

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: June 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.

{¶ 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.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

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