistrate entering the contempt order may set bail pending judicial review of the order.

HISTORY: Amended, eff 7-1-75; 7-1-85; 7-1-92; 7-1-95; 7-1-98; 7-1-01; 7-1-03, 7-1-06.

LEXSTAT OHIO CRIM. R. 52

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*** RULES CURRENT THROUGH JANUARY 1, 2008 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 19, 2007 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 52 (2007)

Rule 52. Harmless Error and Plain Error

(A) Harmless error.

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

LEXSTAT OHIO CIV. R. 53

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*** RULES CURRENT THROUGH JANUARY 1, 2008 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 19, 2007 ***

Ohio Rules Of Civil Procedure
Title VI Trials

Ohio Civ. R. 53 (2007)

Rule 53. Magistrates

(A) Appointment.

A court of record may appoint one or more magistrates who shall be attorneys at law admitted to practice in Ohio.

(B) Compensation.

The compensation of magistrates shall be fixed by the court, and no part of the compensation shall be taxed as costs under *Civ. R. 54(D)*.

(C) Authority.

(1) Scope.

To assist courts of record and pursuant to reference under *Civ. R. 53(D)(1)*, magistrates are authorized, subject to the terms of the relevant reference, to do any of the following:

(a) Determine any motion in any case;

(b) Conduct the trial of any case that will not be tried to a jury;

(c) Upon unanimous written consent of the parties, preside over the trial of any case that will be tried to a jury;

(d) Conduct proceedings upon application for the issuance of a temporary protection order as authorized by law;

(e) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule.

(2) Regulation of proceedings.

In performing the responsibilities described in *Civ. R. 53(C)(1)*, magistrates are authorized, subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the efficient performance of those responsibilities, including but not limited to, the following:

(a) Issuing subpoenas for the attendance of witnesses and the production of evidence;

(b) Ruling upon the admissibility of evidence;

(c) Putting witnesses under oath and examining them;

(d) Calling the parties to the action and examining them under oath;

(e) When necessary to obtain the presence of an alleged contemnor in cases involving direct or indirect contempt of court, issuing an attachment for the alleged contemnor and setting the type, amount, and any conditions of bail pursuant to *Crim. R. 46*;

(f) Imposing, subject to *Civ. R. 53(D)(8)*, appropriate sanctions for civil or criminal contempt committed in the presence of the magistrate.

(D) Proceedings in Matters Referred to Magistrates.

(1) Reference by court of record.

(a) Purpose and method.

A court of record may, for one or more of the purposes described in *Civ. R. 53(C)(1)*, refer a particular case or matter or a category of cases or matters to a magistrate by a specific or general order of reference or by rule.

(b) Limitation.

A court of record may limit a reference by specifying or limiting the magistrate's powers, including but not limited to, directing the magistrate to determine only particular issues, directing the magistrate to perform particular responsibilities, directing the magistrate to receive and report evidence only, fixing the time and place for beginning and closing any hearings, or fixing the time for filing any magistrate's decision on the matter or matters referred.

(2) Magistrate's order; motion to set aside magistrate's order.

(a) Magistrate's order.

(i) Nature of order.

Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.

(ii) Form, filing, and service of magistrate's order.

A magistrate's order shall be in writing, identified as a magistrate's order in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys.

(b) Motion to set aside magistrate's order.

Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

(3) Magistrate's decision; objections to magistrate's decision.

(a) Magistrate's decision.

(i) When required.

Subject to the terms of the relevant reference, a magistrate shall prepare a magistrate's decision respecting any matter referred under *Civ. R. 53(D)(1)*.

(ii) Findings of fact and conclusions of law.

Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.

(iii) Form; filing, and service of magistrate's decision.

A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under *Civ. R. 53(D)(3)(a)(ii)*, unless the party timely and specifically objects to that factual finding or legal conclusion as required by *Civ. R. 53(D)(3)(b)*.

(b) Objections to magistrate's decision.

(i) Time for filing.

A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by *Civ. R. 53(D)(4)(e)(i)*. If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

(ii) Specificity of objection.

An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

(iii) Objection to magistrate's factual finding; transcript or affidavit.

An objection to a factual finding, whether or not specifically designated as a finding of fact under *Civ. R. 53(D)(3)(a)(ii)*, shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

(iv) Waiver of right to assign adoption by court as error on appeal.

Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under *Civ. R. 53(D)(3)(a)(ii)*, unless the party has objected to that finding or conclusion as required by *Civ. R. 53(D)(3)(b)*.

(4) Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.

(a) Action of court required.

A magistrate's decision is not effective unless adopted by the court.

(b) Action on magistrate's decision.

Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.

(c) If no objections are filed.

If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.

(d) Action on objections.

If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

(e) Entry of judgment or interim order by court.

A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.

(i) Judgment.

The court may enter a judgment either during the fourteen days permitted by *Civ. R. 53(D)(3)(b)(i)* for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days permitted by *Civ. R. 53(D)(3)(b)(i)* for the filing of objections, the timely filing of objections to the mag-

istrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.

(ii) Interim order.

The court may enter an interim order on the basis of a magistrate's decision without waiting for or ruling on timely objections by the parties where immediate relief is justified. The timely filing of objections does not stay the execution of an interim order, but an interim order shall not extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown. An interim order shall comply with *Civ. R. 54(A)*, be journalized pursuant to *Civ. R. 58(A)*, and be served pursuant to *Civ. R. 58(B)*.

(5) Extension of time.

For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision.

(6) Disqualification of a magistrate.

Disqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.

(7) Recording of proceedings before a magistrate.

Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court.

(8) Contempt in the presence of a magistrate.

(a) Contempt order.

Contempt sanctions under *Civ. R. 53(C)(2)(f)* may be imposed only by a written order that recites the facts and certifies that the magistrate saw or heard the conduct constituting contempt.

(b) Filing and provision of copies of contempt order.

A contempt order shall be filed and copies provided forthwith by the clerk to the appropriate judge of the court and to the subject of the order.

(c) Review of contempt order by court; bail.

The subject of a contempt order may by motion obtain immediate review by a judge. A judge or the magistrate entering the contempt order may set bail pending judicial review of the order.

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