

[Cite as *State v. Legg*, 2016-Ohio-801.]

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
PICKAWAY COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA23
vs.	:	
JORDAN J. LEGG,	:	DECISION AND JUDGMENT
Defendant-Appellant.	:	ENTRY

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APPEARANCES:

Timothy Young, Ohio Public Defender, and Sheryl Trzaska, Assistant Ohio Public Defender, Columbus, Ohio, for Appellant.

Judy C. Wolford, Pickaway County Prosecutor, and Heather MJ Armstrong, Pickaway County Assistant Prosecuting Attorney, Circleville, Ohio, for Appellee.

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CRIMINAL CASE FROM COMMON PLEAS COURT  
DATE JOURNALIZED: 2-10-16

ABELE, J.

{¶ 1} This is an appeal from a Pickaway County Common Pleas Court judgment of conviction and sentence. The court found Jordan J. Legg, defendant below and appellant herein, guilty of aggravated murder in violation of R.C. 2903.01(B) and sentenced appellant to serve twenty years to life in prison. Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

“THE JUVENILE COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO APPOINT A GUARDIAN AD LITEM FOR JORDAN LEGG AT HIS TRANSFER PROCEEDINGS, IN VIOLATION OF R.C. 2151.281(A) AND JUV.R. 4(B).”

SECOND ASSIGNMENT OF ERROR:

“THE JUVENILE COURT COMMITTED PLAIN ERROR WHEN IT FOUND PROBABLE CAUSE THAT JORDAN COMMITTED A CATEGORY ONE OFFENSE AND TRANSFERRED HIS CASE FOR CRIMINAL PROSECUTION, IN VIOLATION OF HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16, OHIO CONSTITUTION.”

THIRD ASSIGNMENT OF ERROR:

“THE JUVENILE COURT COMMITTED PLAIN ERROR WHEN IT TRANSFERRED JORDAN LEGG’S CASE TO CRIMINAL COURT BECAUSE THE MANDATORY TRANSFER PROVISIONS IN R.C. 2152.10(A)(1)(a) AND R.C. 2152.12(A)(1)(a)(i) ARE UNCONSTITUTIONAL IN VIOLATION OF A CHILD’S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16, OHIO CONSTITUTION.”

## FOURTH ASSIGNMENT OF ERROR:

“JORDAN LEGG WAS TRANSFERRED TO ADULT COURT AND CONVICTED OF AGGRAVATED MURDER IN VIOLATION OF HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENTS, AS GUARANTEED BY THE EIGHTH AND FOURTEEN AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9, OHIO CONSTITUTION.”

## FIFTH ASSIGNMENT OF ERROR:

“THE JUVENILE COURT COMMITTED PLAIN ERROR WHEN IT TRANSFERRED JORDAN LEGG’S CASE TO CRIMINAL COURT BECAUSE THE MANDATORY TRANSFER PROVISIONS IN R.C. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) VIOLATE A CHILD’S RIGHT TO EQUAL PROTECTION AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 2, OHIO CONSTITUTION.”

## SIXTH ASSIGNMENT OF ERROR:

“JORDAN LEGG WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 10, OHIO CONSTITUTION.”

{¶ 2} On March 30, 2014, Thomas Whitson's body was discovered in his home. He had been shot in the head. A subsequent investigation revealed that seven weapons had been stolen from Whitson's home. Law enforcement officers later learned that Whitson's grandson, Shaun Lawson, along with appellant and others, had stolen the weapons. They further learned that Lawson shot Whitson.

{¶ 3} Appellant, who was seventeen years of age, was charged with delinquency for committing several offenses that would constitute felonies if an adult committed them: (1) aggravated burglary in violation of R.C. 2911.11(A)(1); (2) theft in violation of R.C. 2913.02(A);

(3) aggravated murder in violation of R.C. 2903.01(A); (4) aggravated murder in violation of R.C. 2903.01(B); (5) murder in violation of R.C. 2903.02(A); and (6) murder in violation of R.C. 2903.02(B).

{¶ 4} On April 7, 2014, the state filed a motion to transfer the aggravated murder and murder charges for prosecution in common pleas court and on April 24, 2014, the trial court held a hearing to consider the state's request. Pickaway County Sheriff's Detective John Strawser testified that on March 31, 2014, law enforcement officers discovered appellant sleeping in the basement of a home where his friend, Shaun Lawson, had been staying. After a search of the basement, law enforcement officers recovered three of the weapons that had been stolen from the victim's home. Appellant was taken into custody and, during subsequent interviews, Detective Strawser learned that appellant had struck the victim "with a stick type object and he was there and helped carry out the weapons."

{¶ 5} Pickaway County Sheriff's Detective Rex Emrick testified that before he interviewed appellant, he called appellant's mother. Detective Emrick explained that appellant's mother "indicated that \* \* \* she's been having some problems with [appellant] and that [appellant] would probably lie to us." She further advised Detective Emrick that appellant ran away from home and had been missing for approximately three months. Detective Emrick obtained appellant's mother's consent to interview appellant.

{¶ 6} Detective Emrick stated that appellant initially denied being involved in stealing the weapons or murdering the victim. Detective Emrick explained that after his initial interview with appellant, he spoke with Shaun Lawson. The detective stated that Lawson indicated that appellant had been involved in committing the offenses.

{¶ 7} Detective Emrick also interviewed appellant a second time. This time, appellant admitted that he was at the victim's home when the weapons were stolen and admitted that he struck the victim on the arm with a "walking stick." Appellant further admitted that he knew before going to the victim's home that the plan was to steal weapons and, that if either Lawson's grandfather (the victim) or father were home, Lawson would kill them. Detective Emrick stated: "The plan was to go in, knock them to the floor, beat them and then as they got the guns as they left, [Lawson] was going to shoot them." Appellant claimed that he was not inside the house when Lawson shot the victim, but was carrying the weapons to the car when he heard the shots. Detective Emrick concluded that the murder occurred during the commission of a burglary.

{¶ 8} On April 28, 2014, the trial court transferred jurisdiction to the common pleas court for criminal prosecution. The court found that appellant was "seventeen at the time of the conduct charged and that there is probable cause to believe that he committed the acts alleged in the [c]omplaints and that each of such acts, if committed by an adult, would constitute felonies."

{¶ 9} On May 2, 2014, a Pickaway County Grand Jury returned an indictment that charged appellant with (1) aggravated murder in violation of R.C. 2903.01(A); (2) aggravated murder in violation of R.C. 2903.01(B); (3) murder in violation of R.C. 2903.02(A); (4) murder in violation of R.C. 2903.02(B); (5) aggravated burglary in violation of R.C. 2911.11(A)(1); and (6) grand theft in violation of R.C. 2913.02(A)(1).

{¶ 10} On September 4, 2014, appellant entered a petition to enter a plea of guilty to the aggravated murder charge. The court granted the state's motion to amend the indictment and dismissed the remaining counts. The court then found appellant guilty of aggravated murder, in violation of R.C. 2903.01(B), and sentenced appellant to serve twenty years to life in prison.

This appeal followed.

I

{¶ 11} In his first assignment of error, appellant asserts that the trial court erred by failing to appoint a guardian ad litem to protect his interests during the transfer proceedings. Specifically, appellant argues that his interests conflicted with his mother's interests, and that R.C. 2151.281(A) and Juv.R. 4(B) required the court to appoint a guardian ad litem. Appellant contends that his mother's statement to Detective Emrick (she had "been having some problems with [appellant] and \* \* \* [appellant] would probably lie to us") demonstrates that her interests conflicted with appellant's interests. Appellant asserts that the detective's testimony should have prompted the trial court to "recognize its mandatory duty to appoint a guardian ad litem to protect [appellant]'s interests in the proceedings."

{¶ 12} Initially, we question whether appellant, by pleading guilty, preserved this issue for appeal. A guilty plea constitutes a complete admission of guilt, Crim.R. 11(B)(1), and "renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." State v. Fitzpatrick, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶78, quoting Menna v. New York, 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), fn.2; accord State v. Rogers, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶19. Thus, a defendant who voluntarily, knowingly, and intelligently enters a guilty plea "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Fitzpatrick at ¶78, quoting Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). In other words, a voluntary, knowing, and

intelligent guilty plea waives any alleged constitutional violations unrelated to the entry of the guilty plea and nonjurisdictional defects in the proceedings. State v. Ketterer, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶105; State v. Storms, 4<sup>th</sup> Dist. Athens No. 05CA30, 2006-Ohio-3547, ¶9. A guilty plea thus “effectively waives all appealable errors at trial unrelated to the entry of the plea.” Ketterer at ¶105, quoting State v. Kelley, 57 Ohio St.3d 127, 566 N.E.2d 658 (1991), paragraph two of the syllabus. A guilty plea does not, however, “waive a claim that judged on its face the charge is one which the State may not constitutionally prosecute.” Menna, 423 U.S. at 63; accord State v. Wilson, 58 Ohio St.2d 52, 388 N.E.2d 745, 746 (1979), paragraph one of the syllabus (“While a counseled plea of guilty is an admission of factual guilt which removes issues of factual guilt from the case, a defendant is not precluded from raising on appeal other issues which attack the constitutionality of the statute under which he has been convicted.”).

{¶ 13} In the case at bar, appellant’s first assignment of error does not claim that the court’s failure to appoint a guardian ad litem during the transfer proceeding affected the court’s jurisdiction or rendered his plea unknowing, unintelligent, or involuntary. He also does not argue that the state was constitutionally prohibited from prosecuting him. Consequently, by pleading guilty, appellant waived the right to challenge the lack of a guardian ad litem. Cf. State v. Spates, 64 Ohio St.3d 269, 271, 595 N.E.2d 351 (1992) (stating that a guilty plea waives a defendant’s right to challenge the deprivation of counsel at a preliminary hearing).

{¶ 14} Furthermore, we observe that appellant did not request the trial court to appoint a guardian ad litem or object to the court’s failure to do so. It is well-established that “an appellate court will not consider any error which counsel for a party complaining of the trial

court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.'" State v. Quarterman, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶15, quoting State v. Awan, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986), quoting State v. Childs, 14 Ohio St.2d 26, 236 N.E.2d 545 (1968), paragraph three of the syllabus; accord Risner v. Ohio Dept. of Natural Resources, Ohio Div. of Wildlife, 2015-Ohio-3731, ¶26; Rogers, *supra*, at ¶21. Appellate courts nevertheless have discretion to consider forfeited issues using a plain-error analysis. *E.g.* Risner at ¶27. Crim.R. 52(B) provides appellate courts with discretion to correct "[p]lain errors or defects affecting substantial rights." This court previously held that a trial court's failure to appoint a guardian ad litem when required to do so constitutes reversible error.<sup>1</sup> In re Slider, 160 Ohio App.3d 159, 2005-Ohio-1457, 826 N.E.2d 356 (4<sup>th</sup> Dist.), ¶12, citing In re Spradlin, 140 Ohio App.3d 402, 747 N.E.2d 877 (4<sup>th</sup> Dist.).

{¶ 15} If we assume, *arguendo*, that appellant did not waive or forfeit his right to raise this issue, we still do not believe that the trial court erred by failing to appoint a guardian ad litem to represent appellant's interests during the transfer proceeding.

{¶ 16} A guardian ad litem is a "person appointed to protect the interests of a party in a juvenile court proceeding." Juv.R. 2(O). "The role of guardian ad litem is to investigate the ward's situation and then to ask the court to do what the guardian feels is in the child's best

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<sup>1</sup> Recently, the Ohio Supreme Court stated that it has "never recognized [a] hybrid type of plain error \* \* \*, forfeited error that is presumptively prejudicial and is reversible error per se." Rogers at ¶24. The court observed that it previously "rejected the notion that there is any category of forfeited error that is not subject to the plain error rule's requirement of prejudicial effect on the outcome." *Id.*, citing State v. Perry, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643. We thus question the validity of our prior cases recognizing a court's failure to appoint a guardian ad litem when required to do so as reversible error in the absence of a proper objection. However, because the plain error analysis is not central to our decision regarding appellant's first assignment of error, we need not explicitly address the issue at this time. We simply note that our prior cases may be incorrect.



interest.” In re Baby Girl Baxter, 17 Ohio St.3d 229, 232, 479 N.E.2d 257 (1985).

{¶ 17} Both R.C. 2151.281(A) and Juv.R. 4(B) require a juvenile court to appoint a guardian ad litem in certain circumstances. R.C. 2151.281(A) provides:

The court shall appoint a guardian ad litem to protect the interest of a child in any proceeding concerning an alleged or adjudicated delinquent child or unruly child when either of the following applies:

- (1) The child has no parent, guardian, or legal custodian.
- (2) The court finds that there is a conflict of interest between the child and the child’s parent, guardian, or legal custodian.

Juv.R. 4(B) provides:

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, guardians, or legal custodian; [or]
  - (2) The interests of the child and the interests of the parent may conflict \*
- \* \*.

The rule requires a juvenile court to appoint a guardian ad litem upon the possibility of conflict, but the statute requires the juvenile court to appoint a guardian ad litem if the court determines that a conflict indeed exists. “[T]he juvenile court is in the best position to weigh the relevant facts in determining whether a potential conflict of interest exists between the parent and child.” Sappington, 123 Ohio App.3d at 453–454, citing Trickey v. Trickey, 158 Ohio St. 9, 13, 106 N.E.2d 772 (1952). The question is whether the record “reveals a strong enough possibility of conflict of interest between parent and child to show that the juvenile court abused its discretion” by not appointing a guardian ad litem. Sappington, 123 Ohio App.3d at 454.

{¶ 18} A “colorable claim of conflict” frequently arises in a delinquency proceeding when a parent speaks against a child’s penal interests or files delinquency charges against a child. In re Bostwick, 4th Dist. Ross No. 05CA2820, 2005–Ohio–5123, ¶¶8–9, citing In re Howard,

119 Ohio App.3d 201, 207, 695 N.E.2d 1 (1st Dist.1997). Thus, when a parent or legal guardian instigates a delinquency proceeding, or speaks out against the child's penal interests, the juvenile court ordinarily must conduct "a 'thorough inquiry' \* \* \* to determine whether a conflict of interest exists such that the court must appoint a guardian ad litem." Bostwick at ¶8. However, courts have been unwilling to adopt a bright-line rule that would require the appointment of a guardian ad litem in every case in which a child's parents or legal guardians speak against the child's interests. Howard, 119 Ohio App.3d at 207. Instead, courts have examined the record to determine whether the parent or legal guardian expressed any interest inconsistent with the child's interests.

{¶ 19} For example, courts have found no potential for conflict when the victim of the child's delinquent act was a family member and when neither parent (nor a legal guardian) spoke against the child's penal interests or expressed a desire inconsistent with the child's interests. In In re Wilkins, 3rd Dist. No. 5-96-1 (June 26, 1996), the court found no conflict of interest between the father and the child even though the delinquency charge involved the child hitting his father. In reaching its decision, the court observed that the father did not attempt to persuade the court to act in any manner inconsistent with the child's interests. The court explained:

"Timothy's father did not attempt to persuade the court in any manner that would be consistent with an understanding that he was not acting in Timothy's best interests. Indeed, the record reveals just the opposite; that Timothy's father was acting in Timothy's best interests. When the court suggested an institution remedial in nature, as opposed to the harsher environment of a DYS facility, Timothy's father did not object or demand that Timothy be placed in the latter facility. Timothy and his father did not argue or have any contentious words at hearing. In fact, Timothy's father seemed most concerned with the court understanding and helping Timothy with his substance abuse addiction."

{¶ 20} Similarly, in In re A.K., 9th Dist. Medina No. 09CA0025-M, 2009-Ohio-4941,

the court determined that a potential for conflict did not exist even when the child's parents called law enforcement after the child's sister alleged that the child had sexually assaulted her. The court observed that the child's parents did not testify against him and did not recommend that he be committed. Id. at ¶11. Moreover, the child's parents "appeared with him at his adjudication and disposition hearings and, more than once, expressed concern over the length and severity of the disposition that [the child] might receive." Id.

{¶ 21} In contrast, we have concluded that a trial court abused its discretion by failing to appoint a guardian ad litem (or by failing to inquire further into whether a conflict of interest existed sufficient to warrant the court in appointing a guardian ad litem) when the facts showed that the child's legal guardians' interests were not aligned with the child's interests. In Slider, for example, we determined that a sufficient potential for conflict between the child and the child's legal guardians existed when the child's legal guardians were unwilling to hire an attorney for the child, when they refused to take the child home with them because they feared for their daughter's safety, and when they requested the trial court to institutionalize the child. In re Slider, 160 Ohio App.3d 159, 2005–Ohio–1457, 826 N.E.2d 356 (4th Dist.), ¶12. Accord In re Wilson at ¶18 (concluding that trial court abused its discretion by failing to appoint guardian ad litem when the child's step-brother was the victim, the child's mother testified for the prosecution, the child's mother and father recommended that the child be committed to DYS, and the child previously victimized other family members); Sappington, 123 Ohio App.3d at 454–455 (determining that the juvenile court abused its discretion by failing to appoint a guardian ad litem for the child when the child's parents previously filed domestic violence charges against the child, had sought to place the child out of the home, and had convinced the

minor that he did not need an attorney); In re K.J.F., supra (concluding that juvenile court abused its discretion by failing to appoint guardian ad litem for the child's delinquency-related proceedings, which included his original adjudication and the subsequent revocation of probation for the rape of his half-sister, when the child's step-father stated that the family did not want the child to return to their home where the victim lived and when the child's mother informed the court that she "did not feel [she] could make choices in [the child's] best interest").

{¶ 22} We believe that the case at bar bears more similarity to A.K. and Wilkins than to the Slider and Sappington line of cases. Unlike the parents in Slider and Sappington, appellant's mother did not request the court to institutionalize appellant. In fact, at the April 7, 2014 hearing, appellant's counsel stated that appellant's mother "is willing to allow [appellant] to come home." Furthermore, at no point during the transfer hearing did appellant's mother speak against appellant's penal interest. The evidence before the court at the transfer hearing shows simply that appellant's mother had "been having some problems with [appellant] and that [appellant] would probably lie to us." This statement does not show that appellant's mother spoke against appellant's penal interest, or that her interests conflicted with appellant's. Thus, we do not believe that the record demonstrates that a potential for conflict existed so as to warrant the court in appointing a guardian ad litem. Consequently, the trial court did not err by failing to appoint a guardian ad litem to represent appellant during the transfer proceeding.

{¶ 23} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's first assignment of error.

## II

{¶ 24} In his second assignment of error, appellant asserts that the trial court erred by

transferring his case to the common pleas court. In particular, appellant contends that the evidence presented at the transfer hearing does not show probable cause to believe that he committed the acts charged. Appellant claims that the evidence does not show that he actually committed any of the acts charged, but instead, shows simply that he was complicit in committing the offenses. Thus, appellant argues that R.C. 2152.12(A)(1)(a)(i) and State v. Hanning, 89 Ohio St.3d 86, 728 N.E.2d 1059 (2000), do not permit a juvenile court to transfer a case to the adult criminal system unless there is probable cause to believe that the delinquent child actually committed the acts charged. Appellant claims that the evidence presented at the transfer hearing shows that his co-defendant, Shaun Lawson, shot and killed the victim after appellant had exited the victim's home. Appellant notes that the state asserted at the hearing: "[W]e know that it was Shaun Lawson who pulled the trigger both by Shaun's admission as well as testimony from the detectives[;] however [appellant] knew what was going on." Appellant thus contends that because he did not pull the trigger and kill the victim, he did not "commit[] an act that would be aggravated murder, murder, attempted aggravated murder, or attempted murder if committed by an adult." R.C. 2152.12(A)(1)(a)(i). Appellant therefore asserts that the juvenile court improperly transferred the case to the common pleas court, and consequently, the common pleas court lacked subject matter jurisdiction to convict him.

{¶ 25} Within his second assignment of error, appellant also argues that R.C. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) violate his due process rights. Appellant contends that R.C. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) "create an irrebuttable presumption that [appellant] is as culpable as his co-defendant who planned and carried out the killing." Appellant asserts that this irrebuttable presumption violates due process principles.

{¶ 26} Appellant next contends that because this irrebuttable presumption violates due process principles, the juvenile court's mandatory transfer is invalid. Appellant again argues that the common pleas court, therefore, lacked subject matter jurisdiction over appellant's case.

{¶ 27} Initially, we observe that during the trial court proceedings appellant did not object to the juvenile court's probable cause finding, and did not argue that the mandatory bindover statutes created an unconstitutional "irrebuttable presumption." Nor did appellant challenge the juvenile court's mandatory transfer to the common pleas court. Appellant further did not challenge the common pleas court's jurisdiction upon transfer. Thus, appellant forfeited all but plain error.

{¶ 28} Moreover, appellant entered a guilty plea and thus waived all nonjurisdictional defects and constitutional violations that occurred before he entered his guilty plea and that do not "stand in the way of conviction if factual guilt is validly established." Fitzpatrick, supra, at ¶78, quoting Menna, 423 U.S. at 62; accord Rogers, supra, at ¶19. However, appellant's guilty plea did not waive his right to challenge the trial court's jurisdiction or the constitutionality statutes affecting the state's ability to prosecute. Fitzpatrick at ¶79, citing Menna and State v. Wilson, 58 Ohio St.2d 52, 55, 388 N.E.2d 745 (1979) (explaining that "those constitutional violations which go to the ability of the state to prosecute, regardless of factual guilt, may be raised on appeal from a guilty plea"); State v. Easterling, 4<sup>th</sup> Dist. Highland No. 611 (Oct. 29, 1987) (stating that "a guilty plea does not bar assertion of constitutional violations which go to the right and power of the state to place the defendant on trial"). Appellant's guilty plea also did not waive his right to challenge whether he voluntarily, knowingly and intelligently entered his guilty plea. State v. Ketterer, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶105;

Fitzpatrick at ¶79.

{¶ 29} In the case sub judice, appellant asserts that if probable cause does not support the juvenile court's transfer order, or if the transfer violates his due process rights, the bindover to common pleas court is invalid and did not vest the common pleas courts with subject matter jurisdiction. Appellant thus claims that his second assignment of error implicates the trial court's subject matter jurisdiction, an issue that may not be waived and may be challenged despite a guilty plea or absence of an objection. State v. Wilson, 73 Ohio St.3d 40, 46, 652 N.E.2d 196 (1995) (stating that "[t]he issue of a court's subject matter jurisdiction cannot be waived").

{¶ 30} The Ohio Supreme Court has determined that "absent a proper bindover procedure \* \* \* the juvenile court has the exclusive subject matter jurisdiction over any case concerning a child who is alleged to be delinquent." State v. Wilson, 73 Ohio St.3d 40, 44, 652 N.E.2d 196 (1995); Gaskins v. Shiplevy, 74 Ohio St.3d 149, 151, 656 N.E.2d 1282 (1995) (stating that "without a proper bindover procedure under [former] R.C. 2151.26, a juvenile court's jurisdiction is exclusive and cannot be waived")<sup>2</sup>; accord State v. J.T.S., 10<sup>th</sup> Dist. Franklin No. , 2015-Ohio-1103, ¶11 ("Where a juvenile court purports to transfer a juvenile case to adult court without having complied with the proper procedures in R.C. 2152.12, the adult court proceeds in the absence of subject-matter jurisdiction, and any judgment entered by the adult court is a nullity and void ab initio."); State v. Washington, 2d Dist. Montgomery No. 20226, 2005–Ohio–6546, ¶14 ("When a juvenile division court improperly transfers jurisdiction

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<sup>2</sup> Effective January 1, 2002, former R.C. 2151.26 was repealed and replaced by R.C. 2152.12. Johnson v. Timmerman-Cooper, 93 Ohio St.3d 614, 617, fn.1, 757 N.E.2d 1153 (2001).

over a minor \* \* \* any subsequent conviction \* \* \* is void for lack of jurisdiction”). Accord Johnson, 93 Ohio St.3d at 617 (determining that common pleas court lacked subject matter jurisdiction when juvenile court erroneously transferred case under bindover statute). Several Ohio appellate courts have subsequently held that a defendant convicted upon a guilty plea in common pleas court may thereafter challenge on appeal a juvenile court’s probable cause finding in support of mandatory bindover. State v. Mays, 2014-Ohio-3815, 18 N.E.3d 850 (8th Dist.), ¶17 (considering defendant’s claim of improper bindover due to insufficiency of probable cause evidence despite guilty plea); State v. Goodwin, 166 Ohio App.3d 709, 2006-Ohio-2311, 852 N.E.2d 1282 (8th Dist.), ¶11 (considering defendant’s claim that evidence failed to support probable cause for mandatory transfer even though defendant pleaded guilty); State v. Kitchen, 5th Dist. Ashland No. 02CA056, 2003-Ohio-5017, ¶80 (reviewing defendant’s argument that evidence failed to support juvenile court’s probable cause finding despite defendant’s guilty plea); see State v. Poole, 8th Dist. Cuyahoga No. 98153, 2012-Ohio-5739 (“A guilty plea made following a bindover or transfer from the juvenile division does not waive the right to appeal the bindover or transfer.”).

{¶ 31} While we find it arguable whether a challenge to the sufficiency of probable cause evidence in a mandatory bindover proceeding is a challenge to whether the juvenile court applied the “proper bindover procedure,”<sup>3</sup> in the absence of further guidance from the Ohio Supreme

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<sup>3</sup> In the case at bar, there does not appear to be any dispute that the juvenile court followed the bindover procedure specified in the applicable statutes. Appellant’s dispute does not seem to be whether the juvenile court followed the correct procedure, but instead, whether the juvenile court’s probable cause finding—one of the necessary predicates for transfer to adult court—was correct. We are uncertain precisely what the Ohio Supreme Court intended by using the phrase “proper bindover procedure,” and therefore construe it in appellant’s favor to include a challenge to the juvenile court’s probable cause finding. See Johnson, 93 Ohio St.3d 614 (determining that defendant alleged viable habeas corpus claim that trial court lacked jurisdiction to convict defendant when juvenile court incorrectly



Court we will follow the above holdings. Thus, even though appellant entered a guilty plea, thereby completely admitting that he committed aggravated murder,<sup>4</sup> we will consider his claim that the state did not present sufficient evidence to establish probable cause to believe that he committed the acts charged in the delinquency complaints.

{¶ 32} “Juvenile courts possess exclusive jurisdiction over children alleged to be delinquent for committing acts that would constitute a crime if committed by an adult. Under certain circumstances, however, the juvenile court has the duty to transfer a case, or bind a juvenile over, to the adult criminal system.” In re M.P., 124 Ohio St.3d 445, 2010-Ohio-599, 923 N.E.2d 584, ¶11, citing R.C. 2151.23(A), R.C. 2152.10, and R.C. 2152.12. R.C. 2152.10(A) requires a juvenile court to transfer a case to the adult criminal system, pursuant to R.C. 2152.12, if the delinquent child is charged with a category one offense and the child was at least 16 years old at the time of the offense. R.C. 2152.12(A)(1)(a) more specifically describes when a juvenile court has a duty to transfer a case to the adult criminal system:

(A)(1)(a) After a complaint has been filed alleging that a child is a

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determined that former R.C. 2151.26(B)(4)(b) applied, even when defendant subsequently pled guilty to firearm specification in common pleas court; evidence was uncontroverted that defendant did not have a firearm); Wilson, 73 Ohio St.3d at 44 (determining that common pleas court lacked jurisdiction over defendant when parties mistakenly believed he was eighteen years of age and thus defendant never even appeared before juvenile court); Gaskins (determining that defendant presented viable habeas corpus claim that trial court lacked jurisdiction to convict defendant when defendant was unrepresented by counsel during juvenile court bindover hearing and when defendant was not given a mental and physical examination pursuant to former R.C. 2151.26).

<sup>4</sup> Under Crim.R. 11(B)(1), a “plea of guilty is a complete admission of the defendant’s guilt.” State v. Griggs, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶14; State v. Stumpf, 32 Ohio St.3d 95, 104, 512 N.E.2d 598 (1987). Thus, by entering his guilty plea to aggravated murder under R.C. 2903.01(B), appellant admitted that he purposely caused the victim’s death while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, aggravated robbery, robbery, aggravated burglary, burglary, or trespass in a habitation when a person is present or likely to be present. R.C. 2903.01(B). His claim that the evidence fails to show probable cause to believe that he committed this offense seems inconsistent with his complete admission of guilt. Thus, we question whether this is a proper issue to raise on appeal from a guilty plea. See Hanning (considering improper bindover claim based upon trial court’s misapplication of the former R.C. 2151.26(B)(4)(b) firearm-specification bindover provision, when defendant pled guilty in common pleas court to principal offense but not to firearm specification). But see Johnson, supra, fn.3 of this opinion.

delinquent child for committing an act that would be aggravated murder, murder, attempted aggravated murder, or attempted murder if committed by an adult, the juvenile court at a hearing shall transfer the case if either of the following applies:

(i) The child was sixteen or seventeen years of age at the time of the act charged and there is probable cause to believe that the child committed the act charged.

Thus, a juvenile “court has a duty to transfer a case when it determines that the elements of the transfer statute are met, to wit: (1) the charged act would be aggravated murder, murder, attempted aggravated murder, or attempted murder if committed by an adult, (2) the child was 16 or 17 at the time of the act, (3) there is probable cause to believe that the child committed the act charged.” In re A.J.S., 120 Ohio St.3d 185, 2008–Ohio–5307, 897 N.E.2d 629, ¶22.

{¶ 33} In the case at bar, appellant argues that the trial court erroneously transferred his case based upon its allegedly mistaken probable cause finding. He thus argues that the trial court’s transfer order did not comply with R.C. 2152.12(A)(1)(a)(i).

{¶ 34} The probable cause standard contained in the mandatory bindover statute does not require the state to prove guilt beyond a reasonable doubt. A.J.S. at ¶62. Instead, the state need only produce sufficient evidence to raise “more than a suspicion of guilt.” Id. Thus, the juvenile court “need not ‘find as fact that the accused minor is guilty of the offense charged. It simply finds the existence of probable cause to so believe.’” State v. Iacona, 93 Ohio St.3d 83, 752 N.E.2d 937 (2001), quoting State v. Whiteside, 6 Ohio App.3d 30, 452 N.E.2d 332 (3<sup>rd</sup> Dist.1982).

{¶ 35} A juvenile court that is determining whether probable cause exists conducts a limited review of the evidence to “‘evaluate the quality of the evidence presented by the state in support of probable cause as well as any evidence presented by the respondent that attacks

probable cause.” A.J.S. at ¶43, quoting State v. Iacona, 93 Ohio St.3d 83, 93 (2001). The court may not, however, determine the merits of any competing, credible prosecution and defense theories. Id. Instead, determining the merits of competing, credible theories is a matter reserved for the factfinder at trial. Id.

{¶ 36} Appellate review of a “juvenile court’s probable-cause determination in a mandatory-bindover proceeding involves questions of both fact and law.” Id. at ¶51. Appellate courts thus “defer to the trial court’s determinations regarding witness credibility, but \* \* \* review de novo the legal conclusion whether the state presented sufficient evidence to demonstrate probable cause to believe that the juvenile committed the acts charged.” Id.

{¶ 37} In the case sub judice, appellant’s argument is premised upon State v. Hanning, 89 Ohio St.3d 86, 728 N.E.2d 1059 (2000). Appellant contends that pursuant to Hanning, a juvenile court cannot transfer a case for adult prosecution when the evidence shows that the juvenile was merely complicit in committing the acts charged. We, however, do not agree with appellant that Hanning means that the juvenile court in the case at bar could not transfer appellant’s case for adult prosecution.

{¶ 38} In Hanning, the defendant initially was charged in juvenile court with delinquency for committing aggravated robbery while armed with a deadly weapon or dangerous ordnance (a plastic BB gun) and a firearm. The state later requested the juvenile court to transfer the case for adult prosecution. At the probable cause hearing, the evidence revealed that the juvenile possessed a plastic BB gun. The parties agreed that it did not constitute a “firearm” under R.C. 2923.11(B), but the state nonetheless asserted that the juvenile was complicit by aiding and abetting his co-defendant who actually possessed the firearm. The state thus argued that

bindover was proper under former R.C. 2151.26(B)(4)(b), which provided for mandatory bindover if, inter alia, “the child is alleged to have had a firearm on or about the child’s person or under the child’s control while committing the act charged and to have displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the act charged.” The juvenile court agreed with the state and transferred the case to the common pleas court. After his conviction upon a guilty plea, the defendant appealed and the court of appeals reversed and remanded the matter to the juvenile court. The state then appealed to the Ohio Supreme Court.

{¶ 39} The Ohio Supreme Court held that the complicity statute did not apply to R.C. 2151.26(B)(4)(b). The court explained:

“A plain reading of [the complicity and bindover] statutes does not permit this court to apply the complicity concept of R.C. 2923.03 to the bindover proceedings of R.C. 2151.26 because the bindover statute itself does not provide that a child can be bound over based on the fact that a firearm was used by an accomplice. If the General Assembly had intended for a mandatory bindover to occur whenever, as here, an accomplice of the juvenile used a firearm in committing the crime charged, it could have drafted the statute to expressly so provide.”

The court thus held:

“The mandatory bindover provision of R.C. 2151.26(B)(4)(b) does not apply unless the child, himself or herself, had a firearm on or about the child’s person or under the child’s control while committing the act charged and the child displayed the firearm, brandishes the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the act charged.”

Id. at paragraph one of the syllabus. The court further held that “[t]he complicity statute, R.C. 2923.03, does not apply to the juvenile bindover criteria set forth in R.C. 2151.26.” Id. at paragraph two of the syllabus.

[Cite as *State v. Legg*, 2016-Ohio-801.]

{¶ 40} Subsequently, the Ohio Supreme Court limited Hanning to “mandatory bindover cases under R.C. 2151.26(B)(4)(b).” Agee v. Russell, 92 Ohio St.3d 540, 547, 751 N.E.2d 1043 (2001). In Agee, the defendant and a co-defendant robbed a gas station store. A store clerk was shot and killed during the robbery, and the evidence later showed that the co-defendant, not Agee, had killed the store clerk. The defendant was charged in juvenile court with delinquency for committing aggravated murder, in violation of R.C. 2903.01(B), and aggravated robbery, in violation of R.C. 2911.01(A)(1). The complaint further contained a firearm specification for each charge. The state requested the juvenile court to transfer the case for adult prosecution and asserted that former R.C. 2151.26(B)(3) and (B)(4) mandated transfer. The juvenile court agreed and transferred the case to the common pleas court. After his conviction, the defendant appealed. The appellate court determined that the complicity statute applied to the mandatory bindover provisions set forth in former R.C. 2151.26(B)(3) and (4). The defendant then sought further review in the Ohio Supreme Court, but the court denied his discretionary appeal. After the court issued Hanning, the Agee defendant filed a petition for a writ of habeas corpus and alleged that pursuant to Hanning, the trial court lacked jurisdiction over his case due to improper bindover. The Ohio Supreme Court did not agree that Hanning applied to Agee’s case and that it required a finding that the trial court lacked jurisdiction to try, convict, and sentence him. The court observed that the juvenile court transferred the case under former R.C. 2151.26(B)(3)(a)<sup>5</sup> and (4)(b) and that “Hanning differs in several significant respects.” The court explained:

“First, Hanning did not involve a mandatory bindover under R.C. 2151.26(B)(3). Instead, we emphasized in Hanning that the plain language of R.C. 2151.26(B)(4)(b) requires bindover of a child alleged to have personally had a firearm on or about his person or under his or her control while committing the act charged and to have displayed, brandished, indicated possession of, or used the

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<sup>5</sup> Former R.C. 2151.26(B)(3)(a) provided for mandatory bindover “if the child was fourteen years of age or older at the time of the act charged, if there is probable cause to believe that the child committed the act charged, and if \* \* \* [t]he act charged is a category one offense, and \* \* \* [t]he child was sixteen years of age or older at the time of the act charged.”

firearm to facilitate the commission of the act charged. Although the second paragraph of the Hanning syllabus broadly states that ‘[t]he complicity statute \* \* \* does not apply to the juvenile bindover criteria set forth in R.C. 2151.26,’ we have recognized that “[t]he syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication.” State ex rel. Leonard v. White, 75 Ohio St.3d 516, 518, 664 N.E.2d 527 (1996), quoting S.Ct.R.Rep.Op. 1(B). The juvenile offender in Hanning was, unlike Agee, not subject to a mandatory bindover under R.C. 2151.26(B)(3).

Second, despite the breadth of the second paragraph of the Hanning syllabus, which would include discretionary as well as mandatory bindovers, we expressed in our opinion that the syllabus was more limited by specifying that ‘[j]uveniles in Hanning’s situation are still subject to transfer to adult court under R.C. 2151.26(C),’ i.e., discretionary transfer. Hanning, 89 Ohio St.3d at 93, 728 N.E.2d at 1065.

Third, if we were to determine that Hanning applies to all mandatory bindovers, including those under R.C. 2151.26(B)(3), part of the rationale to support the inapplicability of Hanning to discretionary bindovers would be rendered inapplicable. In Hanning, 89 Ohio St.3d at 93, 728 N.E.2d at 1065, we emphasized:

‘Our holding does not allow Hanning or other juveniles to escape responsibility for their own actions. We merely find that the legislature did not intend to automatically attribute responsibility to the juvenile for the actions of his or her accomplice. Contrary to the judge’s remarks at the probable cause hearing, and contrary to the state’s argument, Hanning and other youth who find themselves in the same situation are not “saved” by the fact that someone other than themselves personally possessed the firearm. Juveniles in Hanning’s situation are still subject to transfer to adult court under R.C. 2151.26(C), which provides that a child who commits a felony can be bound over if he is fourteen years of age or older and the results of an investigation and hearing indicate reasonable grounds to believe that the child is not amendable to care or rehabilitation in the juvenile system and the safety of the community requires that the child be placed under legal restraint, including, if necessary, for a period extending beyond the child’s majority.’

But like the mandatory bindover requirement at issue here—the R.C. 2151.26(B) mandatory bindover requirement that there be ‘probable cause to believe that the child committed the act charged’—R.C. 2151.26(C)(1)(b) similarly requires ‘probable cause to believe that the child committed the act charged’ before a discretionary transfer can occur. Therefore, if complicity is inapplicable to all mandatory bindovers so that it cannot be used to support a probable cause finding to believe that the child committed the act charged, it could also not be used to support the identically worded probable cause requirement for discretionary transfers, and juveniles like Agee would not be subject to any

bindover, i.e., they would be saved from the possibility of prosecution as an adult under either mandatory or discretionary bindover.

Fourth, unlike the juvenile court's bindover decision in Hanning, the underlying bindover entry as well as the comments by the juvenile court judge in Agee's case do not establish that the judge relied on the complicity statute to transfer Agee to be tried as an adult. \* \* \* \*

Fifth, R.C. 2151.26(B)(3)(a) requires the following for a mandatory bindover: (1) the act charged is a category one offense; (2) the child was sixteen years of age or older at the time of the act charged; and (3) there is probable cause to believe that the child committed the act charged. Here, one of the acts charged was a category one offense, i.e., aggravated murder. In addition Agee was sixteen years old at the time of the aggravated murder. Finally, there was evidence that Agee obtained a gun, loaded, and test-fired it, talked prior to [the offense] about wanting to commit a murder and a robbery, participated in the robbery of the [gas station] store, during which a clerk was shot and killed with the gun, and hid the gun after the murder."

Id. at 546-547 (citations omitted).

{¶ 41} The court thus concluded that Hanning did "not warrant a finding that the juvenile court lacked jurisdiction, much less that it patently and unambiguously lacked jurisdiction to transfer Agee under R.C. 2151.26(B)(3)(a) for prosecution as an adult." The court further limited Hanning "to mandatory bindover cases under R.C. 2151.26(B)(4)(b)" and stated that Hanning "does not apply to mandatory bindover cases under R.C. 2151.26(B)(3)." Id. at 547.

{¶ 42} We believe that the Agee rationale applies to the facts in the case sub judice. Appellant, like the Agee defendant and unlike the defendant in Hanning, was not transferred for adult prosecution pursuant to the R.C. 2152.10(A)(2)(b)firearm-specification mandatory bindover provision.<sup>6</sup> Instead, like Agee, appellant was transferred for adult prosecution under R.C. 2152.12(A)(1)(a)(i).<sup>7</sup> The Ohio Supreme Court stated in Agee that the Hanning rationale does not apply to all mandatory bindover proceedings, but rather only to those based upon a

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<sup>6</sup> R.C. 2152.10(A)(2)(b) is substantially similar to former R.C. 2151.26(B)(4)(b) as considered in Hanning.

firearm specification. Thus, Agee permits juvenile courts to transfer cases for adult prosecution even if the evidence shows that the juvenile was not a principal offender but was complicit in committing the offense. We therefore disagree with appellant that the Hanning rationale prohibited the juvenile court from transferring his case for adult prosecution.

{¶ 43} Furthermore, we observe that appellant was charged with not only felony-aggravated-murder under R.C. 2903.01(B),<sup>8</sup> but also with felony-murder under R.C. 2903.02(B)—also a category one offense. R.C. 2903.02(B) states that “[n]o person shall cause the death of another as a proximate result of the offender’s committing or attempting to commit an offense of violence \* \* \*.” Under this statute, appellant can be held liable for the victim’s death even though appellant’s co-defendant fired the fatal shots. State v. Tuggle, 6<sup>th</sup> Dist. Lucas No. L-09-1317, 2010-Ohio-4162, ¶100; State v. Dixon, 2<sup>nd</sup> Dist. Montgomery No. 18582 (Feb. 8, 2002). “[I]t is irrelevant [under R.C. 2903.02(B)] whether the killer is the defendant, an accomplice, or a third party.” State v. Abdi, 4<sup>th</sup> Dist. Athens No. 09CA35, 2011-Ohio-3550, ¶74, quoting State v. Ford, 10<sup>th</sup> Dist. Franklin No. 07AP-803, 2008-Ohio-4373, ¶32; see also State v. Williams, 4<sup>th</sup> Dist. Scioto No. 10CA3381, 2012-Ohio-6083, ¶38. The evidence in the case sub judice shows that appellant committed an offense of violence (he stole weapons from the victim’s home and struck the victim with a walking stick) and that a murder proximately resulted from the felony. Cf. State v. Bishop, 8<sup>th</sup> Dist. Cuyahoga No. 89184, 2007-Ohio-6197, ¶26 (determining that mandatory bindover proper under R.C. 2152.10(A)(1)(a) and

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<sup>7</sup> This provision is substantially similar to former R.C. 2151.26(B)(3) as considered in Agee.

<sup>8</sup>R.C. 2903.01(B) states: “No person shall purposely cause the death of another \* \* \* while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit \* \* \* aggravated robbery, robbery, aggravated burglary, burglary, [or] trespass in a habitation when a person is present or likely to be present \* \* \*.”



2152.12(A)(1)(a) even though juvenile's co-defendant shot and killed the victim). Therefore, the evidence establishes probable cause to believe that appellant committed felony-murder, a category one offense.

{¶ 44} We also note that in Agee, the supreme court refused to permit the defendant to attempt to invalidate the juvenile court's transfer and allowed the defendant's R.C. 2903.01(B) felony-aggravated-murder conviction to stand, even though Agee's co-defendant shot and killed the victim. The court observed that the evidence showed that Agee discussed committing murder and robbery before he and his co-defendant walked into the store to rob it. Similarly, in the case at bar appellant's co-defendant shot and killed the victim. Before appellant traveled to the victim's home, he knew that the plan was to steal the victim's guns and that his co-defendant planned to kill the victim, as well as the co-defendant's father, if he were present. Thus, according to Agee, probable cause to transfer for R.C. 2903.01(B) felony-aggravated-murder may exist, even if appellant did not fire the fatal shots. See In re Washington, 81 Ohio St.3d 337, 340, 691 N.E.2d 285 (1998) (recognizing that aggravated murder intent element does not require any showing that defendant fired fatal shot; instead, when "the prosecution seeks to prove intent to kill by establishing the defendant's participation in planning and executing a robbery, the factfinder may infer the defendant's intent to kill and may base its finding of intent to kill solely on that inference. That the state has produced sufficient evidence to permit the factfinder to draw the inference does not mandate a finding that the defendant possessed a specific intent to kill. In weighing the evidence, the factfinder remains bound to consider all evidence of the defendant's intent to kill, including the defendant's evidence on lack of intent to kill"); State v.

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Scott, 61 Ohio St.2d 155, 165, 400 N.E.2d 375, 382 (1980) (“A jury can infer an aider and abettor’s purpose to kill [under R.C. 2903.01(B)] where the facts show that the participants in a felony entered into a common design and either the aider or abettor knew that an inherently dangerous instrumentality was to be employed to accomplish the felony or the felony and the manner of its accomplishment would be reasonably likely to produce death. Since the state presented evidence showing appellant’s complicity, his awareness that handguns were to be employed to accomplish the kidnapping, and also that the kidnapping was reasonably likely to produce [the victim’s] death, a sufficient evidentiary basis was present.”); accord Bradshaw v. Stumpf, 545 U.S. 175, 187, 125 S.Ct. 2398, 2407, 162 L.Ed.2d 143 (2005) (discussing R.C. 2903.01(B) and stating that under Ohio law, “precise identity of the triggerman was immaterial to [defendant’s] conviction for aggravated murder”).

{¶ 45} Consequently, the juvenile court properly transferred appellant’s case for adult prosecution and the common pleas court possessed proper subject matter jurisdiction over appellant’s case.

{¶ 46} Within his second assignment of error, appellant further alleges that R.C. 2152.10(A)(1)(a) and 2152.12(A)(1)(a)(i) violate due process by creating an irrebuttable presumption that appellant is as guilty as his co-defendant. Appellant claims that he was involved in the victim’s murder and theft of weapons at the behest of his adult co-defendant and that “he did not kill or intend to kill.” Appellant thus contends that he cannot be subject to mandatory transfer.

{¶ 47} First, we previously rejected appellant’s claim that he cannot be subject to mandatory transfer when he did not fire the fatal shots. Second, appellant does not explain

precisely how either R.C. 2152.10(A)(1)(a) or 2152.12(A)(1)(a)(i) create an irrebuttable presumption, *i.e.*, one that cannot be refuted. See Vlandis v. Kline, 412 U.S. 441, 446, 93 S.Ct. 2230, 37 L.E.2d 63 (1973), quoting Heiner v. Donnan, 285 U.S. 312, 329, 52 S.Ct. 358, 76 L.Ed. 772 (1932) (stating that “a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment”). The mandatory bindover statutes require a finding of probable cause, and appellant certainly could have challenged whether probable cause existed to support his mandatory transfer during the transfer hearing. He did not argue during the transfer hearing that his participation as an accomplice did not sufficiently demonstrate probable cause to believe that he committed aggravated murder. We do not see an irrebuttable presumption violative of appellant’s due process rights.

{¶ 48} Accordingly, based upon the foregoing reasons, we hereby overrule appellant’s second assignment of error.

### III

{¶ 49} Appellant’s third, fourth, and fifth assignments of error assert that the mandatory transfer provisions violate his due process rights, his right to equal protection under the law, and his right to be free from cruel and unusual punishment.

{¶ 50} We initially note that appellant raises these constitutional challenges for the first time on appeal. Thus, appellant forfeited his right to raise the alleged constitutional infirmities. Additionally, by pleading guilty appellant waived any alleged constitutional violations unrelated to the entry of the guilty plea and nonjurisdictional defects in the proceedings. Appellant asserts, however, that the alleged unconstitutionality of the statutes means that the juvenile court

could not properly transfer his case to the common pleas court, and, thus, the common pleas court did not properly acquire jurisdiction over his case. As such, appellant contends, because the common pleas court lacked jurisdiction his conviction is void ab initio and he may raise these constitutional arguments at any time.

{¶ 51} We first observe that Ohio appellate courts have reached differing decisions on this issue. This court and others have held that a defendant's guilty plea waives all nonjurisdictional arguments, including constitutional statutory challenges, that do not relate to the validity of the guilty plea. State v. Sams, 4th Dist. Athens No. 98CA13, 1999 WL 1598, \*5 (Dec. 22, 1998) (rejecting defendant's argument on appeal following guilty plea that whether mandatory bindover statutes violated due process rights presented jurisdictional issue); State v. Carter, 8<sup>th</sup> Dist. Cuyahoga No. 101810, 2015-Ohio-1834, ¶53 (concluding that defendant's guilty plea waived constitutional challenge to mandatory bindover statutes); State v. Bradford, 5<sup>th</sup> Dist. Stark No. 2013CA00124, 2014-Ohio-904, ¶78 ("Whether the Revised Code's mandatory bind-over provisions are constitutional does not implicate the common pleas court's jurisdiction"); accord State v. Smith, 9<sup>th</sup> Dist. Summit No. 26804, 2015-Ohio-579, ¶26; State v. Muhammad, 11<sup>th</sup> Dist. Geauga No. 2014-G-3182, 2014-Ohio-5771, ¶¶32-35; State v. Brookshire, 2<sup>nd</sup> Dist. Montgomery No. 25853, ¶29.

{¶ 52} Other courts have determined that a guilty plea does not waive constitutional challenges to statutes that would affect a court's jurisdiction over a criminal matter. Accord State v. McKinney, 1st Dist. Hamilton Nos. 140743 and 140744, 2015-Ohio-4398, ¶¶9-10 (recognizing defendant's failure to object and entry of guilty plea but determining that defendant could nonetheless raise due process, equal protection, eighth amendment challenges to R.C.

2152.10 and 2152.12 because those constitutional challenges were unrelated to issues of factual guilt); State v. Lane, 11<sup>th</sup> Dist. Geauga No. 2013-G-3144, 2014-Ohio-2010, ¶¶42-44. Assuming, arguendo, that appellant's guilty plea does not waive his right to raise the constitutionality of the mandatory bindover statutes, we find no merit to appellant's constitutional challenges. See State v. Beauregard, 8<sup>th</sup> Dist. Cuyahoga No. 101418, 2015-Ohio-1021, ¶18 (recognizing defendant's argument that alleged unconstitutionality deprives common pleas court of jurisdiction but ultimately rejecting constitutional challenges).

{¶ 53} Several courts have already considered and rejected similar challenges to the mandatory bindover statutes. State v. Simmonds, 10<sup>th</sup> Dist. Franklin No. 14AP-1065, 2015-Ohio-4460, ¶27 (rejecting defendant's due process, equal protection, and Eighth Amendment challenges to mandatory bindover statutes and explaining that "Ohio's mandatory bindover statutes do not violate the Eighth Amendment because they do not govern the sentencing of juveniles but, rather, whether a juvenile case must be transferred to adult court"); Carter at ¶54 (determining that mandatory bindover statutes do not violate due process or equal protection rights); State v. J.T.S., 10<sup>th</sup> Dist. Franklin No. 14AP-516, 2015-Ohio-1103 (rejecting defendant's due process, equal protection, and Eighth Amendment challenges to mandatory bindover statutes); accord Beauregard at ¶18; State v. Anderson, 2<sup>nd</sup> Dist. No. 25689, 2014-Ohio-4245, ¶¶66-80; Lane, supra; State v. Mays, 8<sup>th</sup> Dist. Cuyahoga No. 100265, 2014-Ohio-3815, ¶43; State v. Brookshire, 2<sup>nd</sup> Dist. Montgomery No. 25853, 2014-Ohio-1971, ¶30. We choose to follow the reasoning of these courts and likewise reject appellant's constitutional challenges to the mandatory bindover statutes.

{¶ 54} Appellant also asserts that his life sentence violates the Eighth Amendment's

prohibition against cruel and unusual punishment. He observes that once the trial court convicted him of aggravated murder, R.C. 2929.03(A)(1) mandated a life sentence and treatment as an adult. Appellant alleges that the statute affords no room for a trial court to consider the age of the offender or whether the offender actually killed the victim.

{¶ 55} In State v. Long, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, the Ohio Supreme Court explicitly recognized:

“As applied to a juvenile found guilty of aggravated murder under R.C. 2929.03(A), \* \* \* Ohio’s sentencing scheme does not fall afoul of [the Eighth Amendment prohibition against cruel and unusual punishment], because the sentence of life without parole is discretionary. Nor is our criminal procedure flawed \* \* \* by failing to take into account that a defendant is a youthful offender.”

Id. at ¶19 (citations omitted). The court noted that R.C. 2929.11(A) requires sentencing courts to “consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution,” and that R.C. 2929.11(B) requires a sentence to be “commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.” Id. at ¶17. The court thus held that “both the nature of the offender and the possibility of the offender’s rehabilitation are already points for the court’s sentencing deliberation.”

{¶ 56} The court further observed that R.C. 2929.12 requires sentencing courts to consider “certain factors that make the offense more or less serious and that indicate whether the offender is more or less likely to commit future offenses.” Id. at ¶18. The court admitted that “youth is not individually mentioned in the statute,” but noted that R.C. 2929.12(C)(4) states that

“an offender’s conduct is considered less serious when there are ‘substantial grounds to mitigate the offender’s conduct, although the grounds are not enough to constitute a defense.’” Id., quoting R.C. 2929.12(C)(4). The court additionally recognized that R.C. 2929.12(C) and (E) allow sentencing courts “to consider ‘any other relevant factors’ to determine that an offense is less serious or that an offender is less likely to recidivate.” Id. The court determined that “[a]n offender’s youth and the attendant circumstances of youth may be considered under either of these provisions \* \* \* before the court imposes a sentence on a juvenile. R.C. 2929.11 and 2929.12 do not prevent a court from considering youth as a factor that makes an offense less serious or makes an offender less likely to commit future offenses.” The court thus clarified that “youth is a mitigating factor for a court to consider when sentencing a juvenile.” Id. at ¶19.

{¶ 57} We therefore disagree with appellant that Ohio law does not permit a sentencing court to consider an offender’s youth when imposing a sentence. The Long court indicated otherwise.

{¶ 58} We further disagree that Ohio law does not permit a sentencing court to consider whether an offender is a principal offender or an accomplice. Long indicates that Ohio’s sentencing scheme allows sentencing courts to consider several factors, including whether the offense is more serious or less serious and any other relevant factors. Additionally, as the Long court recognized, R.C. 2929.12(C)(4) states that an offender’s conduct is considered less serious when there are “substantial grounds to mitigate the offender’s conduct, although the grounds are not enough to constitute a defense.” Furthermore, the sentencing statutes specify that courts should impose sentences that are “commensurate with and not demeaning to the seriousness of the offender’s conduct.” R.C. 2929.11(B). Any of these provisions would allow a sentencing

court to consider an offender's status as an accomplice or as a principal offender. Thus, we do not agree with appellant that his sentence violates the Eighth Amendment prohibition against cruel and unusual punishment.

{¶ 59} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's third, fourth, and fifth assignments of error.

#### IV

{¶ 60} In his sixth assignment of error, appellant argues that trial counsel rendered ineffective assistance (1) by failing to object to the lack of a guardian ad litem during the transfer proceeding, (2) by failing to assert that the state did not present sufficient probable cause evidence to mandate transfer to the common pleas court, and (3) by failing to argue that the mandatory transfer provisions violate appellant's due process rights, right to equal protection, and right to be free from cruel and unusual punishment. Appellant additionally contends that trial counsel performed ineffectively by failing to assert that appellant's life sentence violated the Eighth Amendment prohibition against cruel and unusual punishment.

{¶ 61} Initially, we once again note that appellant entered a guilty plea. "A defendant who pleads guilty waives the right to claim ineffective assistance of counsel on appeal, except to the extent that counsel's deficient performance caused the plea to be less than knowing and voluntary." State v. Persons, 4<sup>th</sup> Dist. Meigs No. 02CA6, 2003-Ohio-4213, ¶11; accord State v. Spates, 64 Ohio St.3d 269, 272-73, 595 N.E.2d 351 (1992); State v. Kelley, 57 Ohio St.3d 127, 129, 566 N.E.2d 658 (1991). Assuming, arguendo, that appellant's guilty plea did not waive his ineffective assistance of counsel claims, we find no merit to them.

{¶ 62} The Sixth Amendment to the United States Constitution and Article I, Section 10



of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a criminal defendant is entitled to the “reasonably effective assistance” of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); McMann v. Richardson, 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); State v. Creech, 188 Ohio App.3d 513, 2010–Ohio–2553, 936 N.E.2d 79, ¶39 (4th Dist.).

{¶ 63} To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel’s performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. Strickland, 466 U.S. at 687; State v. Powell, 132 Ohio St.3d 233, 2012–Ohio–2577, 971 N.E.2d 865, ¶85. “In order to show deficient performance, the defendant must prove that counsel’s performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” State v. Conway, 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶95 (citations omitted); accord State v. Wesson, 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶81. “Failure to establish either element is fatal to the claim.” State v. Jones, 4th Dist. Scioto No. 06CA3116, 2008–Ohio–968, ¶14. Therefore, if one element is dispositive, a court need not analyze both. State v. Madrigal, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (stating that a defendant’s failure to satisfy one of the elements “negates a court’s need to consider the other”).

{¶ 64} When considering whether trial counsel’s representation amounts to deficient performance, “a court must indulge a strong presumption that counsel’s conduct falls within the

wide range of reasonable professional assistance.” Strickland, 466 U.S. at 689. Thus, “the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” Id. “A properly licensed attorney is presumed to execute his duties in an ethical and competent manner.” State v. Taylor, 4th Dist. Washington No. 07CA11, 2008–Ohio–482, ¶10, citing State v. Smith, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel’s errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. State v. Gondor, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶62; State v. Hamblin, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

{¶ 65} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that but for counsel’s errors, the result of the proceedings would have been different. State v. Short, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶113; State v. White, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998); State v. Bradley, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Furthermore, courts may not simply assume the existence of prejudice, but must require the defendant to affirmatively establish prejudice. State v. Clark, 4th Dist. Pike No. 02CA684, 2003–Ohio–1707, ¶22; State v. Tucker, 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002).

{¶ 66} In the case sub judice, even if trial counsel performed deficiently by failing to raise any of the issues, we determined in appellant’s first through fifth assignments of error that none of those issues have merit. As such, any alleged deficiency in failing to raise the issues did not affect the outcome of the proceedings. Had trial counsel raised the issues, no reasonable probability exists that the result would have been different. Consequently, appellant cannot

establish that trial counsel rendered ineffective assistance of counsel.

{¶ 67} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's sixth assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

**McFarland, J., concurring.**

{¶ 68} I agree with the majority's well written decision and concur separately to highlight the dilemma faced by juvenile courts when determining the necessity of a guardian ad litem in these types of cases. During a juvenile court hearing a parent may say words that could be perceived as the type of conflict described in R.C. 2151.281 (A) and Juv.R. 4 (B), but after careful scrutiny they may not be. For instance, if a parent says "I think he is better off where he's at" as the father did in In re Bostwick, supra, referring to the child's temporary placement in a juvenile detention center it may appear to be a conflict on its face but after careful consideration it may be in the best interests of all involved. Especially if, at that time, the parent is unable to provide for and or protect that child based on the current dynamics of the family unit or the child presents a risk to the community or themselves.

{¶ 69} As such, the juvenile court judge or magistrate is in the best position to evaluate if an actual or potential conflict exists. I firmly believe the doctrines of *in loco parentis* and *parens patriae* are still alive and well in Ohio's juvenile courts. Ohio appellate courts should be deferential to juvenile judges and magistrates in their decision regarding appointing or not appointing a guardian ad litem in these difficult cases. These judges and magistrates see their faces, hear their words, and many times know the family from prior contact in their court and, as

appellate judges, we do not.

**Hoover, J.: dissenting.**

{¶ 70} I respectfully dissent from the principal opinion. After a review of the record, it appears that the “Amended Entry of Sentence on Change of Plea” is not a final appealable order.

{¶ 71} Appellate courts in Ohio have jurisdiction to review the final orders or judgments of inferior courts within their district. Ohio Constitution, Article IV, Section 3(B)(2); R.C. 2501.02. A final appealable order is one that affects a “substantial right” and either determines the action or is entered in a special proceeding. R.C. 2505.02(B)(1) & (2). “If a judgment is not final and appealable, then an appellate court has no jurisdiction to review the matter and must dismiss the appeal.” *State v. Ogle*, 4th Dist. Hocking No. 14CA17, 2014-Ohio-4868, ¶ 4, citing *Production Credit Assn. v. Hedges*, 87 Ohio App.3d 207, 210 at fn. 2 (4th Dist.1993) and *Kouns v. Pemberton*, 84 Ohio App.3d 499, 501 (4th Dist.1992).

{¶ 72} This court has stated in *State v. Brewer*, 4th Dist. Meigs No. 12CA9, 2013-Ohio-5118, ¶ 6:

To constitute a final, appealable order under R.C. 2505.02, a judgment of conviction and sentence must satisfy the substantive provisions of Crim.R. 32(C) and include: 1) the fact of conviction; 2) the sentence; 3) the judge's signature; and 4) the time stamp indicating the entry upon the journal by the clerk. *State v. Lester*, 130 Ohio St.3d 303, 2011–Ohio–5204, 958 N.E.2d 142, paragraph one of the syllabus. “The Supreme Court of Ohio has also determined that when a criminal case against a defendant initially consists of more than one charge, it is not necessary that the judgment of conviction includes the dispositions of charges that were terminated and do not form the basis of the conviction.” *Marcum* at ¶ 6, citing *State ex rel. Rose v. McGinty*, 128 Ohio St.3d 371, 2011–Ohio–761, 944 N.E.2d 672, ¶ 3. However, “unless the charges that are not the basis of the conviction have been properly terminated by a journal entry, they remain technically unresolved. This ‘hanging charge’ prevents the conviction from being

a final order under R.C. 2505.02(B) because it does not determine the action, i.e. resolve the case.” *Marcum* at ¶ 6.

{¶ 73} In the case sub judice, the actual sentencing proceeding as demonstrated by the transcript is not accurately reflected in the “Amended Entry of Sentence on Change of Plea.” Nowhere in the transcript does the State of Ohio make a motion to amend the indictment. The trial court instead says:

THE COURT HAS BEEN ADVISED, THROUGH COUNSEL, THERE’S BEEN  
NEGOTIATIONS, AND AS A RESULT THERE WILL BE A PLEA OF  
GUILTY TO COUNT TWO AS CONTAINED IN THE INDICTMENT, BEING  
THE OFFENSE OF AGGRAVATED MURDER; IS THAT CORRECT MS.  
WOLFORD?

{¶ 74} Despite the fact that the transcript does not include (1) a motion by the State of Ohio to amend the indictment; nor (2) an order by the trial court to amend the indictment, the “Amended Entry of Sentence on Change of Plea” nonetheless states:

The State of Ohio moved the Court to amend the indictment by dismissing Count One, Count Three, Count Four, Count Five and Count Six thereof. There being no objection raised by the Defendant, the Court Ordered the indictment be amended to set forth the offense of Aggravated Murder (Count Two), an unspecified Felony, contrary to ORC Section 2903.01(B).

{¶ 75} The trial court did recite in the sentencing hearing as reflected in the transcript that it would “APPROVE DISMISSAL OF COUNTS ONE, AND THREE THROUGH SIX.” (Tr. P. 11) However, the “Amended Entry of Sentence on Change of Plea” does not explicitly dismiss counts one and three through six. Furthermore, a separate entry does not appear in the record disposing of counts one and three through six. Because “[a] court speaks through its

journal entry and not its oral pronouncements,” the oral statement approving dismissal of counts one and three through six cannot be viewed as disposing of those charges in a manner that complies with [R.C. 2505.02](#) and [Crim.R. 32\(C\)](#) . *See Brewer*, 2013-Ohio-5118, at ¶ 8.

{¶ 76} Although I understand (1) what actually occurred during the sentencing hearing and (2) the intent of the parties, it is important that the proceedings that take place in the presence of a defendant should be accurately reflected in a trial court’s docket. Therefore, because counts one and three through six—which are charges that are not the basis of the conviction—have not been properly terminated by a journal entry, they remain technically unresolved. These “hanging charges” prevent the conviction on count two from being a final order under R.C. 2505.02(B) since it does not determine the action or resolve the case. *See Brewer* at ¶ 6.

{¶ 77} Consequently, the trial court’s “Amended Entry of Sentence on Change of Plea” is not a final appealable order. We do not have jurisdiction to consider this appeal from that entry. Therefore, I would dismiss this appeal for lack of jurisdiction.

[Cite as *State v. Legg*, 2016-Ohio-801.]

## JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Pickaway County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, J.: Concurs with Concurring Opinion

Hoover, J.: Dissents with Dissenting Opinion

For the Court

BY: \_\_\_\_\_

Peter B. Abele, 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.