

**IN THE SUPREME COURT OF OHIO
2015**

STATE OF OHIO,

Case No. 2015-0924

Plaintiff-Appellee,

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

RAYMOND MORGAN,

Court of Appeals
Case No. 13AP-620

Defendant-Appellant.

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

None of defendant Raymond Morgan’s four propositions of law warrants this Court’s review. Regarding Morgan’s first two propositions of law, the Tenth District correctly held that a failure to appoint a guardian ad litem (GAL) under Juv.R. 4(B)(2) and R.C. 2151.281(A)(2) is subject to plain error review if not properly preserved. Indeed, numerous courts have applied plain-error review—including the prejudice requirement—to GAL errors. See, e.g., *In re M.T.*, 6th Dist. No. L-09-1197, 2009-Ohio-6674, ¶¶ 14-16; *In re Smith*, 3rd Dist. No. 14-05-33, 2006-Ohio-2788, ¶¶ 35-36; *In re McHugh Children*, 5th Dist. No. 2004CA0091, 2005-Ohio-2345, ¶ 38; *In re Anderson*, 4th Dist. No. 02CA38, 2004-Ohio-7405, ¶ 9; *In re Amber G.*, 6th Dist. No. L-04-1091, 2004-Ohio-5665, ¶ 6 (opinion by Lanzinger, J.); *In re K.P.*, 8th Dist. No. 82709, 2004-Ohio-1448, ¶ 24. Morgan asked the Tenth District to certify a conflict with the cases cited in his memorandum (pp. 7-8), but the Tenth District denied the motion, noting that none of those cases involved the failure to appoint a GAL under Juv.R. 4(B)(1) and R.C. 2151.281(A)(1). Memo. Dec. at ¶ 14.

Even if so-called “structural errors” need not be preserved—a point the State does not concede—a failure to appoint a GAL is not a structural error because only *constitutional* errors can be structural and there is no constitutional right to a GAL, and because the absence of a GAL does not permeate “[t]he entire conduct of the trial from beginning to end” such that the trial cannot “reliably serve its function as a vehicle for determination of guilt or innocence.” *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 17.

The Tenth District also correctly found that Morgan was not prejudiced by the lack of a GAL. Morgan’s mother attended every hearing up until her passing shortly before the amenability hearing. At the amenability hearing, a woman who Morgan’s attorney identified as a “very close friend of the family who’s taken over the role of mom” was present. (The record

does not reveal whether the godsister was Morgan’s guardian or custodian, but the Tenth District apparently assumed that she was neither. If she was in fact Morgan’s guardian or custodian, then there would be no GAL error at all. Juv.R. 4(B)(2); R.C. 2151.281(A)(2).) And, of course, Morgan was represented by counsel throughout all the proceedings. As the Tenth District recognized, while Morgan “articulates in a general sense the important function that a guardian ad litem provides in juvenile court,” he failed to “articulate how, specifically, the juvenile court’s failure to appoint a guardian ad litem here prejudiced him.” Opinion at ¶ 25.

The Tenth District’s application of plain-error review to Morgan’s GAL claim is consistent with the general rule that errors must be preserved to warrant full appellate review. It is also consistent with Juv.R. 3(E), which states that “[o]ther rights of a child may be waived with permission of the court.” This Court has held that the amenability hearing itself is among the “other rights” that may be waived. *State v. D.W.*, 133 Ohio St.3d 434, 2012-Ohio-4544, syllabus. It would be an odd rule that said that the amenability hearing may be waived (thus precluding all appellate review), but that the lack of a GAL at an amenability hearing is not subject to forfeiture through lack of objection.

Morgan’s third proposition of law is equally unworthy of review. Morgan claims that the bindover was “void” because written notice of the amenability hearing was not provided as required by Juv.R. 30(D) and R.C. 2152.12(G). To the extent Morgan claims that notice should have been provided to his mother, that argument is plainly without merit. Morgan’s mother passed away before the amenability hearing was scheduled, so providing Morgan’s deceased mother with notice would have been pointless. To the extent Morgan claims that notice should have been provided to the GAL, that argument is a non-starter. No GAL was appointed, so there was no GAL to send notice to. Since the absence of a GAL was not reversible error, the absence

of notice to a GAL likewise is not reversible error. And to the extent Morgan claims that notice should have been provided to the godsister, that argument too is a non-starter. The Tenth District's apparent assumption that the godsister was not Morgan's guardian or custodian for purposes of Morgan's GAL argument means that she was not entitled to any notice at all.

Thus, there was no lack-of-notice error at all. The Tenth District, however, went one step further and concluded that, even if there was a lack-of-notice error, Morgan failed to show prejudice from any lack of notice. Opinion at ¶ 28. Morgan asked the Court to certify a conflict between this holding and *State v. Taylor*, 26 Ohio App.3d 69 (3rd Dist.1985), but the Tenth District refused, noting that (1) “[n]othing in *Taylor* contemplates the sending of written notice to deceased parents,” and (2) while there was a lack-of-notice error in *Taylor*, “our language in *Morgan* indicates we did not hold that the juvenile court's failure to send written notice to Morgan's deceased parents was error.” Memo. Dec. at ¶ 18.

Lastly, Morgan's fourth proposition of law does not warrant review. This Court has already held that juvenile courts have wide latitude to retain or relinquish jurisdiction over a juvenile. *State v. Watson*, 47 Ohio St.3d 93, 95 (1989), citing *State v. Carmichael*, 35 Ohio St.2d 1 (1973), paragraphs one and two of the syllabus. Even if Morgan is correct in that there is a “presumption” against bindovers, the bottom line is that a juvenile court has discretion in deciding whether such “presumption” has been rebutted. The Tenth District applied the abuse-of-discretion standard of review and found that the juvenile court did not abuse its discretion. Opinion at ¶ 41. This fact-specific holding does not warrant review.

In the end, this case presents no questions of such constitutional substance or great public interest as would warrant further review by this Court. Jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

This case originated as three separate delinquency complaints filed in juvenile court. The first complaint charged Morgan with two counts of felonious assault, each with an accompanying firearm specification. The second complaint charged Morgan with one count of aggravated robbery, one count of robbery, one count of felonious assault, and one count of kidnapping, each with an accompanying firearm specification. The third complaint charged Morgan with one count of receiving stolen property.

The State moved the juvenile court to relinquish jurisdiction to the general division of the common pleas court. After Morgan stipulated to probable cause, the juvenile court held an amenability hearing on all three complaints. Morgan was represented by counsel at the hearing, but he did not have a parent present because his father had passed away in January 2012, and his mother had passed away shortly before the amenability hearing. A family friend who Morgan's counsel referred to as a "very close friend of the family who's taken over the role of mom" was present at the amenability hearing. The juvenile court noted that it had considered the psychological evaluation recommending that Morgan is amenable to care and/or rehabilitation in the juvenile system. Nonetheless, the juvenile court transferred jurisdiction, noting "the particularly egregious nature of this gun violence crime spree".

After the juvenile court had transferred jurisdiction to the general division, Morgan was indicted on 13 counts: one count of aggravated robbery, one count of attempted aggravated robbery, one count of attempted aggravated burglary, two counts of robbery, one count of burglary, three counts of felonious assault, three counts of theft, and one count of tampering with evidence. All 13 counts carried a firearm specification.

Morgan eventually agreed to plead guilty to four counts: one count of burglary (with no firearm specification), two counts of felonious assault (both with a three-year firearm

specification), and one count of aggravated robbery (with a three-year firearm specification). At the plea hearing, the prosecutor recited the facts as follows:

The charges stem from four separate incidents occurring over a two-day period in German Village. On February 8, 2012, Craig Youngman reported that his home on Stewart Avenue was broken into at some point that day and two firearms and a camera had been stolen. Later that night, Bruce Sedlock was unlocking the door to his home on South Sixth Street when he was shot in the leg. About a half-hour later, Eric Hayes was getting out of his vehicle on Stewart Avenue when he noticed two males walk past him. As Hayes was exiting his vehicle, he heard two gunshots and realized he had been shot. He was taken to Grant Medical Center where he had his spleen surgically removed.

The fourth incident occurred the following evening, February 9th. Jimmy White was walking on East Whittier when he passed Morgan, Morgan's brother Joshua, and Rashod Draper. White glanced back over his shoulder and saw that Joshua had turned around and was approaching him with a gun. Joshua pointed the gun at White and demanded his property. White, however, pulled out a utility knife he had in his pocket and stabbed Joshua in the neck. At the same time, White tried to get the gun away from Joshua, but during the tussle White was shot in the leg. Nonetheless, White was able to wrest the gun away from Joshua, at which point he saw Draper—who also had a gun—and Morgan approaching him. White then shot Draper, while Morgan and Joshua ran away.

Morgan and Draper were involved in all four incidents; Joshua was involved in only the fourth incident. The firearm used to shoot Sedlock, Hayes, and White was one of the firearms stolen from Youngman's home. The camera stolen from Youngman's home was recovered from Morgan's and Joshua's home; their mother had turned it over to the police.

The trial court sentenced Morgan to a total of 18 years in prison. Morgan appealed, and Tenth District affirmed Morgan’s convictions but remanded the case for consecutive-sentence findings. Morgan then sought reconsideration and asked the Tenth District to certify a conflict. The Tenth District denied both motions. Morgan now seeks discretionary review.

ARGUMENT

Response to First and Second Propositions of Law: If not properly preserved, a failure to appoint a guardian ad litem under Juv.R. 4(B)(2) and R.C. 2151.281(A)(2) is subject to plain-error review, which requires a showing of prejudice.

Juv.R. 4(B)(1) requires a juvenile court to appoint a GAL when “[t]he child has no parents, guardian, or legal custodian.” See, also, R.C. 2151.281(A)(1). Morgan’s father passed away in January 2012. His mother was alive when the complaints were filed in juvenile court, and she attended every hearing up to and including the August 9, 2012, hearing during which the defense stipulated to probable cause. The amenability hearing was originally scheduled for September 13th, but it was continued to October 18th due to unavailable witnesses. On that date, the amenability hearing was continued again to October 24th—this time due to the funeral for defendant’s mother. At the amenability hearing on October 24th, the passing of defendant’s mother was discussed on the record. Defendant therefore “ha[d] no parents” at the time of his amenability hearing.

But a person to whom defendant’s attorney referred as a “very close friend of the family who’s taken over the role of mom” was present at the amenability hearing. This woman identified herself as Morgan’s “godsister.” Even assuming that the godsister was not Morgan’s guardian or legal custodian, the defense’s failure to raise the GAL issue below forfeits all but plain error. Under the civil plain-error standard (applicable in juvenile proceedings), “reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare

cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings.” *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121 (1997).

Under the plain-error standard, even if the juvenile court erred in failing to appoint a GAL, “this does not end the inquiry.” *In re Amber G.* at ¶¶ 34-35. “If the court finds that a [GAL] should have been appointed, the next inquiry is whether there was any prejudice by the failure to appoint a [GAL].” *In re McHugh Children* at ¶ 49, citing *In re K.P.*, 8th Dist. No. 82709, 2004-Ohio-1448, ¶ 24, and *In re Anderson*, 4th Dist. No. 02CA38, 2004-Ohio-7405, ¶ 9. An appellate court does not “presume prejudice” when a juvenile court fails to appoint a GAL. *In re Amber G.* at ¶ 38, citing *In re Anderson* at ¶ 9.

Morgan “has not pointed to anything in the record to show how he “was prejudiced by the failure to have a [GAL] and also has not argued how having a [GAL] would have altered the outcome.” *In re Amber G.* at ¶ 38. Importantly, Morgan was represented by counsel and thus was not “wholly unprotected.” *Id.* at ¶ 36. Although counsel and a GAL serve different roles, *In re Baby Girl Baxter*, 17 Ohio St.3d 229, 232 (1985), the two roles often coincide. Indeed, appointed counsel may also serve as GAL as long as the roles do not conflict. Juv.R. 4(C)(1); R.C. 2151.281(H). The failure to appoint a GAL results in no prejudice if counsel safeguards the client’s rights and advocates in accordance with the client’s wishes. *In re M.T.* at ¶ 17, citing *In re A.S.*, 6th Dist. No. L-09-1080, 2009-Ohio-5504, ¶ 58.

At no point was there any indication that Morgan’s best interests conflicted with counsel’s role in protecting Morgan’s substantive and procedural rights. It is difficult to imagine that a GAL would have recommended anything other than that Morgan should not be bound

over—which is exactly what Morgan’s counsel argued at the amenability hearing. *In re M.T.* at ¶ 18 (“Appellant has failed to demonstrate how a [GAL] would have acted differently [from counsel] or produced a different result.”). Thus, a GAL in this case would have been little more than glorified co-counsel. This is not to suggest that Morgan’s counsel was also his GAL, but Morgan’s “rights were safeguarded,” because he was represented by counsel who argued against transferring jurisdiction. *In re Amber G.* at ¶ 36.

Moreover, up until her passing, Morgan’s mother attended every hearing and participated in the psychological investigation. *In re Cremeans*, 8th Dist. No. 61367 (1992) (although the GAL was absent during testimony of agency’s witness, the GAL was “actively involved in the case” so the “absence of the [GAL] in this one instance [] could not rise to the level of ‘plain error’”). Morgan is correct that the amenability hearing was important, but by that point the godsister had “taken over the role of mom” and was present at the hearing, thus further eliminating any prejudice. *In re J.J.*, 10th Dist. No. 06AP-495, 2006-Ohio-6151, ¶ 25 (no plain error when a “stand-in” GAL appeared on behalf of the appointed GAL during part of the trial). Morgan failed to demonstrate that having the family friend appear at the amenability hearing rather than his mother undermined the basic fairness of the hearing. *Id.* at ¶ 26.

These propositions of law warrant no further review.

Response to Third Proposition of Law: Written notice under Juv.R. 30(D) need not be sent to a deceased parent or to anyone else who is not the juvenile’s parent, guardian, or other custodian

Written notice of an amenability hearing must be sent to “the state, the child’s parents, guardian, or other custodian and the child’s counsel at least three days prior to the hearing, unless written notice has been waived on the record.” Juv.R. 30(D); see, also, R.C. 2152.12(G). It is not clear who Morgan argues should have received written notice. To the extent Morgan argues

that written notice should have been sent to his mother, that argument is plainly without merit. Morgan’s mother passed away before the October 24th amenability hearing had even been scheduled (the hearing was continued from October 18th to October 24th to allow Morgan to attend his mother’s funeral). Certainly, Juv.R. 30(D) does not require sending written notice to deceased parents. *State v. Reynolds*, 10th Dist. No. 06AP-915, 2007-Ohio-4178, ¶ 11.

To the extent that Morgan claims written notice should have been sent to a GAL, that argument is without merit as well. No GAL was ever appointed, so no written notice was required to be sent to a non-existent GAL. And to the extent Morgan claims that written notice should have been sent to the godsister, that argument fails, too. If the godsister was not Morgan’s guardian or legal custodian—as Morgan argues for purposes of the GAL issue, and as the Tenth District apparently assumed—then she was not entitled to any notice at all.

Even if there were some lack-of-notice error here, the Tenth District correctly concluded that Morgan failed to show prejudice. Morgan “does not suggest he was unaware of the hearing or unprepared, nor does he articulate how the outcome of the proceeding would have been different had his mother received proper notice before her death.” Opinion at ¶ 28.

This proposition of law warrants no further review.

Response to Fourth Proposition of Law: A juvenile court’s decision transferring jurisdiction is subject to an abuse-of-discretion standard of review.

“Given the nature and consequences of the amenability hearing, juvenile court judges are entrusted with significant authority when conducting the hearings.” *D.W.* at ¶ 12. A juvenile court thus has wide latitude to retain or relinquish jurisdiction over a juvenile. *State v. Watson*, 47 Ohio St.3d 93, 95 (1989), citing *State v. Carmichael*, 35 Ohio St.2d 1 (1973), paragraphs one

and two of the syllabus. Thus, a juvenile court’s findings regarding amenability are reviewed for an abuse of discretion. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, ¶ 39.

In exercising this discretion, there is no requirement that each, or any, of the various factors “be resolved against the juvenile so long as the totality of the evidence supports a finding that the juvenile is not amenable to treatment.” *Watson* at 95. The scheme “calls for a broad assessment of individual circumstances. Mechanical application of a rigidly defined test would not serve the purposes of the public or the juvenile. Further, reduction of the bindover decision to a formula would constrain desirable judicial discretion.” *Id.* Even when there are factors that are “admittedly favorable” to the juvenile, the court can still find that the juvenile is not amenable. *Id.* at 96.

The juvenile court was well within its discretion in transferring jurisdiction. The court found the following factors favoring transfer under R.C. 2152.12(D):

(1) The victim of the act charged suffered physical or psychological harm, or serious economic harm, as a result of the alleged act.

* * *

(4) The child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity.

(5) The child had a firearm on or about the child’s person or under the child’s control at the time of the act charged, the act charged is not a violation of section 2923.12 of the Revised Code, and the child, during the commission of the act charged, allegedly used or displayed the firearm, brandished the firearm, or indicated that the child possessed a firearm.

* * *

(8) The child is emotionally, physically, or psychologically mature enough for the transfer.

The juvenile court found none of the factors under R.C. 2152.12(E) weighed against transfer. The court considered the psychological evaluation, but it discounted the recommendations in the evaluation, and placed more emphasis on the nature of Morgan’s acts—particularly the use of guns to commit random acts of violence. The juvenile court stated that this was a “potentially deadly spree of gun violence” involving a “blatant disregard for life, health and the safety of others in the community * * *.” The court further noted that the need to “secure and protect the safety of the community” “would be severely at risk if Raymond Morgan were retained [] in the Juvenile Justice System.”

A juvenile court “is not bound by expert opinion, and may assign any weight to expert opinion that it deems appropriate.” *State v. West*, 167 Ohio App.3d 598, 2006-Ohio-3518, ¶ 30 (4th Dist.), citing *State v. Lopez*, 112 Ohio App.3d 659, 662 (9th Dist.1996), and *State v. Whiteside*, 6 Ohio App.3d 30, 36 (3rd Dist.1982). The juvenile court therefore was well within its discretion in discounting the psychological evaluation and placing greater emphasis on the nature of Morgan’s acts. *Watson* at syllabus (juvenile court is permitted to consider the seriousness of the crime in making a discretionary bindover decision).

This proposition of law warrants no further review.

CONCLUSION

For the foregoing reasons, the State respectfully requests that jurisdiction should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail this day, July 6, 2015, to CHARLYN BOHLAND, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; Counsel for Defendant-Appellant.

/s/ Seth L. Gilbert

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