

**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
RECONSIDERATION**

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MEMORANDUM

Defendant Raymond Morgan offers no good reason for this Court to reconsider its decision not to accept discretionary review. Morgan repeats the same arguments that he made in the Tenth District and in his memorandum supporting jurisdiction. As he has done before, Morgan argues that the juvenile court's failure to appoint a guardian ad litem (GAL) at the amenability hearing requires *automatic reversal*. Morgan claims that even though the issue was not raised in the juvenile court, he should not have to show prejudice because Juv.R. 4(A)(1) and R.C. 2151.281(A)(1) use the word "shall," and because reversal is necessary to protect the fairness of the proceedings. These arguments do not warrant further review now any more so than they did when this Court declined jurisdiction on December 2, 2015.

To start, the fact that a statute or rule uses the word "shall" does not mean that a deviation from that provision requires reversal in every case. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297 (applying plain-error review when trial court failed to comply with R.C. 2945.10(G), which states that courts "shall" maintain written jury instructions with papers of the case). The use of the word "shall" (or other mandatory language, such as "shall not," "must," "must not," "require," etc.) merely establishes a legal rule. But showing a deviation from a legal rule—i.e., an error—does not guarantee reversal. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). If the error was not properly preserved, then the appellant must satisfy plain-error review, which in turn requires a showing of prejudice. *Id.* This is basic appellate procedure.

Indeed, even the most fundamental constitutional rights are subject to plain-error review if not properly preserved. Even if a constitutional error is fully preserved, the judgment will be affirmed if the error was harmless beyond a reasonable doubt. Constitutional rights are no less legal rules than Juv.R. 4(A)(1) and R.C. 2151.281(A)(1). Many constitutional provisions even use the word "shall." See, e.g., United States Constitution, Am. I, IV, V, VI, VIII. If an

unpreserved constitutional violation does not require automatic reversal, then it is difficult to see why an unpreserved violation under Juv.R. 4(A)(1) and R.C. 2151.281(A)(1) should. Morgan does not even try to classify such a violation as a “structural error.” And for good reason, as a failure to appoint a GAL does not come close to satisfying the strict requirements for structural error. Besides, a structural error only means that harmless-error review does not apply; it does not obviate the need to show plain error if the error was not preserved.

Morgan argues that reversal is necessary to protect the fairness of the proceedings, but that is exactly what plain-error review is. As the Tenth District itself stated, plain-error review in this context requires reversal “only if we conclude that the alleged error seriously affected the ‘basic fairness, integrity, or public reputation’ of the proceedings below.” Opinion at ¶ 19, quoting *In re A.L.*, 10th Dist. No. 07AP-638, 2008-Ohio-800, ¶ 24, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus. After examining the record, the court found that, despite the absence of a GAL, this case is not one “in which the public’s confidence in the judicial system has been undermined.” Opinion at ¶ 29. Thus, the Tenth District did in fact “interpret[] the plain error doctrine with a focus towards fairness.” Mtn, p. 6. What Morgan advocates is the exact opposite—i.e., that appellate courts not inquire at all into the fairness of the proceedings, but rather order reversal no matter what impact (or lack thereof) the absence of a GAL had on the outcome of the case.

Moreover, Morgan is wrong in claiming that he faced the amenability hearing without any “protective figure to look to for comfort and advice.” Mtn, p. 1. Importantly, Morgan was represented by counsel. As the Tenth District explained, nothing suggests that a GAL advocating for Morgan’s “best interest” would have requested anything other than that Morgan not be bound over—which is exactly what Morgan’s counsel argued. Opinion at ¶¶ 24-25. This

case is different from *In re J.C.*, 5th Dist. Nos. 14CA23, 14CA24, 2015-Ohio-4664, because in that case, the Fifth District emphasized that the attorney “could not properly serve in a dual capacity as guardian ad litem.” *Id.* at ¶ 34. This is because the attorney said on the record that he was foregoing an objection, even though he thought doing so was *against* the juvenile’s best interest. *Id.* at ¶ 29. The fact that the court in *In re J.C.* even bothered to mention the attorney’s inability to serve as GAL shows that the court was *not* applying an automatic-reversal approach. Rather, it reversed because the specific facts of that case justified it.

The Tenth District noted the existence of another “protective figure” at the amenability hearing: a family friend who identified herself as Morgan’s “godsister.” Opinion at ¶ 26. This woman informed the juvenile court that she had “taken over the role of mom.” The Tenth District held that Morgan failed to show “that the basic fairness of [his] trial was undermined or that its result was affected by the fact that a family friend appeared to support appellant instead of a parent, guardian or legal custodian.” *Id.*, quoting *In re J.J.*, 10th Dist. No. 06AP-495, 2006-Ohio-6151, ¶ 26.

In short, Morgan’s counsel and his godsister were present at the amenability hearing to “protect his interests.” *Mtn*, p. 5. Appointing a GAL would have had no effect on the outcome of the proceedings. The Tenth District therefore correctly held that the juvenile court’s failure to appoint a GAL did not amount to plain error.

Finally, this Court’s review is unwarranted because the circumstances of this case are not widespread. It will rarely be the case that a juvenile has no parent, guardian, or legal custodian, such that a GAL would be required under Juv.R. 4(B)(1) and R.C. 2151.281(A)(1). The vast majority of cases addressing the absence of a GAL involve Juv.R. 4(B)(2) and R.C. 2151.281(A)(2), which require a GAL when there is a conflict of interest between the juvenile

and his or her parents, guardian, or legal custodian. *In re D.R.B.*, 8th Dist. No. 102252, 2015-Ohio-3346, ¶ 22 (noting “minimal case law” addressing Juv.R. 4(B)(1) and R.C. 2151.281(A)(1) and that the “majority of legal challenges have been based on” alleged conflicts). The Tenth District recognized that cases under Juv.R. 4(A)(1) and R.C. 2151.281(A)(1) do not present the same legal question as conflict cases. Opinion at ¶ 21. Morgan cites *State v. Simmonds*, 10th Dist. No. 14AP-1065, 2015-Ohio-4460, as proof of a “trend [that] is troublesome,” Mtn, p. 5, but *Simmonds* was a conflict case. The Tenth District in *Simmonds* found that the record “does not demonstrate a potential conflict” and that “the juvenile court was under no duty to provide a guardian ad litem for Simmonds under the circumstances.” *Id.* at ¶ 13. In other words, there was no GAL error at all in *Simmonds*. That case is not proof of any troublesome trend.

In the end, Morgan fails to show any basis for this Court to reconsider its decision to decline review. His motion should be overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by electronic mail, this day,
December 18, 2015, to Charlyn Bohland, at charlyn.bohland@opd.ohio.gov.

/s/ Seth L. Gilbert
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