

{¶2} In the aftermath, A.T. was charged with four counts of felonious assault, felonies of the second degree if committed by an adult. The trial court found three of the four charges to be true, adjudicating A.T. delinquent. A.T. now argues that his delinquency adjudication was against the manifest weight of the evidence and that the trial court erred in permitting complicity to be argued for the first time during closing arguments. For the reasons stated below, we find A.T.'s manifest weight argument to be with merit and reverse his adjudication of delinquency.

{¶3} **Statement of Facts and Procedural History**

{¶4} On January 14, 2010, Jeremy Lawson and Allan David Ash, childhood friends now in their early twenties, were catching up and having a beer at the Liberty Tavern in Painesville, Lake County, Ohio. Mr. Lawson, a lance corporal in the U.S. Marine Corps, had recently returned from a tour of duty in Afghanistan. The pair left the bar to smoke a cigarette, when they noticed a group of teenagers engaging in a snowball fight as they passed the bar. Mr. Lawson and Mr. Ash joined the fun for a few minutes, lobbing snowballs at the group of teenage boys. Everyone involved appeared to be laughing and having a good time. The group of teenagers continued walking past the bar, and Mr. Lawson and Mr. Ash reentered the bar to pay their tab and returned home. They returned by car to Mr. Lawson's mother, Jackie Smedy's, home, which was located just a few blocks down the road from the bar.

{¶5} Upon arriving back at home, Mr. Lawson and Mr. Ash began to make snowballs in anticipation of some other friends' arrival. Before those friends arrived, however, the group of teenagers with whom Mr. Lawson and Mr. Ash had engaged earlier at the bar walked past the house. Recognizing the group, Mr. Lawson and Mr.

Ash renewed the snowball fight. The group returned fire and everyone appeared to engage in yet another friendly snowball fight in the front yard of Ms. Smedy's house.

{¶6} At some point during the snowball fight, Ms. Smedy's boyfriend, Frederick "Jay" Hadden, came outside and threw a few snowballs at Mr. Lawson. Mr. Hadden made a number of offensive and racially based remarks to the group of teenagers, most of whom were Hispanic. Mr. Lawson heard Mr. Hadden make these statements and told him to stop. Mr. Hadden then left the property, and Mr. Lawson attempted to apologize for Mr. Hadden's behavior and smooth things over with the teenagers. He then told the kids to go on their way, and he and Mr. Ash headed to the backyard where their friends had gathered.

{¶7} Upon reaching the backyard, Ms. Smedy told Mr. Lawson and Mr. Ash that the teenage boys had broken a window. An angered Mr. Lawson and Mr. Ash headed to the front yard to investigate and identify the individual or individuals responsible. Mr. Lawson demanded to know who had broken the window. A teenager holding a broomstick admitted to doing so, and asked Mr. Lawson what he was going to do about it. Mr. Ash then began yelling back and forth with another one of the teenagers, who invited Mr. Ash to hit him. Eventually, that teenager hit Mr. Ash and the melee then ensued. The group of teenagers had expanded to close to 30 by that point and Mr. Ash and Mr. Lawson sustained substantial injuries. Mr. Lawson was hit in the forehead with a broomstick, struck with fists, and beaten with a metal pole, which fractured his jaw. Mr. Ash was struck with a wooden stick in the head, on the hip, and on the back. He sustained a two-inch laceration to his head and bruising on the hip and back.

{¶8} Eventually Mr. Lawson wrested the broomstick and metal pole from the teenagers, who then fled. The police and an ambulance were called to the house, and Mr. Lawson and Mr. Ash were taken for medical treatment. Mr. Lawson's forehead required stitches and his jaw required two surgeries to repair. The Painesville police investigated the matter, and while no suspects were apprehended the evening of the fight, eventually charges were brought against a number of teenagers, including A.T.

{¶9} A.T. was charged with four counts of felonious assault, two as related to Mr. Lawson and two as related to Mr. Ash. He was charged under R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2). After trial, the trial court found the allegations contained in Counts Two, Three, and Four of the indictment to be true and adjudicated A.T. delinquent. The trial court held a disposition hearing, and committed A.T. to the custody of the Ohio Department of Youth Services for three indefinite terms of a minimum of one year, to be served concurrently.

{¶10} A.T. timely filed a notice of appeal and now brings two assignments of error:

{¶11} “[1.] The true finding by the court is against the manifest weight of evidence.

{¶12} “[2.] The trial court erred in allowing the state to allege complicity.”

{¶13} **Manifest Weight of the Evidence**

{¶14} In his first assignment of error, A.T. argues that his adjudication of delinquency was against the manifest weight of the evidence presented at trial. We agree that the trial court's true finding is not supported by the manifest weight of the

evidence. The state did not meet its burden of proof beyond a reasonable doubt, and A.T.'s adjudication of delinquency must be reversed.

{¶15} Standard of Review

{¶16} In juvenile delinquency cases manifest weight challenges are reviewed under the same standards as in adult cases. See *In re White*, 11th Dist. No. 2006-A-0065, 2007-Ohio-1782; *In re Mills*, 11th Dist. No. 2001-A-0028, 2002-Ohio-3125, reversed on other grounds; *In re T.R.*, 5th Dist. No. 10CA000002, 2010-Ohio-4419; *In the Matter of: Joshua M.*, 6th Dist. No. OT-04-038, 2005-Ohio-3067.

{¶17} “[E]vidential weight concerns the inclination of the greater amount of credible evidence, offered at trial, to support one side of the issue rather than the other. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. *** If, on weighing the evidence, the trier of fact finds the greater amount of credible evidence sustains the issue that a party seeks to establish, that party will be entitled to its verdict. ‘Weight is not a question of mathematics, but depends upon its effect in inducing belief.’ *Id.*, citing *Black's Law Dictionary* (6th ed. 1990), 1594. Thus, a court reviewing the manifest weight observes 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 trier of fact clearly lost its way. *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14 -*15.” *In re G.J.D.*, 11th Dist. No. 2009-G-2913, 2010-Ohio-2677, ¶71.

{¶18} “The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23, quoting *State v. Martin*

(1983), 20 Ohio App.3d 172, 175. “A finding on review that the [trier of fact’s] verdict was against the manifest weight of the evidence must be reserved for those extraordinary cases where, on the evidence and theories presented, and taken in a light most favorable to the prosecution, no reasonable [trier of fact] could have found the defendant guilty.” *State v. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶37 (citation omitted).

{¶19} Despite the fact that juvenile court proceedings are “civil” and operate in a separate system, they contain some criminal aspects. *In re Anderson* (2001), 92 Ohio St.3d 63, 65-66. The burden of proof in juvenile delinquency cases is the same as in adult criminal proceedings: beyond a reasonable doubt. Juv.R 29(E)(4); R.C. 2151.35(A). The state must prove every element of the offenses charged beyond a reasonable doubt. *State v. Winterich* (1952), 157 Ohio St. 414. “In addition to the elements of the crime, the state is required to prove the identity of the perpetrator of the crime beyond a reasonable doubt.” *State v. Heigley*, 11th Dist. No. 2007-L-122, 2008-Ohio-1688, ¶26, *citing State v. Cook* (1992), 65 Ohio St.3d 516.

{¶20} A review of the evidence presented against A.T. reveals that the state failed to carry its burden in proving beyond a reasonable doubt that A.T. committed the offenses with which he was charged. While it is beyond doubt that a young man in an orange shirt assaulted the victims, the state failed to establish beyond a reasonable doubt that it was A.T. who perpetrated the assaults against Mr. Lawson and Mr. Ash.

{¶21} The State’s Case

{¶22} The state presented seven witnesses: 1) Jeremy Lawson; 2) Alan Ash; 3) Jackie Smedy; 4) Leonardo Fuentes, one of the Hispanic youths present during the fight

and an acquaintance of A.T.'s; 5) Luis Palomino, Sammy Palomino's brother; 6) Officer Brenda McNeely, an officer with the City of Painesville Police Department, who was the first officer to arrive on scene and investigated the incident; and 7) Melissa Deangelis, assistant principal at Harvey High School in Painesville. Not one of the witnesses provided the quantum of evidence necessary to support a finding that A.T. attempted to cause or caused serious bodily harm to Mr. Lawson or Mr. Ash, with fists or with a weapon.

{¶23} Assault on Mr. Ash

{¶24} Counts one and two of the complaint relate to Mr. Ash and allege violations of R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2). Evidence adduced at trial proved that Mr. Ash was struck with fists and a wooden stick, but failed to identify A.T. as the individual responsible. Mr. Lawson testified that upon coming out front to investigate the broken window and engaging verbally with a Hispanic teenager holding a broomstick, he witnessed Mr. Ash and a shorter, plumper teenager engaging in a verbal back-and-forth. He then saw this "fat kid" run and hit Mr. Ash in the face with his fist. Mr. Lawson described this individual as 5'5" or 5'6" and approximately 215 to 230 pounds. When asked to describe A.T., Mr. Lawson estimated that he was about 5'7" and 160 pounds.

{¶25} Mr. Ash corroborated Mr. Lawson's testimony that the "fat kid" was the first to get in his face and eventually hit him. He estimated that this teenager weighed between 200 and 220 pounds, and stated that he did not see the teenager who hit him in the courtroom that day. Mr. Ash stated he was also struck with a wooden stick on the back and hip. Further, he stated that he recognized A.T. from the day of the fight, but

did not see him carrying a weapon. Leonardo Fuentes identified the “fat kid” who hit Mr. Ash as Sammy Palomino, and further identified Jose Chavez as one of the kids who fought with Mr. Ash, after Mr. Lawson knocked Palomino to the ground. Mr. Fuentes, who had known A.T. for six years, said nothing about A.T. as it related to Mr. Ash.

{¶26} No witness, including Mr. Ash himself, provided testimony that A.T. engaged physically with Mr. Ash, either with fists or with a weapon. Therefore, the state did not meet its burden of proving beyond a reasonable doubt that A.T. either caused serious physical injury to Mr. Ash, as prohibited under R.C. 2903.11(A)(1), or attempted to cause or caused serious physical harm to Mr. Ash with a deadly weapon, as prohibited under R.C. 2903.11(A)(2). The trial court was correct in finding the charge under subsection (A)(1), as alleged in count one untrue, but was mistaken in finding the charge under subsection (A)(2), as alleged in count two, true. We reverse the finding of true as to count two.

{¶27} **Assault on Mr. Lawson**

{¶28} Counts three and four of the complaint relate to Mr. Lawson and also allege violations of R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2). Again, the evidence adduced at trial proved that Mr. Lawson was assaulted with both fists and weapons, sustaining serious physical injuries. It is also quite evident from the trial testimony that a boy in an orange shirt struck Mr. Lawson with the wooden broomstick. However, the evidence failed to identify, beyond a reasonable doubt, A.T. as the individual wearing an orange shirt.

{¶29} Mr. Lawson testified that upon investigating the broken window and asking the group who was responsible, a Hispanic teenager with a goatee, holding a

broomstick, stated "I did. What the f*** are you going to do about?" Mr. Lawson described this goateed teenager as 5'8" or 5'9" and approximately 170 to 175 pounds. Mr. Lawson described hitting the fat kid who had first hit Mr. Ash and, upon turning around, being struck in the forehead with the broomstick by the same goateed teenager who had previously been holding the broomstick. Mr. Lawson stated that he then hit the goateed boy in the face with his fist, before being hit by another teenager's fist on the right side of his face. He was unable to describe this third teenager when asked to do so while on the stand, but did admit to punching him as well. A fourth teenager then grabbed him, and again was unable to describe this individual when asked to do so.

{¶30} After being hit by this fourth teenager and hitting him back, Mr. Lawson stated that he was struck with a metal pole. He testified that, although he saw an individual with a metal pole, he could not describe him. He stated that he punched this teenager in the face. The goateed teenager with the broomstick then attempted to hit him again, but Mr. Lawson was able to catch the stick and wrest it away from the boy, who then took off running.

{¶31} Mr. Lawson stated that after the incident he was shown a number of photos in a photo array, but he was unable to identify any individual who had hit him with either the metal pole or the wooden broomstick. Mr. Lawson stated that the altercation lasted about two minutes and that he was in close proximity to the teenagers the whole time. He testified that he would be able to identify the kid with the goatee, but that he was not in the photo arrays presented to him. Mr. Lawson was asked on cross-examination whether he could "identify [A.T.] as being one of the individuals who assaulted you?" He answered "[n]o."

{¶32} “You cannot do that?”

{¶33} “No.”

{¶34} “Do you recognize him being at the scene?”

{¶35} “No.”

{¶36} Mr. Ash testified that he did recognize A.T. from the day of the altercation, but was unable to describe what A.T. had been wearing that day. Mr. Ash further testified that he saw A.T. hit Mr. Lawson, but that it was with fists only. He was very clear that A.T. did not have a weapon. Mr. Ash described one of the individuals carrying a weapon as having dreadlocks or braids and wearing a white hat.

{¶37} Mr. Fuentes testified on direct that although he saw an individual hitting Mr. Lawson with a broomstick, he did not see his face. He did, however, testify that the broomstick-wielding individual was wearing an orange shirt and a black hoodie. Upon cross-examination, Mr. Fuentes clarified that the kid wearing the orange shirt and the kid wearing the black hoodie were, in fact, two different individuals and that it was the kid in the orange shirt who carried the broomstick. Mr. Fuentes also stated that he briefly engaged physically with the boy in the orange shirt and was very clear that he was not A.T. Further, Mr. Fuentes testified that he did not see A.T. at the scene of the fight and that the individual in the orange shirt was “kinda big.” When asked whether he could “state under oath here that it was [A.T.] who did the hitting with the broomstick or with the metal pole,” Mr. Fuentes stated, “I can’t.” Mr. Fuentes further stated that he had not seen A.T. at the Liberty Tavern earlier that day or during the snowball fight, testifying “I didn’t see [A.T.] the whole day. Like there I didn’t see him like in the whole place.”

{¶38} Luis Palomino, after having his recollection refreshed on the stand by the statement he gave police, acknowledged that he had stated to police that he, like Mr. Ash, saw A.T. fighting with Mr. Lawson. However, he quickly backtracked and said “I don’t know if it was with the marine. I saw him just fist fighting.” When asked, Mr. Palomino could not identify anyone who had hit Mr. Lawson with either the metal pole or the wooden broomstick, but he was very clear that A.T. was only fighting hand-to-hand and not with a weapon.

{¶39} Testimony from the Investigating Officer and Assistant Principal

{¶40} Officer McNeely testified that when she pulled up to the house, Ms. Smedy pointed to a boy in an orange shirt and black jacket and stated that he had just hit Mr. Lawson. Officer McNeely observed the boy in the orange shirt as he ran away, but never saw his face and was unable to positively identify him. In investigating the matter, Officer McNeely spoke to the Palomino brothers and A.T.’s name was provided to her during this discussion. She also testified that A.T.’s name was brought up by a confidential informant from the high school; she does not know who this informant is.

{¶41} Officer McNeely testified that she then went to A.T.’s house to speak to him. He was not home at the time, but she noticed an orange shirt lying on the back of the couch. She stated, “I identified the shirt that I saw at the house as being of the same color, style and nature as the shirt the person was wearing running away from the scene wearing an orange shirt, black coat and short black hair.” However, Officer McNeely never collected the shirt as evidence and the orange shirt was never presented to the court. She further testified that she had not seen that bright shade of tangerine before and that when she arrived on scene the night of the fight, she

observed only one individual wearing an orange shirt. Despite this circumstantial evidence, Officer McNeely conceded that A.T. was never picked out of any of the four photos shown to Mr. Lawson.

{¶42} Melissa Deangelis also testified regarding the orange shirt. She was contacted by the school's security guard regarding the fight, soon after it occurred. He was inquiring as to who had worn a particular outfit. Ms. Deangelis stated that, after reviewing the police report, she remembered A.T. wearing an orange polo and black jacket; she described the polo as pumpkin orange. When asked during cross-examination what other boys were wearing that day, she could not remember and admitted to having no independent recollection of what A.T. was wearing the day of the fight. She also admitted to not remembering what day it was that she told the security officer A.T. was wearing the orange polo.

{¶43} The weight of the evidence is insufficient to support a true finding, Mr. Lawson, despite numerous opportunities to do so, never identified A.T. as one of the individuals responsible for his injuries. Further, Mr. Fuentes stated that he did not see A.T. at all on the afternoon of January 14. Mr. Fuentes also did not identify the individual in the orange shirt as A.T. Although Mr. Ash and Mr. Palomino stated that they saw A.T. throwing punches, Mr. Palomino was unable to say for sure with whom A.T. was fighting. The only evidence against A.T. is Mr. Ash's testimony that he saw A.T. hit Mr. Lawson, Mr. Deangelis' statement that A.T. was wearing a pumpkin-orange polo near the time of the fight, and the tangerine orange shirt viewed by Officer McNeely in A.T.'s home a few days after the fight. Further casting doubt on the proposition that

A.T. was responsible for Mr. Lawson's injuries, not one witness testified that A.T. was sporting a goatee on or around January 14.

{¶44} While Mr. Lawson clearly sustained serious injuries at the hands of an individual in an orange shirt, the evidence does not support a finding beyond a reasonable doubt that A.T. was the individual in the orange shirt that day. A youth's delinquency finding cannot be predicated merely on the fact that he owns an orange shirt and happened to have donned it at school around the time of the occurrence. The trial court erred in finding that A.T. violated either subsection (A)(1) or (A)(2) of R.C. 2903.11 and we therefore reverse the findings of true as to counts three and four of the complaint.

{¶45} Because the state failed to prove A.T.'s identity in relation to the assaults perpetrated on Mr. Ash and Mr. Lawson, his adjudication of delinquency is against the manifest weight of the evidence. The first assignment of error is meritorious.

{¶46} Allegations of Complicity

{¶47} In his second assignment of error, A.T. argues that the trial court erred in allowing the state to allege complicity without having first put A.T. on notice of its intent to do so. A.T. alleges that the state's evidence did not meet the criteria for complicity and mention of complicity during the state's closing arguments was improper. This assignment of error is not well taken.

{¶48} Ohio courts agree that defendants are put on notice of the possibility of criminal liability based on complicity simply by virtue of the language in R.C. 2923.03(F). See *State v. Herring* (2002), 94 Ohio St.3d 246; *State v. Nichols*, 11th Dist. No. 2005-L-0017, 2006-Ohio-2934; *State v. Christian*, 184 Ohio App.3d 1, 2009-Ohio-4811; *State v.*

Barnett, 8th Dist. No. 81101, 2003-Ohio-3938. R.C. 2923.03 lays out the elements of complicity and subsection (F) states that “[w]hoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.” Introduction of complicity for the first time at closing arguments is generally acceptable because the defendant is considered to be on notice via R.C. 2923.03(F). See, e.g. *State v. Pressley* (Aug. 31, 1993), 4th Dist. No. 1923, 1993 Ohio App. LEXIS 4259.

{¶49} In A.T.’s case, the state presented evidence of A.T. as a principal actor, making mention of complicity only during closing arguments. Allowing introduction of such an argument was not erroneous, as A.T. was on notice under R.C. 2923.03(F). However, mention of complicity during closing arguments cannot possibly have benefited the state, since the prosecutor presented absolutely no evidence to support as adjudication of delinquency under the complicity statute. “To support a conviction for complicity *** the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime and that the defendant shared the criminal intent of the principal.” *State v. Kidd*, 11th Dist. No. 2006-L-193, 2007-Ohio-4113, citing *State v. Johnson* (2001), 93 Ohio St.3d 240, at syllabus.

{¶50} No evidence was presented that A.T. solicited or procured, aided or abetted, conspired with, incited or caused another to commit the offense of assault. The state was certainly permitted to argue complicity, if that was its theory, but the

evidence did not ultimately support an adjudication of delinquency under R.C. 2923.03. A.T.'s second assignment of error is without merit.

{¶51} Based on the merits of assignment of error one, the trial court's adjudication of delinquency is reversed, and the matter is remanded for further proceedings consistent with the foregoing opinion.

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in part and dissents in part, with Concurring/Dissenting Opinion.

TIMOTHY P. CANNON, P.J., concurring and dissenting.

{¶52} I respectfully concur in part and dissent in part from the opinion of the majority.

{¶53} I concur with the majority's conclusion that A.T. was put on notice of the possibility of criminal liability based on complicity by virtue of the language in R.C. 2923.03(F). I disagree that no evidence existed to support a finding of "true" that appellant was complicit in the offense of felonious assault.

{¶54} The scene of this crime was mayhem. The evidence shows that A.T. and his numerous associates were there to confront and engage the victims in this case. I agree that the evidence does not establish A.T. was the principal offender who committed the felonious assault; however, A.T. was much more than a casual observer. The distinct advantage A.T. and his associates had in this chaos was their strength in numbers. A.T. and his associates numbered nearly 30 against two victims. The victim

who was hit by the broomstick or pole was unable to defend himself, at least in part, as a result of being outnumbered. The complicity statute requires proof that A.T. “supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime” and that he shared the criminal intent of the principal offender.

{¶55} The testimony, if believed by the finder of fact, established at a minimum that A.T. committed an assault by fighting and hitting Mr. Lawson and/or Mr. Ash with his fists. By definition, this conduct, in such a chaotic scene, would contribute to the strength in numbers needed for the principal offender to succeed in his mission. This is the very essence of a complicit offender.