ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE:	:	Case No. 13-1295
M.C.,	:	
a minor child.	:	On Appeal from the Erie County Court of Appeals Sixth Appellate District
	:	C.A. Case No. E-12-031

MEMORANDUM IN SUPPORT OF JURISDICTION OF MINOR CHILD-APPELLANT M.C.

KEVIN J. BAXTER #0015782
Erie County Prosecuting Attorney

ASHLEY L. THOMAS # 0086241
Assistant Erie County Prosecutor
(Counsel of Record)

Erie County Courthouse
One South Court Street, 1st Floor
Erie, Ohio 45701
(740) 592-3208
(740) 592-3291 (Fax)

COUNSEL FOR THE STATE OF OHIO

Office of the Ohio Public Defender

BROOKE M. BURNS #0080256
Assistant State Public Defender
(Counsel of Record)

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
brooke.burns@opd.ohio.gov

COUNSEL FOR M.C.

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SUPREME COURT OF OHIO

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In re M.C., Erie County Court of Appeals Case No. E-12-031, Decision and Judgment Entry, (June 28, 2013) A-1

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Juveniles are entitled to the same double jeopardy protections as adults. *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.E.2d 346 (1975); *In re Cross*, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258, ¶ 23. Yet, the Sixth District Court of Appeals denied M.C. those protections when it found that the allied offense doctrine in R.C. 2941.25(A) does not apply in delinquency proceedings. *Op.* at ¶ 27. The Sixth District's thin analysis does not survive constitutional muster, as there is no constitutional distinction between an adult and a juvenile's right to be free from multiple terms of incarceration for one offense. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (holding that a juvenile "commitment" is a deprivation of liberty). The appellate court's decision is even more egregious, since M.C. was designated a serious youthful offender relative to his offenses, and was given an adult sentence in addition to his juvenile disposition. Should his adult sentence be invoked, M.C. will have been denied the same double jeopardy protections of his adult counterparts.

Moreover, the Sixth District's decision authorizes juvenile courts to find youth delinquent of inciting to violence any time a child is charged with a gang-related felonious assault. *Op.* at ¶ 14. Such enhancement is not authorized by the Ohio Revised Code, and is contrary to due process. *McKeiver v. Pennsylvania,* 403 U.S. 528, 543, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (the appropriate due process standard in juvenile proceedings is fundamental fairness). This Court should

accept jurisdiction of this case to protect juveniles' double jeopardy rights and to ensure that juvenile courts may not find youth delinquent of additional offenses simply because they are delinquent of a gang specification.

STATEMENT OF THE CASE AND FACTS

On July 16, 2011, Rocco Marinucci was assaulted by a group of teenagers from the "Gotti Boyz" gang.[1] The altercation started immediately after Rocco and one of the boys exchanged words with each other. Rocco sustained multiple injuries during the incident, including brain hemorrhages. 14-year-old M.C. was not the youth who argued with Rocco before the fight ensued. In fact, of the 23 witnesses who testified at trial, only three of them (two of whom were confidential informants) testified that M.C. was a participant in the assault. None of the witnesses testified that M.C. took part in instigating or encouraging others to attack Rocco Marinucci.

On August 16, 2011, an Erie County grand jury indicted M.C. as a serious youthful offender ("SYO"), alleging that he was delinquent of two counts of complicity to commit felonious assault, in violation of R.C. 2903.11(A)(2), felonies of the second degree if committed by an adult; and one count of inciting to violence, in violation of R.C. 2917.01, a felony of the third degree if committed by an adult. Each charge also carried a gang specification under R.C. 2941.142. In March 2012, M.C. was tried by a jury and found delinquent of each charge and firearm specification.

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[1] All information contained in the Statement of the Case and Facts is found in the Sixth District's opinion below.

For disposition, the Erie County Juvenile Court merged the two felonious assault charges according to R.C. 2941.25, and imposed a blended SYO sentence. R.C. 2152.13. For his juvenile disposition, the juvenile court committed M.C. to the Ohio Department of Youth Services ("DYS") for an aggregate minimum commitment of three years and six months, maximum to his 21st birthday. For his adult sentence, the court imposed a suspended nine-year term in the Ohio Department of Rehabilitation and Correction ("DRC"), to be invoked only in the event that M.C. does not successfully complete his juvenile disposition. R.C. 2152.14.

M.C. appealed his adjudication and commitments to the Sixth District Court of Appeals. *See generally Op.* He assigned error to the juvenile court's failure to merge his felonious assault and inciting to violence adjudications, as they were allied offenses of similar import. *Id.* at ¶ 5. He also challenged the juvenile court's finding of delinquency for inciting to violence, as there was no evidence presented at trial that M.C. committed inciting to violence, or that if he did, he did so apart from the felonious assault. *Id.*

The Sixth District Court of Appeals affirmed M.C.'s adjudications, finding that the evidence presented at trial was sufficient to prove that M.C. was a gang member who participated in the assault against Rocco Marinucci; and therefore, also committed inciting to violence. *Id.* at ¶ 14. But, despite finding that the same conduct resulted in each offense, the Sixth District held that R.C. 2941.25(A) does not apply to juveniles; and thus, M.C. could be found delinquent of and sentenced separately for both. *Id.* at ¶ 27. This appeal timely follows.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW I: The double jeopardy protections in R.C. 2941.25(A) apply to juveniles in delinquency proceedings. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061; *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.E.2d 346 (1975); Fifth and Fourteenth Amendments to the United States Constitution.

"The purpose of the Double Jeopardy Clause is to require that [the accused] be subject to [prosecution] only once for the same offence." *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.E.2d 346 (1975), citing *Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). R.C. 2941.25(A) embodies the Fifth Amendment's double jeopardy protections. The statute provides that, "where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A).

This Court has reasoned that "the purpose of R.C. 2941.25(A) is to prevent shotgun convictions, that is, multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same conduct." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 43, citing *State v. Geiger*, 45 Ohio St.2d 238, 242, 344 N.E.2d 133 (1976). And, after finding that its prior allied offense jurisprudence produced "inconsistent, unreasonable, and at time abstract results," this Court set a clear and more straightforward standard for determining whether two offenses qualify for merger under R.C. 2941.25(A). *Johnson* at ¶ 50.

The defendant in *Johnson* was convicted of murder and child endangering for causing a child's death by child abuse. *Id.* at ¶ 55. This Court examined the defendant's conduct and determined that he could not be convicted of and sentenced for both murder and child endangering because the same conduct resulted in the commission of each offense. *Id.* at ¶ 9; 56. In reaching its conclusion, this Court instructed that the proper inquiry in an allied offense analysis is "whether it is possible to commit one offense and commit the other with the same conduct," and if so, whether the offenses were committed by the same conduct, "i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶ 48-49. "If the answer of both questions is yes, then the offenses are allied offenses of similar import," and they must be merged. *Id.* at ¶ 50. Because the state had relied on the same conduct to prove that Johnson committed murder and child endangering, the offenses had to merge. *Id.* at ¶ 56.

In this case, the State relied on the same conduct to prove that M.C. was delinquent of both felonious assault and inciting to violence. *Op.* at ¶ 10-12. At trial, the State presented evidence that M.C. was a member of the Gotti Boyz gang and that he and 10-15 other gang members repeatedly punched and kicked Rocco Marinucci, resulting in multiple, serious injuries. *Id.* at ¶ 10-11. The State not only relied on M.C.'s alleged participation in the assault and his gang membership to prove that he was delinquent of complicity to commit felonious assault, but also to prove that he was delinquent of inciting to violence. *Id.* at ¶ 10-12; 15-19. The State did not present any evidence that a separate incident or set of facts resulted

in the inciting to violence charge. *Id.* at ¶ 10-12. On appeal, the Sixth District relied on the following evidence:

> At trial, the state produced several witnesses who stated that they saw appellant in the group of youths who attacked Marinucci. Rocco Marinucci testified that he recalled walking outside his house and being jumped by a group of young people. He suffered brain injury and some memory loss as a result of the assault and does not recall anything else.
>
> K.E. testified that she was walking by Marinucci's house with two friends and saw a gang of about ten boys, including appellant, start to beat Marinucci when he walked out of his house and said something to them. She also testified that streetlights were on and she was able to see the people who were participating in the assault. K.E. admitted that she was not truthful when she was first interviewed by a detective, but testified that she later contacted the detective and told him what she saw that night. Ti'Ondra Hunter testified that she saw appellant and a group of 15 or 20 gang members kicking, stomping and punching Marinucci as she was walking home that night. Chassidy Knerr testified that she also witnessed appellant and six or seven others kicking Marinucci while he screamed for help.
>
> Additionally, Sandusky Police Detective Gary Wichman testified that while investigating this case he learned that appellant was a member of the Gotti Boyz gang which was involved in numerous altercations and beat downs in the area. S.T., who admitted to being involved in Gotti Boyz and participating in the assault on Marinucci, testified that appellant was involved in the gang as well and was with him during the assault. Sandusky Police Sergeant Newell testified that through his work as a school resource officer he acquired information on the Gotti Boyz and learned that appellant was a member of the gang.

Id. at ¶ 10-12. The Sixth District found that the behavior that supported M.C.'s adjudication for inciting to violence was the same behavior that supported his adjudication for complicity to commit felonious assault. *Id.* at ¶ 15-19. Yet, the juvenile and appellate courts failed to merge the offenses. *Id.* at ¶ 27.

The Sixth District held that R.C. 2941.25(A) does not apply to juveniles because youth in the delinquency system are not charged with crimes, and any evidence offered against them is used for protection and custody rather than punishment. *Op.* at ¶ 21, citing *In re Skeens*, 10th Dist. Nos. 81AP882 & 81AP883, 1982 Ohio App. LEXIS 12181 (Feb. 25, 1982). The Sixth District's reasoning ignores what this Court has long recognized; namely that "juvenile delinquency laws feature inherently criminal aspects" and "the state's goals in prosecuting a criminal action and in adjudicating a juvenile delinquency case are the same: to 'vindicate a vital interest in the enforcement of *criminal* laws.'" (Emphasis sic.) *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶76, quoting *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶26; *see also In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 26 (finding that delinquency proceedings have inherently criminal aspects).

When the Supreme Court of the United States extended double jeopardy protections to children, it acknowledged that such protections were usually reserved for criminal prosecution, and that juvenile proceedings were typically civil in nature. *Breed*, 421 U.S. at 528-29, 95 S.Ct. 1779, 44 L.Ed.2d 346. But, the Supreme Court recognized that "there is a gap between the originally benign conception of the [juvenile] system and its realities." *Id.* at 529. Further, the Court reiterated that a juvenile's "'commitment' is a deprivation of liberty. It is incarceration against one's will, whether it is called criminal or civil." *Id.* at 530, quoting *Gault*, 387 U.S. at 50, 87 S.Ct. 1428, 18 L.Ed.2d 527. Given the inherent

pressures, burdens, and consequences associated with juvenile delinquency proceedings, the Supreme Court found that fundamental fairness requires that youth be protected by the Double Jeopardy Clause. *Id.* at 529-31; *see also In re Cross*, 96 Ohio St.3d 328, 2002-Ohio-4183, 774 N.E.2d 258, ¶ 23 ("included in the essentials of due process [is] the protection of the Double Jeopardy Clause of the Fifth Amendment.").

The Sixth District's holding is inconsistent with long-standing Supreme Court precedent regarding the constitutional rights of children who are in the juvenile justice system and subject to incarceration. There is no constitutional justification for finding that R.C. 2941.25(A) does not apply to delinquency proceedings. The deprivation of liberty that a child faces following a prosecution in juvenile court is the same as the deprivation an adult defendant faces in criminal court. *Gault* at 50. Because M.C. was found delinquent of two offenses for the same act, and given two commitments for that act, his right to be protected from multiple terms of incarceration was violated.

It is of note that at M.C.'s disposition hearing, the Erie County Juvenile Court stated on the record that it was merging his two felonious assault charges under R.C. 2941.25(A). The State failed to raise an objection; and the Sixth District did not reverse the trial court's merger, despite finding that R.C. 2941.25(A) does not apply to juveniles. Such inconsistency further demonstrates the absurdity of the Sixth District's holding.

Moreover, additional injustice will occur in M.C.'s case if the adult portion of his SYO sentence is ever invoked. Since the juvenile court failed to merge his felonious assault and inciting to violence charges, if the adult portion of his SYO sentence is invoked, M.C. would serve multiple punishments for one act—something that would be impermissible for his adult counterparts. *Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 50.

This Court should accept this appeal in order to protect a child's right to be free from double jeopardy in juvenile court.

PROPOSITION OF LAW II: Participation in a youth gang does not meet the elements of inciting to violence absent proof that the youth charged engaged in conduct designed to urge or incite another to commit an act of violence. Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 16 of the Ohio Constitution..

Article II, Section I of the Ohio Constitution grants the General Assembly alone the power to enact laws. Pursuant to its police powers, the General Assembly has the authority to enact laws defining criminal conduct and to prescribe its punishment. *State v. Thompkins,* 75 Ohio St.3d 558, 664 N.E.2d 926 (1996). But, in this case, the Erie County Juvenile Court and the Sixth District Court of Appeals determined that M.C.'s involvement in a gang, and the gang's participation in a felonious assault, mandated that M.C. also be found delinquent of inciting to violence. *Op.* at ¶ 10-12. This is not the purpose of R.C. 2917.01.

"The state has inherent authority to protect itself and its citizens from violence, and to this end may limit speech and expression which preaches it, provided there is an obvious and imminent danger that such conduct will actually

result in the evil which the state has the right to prevent." *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919); *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). Ohio prohibits any person from "knowingly engag[ing] in conduct designed to urge or incite another to commit any offense of violence," when the conduct "takes place under circumstances that create a clear and present danger that" such offense will be committed or "proximately results in the commission of any offense of violence." R.C. 2917.01(A)(1)(2).

As outlined above, a single act supported M.C.'s adjudications for complicity to commit felonious assault and inciting to violence. (*See* Proposition of Law I). Yet, his offenses were not merged under R.C. 2941.25(A). (*See* Proposition of Law I). Instead, both the trial court and the court of appeals found that M.C.'s membership in the "Gotti Boyz" gang and complicity in the felonious assault also warranted an additional adjudication for inciting to violence. *Op.* at ¶ 10-12. In so holding, both the Erie County Juvenile Court and Sixth District effectively taxed M.C.'s participation in a gang. *Op.* at ¶ 10-12; 15-19.

The Sixth District found that a rational trier of fact could have found that M.C.'s gang involvement and participation in the assault against Rocco Marinucci was sufficient to support a finding that he engaged in inciting to violence, because the gang-initiated assault proximately resulted in an offense of violence. *Op.* at ¶ 14. Implicit in the Sixth District's reasoning, is the idea that whenever a person participates in a felonious assault as part of a criminal gang, he also automatically

commits inciting to violence. *Id.* at ¶ 10-12; 15-19. Such a finding is not authorized by Ohio law.

The Ohio General Assembly's Committee Comments to R.C. 2917.01 provide:

> This section provides a *proscription against abuse of the right of free speech and expression* by consciously, and under explosive circumstances, spurring others to violence. . . . The state has inherent authority to protect itself and its citizens from violence, *and to this end may limit speech and expression which preaches it*, provided there is an obvious and imminent danger that such conduct will actually result in the evil which the state has the right to prevent.

(Emphasis sic.) *State v. Rutherford*, 12th Dist. No. CA83-03-013, 1983 Ohio App. LEXIS 11925, 6-7 (Dec. 19, 1983). The statute was crafted to protect citizens from violence incited by the speech of others. It applies to circumstances where a defendant or alleged delinquent child not only engages in assaultive behavior, but also verbally enlists others to do the same. *See State v. Mercado*, 3d Dist. No. 9-06-68, 2008-Ohio-3219, (finding that circumstantial evidence existed from which the jury could infer that Mercado knowingly made statements which were designed to incite another to commit an offense of violence).

Evidence that M.C. incited or urged others to assault Rocco Marinucci is absent from the record below. The juvenile court and appellate court each equated his participation in gang-related violence to encouraging others to commit violence against a third person, when there was no specific evidence that he incited others.

In R.C. 2941.142, the General Assembly outlined what the State may charge when a child commits an act that would be a felony as part of a criminal gang. The enhancement authorized by Ohio law is a gang specification, which must be alleged

in the original charging document; and which, if found requires that the court impose a mandatory sentence in addition to the sentence imposed on the underlying charge. R.C. 2941.142(A),(B). Neither R.C. 2917.01(A) or R.C. 2941.142 permits a court to find that gang participation requires an inciting to violence adjudication in the absence of evidence that the youth charged engaged in speech or behavior designed to urge others into committing violence against a third person.

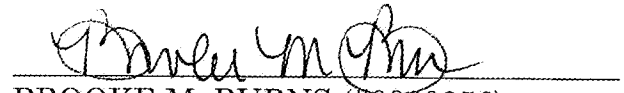
This Court should accept jurisdiction of this case to ensure that juvenile courts are not adjudicating youth delinquent of unproven offenses, simply because they are part of a youth gang.

CONCLUSION

The Sixth District's determination that R.C. 2941.25(A) does not apply to delinquency proceedings violates a juvenile's right to be free from double jeopardy. *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.E.2d 346 (1975). A court's finding that a child is delinquent of inciting to violence simply because he participated in a felonious assault as part of a gang, violates that child's right to due process because it permits court to issue findings of delinquency absent sufficient proof of every element of the offense charged. For these reasons, M.C. respectfully requests that this Court accept jurisdiction of his case.

Respectfully submitted,

Office of the Ohio Public Defender



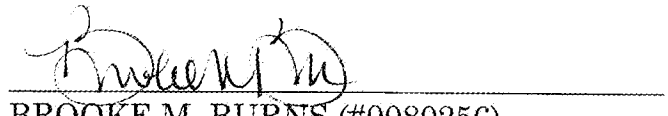
BROOKE M. BURNS (#0080256)
Assistant State Public Defender
(Counsel of Record)

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
Brooke.burns@opd.ohio.gov

COUNSEL FOR M.C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF MINOR CHILD-APPELLANT, M.C. was forwarded by regular U.S. Mail to the office of Ashley Thomas, Assistant Erie County Prosecutor, Erie County Courthouse, One South Court Street, 1st Floor, Erie Ohio 45701 this 12th day of August, 2013.



BROOKE M. BURNS (#0080256)
Assistant State Public Defender

COUNSEL FOR M.C.

#399730

IN THE SUPREME COURT OF OHIO

IN RE:	:	
	:	Case No. _____
M.C.,	:	
a minor child.	:	On Appeal from the Erie
	:	County Court of Appeals
	:	Sixth Appellate District
	:	
	:	C.A. Case No. E-12-031
	:	

APPENDIX TO
MEMORANDUM IN SUPPORT OF JURISDICTION OF
MINOR CHILD-APPELLANT, M.C.

COURT OF APPEALS
ERIE COUNTY, O.
2013 JUN 28 PM 12:
LUWANDA S. WILSON
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

In re M.C.

Court of Appeals No. E-12-031

Trial Court Nos. 2011 JF 113 (FC)
2011 JF 113 (FE)

DECISION AND JUDGMENT

Decided: JUN 28 2013

* * * * *

Timothy Young, State Public Defender, Brooke M. Burns and Laura E. Austen, Assistant State Public Defenders, for appellant.

Kevin J. Baxter, Erie County Prosecuting Attorney, Ashley L. Thomas and Cheryl Goodrum, Assistant Prosecuting Attorneys, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas, Juvenile Division. For the following reasons, the judgment of the trial court is affirmed.

J33|534
6|28|13

{¶ 2} On August 16, 2011, appellant M.C. was indicted as a serious youthful offender pursuant to R.C. 2152.11 in a six-count indictment. Counts 1 and 2 charged appellant with complicity to commit attempted murder in violation of R.C. 2903.02(A). Counts 3 and 4 charged appellant with complicity to commit felonious assault in violation of R.C. 2923.03(A)(2) and 2903.11(A)(1) and (2). Count 5 charged appellant with inciting to violence in violation of R.C. 2917.01(A)(2). Count 6 charged appellant with participating in a criminal gang in violation of R.C. 2923.42(A). All counts carried a serious youthful offender ("SYO") specification pursuant to R.C. 2152.11. Counts 1 through 5 carried a criminal gang participation specification pursuant to R.C. 2941.142.

{¶ 3} The case proceeded to a jury trial on March 19, 2012. The state produced evidence that on July 16, 2011, appellant, along with approximately 10 to 15 members of a local gang known as the Gotti Boyz, assaulted Rocco Marinucci outside the victim's home, causing Marinucci to be hospitalized for three days with brain hemorrhaging and other injuries. At the conclusion of the trial, the jury found appellant not delinquent of the two counts of complicity to commit attempted murder. Appellant was found delinquent of the remaining four counts along with the specifications of participating in a criminal gang.

{¶ 4} The trial court imposed a blended sentence in accordance with appellant's classification as a serious youthful offender. As to the two counts of complicity to commit felonious assault, the trial court imposed sentences of a minimum of one year not to exceed appellant's attainment of the age of 21 for each count, with one-year gang

participation specifications to be served consecutively to each count. The trial court then merged the two sentences for a total of two years. As to the inciting to violence count, the trial court imposed a sentence of a minimum of six months not to exceed appellant's attainment of the age of 21, with a one-year consecutive gang participation specification. This sentence was ordered to be served consecutively to the first commitment, for a total of three and one-half years' incarceration with the Ohio Department of Youth Services. As to the charge of participating in gang activity, the trial court imposed a one-year suspended sentence. Additionally, due to appellant's status as a serious youthful offender, the trial court ordered adult prison sentences for each conviction, to be imposed if appellant should fail to successfully complete his juvenile sentences.

{¶ 5} Appellant now appeals, setting forth the following assignments of error:

> ASSIGNMENT OF ERROR I: The Juvenile Court erred when it adjudicated [M.C.] delinquent of inciting to violence, along with a gang specification for that offense, when no evidence was presented that [M.] engaged in conduct designed to urge or incite another to commit an act of violence against a third party. * * *
>
> ASSIGNMENT OF ERROR II: The juvenile court violated [M.C.]'s right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution when it adjudicated him delinquent of inciting to violence and complicity to commit felonious assault, when that decision was based on

the unreliable testimony of one of [M.]'s codefendants, who had a demonstrated motive to provide the court with false information, and on the unreliable testimony of multiple witnesses who lied to law enforcement and whose testimony at trial demonstrated a propensity for untruthfulness. * * *

ASSIGNMENT OF ERROR III: The juvenile court committed plain error by finding [M.C.] delinquent for allied offenses of similar import and sentencing him on each offense, in violation of R.C. 2941.25(A). * *

{¶ 6} In support of his first assignment of error, appellant challenges the sufficiency of the evidence against him by asserting that the state did not present any evidence that he engaged in conduct designed to urge or incite another to commit an act of violence.

{¶ 7} Sufficiency of the evidence is a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court must examine "the evidence admitted to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. A conviction that is based on legally insufficient

evidence constitutes a denial of due process, and will bar a retrial. *Thompkins, supra*, at 386-387.

{¶ 8} R.C. 2917.01, inciting to violence, provides that: "(A) No person shall knowingly engage in conduct designed to urge or incite another to commit any offense of violence, when either of the following apply: * * * (2) The conduct proximately results in the commission of any offense of violence."

{¶ 9} The thrust of appellant's argument seems to be that there was no witness testimony that appellant yelled anything to the other youth involved in the assault urging them to fight or took any other action designed to move them to violence.

{¶ 10} At trial, the state produced several witnesses who stated that they saw appellant in the group of youths who attacked Marinucci. Rocco Marinucci testified that he recalled walking outside his house and being jumped by a group of young people. He suffered brain injury and some memory loss as a result of the assault and does not recall anything else.

{¶ 11} K.E. testified that she was walking by Marinucci's house with two friends and saw a gang of about ten boys, including appellant, start to beat Marinucci when he walked out of his house and said something to them. She also testified that streetlights were on and she was able to see the people who were participating in the assault. K.E. admitted that she was not truthful when she was first interviewed by a detective, but testified that she later contacted the detective and told him what she saw that night. Ti'Ondra Hunter testified that she saw appellant and a group of 15 or 20 gang members

kicking, stomping and punching Marinucci as she was walking home that night. Chassidy Knerr testified that she also witnessed appellant and six or seven others kicking Marinucci while he screamed for help.

{¶ 12} Additionally, Sandusky Police Detective Gary Wichman testified that while investigating this case he learned that appellant was a member of the Gotti Boyz gang which was involved in numerous altercations and "beat downs" in the area. S.T., who admitted to being involved in Gotti Boyz and participating in the assault on Marinucci, testified that appellant was involved in the gang as well and was with him during the assault. Sandusky Police Sergeant Newell testified that through his work as a school resource officer he acquired information on the Gotti Boyz and learned that appellant was a member of the gang.

{¶ 13} The record reflects that the defense presented alibi witnesses, some of whom placed appellant at another location in the neighborhood at or around the time of the assault and others who said they saw the gang and did not see appellant in the group.

{¶ 14} This court has thoroughly considered the entire record of proceedings in the trial court and the testimony as summarized above and finds that the state presented sufficient evidence from which, when viewed in a light most favorable to the state, a rational trier of fact could have found that appellant knowingly engaged in conduct designed to encourage or incite another to commit an offense of violence when the conduct proximately results in an offense of violence. *See* R.C. 2917.01; *Jenks, supra,* 61

Ohio St.3d 259, 574 N.E.2d 492. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 15} As his second assignment of error, appellant asserts that his convictions of complicity to felonious assault and inciting to violence were based on the testimony of a co-defendant who had a "demonstrated motive" to provide the court with false information and on additional unreliable testimony from witnesses who initially lied to law enforcement.

{¶ 16} A manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins, supra,* 78 Ohio St.3d 380 at 387, 678 N.E.2d 541. In making this determination, the court of appeals sits as a "thirteenth juror" and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.*, citing *State v. Martin*, 20 Ohio App.3d 172, 485. N.E.2d 717 (1st Dist.1983).

{¶ 17} Appellant was found delinquent of one count of inciting to violence, in violation of R.C. 2917.01(A)(2), as set forth above, and two counts of complicity to commit felonious assault, in violation of R.C. 2923.03(A)(2) and 2903.11(A)(1) and (2).

{¶ 18} In support of this argument, appellant refers to the testimony of co-defendant S.T., who placed appellant at the scene. S.T. testified that he was charged in connection with this incident and had entered into a plea agreement with the state in

exchange for agreeing to testify at appellant's trial. Appellant also claims the testimony of Ti'Ondra Hunter and Chassidy Knerr was unreliable. Hunter testified that when she initially spoke to a detective she did not remember seeing one of the attackers hit Marinucci with a metal pipe; at trial, she stated that she did in fact see the victim hit by a pipe. As to Knerr, Detective Wichman testified that he interviewed her twice after discovering that she had withheld appellant's name when initially asked who had participated in the attack. Appellant claims that, based on the foregoing, the jury lost its way when it adjudicated him delinquent of inciting to violence and complicity to commit felonious assault.

{¶ 19} As this court has consistently held, the trier of fact is vested with the discretion to weigh and evaluate the credibility of the evidence in reaching its determination. It is not within the proper scope of the appellate court's responsibility to judge witness credibility. *State v. Hill*, 6th Dist. No. OT-04-035, 2005-Ohio-5028, ¶ 42. The fact-finders in this case were free to weigh and evaluate the credibility of the testimony presented. Further, based on the testimony at trial and the law, this court cannot say that the jury clearly lost its way or created a manifest miscarriage of justice by finding appellant delinquent of inciting to violence and complicity to commit felonious assault. *See Thompkins, supra,* 78 Ohio St.3d 380 at 387, 678 N.E.2d 541. Accordingly, we find that appellant's second assignment of error is not well-taken.

{¶ 20} In support of his third assignment of error, appellant asserts that inciting to violence and complicity to commit felonious assault are allied offenses of similar import

and that his multiple dispositions/sentences were prohibited by R.C. 2941.25(A) and by state and federal constitutional protections against double jeopardy. R.C. 2941.25(A) states that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

{¶ 21} A longstanding series of Ohio appellate decisions, including one from this court, has held R.C. 2941.25 does not apply to juvenile delinquency proceedings. In 1982, the Tenth District Court of Appeals decided the case of *In re Skeens*, 10th Dist. Nos. 81AP-882, 81AP-883, 1982 WL 3994 (Feb. 25, 1982), and set forth the following rationale for holding that R.C. 2941.25 does not apply:

> R.C. 2941.25(A) does not apply to situations where a minor is alleged to be a delinquent minor since, under our Juvenile Code, such a minor is not charged with a crime. While the commission of acts which would constitute a crime if committed by an adult sets the machinery of the Juvenile Court in motion, the issue before the court is whether or not the minor has engaged in the kind of conduct that constitutes delinquency and will therefore justify the intervention of the state to assume his protection and custody. Evidence that the minor committed acts that would constitute a crime if committed by an adult is used only for the purpose of establishing that the minor is delinquent, not to convict him of a crime and to subject him to punishment for that crime. *Id.* at *2.

{¶ 22} Recently, in *In re M.K.*, 6th Dist. No. E-12-025, 2013-Ohio-2027, this court reaffirmed our holding in the case of *In re Lugo,* 6th Dist. No. WD-90-38, 1991 WL 106085 (June 14, 1991), wherein we agreed with the reasoning in *Skeens* and held that R.C. 2941.25(A) does not apply to juvenile delinquency proceedings. Other appellate courts have also followed the analysis in *Skeens*. *See In re Bowers*, 11th Dist. No. 2002-A-0010, 2001-Ohio-6913, ¶ 23; *In re J.H.*, 8th Dist. No. 85753, 2005-Ohio-5694, ¶ 15-20; *In re H.F.*, 8th Dist. No. 94840, 2010-Ohio-5283, ¶ 13-15; *In re S.S.*, 4th Dist. No. 10CA682, 2010-Ohio-4081, ¶ 29.

{¶ 23} Appellant argues that R.C. 2941.25(A) is applicable in his case because he was classified as a serious youthful offender, which potentially subjects him to the adult justice system.

{¶ 24} In 2009 in *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, the Ohio Supreme Court considered and compared treatment of juveniles as serious youthful offenders in the juvenile courts in Ohio to prosecution of adults in criminal cases generally. The court recognized that SYO cases do not involve a bindover to an adult court and that the juvenile remains under the continuing jurisdiction of the juvenile judge. *Id.* at ¶ 18. Any adult sentence imposed by the juvenile judge is only a "potential sentence." *Id.* at ¶ 30.

{¶ 25} After reviewing the SYO statutory scheme in *State v. D.H.*, the Ohio Supreme Court concluded that in SYO cases, "[t]he aims of the juvenile system and its heightened goals of rehabilitation and treatment, control * * * [the juvenile offender's]

disposition." *Id.* at ¶ 38. The Ohio Supreme court reaffirmed in *State v. D.H.*, *supra*, that juvenile court proceedings and adult criminal trials are "fundamentally different." *Id.* at ¶ 50.

> **{¶ 26}** As we stated recently in *In re M.K.*, *supra*, it is this court's view that: the differences between the juvenile justice system and adult criminal justice system recognized by the Ohio Supreme Court in *State v. D.H.* and the scope of juvenile court authority over SYO proceedings demonstrate that a continuing basis exists to treat juvenile court proceedings differently than adult criminal cases with respect to merger of allied offenses. *In re M.K.*, 6th Dist. No. E-12-025, 2013-Ohio-2027, at ¶ 18.

{¶ 27} Accordingly, we affirm our holding in *In re M.K.* that R.C. 2941.25(A) does not apply to juvenile court delinquency proceedings. Appellant's third assignment of error is not well-taken.

{¶ 28} On consideration whereof, the judgment of the Erie County Court of Common Pleas, Juvenile Division, is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

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LUVADA S. WILSON, CLERK OF COURTS
Erie County, Ohio
By