[Cite as *State v. Phillips*, 2010-Ohio-2711.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-03-001
	:	O P I N I O N
- vs -		6/14/2010
	:	
RICHARD PRESTON PHILLIPS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI2008-5177

Richard W. Moyer, Clinton County Prosecuting Attorney, Brian A. Shidaker, 103 E. Main Street, Wilmington, Ohio 45177, for plaintiff-appellee

Keith L. O'Korn, 440 Polaris Parkway, Suite 150, Westerville, Ohio 43082, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Richard Preston Phillips, appeals the juvenile court's decision to relinquish jurisdiction and transfer him to the adult division. In addition, appellant appeals his conviction for theft in the Clinton County Court of Common Pleas. We affirm in part, reverse in part, and remand.

{¶2} On February 27, 2008, the Clinton County Sheriff's Office filed a delinquency complaint against appellant with the Clinton County Juvenile Court. The

complaint alleged appellant, born December 19, 1990, and Thomas F. Heywood, II (Tommy) took $321,500 worth of personal property from various parties in Clinton County and surrounding counties without their consent. If committed by an adult, the delinquency complaint stated the acts would have been a violation of R.C. 2913.02(A)(1).

{¶3} Specifically, the following persons were deprived of the following property:

(1) Brandi FitzPatrick, of Clinton County, had a Yamaha Raptor ATV taken worth $8,794.00 to $9,567.62;

(2) Thomas F. Heywood, I, of Clinton County, had a Caterpillar Bulldozer taken worth $30,000.00;

(3) Charles Borton/Borton Farms, in Clinton County, had 100 gallons of diesel fuel taken worth $286 to $300;

(4) Daniel P. Oehler, of Clinton County, had a Bobcat 753 Skid Steer Loader taken worth $10,700 to $15,000;

(5) James Douglas Borton/Borton Signature Homes, in Clinton County, had a Bobcat S250 Skid Steer Loader taken worth $31,170 to $34,000;

(6) Barbara Mootz/Fayetteville Hardware, in Brown County, had a Pro Star Toughloader Trailer taken worth $2,979 to $2,900;

(7) Darryl Williams, of Highland County, had a Caterpillar 257 Skid Steer Loader taken worth $25,000 to $30,000;

(8) Ray Purdin/Purdin's Auto Parts, in Highland County, had a Caterpillar 262B Skid Steer Loader taken worth $25,000 to $30,000;

(9) Charles Lovett, of Highland County, had a Kawasaki Mule Utility Vehicle taken worth $6,500 to $7,200;

(10) Tyler Reno/Reno's Auto Parts, in Highland County, had a Dodge

Ram Truck taken worth $13,000 to $15,000;

(11) Jerry Liming/Custom Cabs and Trailers, in Greene County, had a Corn Pro 30-foot Gooseneck Trailer taken worth $8,000 and a Corn Pro 25-foot Gooseneck Trailer taken worth $7,600;

(12) Tom Smith/Smith's Customs, in Clermont County, had three Kubota RTVs taken worth $9,887.44 each ($29,662.32 total) and one John Deere Gator taken worth $9,343.40; and

(13) Ralph B Shannon/Ralph B. Shannon Excavating, in Clermont County had a Caterpillar 304C Mini-Excavator taken worth $56,000 to $60,000 and a Caterpillar 246 Skid Steer Loader taken worth $30,000.

{¶4} The state moved to transfer the case from the juvenile division to common pleas general division. After a probable cause hearing and an amenability hearing, the juvenile court transferred the case to the general division of the Clinton County Court of Common Pleas.

{¶5} Although there were multiple victims and many items of property taken over the course of several months, the state charged appellant with a single violation of R.C. 2913.02(A)(1). Appellant waived his right to a jury trial, and the case proceeded to a three-day bench trial. The trial court found appellant guilty of a violation of R.C. 2913.02(A)(1). The trial court also determined the value of the property taken was $100,000 or more and less than $500,000, making it a third-degree felony. The trial court sentenced appellant to three years in prison, and ordered him to pay $60,306.69 in restitution. Appellant filed a timely appeal raising five assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE JUVENILE COURT ERRED IN RELINQUISHING JURISDICTION TO THE GENERAL DIVISION."

{¶8} In his first assignment of error, appellant presents three separate issues. Appellant first argues that the juvenile court erred in finding probable cause that he committed the acts he was charged with in the delinquency complaint. Next, appellant contends the juvenile court erred in determining he was not amenable to rehabilitation within the juvenile system. Finally, appellant maintains the juvenile court erred in failing to obtain an investigation by Dr. Bobbie G. Hopes, Ph.D., the court-appointed psychologist, regarding appellant's suitability for transfer to the adult system.

{¶9} "Juv.R. 30 and R.C. 2152.12 govern the transfer of a child from the juvenile court to the general division of the common pleas court to be prosecuted as an adult." *State v. Allen*, Butler App. No. CA2007-04-085, 2008-Ohio-1885, ¶7. "Specifically, R.C. 2152.12(B) provides that the juvenile court may transfer the case if it finds that the child was 14 years of age or older at the time of the offense; there is probable cause to believe the child committed the offense; and the 'child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions.'" Id.

{¶10} Because appellant was 17, the initial step in the transfer process is determining whether probable cause exists "to believe the child committed the act alleged and that the act would be an offense if committed by an adult." Juv.R. 30(A). See, also, R.C. 2152.12(B)(2) ("There is probable cause to believe the child committed the act charged"). "'Probable cause' is defined as 'a reasonably strong suspicion supported by facts and circumstances sufficiently strong in themselves to warrant a prudent person in believing an accused person had committed or was committing an offense.'" *State v. Philpot* (2001), 145 Ohio App.3d 231, 237, quoting *State v. Ratcliff* (1994), 95 Ohio App.3d 199, 205.

{¶11} "Probable cause is a flexible concept, grounded in probabilities, requiring

more than a mere suspicion of guilt but a degree of proof less than that required to sustain a conviction." *State v. Ruggles* (Sept. 11, 2000), Clinton App. No. CA99-09-027, at 7, citing *State v. Iacona* (Mar. 15, 2000), Medina App. No. CA 2891-M, 2000 WL 277911, at *3. "In meeting this standard the state must produce evidence that raises more than a mere suspicion of guilt, but need not provide evidence proving guilt beyond a reasonable doubt." *State v. Iacona*, 93 Ohio St.3d 83, 2001-Ohio-1292, at 14.

{¶12} The complaint alleged appellant committed an act which would be a theft offense, in violation of R.C. 2913.02(A)(1), if committed by an adult. Theft is defined in pertinent part as, "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways * * * [w]ithout the consent of the owner or person authorized to give consent." R.C. 2913.02(A)(1). Thus, in order to show probable cause, the state had the burden to provide credible evidence that appellant purposely acted to deprive the owner of property, by knowingly obtaining or exerting control over the property without the owner's consent. See *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, ¶52; *Iacona* at 14.

{¶13} Although the state also alleged the value of the items taken was $321,500, we do not believe that the value of the items taken is necessary to determine whether probable cause of a theft exists, at least for the purposes of a discretionary transfer hearing. This is because value is not an essential element of theft, and is only a determination related to the level of criminal punishment. See *State v. Smith*, 121 Ohio St. 3d. 409, 2009-Ohio-787, ¶13; R.C. 2913.02(B)(2).

{¶14} Even though we defer to the juvenile court's determination of witness credibility, we must independently determine whether the state presented sufficient credible evidence to demonstrate there was probable cause to believe the juvenile

committed the acts for which he was charged. See *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, ¶51; *Ruggles* at 7.

{¶15} Appellant argues the juvenile court erred in finding there was probable cause to believe he committed a theft offense of more than $100,000 in Clinton County. In particular, appellant asserts that the items stolen in Clinton County only totaled $81,152.62. In addition, appellant maintains the state failed to provide credible evidence appellant was involved in the theft of a bulldozer belonging to Thomas Heywood I. Also, appellant contends the state did not present physical evidence or eyewitness testimony regarding the appellant's involvement in any of the acts which constituted the theft offense. Lastly, appellant argues the state's witnesses, Timothy Cole and Larry Strong, did not provide credible evidence to prove appellant committed the theft.

{¶16} Appellant is correct in that the acts alleged in the delinquency complaint did not all occur in Clinton County. The delinquency complaint stated that the acts occurred both in Clinton County and in neighboring counties. In addition, the victims testified to their property being taken from Clinton, Brown, Highland, Greene and Clermont Counties. Essentially, appellant's argument is whether the Clinton County Juvenile Court was the appropriate venue for all of the acts which were committed, rather than just those acts which occurred in Clinton County.

{¶17} While R.C. 2901.12 vests venue in a court that has subject matter jurisdiction, and in whose territory the offense or any element of the offense was committed, there is no analogous venue provision within R.C. Chapter 2151.[1] This court

1. Juv.R. 10 states that "[t]he complaint shall be filed in the county in which the child who is the subject of the complaint is found or was last known to be." We are aware that Juv.R. 10 has been applied to issues of venue, rather than personal jurisdiction. See *Goeller v. Moore*, Franklin App. No. 04AP-394, 2005-Ohio-292, ¶7. However, *Goeller*, and those cases cited therein, relate to custody rather than delinquency adjudications or transfer proceedings. See, e.g., *Squires v. Squires* (1983), 12 Ohio App.3d 138.

has twice dealt with juveniles transferred to the general division, who raised arguments regarding a juvenile court's lack of venue. See *State v. Todd*, Butler App. No. CA2004-03-123, 2005-Ohio-2270, ¶26 (overruled on other grounds by *In re Ohio Criminal Sentencing Statutes Cases*, 109 OhioSt.3d 313, 2006-Ohio-2109); *Ruggles*, Clinton App. No. CA99-09-027 at 10-11. This court, as well as other courts, have all looked to the criminal venue requirements in analyzing this issue. *Todd* at ¶26; *Ruggles* at 10-11. See, also, *In the Matter of Jeff Hauenstein*, Tuscarawas App. No. No. 2001 AP 07 0071, 2002-Ohio-2854, ¶27-32 (applied criminal venue statute to juvenile delinquency proceeding); *In the Matter of Hackathorn* (Dec. 15, 1998), Belmont App. No. 97 BA 29, 1998 WL 896468, at *1-2 (applying R.C. 2901.12 to the juvenile delinquency adjudication); *In re Heater* (Feb 10, 1997), Stark App. No. 1996 CA 00208, 1997 WL 117136, at *2 (applying criminal venue requirements to a delinquency hearing); Giannelli & Salvador, Ohio Juvenile Law (2009) 46, Section 5:4 (in Serious Youth Offender cases, venue lies in the county where the alleged act occurred).

{¶18} Therefore, we find that with regard to juvenile transfer proceedings, the criminal venue statutes are controlling. See, generally, *Kent v. United States* (1966), 383 U.S. 541, 553, 86 S.Ct. 1045 (basic requirements of due process and fairness apply in a proceeding relinquishing jurisdiction over a juvenile).

{¶19} However, where a juvenile fails to object to venue, it is waived upon appeal. See *Hackathorn* at *2. See, also, *State v. Loucks* (1971), 28 Ohio App.2d 77, 82 (failure to object to venue waives the issue on appeal); *In re C.W.*, Butler App. No. CA2004-12-312, 2005-Ohio-3905, ¶15, 16 (finding personal jurisdiction waived because juvenile failed to object pursuant to Juv.R. 22[D]). Because appellant failed to object to venue at either the probable cause hearing or the transfer hearing, he has waived

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Furthermore, Juv.R. 1(C) specifically excludes the juvenile rules from applying to "criminal actions."

review of venue in those proceedings. Thus, we may examine all of the acts alleged in the delinquency complaint to determine whether the state presented sufficient credible evidence to demonstrate probable cause to believe appellant committed the acts for which he was charged.

PROBABLE CAUSE ANALYSIS

{¶20} There was probable cause to believe appellant took Brandi Fitzpatrick's Yamaha Raptor from Clinton County without the owner's permission. Cole testified appellant and Tommy brought the Raptor to his garage to be repaired. Cole also stated he assumed it belonged to appellant, but later learned from Tommy that the Raptor was stolen.

{¶21} There was probable cause to believe appellant took Charles Borton/Borton Farms' 100 gallons of diesel fuel from Clinton County without the owner's permission. Cole testified appellant and another boy offered to sell him diesel fuel. In addition, Strong testified that he bought 100 gallons of diesel fuel from appellant for $100.

{¶22} There was probable cause to believe appellant took Daniel P. Oehler's Bobcat 753 Skid Steer Loader from Clinton County without the owner's permission. Strong testified that even though he picked up the 753 from Tommy's house, and paid Tommy $1,000, Tommy told him appellant stole the vehicle.

{¶23} There was probable cause to believe appellant took James Douglas Borton/Borton Signature Homes' Bobcat S250 Skid Steer Loader from Clinton County without the owner's permission. Strong testified that Tommy called him about an S250 that he sold to a guy who had not paid for the vehicle. Strong stated that he followed Tommy and appellant in order to "repossess" the vehicle. Strong testified that he paid either Tommy or appellant $1,700 for the vehicle, and appellant went into a United Dairy Farmer's in Blanchester to get change.

{¶24} There was probable cause to believe appellant took Barbara Mootz/Fayetteville Hardware's Pro Star Trailer from Brown County without the owner's permission. Strong testified that both Tommy and appellant brought the trailer to his home, and Strong bought it for $800.

{¶25} There was probable cause to believe appellant took Darryl Williams' Caterpillar 257 Skid Steer Loader from Highland County without the owner's permission. Strong testified appellant and another boy brought it to his house, although Strong did not pay appellant any money for the vehicle.

{¶26} There was probable cause to believe appellant took Ray Purdin/Purdin's Auto Parts' Caterpillar 262B Skid Steer Loader from Highland County without the owner's permission. Purdin testified that he found the 262B the next morning, after his neighbor called him and told him that two boys had tried to load it on a trailer. Cole testified that while appellant was present, Tommy told him that appellant had tried to steal a skid steer, but as appellant was loading it he made a wrong turn and got it stuck in a yard.

{¶27} There was probable cause to believe appellant took Charles Lovett's Kawasaki Mule Utility Vehicle from Highland County without the owner's permission. Cole testified that Tommy and appellant had offered to sell him a used Kawasaki Mule, although he never saw the vehicle.

{¶28} There was probable cause to believe appellant took Tyler Reno/Reno's Auto Parts' Dodge Ram Truck from Highland County without the owner's permission. Reno testified that the Dodge truck was later recovered, without its engine, at Stonelick Lake. Strong testified that Tommy and appellant brought him the Dodge truck. After Strong had removed the engine, both Tommy and appellant came to Strong's house picked up the truck and Strong paid Tommy $1,500. Strong stated that Tommy later

told him that he and appellant had abandoned the truck in Stonelick Lake.

{¶29} There was probable cause to believe appellant took Jerry Liming/Custom Cabs and Trailers' Corn Pro 30-foot Gooseneck Trailer from Greene County without the owner's permission. Strong testified both Tommy and appellant brought him a trailer with Custom Cab stickers. Strong believed that he paid appellant $1,200 for the trailer.

{¶30} There was probable cause to believe appellant took Tom Smith/Smith's Customs' three Kubotas from Clermont County without the owner's permission. Cole testified he saw appellant with a trailer with two new Kubotas on it, early one morning. Strong testified that Tommy and appellant offered to sell him two brand new Kubotas. Strong testified that he did purchase a used Kubota from Tommy and appellant, which appellant drove to his house while Tommy followed in a truck. Lastly, Sergeant Douglas Eastes (Sergeant Eastes) testified that while conducting a search for the Kubotas, he found one approximately one quarter of a mile a way from appellant's home. Sergeant Eastes also stated that Tommy's mother told him she had seen appellant riding a Kubota on the Heywoods' property.

{¶31} There was probable cause to believe appellant took Tom Smith/Smith's Customs' John Deere Gator from Clermont County without the owner's permission. Strong testified that appellant drove the Gator to his home, while Tommy followed in a truck. Strong paid Tommy and appellant $1,300 for the Gator and the used Kubota which was also delivered the same night.

{¶32} Thus, there was probable cause to believe appellant committed some of the acts which constituted the theft offense that he was charged with in the delinquency complaint. A theft offense, which if committed by an adult, would be a violation of R.C. 2913.02(A)(1).

{¶33} However, there was no probable cause to believe appellant took a

Caterpillar Bulldozer from Clinton County without the permission of its owner, Thomas F. Heywood I. Heywood, who is also Tommy's father, testified that his son, rather than appellant, attempted to sell the Bulldozer to Strong. The state presented no other evidence to indicate appellant was involved in the theft.

{¶34} In addition, there was also no probable cause to believe appellant took Jerry Liming/Custom Cabs and Trailers' Corn Pro 25-foot Gooseneck Trailer without the owner's permission. Liming testified the trailer was stolen on January 26, 2008, and Sergeant Eastes admitted that appellant was in custody on that date.

{¶35} Finally, there was no probable cause to believe appellant took Ralph B. Shannon/Ralph B. Shannon Excavating's Caterpillar 304C Mini Excavator or the Caterpillar 246 without the owner's permission. Strong stated that Tommy and another boy brought him both vehicles. Strong also specifically testified the thefts did not involve appellant.

{¶36} In conclusion, we find there was probable cause to believe appellant did take a number of items of property from several different victims. However, there was not probable cause to believe appellant committed *all* of the acts for which he was charged. We do not believe this finding is fatal to the probable cause determination, as it is clear that the requirements of Juv.R. 30(A) and R.C. 2152.12(B)(2) are satisfied even if there was only probable cause to believe appellant committed only one of the acts.[2] Therefore, we cannot say the juvenile court erred in finding there was probable cause to believe appellant committed alleged acts which would be criminal offenses if committed by an adult.

2. It should be noted that delinquency complaints are not subject to the same scrutiny as a complaint or indictment filed in adult proceedings. See, generally, *In re G.E.S.*, Summit App No. No. 23963, 2008-Ohio-2671, ¶13-17; *In re Good* (1997), 118 Ohio App.3d 371, 375-76; *In re Burgess* (1984), 13 Ohio App.3d 374, 375.

AMENABILITY AND REHABILITATION DETERMINATION

{¶37} After the juvenile court determines there is probable cause, it must continue the proceedings for a full investigation, including a mental examination of the child. Juv.R. 30(C); R.C. 2152.12(C). Then the juvenile court must conduct a hearing to determine whether the child is amenable to care or rehabilitation within the juvenile system. Juv.R. 30(C); R.C. 2152.12(B)(3). "To determine whether the child can be rehabilitated [or] whether adult sanctions are necessary for the safety of the community, the juvenile court must consider whether the factors in favor of a transfer listed in R.C. 2152.12(D)[3] outweigh the factors against a transfer listed in R.C. 2152.12(E)."[4] *Allen*,

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3. **{¶a}** R.C. 2152.12(D) states: "In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the following relevant factors, and any other relevant factors, in favor of a transfer under that division:

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

{¶c} " (2) The physical or psychological harm suffered by the victim due to the alleged act of the child was exacerbated because of the physical or psychological vulnerability or the age of the victim.

{¶d} "(3) The child's relationship with the victim facilitated the act charged.

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

{¶f} "(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.

{¶g} "(6) At the time of the act charged, the child was awaiting adjudication or disposition as a delinquent child, was under a community control sanction, or was on parole for a prior delinquent child adjudication or conviction.

{¶h} "(7) The results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system.

{¶i} "(8) The child is emotionally, physically, or psychologically mature enough for the transfer.

{¶j} "(9) There is not sufficient time to rehabilitate the child within the juvenile system."

4. **{¶a}** "R.C. 2152.12(E) states: "In considering whether to transfer a child under division (B) of this section, the juvenile court shall consider the following relevant factors, and any other relevant factors, against a transfer under that division:

{¶b} "(1) The victim induced or facilitated the act charged.

2008-Ohio-1885 at ¶7, citing R.C. 2152.12(B).

{¶38} Unlike a probable cause determination, a juvenile court has wide latitude in determining whether it should retain or relinquish jurisdiction over a juvenile, and its decision will not be reversed unless the court abuses its discretion. See *State v. Watson* (1989), 47 Ohio St.3d 93, 95; *Allen*, 2008-Ohio-1885 at ¶8. *State v. Dunston* (Apr. 2, 2001), Madison App. No. CA2000-05-026, at 3. The question is not whether we would have reached the same decision to relinquish jurisdiction over the juvenile, but whether the juvenile court abused its discretion in reaching that conclusion. *State v. Hopfer* (1996), 112 Ohio App.3d 521, 535.

{¶39} "As long as the court considers the appropriate statutory factors and there is some rational basis in the record to support the court's findings when applying those factors, we cannot conclude that the [juvenile] court abused its discretion in deciding whether to transfer jurisdiction."[5] *State v. West*, 167 Ohio App.3d 598, 2006-Ohio-3518, ¶10, citing R.C. 2152.12(B); *Watson*, 47 Ohio St.3d at 95-96; *State v. Douglas* (1985), 20 Ohio St.3d 34, 36-37; and *State v. Hopfer* (1996), 112 Ohio App.3d 521, 535-536. However, juvenile courts must also be mindful of the most important purpose behind this

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{¶c} "(2) The child acted under provocation in allegedly committing the act charged.

{¶d} "(3) The child was not the principal actor in the act charged, or, at the time of the act charged, the child was under the negative influence or coercion of another person.

{¶e} "(4) The child did not cause physical harm to any person or property, or have reasonable cause to believe that harm of that nature would occur, in allegedly committing the act charged.

{¶f} "(5) The child previously has not been adjudicated a delinquent child.

{¶g} "(6) The child is not emotionally, physically, or psychologically mature enough for the transfer.

{¶h} "(7) The child has a mental illness or is a mentally retarded person.

{¶i} "(8) There is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety."

5. R.C. 2152.12(B)(3) also states "[t]he record shall indicate the specific factors that were applicable and that the court weighed."

determination, which is, "the assessment of the probability of rehabilitating the child within the juvenile justice system." *State v. Douglas* at 36, citing *State v. Adams* (1982), 69 Ohio St.2d 120, 123.

ANALYSIS OF THE TRANSFER FACTORS

{¶40} In rendering its decision to relinquish jurisdiction, the juvenile court found the factors in favor of transfer were: (1) the victims suffered serious economic harm; (2) at the time of the acts charged, the child was awaiting adjudication or disposition as a delinquent child and was under a community control sanction for a prior delinquent child adjudication; (3) the court was unable to assess whether previous sanctions and programs could indicate rehabilitation could not occur; (4) the child was physically and emotionally mature enough for transfer; (5) there was insufficient time to rehabilitate the child; (6) the juvenile's prior delinquent offense required calculation and participation of others; (7) the current offense required calculation and extensive planning and occurred while the juvenile was on probation; and (8) pursuant to Dr. Hopes' written opinion, if appellant committed the alleged acts, "the juvenile 'appeared to be escalating quickly into more serious criminal behavior and the risk of future crimes is significant.'" Applying the factors in R.C. 2152.12(E), the juvenile court found that it was difficult to assess whether there was sufficient time to rehabilitate the child, and that there had not been extensive rehabilitation efforts by the court. The juvenile court also considered whether the security of the juvenile system was able to assure public safety.

{¶41} Appellant argues that the factors against transfer outweigh the factors in favor of transfer. Among the factors cited by appellant is the fact that none of the victims suffered serious economic or physical harm. Appellant further argues that there were no "tangible results to show that appellant could not be rehabilitated," because he had not completed his rehabilitation for his prior delinquency by the time the instant acts

were committed. In addition, appellant contends there was "sufficient time for rehabilitation in the juvenile system" because there were more than three years remaining before he turned 21. Lastly, appellant relies on Dr. Hopes' recommendations that he be sent to a juvenile rehabilitation center because he had only been offered minimal rehabilitative services. Based on the totality of the circumstances, appellant maintains the trial court erred in finding he was not amenable to rehabilitation in the juvenile system.

{¶42} Appellant argues that the victims did not suffer serious economic harm because most of the property was returned to their owners, and there was no evidence as to the actual "economic harm" suffered by the owners, because they only testified to the items' "value."[6] However, we also believe there is support for the juvenile court's determination that the victims did suffer economic harm. Heavy equipment and machinery were taken from active worksites worth thousands of dollars, there was damage sustained to at least three of the items of property, and a victim stated the thieves had cut a padlocked chain in order to take his property. See *State v. Ankrom*, Lake App. No. 2004-L-125, 2005-Ohio-6568, ¶4, 38-39 (judgment reversed by *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109). The juvenile court had the discretion to determine that the economic harm suffered by the victims weighed in favor of relinquishing jurisdiction.

{¶43} In addition, appellant argues the juvenile court was mistaken in finding there was insufficient time to rehabilitate him within the juvenile system because (1) he

6. See, e.g., *State v. Jung*, Washington App. No. 02CA40, 2003-Ohio-7346, ¶20, 21 (no evidence showed $400.00 was a substantial loss and the money was recovered and returned to the victim); *State v. Cosgrove*, Auglaize App. No. 2-2000-33, 2001-Ohio-2352, at 7 (the trial court found the victim did not suffer serious economic harm, even though the victim suffered damage and loss of property, most of it was recovered). See, also, *State v. Cantrell*, Champaign App. No. 2005-CA-4, 2006-Ohio-404, ¶41; *State v. Elkins*, 156 Ohio App. 3d 281, 2004-Ohio-842, ¶9-10; *State v. Elkins*, 148 Ohio App. 3d 370, 2002-Ohio-2914, ¶41, 46-47.

was 17 years old at the time of the transfer hearing, and (2) the juvenile court retains jurisdiction over juveniles until they reach 21 years of age. Appellant cites to the fact that his criminal sentence was only three years, while the juvenile court could have maintained jurisdiction over him for three and a half years.

{¶44} Appellant is correct in that a juvenile court does retain jurisdiction over a juvenile until the age of 21. See R.C. 2152.02(C)(6); *State v. Watson* (1989), 47 Ohio St. 3d 93, 96; *In re Andrew*, 119 Ohio St.3d 466, 2009-Ohio-4791. However, it was within the juvenile court's discretion to find that three and a half years was not sufficient time to rehabilitate appellant. We also note that had appellant been found guilty of all of the acts he was alleged to have committed, he may have been sentenced to more than three and a half years and subject to postrelease control.

{¶45} Appellant maintains that the results of his previous juvenile sanctions showed that he was amenable to treatment, and in compliance with the requirements of his juvenile probation. In addition, appellant contends that other courts have cited to lengthy records and failures at rehabilitation efforts to support transfer under this factor which is lacking in this case.

{¶46} In its entry relinquishing jurisdiction, the juvenile court stated as a factor in favor of transfer that "it was difficult to assess whether the results of any previous juvenile sanctions and programs indicate rehabilitation of the child will not occur in the juvenile system." However, the juvenile court also acknowledged as a factor in favor of maintaining jurisdiction that it was aware appellant had not been subject to "extensive rehabilitation efforts" within the juvenile system. Therefore, the factor which the juvenile court weighed in favor of transfer was also used by the court to weigh in favor of maintaining jurisdiction. We also observe that the juvenile court was cognizant of the fact that appellant had been complying with the terms of his probation for his previous

delinquency adjudication; but we note the court recognized that at least some of the acts occurred during the time appellant was in "rehabilitation." We simply cannot find the juvenile court abused its discretion when considering this factor, especially in light of the fact that the court also considered it a factor in maintaining jurisdiction.

{¶47} In conclusion, we cannot say that the juvenile court abused its discretion in relinquishing jurisdiction because the court clearly considered and weighed the statutory factors in R.C. 2152.12(D) and (E). Moreover, there is also a rational basis in the record to support the juvenile court's findings. Lastly, the court expressly stated that it found the "juvenile was not amenable to rehabilitation within the juvenile system [and] that the safety of the community requires that the juvenile be subject to adult sanctions."

THE EXPERT OPINION

{¶48} Finally, appellant argues that the juvenile court should not have conducted an amenability hearing without receiving an opinion from Dr. Hopes as to whether appellant should be transferred to the adult system. In support of this contention, appellant argues that R.C. 2152.12(C) mandates the juvenile court order an investigation and mental examination, and Juv.R. 30 requires the court to continue an amenability hearing to wait until a "full" investigation is completed. Appellant's argument is that the juvenile court should not have made a determination on amenability because the court *lacked* a psychologist's opinion on the subject.

{¶49} We find the juvenile court fully complied with the requirements of both R.C. 2152.12(C) and Juvenile R. 30(C). R.C. 2152.12(C) only requires the juvenile court to order, as part of an investigation, a mental examination by a public or private agency or a person otherwise qualified to make such an examination.[7] The juvenile court clearly

7. R.C. 2152.12(C) states, "Before considering a transfer under division (B) of this section, the juvenile court shall order an investigation, including a mental examination of the child by a public or private agency or a person qualified to make the examination. The child may waive the examination required by this

complied with this requirement when the court appointed Dr. Hopes to conduct appellant's mental examination.[8]

{¶50} Juv.R. 30(C) sets forth the procedure by which a juvenile court may relinquish jurisdiction of a juvenile for the purposes of criminal prosecution.[9] Juv.R. 30(C) requires the juvenile court to continue the proceeding for a full investigation after probable cause is found. The rule does not specify or define what constitutes a full investigation, it merely states the investigation contain a mental examination of the child. When the investigation is completed, Juv.R. 30(C) mandates the juvenile court hold an amenability hearing to determine whether to transfer jurisdiction. The juvenile court appointed Dr. Hopes to perform the mental examination of appellant. Dr. Hopes examined appellant and provided the juvenile court with her report and findings, which the court could consider as part of the investigation.

{¶51} Appellant asserts that because Dr. Hopes' report did not provide an opinion on the ultimate issue of his transfer to the adult system, the investigation was not complete. As such, appellant maintains the amenability hearing should have been continued until Dr. Hopes provided the juvenile court with an opinion on transfer. We disagree. Neither R.C. 2152.12(C) nor Juv.R. 30(C) require the mental examiner to provide such an opinion to the court.

{¶52} Furthermore, Juv.R. 30(F) states that "[r]efusal by the child to submit to a

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division if the court finds that the waiver is competently and intelligently made. Refusal to submit to a mental examination by the child constitutes a waiver of the examination."

8. There is no suggestion that Dr. Hopes was in any way unqualified to make such an examination, and a failure to challenge her qualifications waives any issue for appeal.

9. "Discretionary transfer. In any proceeding in which transfer of a case for criminal prosecution is permitted, but not required, by statute, and in which probable cause is found at the preliminary hearing, the court shall continue the proceeding for full investigation. The investigation shall include a mental examination of the child by a public or private agency or by a person qualified to make the examination. When the investigation is completed, an amenability hearing shall be held to determine whether to transfer jurisdiction. The criteria for transfer shall be as provided by statute." Juv.R. 30(C).

mental examination *or any part of the examination* shall constitute a waiver of the examination." (Emphasis added.) Appellant refused to provide certain relevant information regarding his attitude for and motivation behind the acts for which the complaint was filed. Thus, he has effectively waived his right to the examination. Indeed, it is because of his refusal to provide Dr. Hopes with this information, that she was unable to render the "ultimate" opinion on transfer.

{¶53} We find that it does not matter that Dr. Hopes' report did not contain an opinion on whether to transfer appellant to the general division. While Dr. Hopes may not have issued an "ultimate" opinion, Dr. Hopes did offer an opinion as to the "positive and negative aspects for retention within the juvenile system versus his bindover to the adult system." For instance, Dr. Hopes' report stated that appellant had only "received a very small sample of the rehabilitative services that could potentially benefit in his rehabilitation." Dr. Hopes further suggested the "next most reasonable step" would be to place appellant in a juvenile rehabilitation center. However, Dr. Hopes also remarked that appellant has "demonstrated the willingness to engage in a pattern of serious criminal conduct" which is "beyond the typical criminal behavior that is exhibited by most juveniles." In addition, as stated previously, Dr. Hopes opined that if appellant committed the acts he "appeared to be escalating quickly into more serious criminal behavior and the risk of future crimes [wa]s significant." Therefore, even though Dr. Hopes' examination may not have resulted in an opinion regarding transfer, we believe the juvenile court complied with all statutory requirements, and had sufficient information from the mental examination to render its own decision to transfer appellant to the adult system.

{¶54} In conclusion, we find there was probable cause to believe that appellant committed most of the acts for which he was charged. In addition, the juvenile court

properly considered the statutory factors related to relinquishing jurisdiction. Finally, there was no abuse of discretion in ordering appellant's transfer to the general division. Appellant's first assignment of error is overruled.

{¶55} Assignment of Error No. 2:

{¶56} "INDIVIDUAL EVIDENTIARY RULINGS VIOLATED OHIO'S EVIDENCE RULES AND THE COMBINED EFFECT OF MULTIPLE TRIAL COURT ERRORS VIOLATED APPELLANT'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

{¶57} Assignment of Error No.3:

{¶58} "APPELLANT'S CONVICTIONS WERE BOTH AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1, 10 [AND] 16 OF THE OHIO CONSTITUTION."

{¶59} Assignment of Error No. 4:

{¶60} "THE TRIAL COURT ERRED BY ORDERING RESTITUTION IN THE DELINEATED AMOUNTS IN VIOLATION OF R.C. § 2929.18, OHIO COMMON LAW, AND THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION."

{¶61} Assignment of Error No. 5:

{¶62} "TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 [AND] 16 OF THE OHIO CONSTITUTION."

{¶63} In his second assignment of error, appellant maintains the trial court committed multiple evidentiary errors which violated both his due process rights and several of the Rules of Evidence. In his third assignment of error, appellant argues there was insufficient evidence of venue to support his conviction, and his conviction for theft is against the manifest weight of the evidence. In his fourth assignment of error, appellant contends the trial court erred in ordering restitution because the amount ordered was greater than the loss suffered by the victims and because the trial court failed to ascertain his present and future ability to pay restitution. In his fifth assignment of error, appellant argues he was denied effective assistance of trial counsel because his attorney failed to offer proper advice and failed to make several objections.

{¶64} Before addressing appellant's remaining assignments of error, we sua sponte consider the state's decision to try all of the alleged offenses as a single offense, and aggregate the value of all of the items taken. See *State v. Slagle* (1992), 65 Ohio St.3d 597, 604-05; *State v. Long* (1978), 53 Ohio St.2d 91, 94-95; *State v. Sneed* (1992), 63 Ohio St.3d 3, 10; *State v. Scott*, 174 Ohio App.3d 446, 2007-Ohio-7065, ¶8; *State v. McClain*, Cuyahoga App. No. 88217, 2007-Ohio-1604, ¶32; *State v. Gooch*, 162 Ohio App.3d 105, 2005-Ohio-3476, ¶24. Although appellant did not specifically raise this issue on appeal, he nevertheless indirectly presents it via his Fifth Assignment of Error in which he argues the insufficiency of the evidence relative to venue in an ineffective assistance of counsel claim. Generally, the failure to raise a particular error requires the application of a plain error standard of review. Within that context, a reviewing court must determine whether substantial prejudice may have been visited upon an appellant, thereby resulting in a manifest miscarriage of justice.

{¶65} In order to find plain error (1) "there must be an error * * * a deviation from a legal rule;" (2) "the error must be plain" that is "an obvious defect in the trial

proceedings;" and (3) "the error must have affected substantial rights" meaning the error "must have affected the outcome of the trial." *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, at 9-10 (internal quotations and citations omitted). "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *Moreland* at 62. However, we are mindful that an appellate court should only "notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Barnes* at 10, quoting *State v. Long*, 53 Ohio St.2d 91, at paragraph three of the syllabus.

{¶66} The Clinton County Grand Jury issued the following indictment in this matter:

{¶67} "Of the Term APRIL in the year two thousand eight[.] THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find a present that on or about the period of August 19, 2007, through and including January 28, 2008 at Clinton County, Ohio, Richard Preston Phillips, did with purpose to deprive the owners, to wit: Tom Smith, Borton Farms, Signature Homes, Daniel Oehler; Purdin's Auto Parts; Brandi Fitzpatrick, Fayetteville Hardware; Custom Cabs and Trailers; Reno's Auto Parts; Ralph B. Shannon Excavating; Charles Lovett; Thomas F. Heywood of their property or services, did knowingly obtain and exert control over said property or services, to wit: Numerous Heavy Equipment machinery; the value of said property or services being One Hundred Thousand Dollars $100,000) or more in violation of Ohio Revised Code Title 29, Section 2913.02(A)(1) (Aggravated Theft, a felony of the third degree) and against the peace and dignity of the State of Ohio."

{¶68} Therefore, although there were 13 separate victims and 18 various items taken at 14 different time periods, appellant was only indicted for a single third-degree

felony theft offense.

{¶69} According to the trial transcript, the trial court found that the state properly brought the case pursuant to R.C. 2913.61(C)(2) because there was a "demonstration of a course of continuing conduct." While a series of offenses may be tried as a single offense, and the values of those offenses aggregated, R.C. 2913.61(C) is unambiguous in defining the circumstances under which this may occur.[10] After a careful reading of R.C. 2913.61(C)(2), we find the statute inapplicable to the proceedings at bar.

{¶70} R.C. 2913.61(C)(2) provides two instances which allow multiple offenses to be tried as a single offense, and the value of property taken to be aggregated. The first circumstance is where "an offender commits a series of offenses under section 2913.02 of the Revised Code that involves a common course of conduct to *defraud* multiple victims * * *." (Emphasis added.) Defraud is defined by R.C. 2913.01(B) and "means to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another." Deception is also defined, and "means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact." R.C. 2913.01(A). With this in mind, we find there is nothing in the record to suggest that appellant obtained any of the property through a common course of conduct to defraud any of his victims. Therefore, the state could not have tried the offenses as a single offense on this basis.

10. "An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language." *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶9. See, also, *State v. Krutz* (1986), 28 Ohio St.3d 36 (refusing to ignore the plain and unambiguous language in R.C. 2913.61[C]); *State v. McGhee*, Franklin App. No. 07AP-216, 2007-Ohio-6537 (finding the state did not have the authority to prosecute a series of offenses as a single offense under R.C. 2913.61[C]).

{¶71} Likewise the second circumstance under R.C. 2913.61(C)(2) is also inapplicable, because the victim(s) of an offender's scheme or course of conduct involve victims who are elderly or disabled. After a careful review of the record, we find there was no testimony or evidence elicited or offered to suggest that any of the victims were either elderly or disabled, thus the state could not have proceeded to try the offenses as a single offense, under this rationale.

{¶72} The only other way all of the offenses could have been tried as a single offense is if the facts in this case conform to the requirements set forth in either R.C. 2913.61(C)(1) or (3). R.C. 2913.61(C)(1) does not apply because the subsection is limited to thefts involving elderly or disabled victims, through the offender's employment, capacity, or relationship with another. In addition, R.C. 2913.61(C)(3) is not applicable because the offenses are limited to violations of R.C. 2921.41, and are committed through the offender's employment, capacity, or relationship with another.

{¶73} Appellant was indicted in Clinton County for criminal conduct occurring in other counties, conduct which should have been prosecuted in those respective counties. Standing alone, none of the individual Clinton County charges would have been more serious than a fourth-degree felony.

{¶74} Under the facts specific to this particular case, the state acted without legal authority by trying the offenses as a single offense and aggregating the value of the items stolen, which in turn created an obvious defect in the proceedings. Because this error began at the inception of the criminal proceedings, we believe that this error affected appellant's substantial rights. Moreover, exceptional circumstances exist, in this case, which warrant preventing a manifest miscarriage of justice.

{¶75} In conclusion, we affirm the juvenile court's decision to transfer appellant to the adult division. However, we reverse appellant's criminal conviction, and remand

this case to the trial court. Because the separate offenses may not be tried together as a single charge, nor the value of the separate stolen items aggregated for purposes of determining the degree of the offense, the state must choose one of the Clinton County theft offenses for which appellant is to be sentenced, and, if necessary, restitution awarded.

{¶76} Based on this decision, appellant's remaining assignments of error are rendered moot, and will not be addressed. See App.R. 12(A)(1)(c).

{¶77} Judgment affirmed in part, reversed in part, and remanded.

BRESSLER, P.J., and POWELL, J., concur.