

IN THE SUPREME COURT OF OHIO

IN RE:	:	S. Ct. Case No. 13-1295
M.C.,	:	C.A. Case No. E-12-031
a minor child.	:	C.P. Case No. 2011-JF-113
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APPEAL FROM THE SIXTH APPELLATE DISTRICT
ERIE COUNTY, OHIO

MEMORANDUM IN OPPOSITION OF JURISDICTION

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WHY LEAVE TO APPEAL SHOULD BE DENIED

Appellant has failed to demonstrate in his Memorandum in Support of Jurisdiction that this case involves a substantial constitutional question or that this case is one of public or great general interest. The Sixth District Court of Appeals properly found that the trial court was not required to merge Appellant's adjudications of delinquency for Felonious Assault and Inciting to Violence. In doing so the Sixth District properly relied on the authority of numerous Ohio Appellate Courts that have held that the Ohio Merger Statute, Ohio Revised Code Ann. (hereinafter "O.R.C.") §2941.25, does not apply to juvenile proceedings. See In re M.K., 2013 Ohio App. LEXIS 1926, 2013-Ohio-2027, ¶19 (Ohio App. 6 Dist.); In re H.F., 2010 Ohio App. LEXIS 4432, 2010-Ohio-5253, ¶13-15 (Ohio App. 8 Dist.); In re Skeens, 10th Dist. Nos. 81AP-882, 81AP-883, 1982 Ohio App. LEXIS 12181 (Ohio App. 10 Dist.).

Furthermore, the Sixth District Court of Appeals properly determined that evidence of Appellant's involvement with a gang that routinely engages in violence may be considered by a trier of fact to determine whether an accused knowingly engaged in conduct designed to encourage or incite another to commit violence. See In re M.C., 2013-Ohio-2808, ¶14 (Ohio App. 6 Dist.). This Honorable Court has noted that "[c]ircumstantial evidence and direct evidence inherently possess the same probative value. In some instances certain facts can only be established by circumstantial evidence." State v. Jenks, (1991) 61 Ohio St.3d 259, 272. The fact that an accused was a member of a gang that routinely engaged in assaults is a fact that a trier of fact may use to determine whether the accused was aware that his violent conduct could encourage others, particularly his fellow gang members, to engage in violent conduct, thereby establishing that the accused had the requisite mens rea for a conviction of Inciting to Violence.

Based on the foregoing, Appellant's Memorandum in Support of Jurisdiction fails to

establish a substantial constitutional question or that this case is of public or great general interest.

STATEMENT OF THE CASE AND FACTS

On July 16, 2011, Rocco Marinucci (hereinafter “Marinucci”) began his day just like any normal day. He went to work and was there for most of the day. At about 9pm, after about ten hours of work, Marinucci’s girlfriend, Amy Barnett, picked him up. They stopped at a BP station, purchased two beers, and headed home where he lived with his 13-year-old son, Rocco. Once at home, Marinucci spent his night playing Wii video games and drinking the two beers he had purchased.

Later that night, sometime after he finished his first beer, Marinucci’s son came inside and told him that a group of people were outside trying to jump him and his friend. Upon hearing this, Marinucci went outside and noticed “a whole lot” of kids in front of his house and on his front lawn; approximately 25 kids in all.

According to numerous witnesses that testified at trial, Appellant was one of the kids outside. Katelyn Eaton testified that just before the incident occurred, she saw Appellant play-fighting with another boy named “Fred”. Ti’Ondra Hunter testified that she saw Appellant there that night “with a whole group of people.” Chassidy Knerr testified that she saw Appellant at the scene of the assault that night. Sean Taylor testified that he had also seen Appellant there.

Marinucci confronted the group of kids and asked them to leave. According to Marinucci, in response he “was struck in the face” and was subsequently surrounded by “upwards of more than ten people and they were all hitting [him] in the face and in the back of the head...” Katelyn Eaton (hereinafter “Eaton”) testified that Appellant was there when the group attacked Marinucci, and as they beat him: “[Marinucci] tried to stay on his feet but he

ended up falling and they just kept beating him and then they ran off and he was laying there and then the ambulance came.” Ti’Ondra Hunter observed Appellant kicking, stomping, and punching Marinucci with about 15-20 other people. Chassidy Knerr also witnessed Appellant kicking Marinucci, whom she identified as “some white man,” with about six or seven other people, while the “white man” was screaming for help.

Eventually the group scattered. As they ran away, Karagin Slaughter (hereinafter “Slaughter”) testified that the group of kids were throwing up gang signs and yelling “Gotti Boyz.” Sean Taylor also stated that, as the kids ran off, they were yelling “Gotti” in reference to the gang “Gotti Boyz”. Sean Taylor also stated that he and Appellant belonged to this gang. The “Gotti Boyz” is a local gang, whose activities, according to Sergeant Newell of the Sandusky Police Department, included “breaking into houses.” In fact, according to Detective Wichman, the “Gotti Boyz” have been involved in a “lot of beat downs.” Of the ten people charged from this incident, all ten were involved in the gang “Gotti Boyz.” Furthermore, Ti’Ondra Hunter also testified by stating that she had personally seen the “Gotti Boyz” engage in “fighting people on the street.”

On August 16, 2011 Appellant was indicted as a Serious Youthful Offender pursuant to O.R.C. §2152.11 by the grand jury of Erie County in a Six Count indictment. Counts One and Two charged Appellant with Complicity to Commit Attempted Murder in violation of O.R.C. §2923.02, O.R.C. §2903.02(A), and O.R.C. §2923.03(A)(2), Counts Three and Four charged Appellant with Complicity to Commit Felonious Assault in violation of O.R.C. §2923.03(A)(1) and O.R.C. §2923.03(A)(2), Count Five charged Appellant with Inciting to Violence in violation of O.R.C. §2917.01(A)(2) and Count Six charged Appellant with Participating in a Criminal Gang in violation of O.R.C. §2941(C) and O.R.C. §2923.42(A).

On March 19-22, 2012 a jury trial was held on the indicted offenses. At the conclusion of the trial, the jury found Appellant Not Guilty as to Counts One and Two, Complicity to Commit Attempted Murder but guilty to the remaining counts and specifications charged in the indictment.

On April 30, 2012, a Dispositional Hearing was held. The Juvenile Court committed Appellant into the legal custody of the Department of Youth Services for a period of one year for the charges of Complicity to Commit Felonious Assault. It was further ordered that Appellant serve one year for the gang specification for each count of Complicity to Commit Felonious Assault Charges and Inciting to Violence charges. All imposed sentences were imposed to run consecutively for a minimum sentence of three years, not to exceed 21 years of age. Further, the Court ordered Appellant to serve six months for Inciting to Violence, to run concurrently to the imposed sentences.

Appellant filed an appeal in the Sixth District Court of Appeals for Erie County, Ohio. The Sixth District affirmed the judgment of the trial court by the decision and judgment filed June 28, 2013. Appellant has filed a Notice of Appeal in the Ohio Supreme Court on the judgment entry filed June 28, 2013.

ARGUMENT

PROPOSITION OF LAW NO. ONE: THE MERGER STATUTE, O.R.C. §2941.25(A), IS NOT APPLICABLE TO JUVENILE PROCEEDINGS. *In re H.F.*, 2010 Ohio App. LEXIS 4432, 2010-Ohio-5253 (Ohio App. 8 Dist.); *In re S.S.*, 2011 Ohio App. LEXIS 3475, 2011-Ohio-4081 (Ohio App. 4 Dist.); *In re Skeens*, 10th Dist. Nos. 81AP-882, 81AP-883, 1982 Ohio App. LEXIS 12181 (Ohio App. 10 Dist.).

The Ohio merger statute states that “[w]here the same conduct by a 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.” O.R.C. §2941.25(A). “If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.” **State v. Johnson**, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 48.

In regards to juvenile proceedings, however, multiple “Ohio Appellate Courts have held that O.R.C. §2941.25(A) . . . does not apply to juvenile delinquency matters.” **In re S.S.**, 2011 Ohio App. LEXIS 3475, 2011-Ohio-4081, ¶29 (Ohio App. 4 Dist.) quoting **In re Bowers**, 2002 Ohio App. LEXIS 6744, 2002-Ohio-6913, ¶17 (Ohio App. 11 Dist.). **See also In re M.K.**, 2013 Ohio App. LEXIS 1926, 2013-Ohio-2027, ¶19 (Ohio App. 6 Dist.); **In re H.F.**, 2010 Ohio App. LEXIS 4432, 2010-Ohio-5253, ¶13-15 (Ohio App. 8 Dist.); **In re J.H.**, 2005 Ohio App. LEXIS 5133, 2005-Ohio-5964 (Ohio App. 8 Dist.); **In re Skeens**, Case Nos. 81AP-882, 81AP-883, 1982 Ohio App. LEXIS 12181 (Ohio App. 10 Dist.). The rationale for not applying O.R.C. 2941.25(A) to juvenile proceedings was first laid out by the Tenth District. In **Skeens**, the court stated that:

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*. (Emphasis added)

Id. at 6-7.

This Honorable Court, as recently as 2009, recognized and reaffirmed these fundamental differences that exist between juvenile proceedings and adult criminal trials. **See State v. D.H.**, 120 Ohio St.3d 540, 2009-Ohio-9, ¶50. In **D.H.** this Honorable Court noted

that the “State has a ‘parens patriae interest in preserving and promoting the welfare of the child’ **Santosky v. Kramer**, 455 U.S. 745, 766 (1982), which makes a juvenile proceeding fundamentally different from an adult criminal trial.” **D.H.** 120 Ohio St. 3d at ¶50. As such, “[t]he aims of the juvenile system – and its heightened goals of rehabilitation and treatment – control [the juvenile’s] disposition.” **Id.** at ¶38. Due to these different aims and goals associated with juvenile proceedings and criminal proceedings, O.R.C. §2941.25 is not applicable to juvenile proceedings. **Accord In re Caldwell**, 76 Ohio St. 3d 156, 1996-Ohio-410, headnote 8 (“A juvenile court is authorized to impose consecutive terms of commitment upon a delinquent minor for separate delinquent acts whether or not they arise from the same set of operative facts”)

The thrust of Appellant’s Support of Jurisdiction is that failure to merge a juvenile’s adjudications of delinquency is a violation of his double jeopardy protections. Appellant cites to **Breed v. Jones**, 421 U.S. 519 (1975), in which the Supreme Court of the United States extended double jeopardy protections to juveniles. However, **Breed** is distinguishable from the case at bar. In **Breed**, a hearing was held in the juvenile court, and the juvenile was found guilty of robbery, if tried as an adult. A dispositional hearing was held; whereby it was determined that the juvenile was not fit for treatment in the juvenile system. The juvenile court ordered that the juvenile be remanded to the adult court for prosecution, where the juvenile was again found guilty of robbery. The Court found that the transfer to adult court after the dispositional hearing in juvenile court and a subsequent trial as an adult placed the juvenile in double jeopardy. The Court noted that:

Because of its purpose and potential consequences, and the nature and resources of the State, such a proceeding imposes heavy pressures and burdens – psychological, physical, and financial – on a person charged. The purpose of the *Double Jeopardy Clause* is to require that he be *subject to the experience only*

once for the same offence. (Emphasis added)

Id. at 529-30.

In the case at bar, Appellant was subjected to prosecution for his actions only once. Thereby, the Double Jeopardy rights afforded to juvenile proceedings were never violated upon the reasoning set forth in **Breed**. Because the goals of juvenile proceedings are “fundamentally different” than those of adult criminal trials, O.R.C. §2941.25(A) is not applicable to juvenile proceedings, nor is it required pursuant to **Breed**.

Appellant further sets forth the argument that since he was determined to be a Serious Youthful Offender, if the adult portion of his SYO sentence is invoked, he would be serving multiple punishments for one act, in violation of O.R.C. §2941.25(A). However, as the lower court noted, this Honorable Court has

[C]onsidered and compared treatment of juveniles as serious youthful offenders in the juvenile courts in Ohio to prosecution of adults in criminal cases generally. [This Honorable 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. **D.H.** at ¶ 18. Any adult sentence imposed by the juvenile judge is only a "potential sentence." Id. at ¶ 30.

In re M.C., 2013-Ohio-2808 (Ohio App. 6 Dist.). In the case of **D.H.**, this Court went on to hold that since a youthful offender remains under the jurisdiction of the juvenile court, “R.C. 2152.13(D)(2)(a)(i), which requires a juvenile court judge to consider certain factors before imposing a serious youthful-offender-dispositional sentence, does not violate the Sixth Amendment to the United States Constitution or Section 5 and 10, Article I. of the Ohio Constitution.” **D.H.**, 120 Ohio St. 3d at ¶18.

Since Appellant remains under the continuing jurisdiction of the juvenile judge, O.R.C. §2941.25(A) does not apply, even when a juvenile has been labeled a Serious Youthful Offender and subject to adult sentences. Therefore, failure to apply the Ohio merger statute to juvenile

proceedings does not raise a substantial constitutional question, nor is it one of great public interest. As this Honorable Court reaffirmed in D.H., the aims and goals of the juvenile justice system and the adult criminal justice system are “fundamentally different.” D.H., 120 Ohio St. 3d at ¶50. As such, multiple Appellate courts have found the provisions of O.R.C. §2941.25 to be inapplicable to juvenile proceedings, without violating the juvenile’s double jeopardy protections. Since this case does not raise a substantial constitutional question, nor is it a matter of public or great general interest, jurisdiction should be denied.

PROPOSITION OF LAW NO. TWO: THE TRIER OF FACT MAY CONSIDER AN ACCUSED GANG MEMBER’S AFFILIATION WITH A GANG THAT REGULARLY ENGAGES IN ASSAULTS IN ORDER TO DETERMINE THAT THE ACCUSED POSSESSED THE REQUISITE MENS REA TO BE CONVICTED OF INCITING TO VIOLENCE.

A person is guilty of Inciting to Violence if they “knowingly engage in conduct designed to urge or incite another to commit any offense of violence, when . . . [t]he conduct proximately results in the commission of any offense of violence.” O.R.C. §2917.01(A)(2). “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. *A person has knowledge of circumstances when he is aware that such circumstances probably exist.*” (Emphasis added) O.R.C. §2901.22(B). As such, in order to be found guilty of Inciting to Violence, a person does not have to purposely incite others to violence. Instead, the accused must be shown to have engaged in conduct that he knows will probably cause others to engage in violence, regardless of whether that was his intended purpose.

In the case at bar, numerous witnesses were introduced at trial that stated that they saw Appellant amongst the group of kids that attacked Mr. Marinucci. Ti’Ondra Hunter testified that she observed Appellant kicking, stomping, and punching Mr. Marinucci with about 15-20 other people. Chassidy Knerr also testified that she had witnessed Appellant kicking Mr.

Marinucci, whom she identified as “some white man,” with about six or seven other people, while the “white man” was screaming for help. Furthermore, Appellee introduced evidence that Appellant and the rest of the attackers had belonged to the gang, “Gotti Boyz,” a gang that regularly engaged in “beat downs.”

Appellant’s involvement with a gang that routinely engages in “beat downs” provides the circumstances for which a rational trier of fact may use to determine whether Appellant was aware that his conduct of assaulting Mr. Marinucci would probably cause others, particularly his fellow gang members, to join him in the assault; thereby establishing that Appellant possessed the requisite mens rea of “knowingly.” This Honorable Court has noted that “[c]ircumstantial evidence and direct evidence inherently possess the same probative value. In some instances certain facts can only be established by circumstantial evidence.” State v. Jenks, (1991) 61 Ohio St.3d 259, 272. In order to determine whether Appellant was aware that his conduct would probably cause a certain result, it was proper for the trier of fact to take into account that Appellant was a member of a gang that regularly engages in “beat downs,” and that the rest of his gang was with him when he began the assault. Accord State v. King, 2013 Ohio App. LEXIS 504, 2013-Ohio-574 (Ohio App. 8 Dist.)(Defendant had knowledge of gang activity based on testimony of his gang membership)

Appellant argues that an accused may only be found guilty of Inciting to Violence so long as he verbally urges others to violence. However, a plain reading of the statute does not support this proposed limitation to the statute. O.R.C. §2917.01(A)(2) states that a person is guilty of Inciting to Violence if they “knowingly *engage in conduct* designed to urge or incite another to commit any offense of violence.” (Emphasis added) The use of the word “conduct” encompasses a broader spectrum of activities than just verbal speech alone. If the General Assembly had intended for this

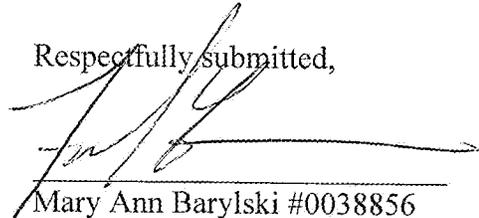
statute to be limited to speech only, they could have easily stated as much. Instead, the General Assembly chose to encompass the broader spectrum of “*conduct*.” As such, “conduct,” as used in the statute, is not limited merely to verbal speech as Appellant proposes.

Based on the foregoing, if an accused is a member of a gang that regularly engages in assaulting people, a trier of fact may be apprised of that fact, in order show that the accused possessed the requisite mens rea of “knowingly” required for a conviction under the Inciting to Violence statute. As such, this case does not raise a substantial constitutional question, nor is it a matter of public or great general interest, and jurisdiction should be denied.

CONCLUSION

Because Appellant has failed to demonstrate that this Honorable Court has original or appellate jurisdiction, or why this case involves a substantial constitutional question, or that this case is one of public or great general interest, Appellee respectfully moves that Appellant's memorandum in support of jurisdiction be dismissed.

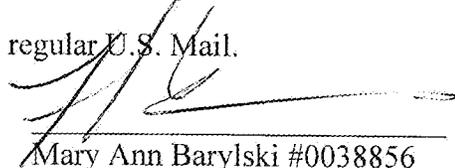
Respectfully submitted,



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CERTIFICATION

This is to certify that a copy of the foregoing Memorandum in Opposition of Jurisdiction was mailed to Brooke M. Burns, Asst. State Public Defender, 250 E. Broad St., Suite 1400, Columbus, Ohio 43215, this 30th day of August, 2013, by regular U.S. Mail.



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