

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

11-1677

Appellee

-vs-

DEREK WARNER,
Appellant

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 95750

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DEREK WARNER

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TABLE OF CONTENTS

PAGES

EXPLANATION OF WHY THIS CASE RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND INVOLVES AN ISSUE OF GREAT GENERAL AND PUBLIC INTEREST 1

STATEMENT OF THE CASE & FACTS2

LAW AND ARGUMENT4

Proposition of Law I: The R.C. 2152.12(B)(3) amenability hearing cannot be waived.4

Proposition of Law II: Waiver of the R.C. 2152.12(B)(3) amenability hearing before the juvenile court is not valid unless it is expressly stated on the record by the juvenile through his or her counsel, and the trial court must determine through a colloquy with the juvenile that the waiver is voluntarily, knowingly, and intelligently made.8

CONCLUSION11

SERVICE12

APPENDIX

Decision, Eighth District Court of Appeals
State of Ohio v. Derek Warner (August 18, 2011), Cuyahoga App. No. 95750, 2011-Ohio-4096A1

**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT GENERAL
AND PUBLIC INTEREST:**

The R.C. 2152.12(B) amenability hearing is at the crossroads of the juvenile and adult justice system. The outcome of the amenability hearing determines whether the juvenile defendant will have an adult conviction, sentence, and criminal record. Amenability invokes the rehabilitative effort that is the primary goal of the juvenile justice system; non-amenability is the gateway to life as a felon.

In light of these dire consequences, strict adherence to the Ohio General Assembly's approach to the amenability determination is critical. The discretionary transfer procedure is set forth at R.C. 2152.12(B)-(E), as well as Rule 30 of the Ohio Rules of Juvenile Procedure. Both the statute and the rule expressly require the juvenile court to conduct an amenability hearing, to consider enumerated factors concerning amenability, and to indicate on the record the factors considered and weighed in making the amenability decision. Although the statute and the rule provide for waiver of certain other requirements, neither provides for waiver of the amenability hearing. Furthermore, there is a split of authority as to whether the amenability hearing is subject to waiver. Compare *State v. Soke*, Cuyahoga App. No. 62908, 1993 WL 266951 at *3 (permitting waiver of the amenability hearing), with *State v. Newton*, Fulton App. No. F-82-17, 1983 WL 6836 at *3 (prohibiting waiver of the amenability hearing).

Additionally, the statutory scheme for transfer of jurisdiction from juvenile court reflects the fundamental differences between the juvenile and adult court systems. The amenability hearing illustrates these differences well. It reflects "a focus on the state's role as *parens patriae* and the vision that the courts would protect the wayward child from 'evil influences,' 'save' him from criminal prosecution, and provide social and rehabilitative services." *In re C.S.*, 115 Ohio

St.3d 267, 273. In other words, the R.C. 2152.12(B) amenability hearing exemplifies the paternalistic role that distinguishes the juvenile court from adult court. By requiring an amenability hearing, the law recognizes that the juvenile court has a duty—independent of the wishes of the child, parents, and the State—to determine whether rehabilitation in the juvenile justice system is appropriate.

In the Opinion Below, the Eighth District adopted an approach that allows the juvenile court to short-circuit its independent statutory duty to consider amenability as a threshold to a discretionary transfer. First, the Eighth District permitted the juvenile court to transfer jurisdiction to adult court without conducting an amenability hearing, based solely on the Eighth District's finding that Mr. Warner's counsel implicitly waived the hearing. This holding is inconsistent with statutory authority requiring an amenability hearing, contradicts the holding in *Newton*, 1983 WL 6836 at *3, and is premised on the conflicting opinion in *Soke*, 1993 WL 266951 at *3. Accordingly, this Court's intervention is necessary to resolve the split of authority and re-align the procedure with the statute. Second, even if waiver is permissible under the statute, there is no authority for the proposition that an implicit waiver based on reference to an amenability hearing in a prior case is sufficient. Consequently, even if waiver is permissible, this Court should accept jurisdiction to clarify the procedure the juvenile court must use to find that a juvenile defendant is knowingly, voluntarily, and intelligently waiving his or her right to the amenability hearing.

STATEMENT OF THE CASE & FACTS

~~At the time of the incident at issue Mr. Warner was 17 years old. He was charged in~~
juvenile court, where a discretionary transfer hearing occurred on May 10, 2010 in Case No. DL
09-121602 to determine whether the case should be bound over to adult court.

At the bind over hearing, the juvenile court heard testimony and found probable cause. Then, the juvenile court noted that the bind over would be discretionary pursuant to R.C. 2152.10. The juvenile court further noted that Mr. Warner had previously been bound over in another case,¹ and the State raised the issue of amenability pursuant to R.C. 2951.12(B)(3). Specifically, the following exchange occurred on the record of the bind over hearing:

[ASSISTANT PROSECUTOR]: Your Honor, I believe we've had some preliminary discussions about waiving amenability. It has already been found. I don't even know that we need to waive amenability.

[DEFENSE COUNSEL]: If we could approach, your Honor.

THE COURT: Yes. Okay.

(Discussion held off the record.)

THE COURT: Okay. All right. Because this Court has already found this alleged delinquent to be not amenable to the juvenile justice system on a prior case in which the Court transferred jurisdiction to the adult court, the Court in this case then will, based on this probable cause finding will then – we will transfer this case over to the adult court, as well, without having another amenability hearing. And so we will not refer him to the Court Clinic at this time.

Based on this reasoning and conclusion, the juvenile court granted discretionary transfer and bound the case over to the Cuyahoga County Court of Common Pleas.

Mr. Warner was then indicted by the Cuyahoga County Grand Jury on one count each of burglary, theft, vandalism, and criminal damaging, and two counts of bribery.

The case proceeded to trial on August 3, 2010. The jury found Mr. Warner not guilty of the bribery counts, but guilty of the other charges.

¹ The prior case that was bound over to adult court was DL 09-123216. After transfer, DL 09-123216 became CR-10-535961, and was ultimately dismissed pursuant to Crim. R. 29. Thus, ironically, Mr. Warner was not convicted in the case the juvenile court used to avoid conducting an amenability hearing in this case.

On August 24, 2010 the trial court sentenced Mr. Warner to six years in prison and imposed mandatory postrelease control.

Mr. Warner filed a direct appeal on September 22, 2010. In his appeal, Mr. Warner raised four assignments of error: (1) sufficiency of the evidence; (2) manifest weight; (3) admissibility of other acts and character evidence; and (4) improper discretionary transfer from juvenile to adult court. The Eighth District Court of Appeals affirmed Mr. Warner's convictions on August 18, 2011 in the Opinion Below. *State v. Warner*, Cuyahoga App. No. 95750, 2011-Ohio-4096 ("Opinion Below"). In overruling the fourth assignment of error, the Eighth District explained that, in order to transfer a case to adult court under R.C. 2152.12(B), the juvenile court must first conduct the amenability hearing required by R.C. 2152.12(B)(3). (Opinion Below at ¶ 29, quoting *State v. Grimes*, 2d Dist. No. 2009-CA-30, 2010-Ohio-5385, ¶ 15.) Although the Eighth District found that the juvenile court did not conduct the amenability hearing, it also found that Mr. Warner waived the amenability hearing. (Opinion Below at ¶ 30.)

Mr. Warner now files this memorandum in support of jurisdiction, along with a timely notice of appeal.

LAW AND ARGUMENT

Proposition of Law I: *The R.C. 2152.12(B)(3) amenability hearing cannot be waived.*

In the Opinion Below, the Eighth District held that Mr. Warner, through counsel, waived the R.C. 2152(B)(3) amenability hearing. (Opinion Below ¶ 30.) This holding was necessarily premised upon a proposition of law: that the amenability hearing can be waived. This proposition of law is not settled in Ohio, however. Although the Eighth District cited *State v. Soke*, Cuyahoga App. No. 62908, 1993 WL 266951 at *3 in support of permitting waiver, the Sixth District Court of Appeals reached the opposite conclusion in *State v. Newton*, Fulton App.

No. F-82-17, 1983 WL 6836 at *3. Specifically, the Sixth District in *Newton* concluded that “the Juvenile Court erred in accepting ‘waiver’ of [the R.C. 2152.12(B)] procedures, which are mandatory **and cannot be waived.**” *Newton*, 1983 WL 6836 at *3 (emphasis added).² The Eighth District issued *Soke* ten years after *Newton* without citing it. Accordingly, there is a split of authority among appellate districts on this important issue to juvenile courts in Ohio.

Discretionary transfer of jurisdiction to adult court implicates both the fundamental rights of the juvenile and the essential purpose of juvenile courts. Indeed, the Supreme Court has long-recognized that bind over to adult court is a critical phase of proceedings that triggers constitutional due process and fundamental fairness principles. *Kent v. United States* (1966), 383 U.S. 541, 554 (“There is no place in our system of law for reaching a result of such tremendous consequence without ceremony-without hearing, without effective assistance of counsel, without a statement of reasons.”); *In re Gault* (1967), 387 U.S. 1. A central purpose of juvenile courts has always been rehabilitation. See e.g., *In re C.S.* (2007), 115 Ohio St.3d 267 (discussing rehabilitation as the historically recognized primary purpose of juvenile courts); see also *In re Snitzky*, 73 Ohio Misc.2d 52, 657 N.E.2d 1379. And, it is well-established that juvenile offenders should be treated differently than adults who commit the same crime. See generally *Roper v. Simmons* (2005), 543 U.S. 551 (discussing distinctions between juvenile and adult offenders and prohibiting execution of individuals who were under 18 at the time of their capital crime).

These principles are reflected in the Ohio statutes and rules regarding discretionary transfer. See R.C. 2152.12(B) and Ohio Juv. R. 30. Specifically, Ohio law expressly requires the juvenile court to assess a juvenile defendant’s amenability to rehabilitation before

² Former R.C. 2151.26, cited in both *Soke* and *Newton*, was amended and recodified as 2152.12

transferring jurisdiction to adult court. Moreover, R.C. 2152.12(B)(3) makes non-amenability a prerequisite to transfer of jurisdiction. The statute also states that, in assessing amenability, the juvenile court “*shall*” consider and weigh a list of enumerated factors, and that the record “*shall*” indicate the specific factors that were applicable and that the court weighed.” R.C. 2152.12(B)(3) (emphasis added). Similarly, Juv. R. 30 states that “an amenability hearing *shall* be held to determine whether to transfer jurisdiction.” Juv. R. 30(C) (emphasis added).

Importantly, there is nothing in the statute or the rule indicating that the juvenile defendant can waive the amenability hearing. On the other hand, while the statute and the rule expressly require the juvenile court to order a mental examination of the child, both the statute and the rule also expressly permit the child to waive the mental examination. See R.C. 2152.12(C) (“The child may waive the examination required by this division if the court finds the waiver is competently and intelligently made.”); Juv. R. 30(F) (“The child may waive the mental examination required under division (C) of this rule.”). See also *Newton*, 1983 WL 6836 at *3 (noting that, “if such procedures were intended to be subject to waiver, both Juv. R. 30 and R.C. 2151.26 would so provide, as they do in fact provide for waiver of the examinations.”). Therefore, as a matter of statutory interpretation, *inclusio unius est exclusio alterius*, and the statute prohibits waiver of the amenability hearing.

As a policy matter, prohibiting waiver is supported by the fundamental difference between jurisdiction over juvenile and adult defendants. The task of the adult court is to administer justice in society, in light of all of the rights and social responsibilities of adulthood. Juvenile courts must focus on rehabilitation, balancing the social interest in rehabilitating youthful offenders with the constant need to maintain safety. See generally *In re C.S.* (2007),

115 Ohio St.3d 267. Prohibiting waiver is consistent with the juvenile court's role "as *parens patriae* and the vision that the courts would protect the wayward child from 'evil influences,' 'save' him from criminal prosecution, and provide social and rehabilitative services." *Id.* at 273. It recognizes the policy that a juvenile court may determine that rehabilitation as a juvenile is appropriate even if the juvenile is willing to stand trial in adult court.

In the Opinion Below, the Eighth District simply cited *Soke* and included a parenthetical for the proposition that the amenability hearing may be waived. (Opinion Below at ¶ 30.) *Soke*, in turn, offers a cursory analysis of the issue. 1993 WL 266951. First, the *Soke* opinion acknowledges "that there is no specific authority for waiver of a bind over hearing," but also notes that "there is likewise no prohibition" *Id.* at *3. Then, the court correctly notes that the mental and physical examination may be waived. *Id.* Finally, the court cites *Kent*, 383 U.S. 541, for the proposition that "bind over is a critical phase and is mandatory[.]" but also notes that critical phases "may be knowingly, competently, and intelligently waived." *Id.* While other appellate courts have relied on *Soke*, their analysis has been similarly cursory. See e.g., *State v. Brown*, Clark App. No. 2005-CA-96, 2006-Ohio-4393 at ¶ 13.³

Newton, on the other hand, includes a more thorough analysis and is consistent with the plain language of the statute and rule governing discretionary transfer. Accordingly, this Court should accept jurisdiction over Mr. Warner's first proposition of law, and adopt the *Newton* holding: the R.C. 2152.12(B)(3) amenability hearing cannot be waived.

³ In *Brown*, the appellate court notes that Juv. R. 3 "provides that except for the right to counsel at transfer hearings, the 'rights of a child may be waived with the permission of the court.'" 2006-Ohio-4393 at ¶ 13. What *Brown* fails to recognize is that the amenability hearing is not only a right of the child but also a responsibility of the juvenile court.

Proposition of Law II: Waiver of the R.C. 2152.12(B)(3) amenability hearing before the juvenile court is not valid unless it is expressly stated on the record by the juvenile through his or her counsel, and the trial court must determine through a colloquy with the juvenile that the waiver is voluntarily, knowingly, and intelligently made.

Even if the amenability hearing is subject to waiver, there is no authority for the proposition that an implicit waiver will suffice. In the Opinion Below, the Eighth District held that Mr. Warner waived the amenability hearing. The Eighth District's finding of waiver was based on an off-the-record sidebar after which the juvenile court: (1) noted that an amenability hearing had occurred in a previous case and (2) concluded that the finding of non-amenability in the prior case rendered an amenability hearing unnecessary in this case. Thus, the Eight District adopted a concept of implied waiver under which the juvenile court can forgo an amenability hearing if the juvenile has previously been found not amenable to rehabilitation within the juvenile justice system. This rule is inconsistent with the express requirements of R.C. 2152.12(B), which states that the juvenile court may transfer the case to adult court only if it conducts a hearing and finds that "[t]he child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions." R.C. 2152.12(B)(3). Indeed, the statute requires the juvenile court to specifically state on the record the factors it considered in determining the question of amenability. *Id.*⁴

⁴ R.C. 2152.12(B)(3) provides:

(B) Except as provided in division (A) of this section, after a complaint has been filed alleging that a child is a delinquent child for committing an act that would be a felony if committed by an adult, the juvenile court at a hearing may transfer the case if the court finds all of the following:

(3) The child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions. In making its decision under this division, the court shall consider whether the applicable factors under division (D) of this section indicating that the case should be transferred outweigh the applicable factors under division (E) of

In addition, the Eighth District's rule conflicts with Rule 30(C) of the Ohio Rules of Juvenile Procedure, which states that an amenability hearing "*shall* be held":

(C) Discretionary transfer

In any proceeding in which transfer of a case for criminal prosecution is permitted, but not required, by statute, and in which probable cause is found at the preliminary hearing, the court shall continue the proceeding for full investigation. The investigation shall include a mental examination of the child by a public or private agency or by a person qualified to make the examination. When the investigation is completed, an amenability hearing shall be held to determine whether to transfer jurisdiction. The criteria for transfer shall be as provided by statute.

Juv. R. 30(C). Neither the applicable statute nor the procedural rule include any exceptions to the amenability hearing requirement, let alone the implied waiver exception relied upon by the juvenile court and the Eighth District in the instant case.

As the Eighth District found in the Opinion Below, the juvenile court did not conduct an amenability hearing prior to ordering discretionary transfer to adult court. Furthermore, the basis of the decision not to conduct a hearing is clearly stated on the record: the juvenile court had found Mr. Warner not amenable in connection with a prior case and, therefore, decided to "transfer this case over to the adult court, as well, without having another amenability hearing." Thus, the juvenile court did *not* find that Mr. Warner waived his right to an amenability hearing; instead, it found that no amenability hearing was necessary based on transfer of the prior case.

Nonetheless, the Eighth District overruled Mr. Warner's fourth assignment of error because it found that Mr. Warner's counsel waived the amenability hearing. The record establishes that Mr. Warner's counsel did not expressly waive the amenability hearing. Indeed,

this section indicating that the case should not be transferred. The record shall indicate the specific factors that were applicable and that the court weighed.

the record shows that defense counsel simply asked to approach the bench in response to the assistant prosecutor's suggestion that waiver of the amenability hearing was *not* necessary.

[ASSISTANT PROSECUTOR]: Your Honor, I believe we've had some preliminary discussions about waiving amenability. It has already been found. I don't even know that we need to waive amenability.

[DEFENSE COUNSEL]: If we could approach, your Honor.

THE COURT: Yes. Okay.

(Discussion held off the record.)

Immediately thereafter, the juvenile court explained that it would not conduct an amenability hearing in this case but would, instead, transfer the case based on the amenability hearing conducted in a prior case. In other words, Mr. Warner's counsel did not indicate to the juvenile court that his client would waive the amenability hearing; he simply did not take exception to the juvenile court's decision not to conduct it.

It is well-established that waiver is the "intentional relinquishment or abandonment of a known right." *State v. Foster* (2006), 109 Ohio St.3d 1, 11 ¶ 30 (quoting *United States v. Olano* (1993), 507 U.S. 725, 733, quoting *Johnson v. Zerbst* (1938), 304 U.S. 458, 464). The record clearly indicates that Mr. Warner did not intentionally relinquish or abandon his right to an amenability hearing. At most, Mr. Warner's counsel stood silent while the juvenile court erroneously decided not to conduct the required amenability hearing based on bootstrapping the prior finding of non-amenability onto this case.

As discussed above in the first proposition of law, R.C. 2152.12(B) and Juv. R. 30 expressly require an amenability hearing, followed by an on-the-record findings concerning the

Sub-section (A) of the statute relates to mandatory transfer of proceedings to adult court. R.C. 2152.12(A). It is undisputed that this is a discretionary transfer case governed by R.C. 2152.12(B).

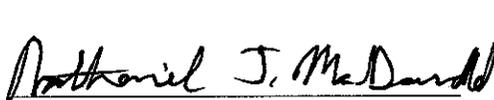
amenability factors considered and weighed. In *State v. Golphin* (1998), 81 Ohio St.3d 543, 545-46, this Court clearly stated that the mandatory procedures expressly required by these statutes must be followed by juvenile courts. While both the statute and the rule provide for an amenability hearing, neither provides for waiver of the hearing (let alone the implicit waiver applied in this case). Furthermore, as discussed above, the policy considerations at the heart of the jurisdiction of juvenile courts favors, at least, an express waiver of the amenability hearing, with permission of the court. See generally *In re C.S.*, 115 Ohio St.3d 267; Juv. R. 3.

Accordingly, this Court should accept jurisdiction over this case and adopt the second proposition of law to clarify that juvenile courts may not rely upon an implicit waiver of the amenability hearing expressly required under R.C. 2152.12(B) and Juv. R. 30.

CONCLUSION

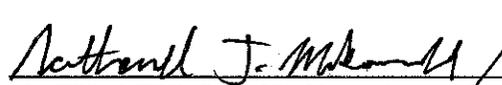
For the foregoing reasons, Defendant-Appellant Derek Warner respectfully asks this Court to accept jurisdiction over this matter as it raises a substantial constitutional issue and presents an issue of great general and public interest for review.

Respectfully Submitted,


NATHANIEL J. MCDONALD, ESQ. /CMT
0052997

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was hand-delivered upon William D. Mason and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 3rd day of October 2011.

 / CMJ
NATHANIEL J. MCDONALD, ESQ. 0052997
Assistant Public Defender

Judge Matia

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
No. 95750

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GERALD E. FUERST
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CUYAHOGA COUNTY

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEREK WARNER

A592912

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-539458

BEFORE: Boyle, P.J., S. Gallagher, J., and E. Gallagher, J.

RELEASED AND JOURNALIZED: August 18, 2011

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MARY J. BOYLE, P.J.:

Defendant-appellant, Derek Warner, appeals his conviction, arguing that there was insufficient evidence and that his conviction was against the manifest weight of the evidence. He also argues that the trial court erred in admitting other acts evidence and further challenges the juvenile court's decision binding him over to common pleas court. We affirm.

Procedural History and Facts

Warner, who was 17 years of age at the time of the offenses, was charged in juvenile court but subsequently bound over to common pleas court. The grand jury then returned a six-count indictment against Warner for the following charges: (1) burglary, in violation of R.C. 2911.12(A)(2), a second degree felony; (2) theft, in violation of R.C. 2913.02(A)(1), a fifth degree felony; (3) vandalism, in violation of R.C. 2909.05, a fifth degree felony; (4) criminal damaging, in violation of R.C. 2909.06, a misdemeanor of the second degree; and (5) two counts of bribery, in violation of R.C. 2921.02(C), third degree felonies. Warner pleaded not guilty to the charges, and the matter proceeded to a jury trial. The following evidence was presented:

On November 18, 2009, around 8:30 in the morning, two individuals broke into a home located on Kildeer Avenue in Cleveland. Shanay Ball was

downstairs in the basement working on her computer at the time of the break-in. Ball testified that she heard a loud bang and went upstairs to investigate. The perpetrators had broken into the side door of the house, leaving it open and blocking the basement door from fully opening. Ball "started banging on the door to get out" and apparently startled the two perpetrators, who dropped the flat screen television that was located in the living room and ran out of the house. Through the six-to-eight-inch opening in the doorway, Ball, however, was able to see the two perpetrators, whom she recognized from the neighborhood. Although she knew the two perpetrators by their "street names" — "Lil'D" and "Mookie," she did not know their proper names in order to tell the police.

The day following the incident, on November 19, Shanay positively identified Warner in a photo array as one of the perpetrators. She likewise identified Warner at trial.

The state also offered the testimony of Shanay's younger sister, Shaneice Ball (age 17), and Shanay's niece, Tahjay King (age 15), both of whom lived at the Kildeer residence and were friends with Warner. Both girls testified that Warner admitted to being involved in the burglary, albeit, solely as a "lookout," and had attempted to apologize following the incident.

Shaneice further testified that Warner gave her \$100, which she perceived to be part of his apology. Tahjay corroborated Shaneice's testimony, indicating that Warner had told her that he gave Shaneice \$100 and further told her that he wanted to give money to Tahjay's mother as well. According to Tahjay, Warner also instructed Tahjay to tell her mother not to appear in court because the burglary was not his fault. He stated that he would never have pursued the burglary if he knew someone was going to be home.

Through the testimony of the city of Cleveland and the city of Euclid police detectives and police officers, the state further established that Warner was spotted on November 18, 2009, hours after the burglary, driving a minivan that had been reported as being involved in a Cleveland burglary. Upon being flagged to pull over, Warner fled the vehicle and was later found hiding in a Euclid resident's garage. Upon Warner's being arrested, the police confiscated his cell phone. The police subsequently obtained a search warrant to go through the cell phone and retrieved photographs and texts sent from the phone, which included a picture of Warner with stacks of cash and the text "Lil'D."

Warner offered one witness in support of his defense—Cleveland police officer Francisco Cruz. Cruz testified that he was the first officer to respond to the scene of the burglary on Kildeer. According to Cruz, Shanay told him that two young, light-skinned males burglarized her home but did not indicate that she knew the two perpetrators.

The jury found Warner not guilty of the two counts of bribery but guilty of the remaining charges. The trial court subsequently sentenced Warner to six years in prison and notified him that he would be subject to a mandatory three-year period of postrelease control upon completion of his sentence.

Warner appeals, raising the following four assignments of error:

“[I.] The trial court erred in denying appellant’s criminal rule 29 motion for acquittal where there was insufficient evidence to prove identification of appellant.

“[II.] The appellant’s conviction for burglary under O.R.C. 2911.12(A)(2) was against the manifest weight of the evidence.

“[III.] The trial court erred in admitting prejudicial other acts and character type evidence.

“[IV.] The juvenile court erred in finding that appellant was not amenable to care and rehabilitation in the juvenile justice system, improperly

transferring/binding over appellant to the criminal division, common pleas court.”

Sufficiency and Weight of the Evidence

In his first assignment of error, Warner contends the state’s evidence was not sufficient to convict him of any of the offenses because the identification evidence tying Warner to the offenses was simply unreliable. In his second assignment of error, he maintains that the jury lost its way in convicting him of the charges because “his identity was not established.” We disagree.

When an appellate court reviews a record upon a sufficiency challenge, “the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. In reviewing a claim challenging the manifest weight of the evidence, “[t]he question to be answered is whether there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we

must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." (Internal quotes and citations omitted.) *Leonard*, 104 Ohio St.3d at ¶ 81.

The gravamen of Warner's first two assignments of error is that the state failed to present reliable identification evidence to establish that he was one of the perpetrators. Specifically, he contends that the victim had insufficient time and a limited view of the perpetrators to make a reliable identification and that the victim failed to provide the names of either perpetrator to the responding officer on the scene, despite her knowing Warner and the other alleged burglar. We find Warner's argument, however, misplaced. Here, the state presented the testimony of Shanay, who positively identified Warner as one of the perpetrators. Her testimony alone was enough to establish identification to survive a Crim.R. 29 motion for acquittal.

To the extent that Warner attacks Shanay's credibility in identifying him as one of the perpetrators, the jury heard and considered these arguments at trial. Notably, contrary to the defense's sole witness at trial,

Shanay testified that she did tell the street names of the perpetrators to the reporting officer on the scene. We cannot say that the jury "lost its way" simply because it found Shanay's testimony credible. Moreover, aside from Shanay's testimony, the state offered testimony of two other witnesses who established that Warner admitted to being involved in the burglary. Based on the record before us, again, we cannot say that this is the exceptional case where the jury clearly lost its way.

The first two assignments of error are overruled.

Other Acts Evidence

In his third assignment of error, Warner argues that the trial court erred in allowing the admission of text messages and photos taken from his cell phone. He contends that the evidence served no purpose other than to attack his character because the texts "strongly implied gangster or criminal conduct."

The standard of review regarding the admissibility of any such evidence is abuse of discretion. *State v. Sanford*, 8th Dist. No. 84478, 2005-Ohio-1009, ¶10, citing *State v. Montgomery* (1991), 61 Ohio St.3d 410, 575 N.E.2d 167.

Evid.R. 404(B) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The listed exceptions within Evid.R. 404(B) are not exclusive, and other acts evidence not fitting within the enumerated categories may be admissible so long as the evidence is admitted for any proper purpose other than proving the defendant's propensity to act and conformity with a particular trait of his character. *State v. Smith* (1990), 49 Ohio St.3d 137, 140, 551 N.E.2d 190.

Additionally, before allowing the admission of any relevant evidence, a trial court must comply with Evid.R. 403(A), which expressly requires the exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

Warner specifically contends that the trial court should not have allowed the admission of the photographs retrieved from his cell phone wherein he is holding stacks of money, and there are various phrases stated below the photographs, including "Money TalkZ" and "Li'D." The trial court allowed the admission of these exhibits, finding that they were admissible for the purpose of proving Warner's identity, i.e., that Warner was Li'D. The

trial court further agreed with the state that the stacks of money were relevant and admissible for showing that Warner, despite being only 17 years of age, had the means to bribe the victims. Under these circumstances, we fail to find an abuse of discretion.

Even assuming that the trial court should have excluded the photographs and texts retrieved from the telephone, we find that their admission was harmless error. "An error in the admission or exclusion of evidence is properly considered harmless error if it does not affect a substantial right of the accused." *State v. Condon*, 152 Ohio App.3d 629, 2003-Ohio-2335, 789 N.E.2d 696, ¶80, citing Crim.R. 52(A). As discussed above, aside from the eyewitness identification testimony wherein Warner was positively identified by someone who knew him, the state further offered Warner's own admissions made to other witnesses wherein he expressly acknowledged being involved in the burglary. Therefore, even if these exhibits had been excluded, we find that the record contains substantial evidence to support the convictions.

The third assignment of error is overruled.

Bindover Proceedings

In his final assignment of error, Warner argues that the juvenile court erred in determining that he was not amenable to care and rehabilitation in the juvenile justice system and therefore improperly transferred him over to common pleas court to be tried as an adult. We disagree.

A juvenile court's relinquishment of jurisdiction in a discretionary transfer proceeding pursuant to R.C. 2152.12(B) is reviewed under an abuse of discretion standard. *State v. Flagg*, Cuyahoga App. Nos. 93248 and 93249, 2010-Ohio-4247, ¶26, citing *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629.

"In a discretionary transfer proceeding, the juvenile court must first determine the age of the juvenile and whether probable cause exists to believe that he committed the alleged act. R.C. 2152.12(B)(1) and (2). The court must then determine whether the juvenile is amenable to rehabilitation within the juvenile justice system and whether the juvenile should be subject to adult sanctions in order to protect the community. R.C. 2152.12(B)(3). See, also *Juv.R. 30.*" *State v. Grimes*, 2d Dist. No. 2009-CA-30, 2010-Ohio-5385, ¶15.

Here, the record reveals that the juvenile court first held a probable cause hearing but then never held an amenability hearing. We find, however,

that Warner, through his counsel, waived the amenability hearing. See *State v. Soke* (July 15, 1993), 8th Dist. No. 62908 (recognizing that the amenability hearing may be waived). We therefore cannot say that the juvenile court abused its discretion in transferring the case to the common pleas division.

The final assignment of error is overruled.

Judgment affirmed.

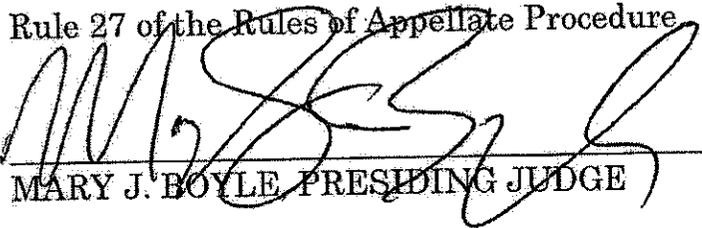
It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure



MARY J. BOYLE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
EILEEN A. GALLAGHER, J., CONCUR