STATE OF MICHIGAN

COURT OF APPEALS

In re DEMOND ANTHONY GASTON, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMOND ANTHONY GASTON,

Defendant-Appellant.

UNPUBLISHED
July 6, 2010

No. 290982
Wayne Circuit Court
LC No. 07-470392

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Respondent appeals as of right from his juvenile conviction of disturbing the peace, MCL 750.170, entered after a bench trial. We reverse.

Respondent (DOB 01/19/97) was charged with assault and battery, MCL 750.81, a misdemeanor, following an incident at the Methodist Children's Home, a residential facility at which he had been placed following neglect and delinquency proceedings. The evidence showed that respondent was bothering and hitting other residents, and when Mr. Coleman, a staff member, attempted to restrain respondent, respondent flailed about and knocked Ms. Montgomery, another staff member, against a wall.

In making findings of fact and conclusions of law, the referee noted that each witness testified that respondent touched Ms. Montgomery in some manner, causing her to fall into a wall. The issue was whether respondent intentionally pushed Ms. Montgomery, or whether respondent simply was attempting to break out of Mr. Coleman's grasp. The referee then stated:

> I do believe he was in the grasp of Mr. Coleman. And I'm going to find him guilty of disorderly conduct. I'll dismiss the assault and battery because it's a possibility that at that point, he wasn't trying to assault Ms. Coleman [sic, Ms. Montgomery], but he certainly was assaulting other residence [sic, residents] in the facility who are not here as complainants, and possibly could have been and should have been. But he definitely was disorderly. He was serving the piece [sic, disturbing the peace], his behavior was out of control. Those folks were doing their job in trying to restrain him and he was resisting them in the process of them doing their job. And there is no excuse for that behavior, period, no

> excuse. You're not, you know, you're there and they are responsible for you, just like you're at home, your parents are responsible for you. And your parents, or when they tell you to do something, you're suppose [sic, supposed] to do it. You're not suppose [sic, supposed] to start fighting, hitting people, cussing and fussing, swinging at folks and doing what you want you to do. That's not appropriate, it's, and uh . . . you know, you were totally out of control.

The court signed an order placing respondent in custody at a nonsecure facility and directing that respondent receive various services. The order listed respondent's conviction offense as disturbing the peace, MCL 750.170.

On appeal, respondent argues that the evidence was insufficient to convict him of either disturbing the peace, the offense listed on the order of disposition, or disorderly person, MCL 750.167, the offense noted in the referee's findings of fact and conclusions of law. An element of both offenses is that the prohibited conduct take place in public. The evidence showed that respondent's conduct occurred in the Methodist Children's Home, which is not a public place.

The applicable standard of proof in the adjudicative phase of a juvenile proceeding is beyond a reasonable doubt. MCR 3.942(C); *In re Weiss*, 224 Mich App 37, 42; 336 (1997). When reviewing a challenge to the sufficiency of the evidence in a bench trial, we view the evidence presented in a light most favorable to the prosecution, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. The trier of fact may make reasonable inferences from evidence in the record, but may not make inferences completely unsupported by any direct or circumstantial evidence. *People v Petrella*, 424 Mich 221, 268-270, 275; 380 NW2d 11 (1985); *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

MCR 3.942(D) provides that, "[i]n a delinquency proceeding, the verdict must be guilty or not guilty of either the offense charged or a lesser included offense."

Respondent was originally charged with assault and battery, MCL 750.81. "A simple criminal assault has been defined as 'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995), quoting *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). A battery is "'an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.'" *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004), quoting *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998).

Disorderly conduct, the offense of which the referee said it would convict respondent, is set out in MCL 750.167, which provides in pertinent part:

> (1) A person is a disorderly person if the person is any of the following:
>
> (a) A person of sufficient ability who refuses or neglects to support his or her family.
>
> (b) A common prostitute.

(c) A window peeper.

(d) A person who engages in an illegal occupation or business.

(e) A person who is intoxicated in a public place and who is either endangering directly the safety of another person or of property or is acting in a manner that causes a public disturbance.

(f) A person who is engaged in indecent or obscene conduct in a public place.

(g) A vagrant.

(h) A person found begging in a public place.

(i) A person found loitering in a house of ill fame or prostitution or place where prostitution or lewdness is practiced, encouraged, or allowed.

(j) A person who knowingly loiters in or about a place where an illegal occupation or business is being conducted.

(k) A person who loiters in or about a police station, headquarters building, county jail, hospital, court building, or other public building or place for the purpose of soliciting employment of legal services or the services of sureties upon criminal recognizances.

(l) A person who is found jostling or roughly crowding people unnecessarily in a public place.

The behavior described in MCL 750.167(1)(l) is the only behavior that could apply in the present case.

Disturbing the peace, respondent's conviction offense, is set out in MCL 750.170. That statute provides:

> Any person who shall make or excite any disturbance or contention in any tavern, store or grocery, manufacturing establishment or any other business place or in any street, lane, alley, highway, public building, grounds or park, or at any election or other public meeting where citizens are peaceably and lawfully assembled, shall be guilty of a misdemeanor.

We reverse respondent's conviction. Both offenses, as considered in the context of the instant case, require that the offending conduct occur in public. Neither statute defines "public" or "public place." However, a public place generally includes an enclosed space where the general public is invited to gather for purposes of business, entertainment, etc. See *City of Westland v Okopski*, 208 Mich App 66, 75; 527 NW2d 780 (1994). In this case, respondent's conduct occurred in respondent's living area at the Methodist Children's Home. No evidence showed that this area met the definition of public or public place. The evidence produced at trial was insufficient to support a conviction of disturbing the peace or disorderly person.

Furthermore, respondent was not charged with either disturbing the peace or disorderly person.[1] Neither disturbing the peace nor disorderly person is a lesser included offense of assault and battery. Thus, respondent could not be convicted of either offense in the context of this case. MCR 5.942(D).

The trial court dismissed the original charge of assault and battery on the ground of insufficient evidence. Therefore, retrial on that charge is precluded. *People v Mehall*, 454 Mich 1, 5; 557 NW2d 110 (1997).

Reversed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio

[1] Given that respondent's conduct did not occur in a public place, bringing either charge would have been an exercise in futility.