STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of GAILEN JOEL FOSTER, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

GAILEN JOEL FOSTER,

Respondent-Appellant.

UNPUBLISHED
January 31, 2008

No. 271080
Washtenaw Circuit Court
Family Division
LC No. 06-000038-DL

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Respondent, a juvenile, appeals as of right from a dispositional order adjudicating him guilty of domestic violence, third offense, MCL 750.81(4). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The offense arises from an altercation involving respondent, then 15 years old, and his brother Jovon, who was 16 years old at the time. Respondent entered Jovon's room and asked him to resume playing a song. Jovon asked respondent to leave. After respondent repeatedly refused, Jovon grabbed respondent's arm and tried to pull him out. Respondent pushed and hit Jovon. Jovon testified that he did not hit back and his 16-year-old cousin Jared Gibbons broke it up. Respondent testified that he hit Jovon in the chest once and they "tussled" for two or three minutes. The altercation lasted about ten minutes total.

Gibbons testified that after Jovon tried to pull respondent from the room, respondent pushed Jovon and they "started swinging." When they "got into it," a phone was dropped. [1] Gibbons broke it up and tried to keep them separated. They started looking for the phone, but were unsuccessful. Jovon again asked respondent to leave, and they "got into it again." They stood face-to-face, and respondent asked Jovon to get out of his face. When Jovon did not back up, respondent pushed him and "they started getting into it again." While they were "getting into

[1] Gibbons believed that Jovon was on the phone. Jovon testified that respondent was on the phone.

it the second time," their sister saw them and summoned their mother. She broke up the fight and called 911 when they would not calm down. Respondent denied that there were two altercations and maintained that there was "just one big one."

The trial court found:

> [I]nitially Jovon Foster made the first forceful violent or offensive touching on Gailen, his brother, and there was a mutual fray that ensued after that. However, the Court is persuaded by the testimony of Jared Gibbs [sic, Gibbons] that there was a time when the mutual fray, so to speak, had ceased; and Gailen Foster was standing face-to-face in front of Jovon Foster, and neither of them were touching at that time, Gailen asked Jovon to get out of his face, Jovon asked Gailen to get out of his room. And then Gailen is the one who then pushed Jovon, starting a second fray. And that is what the Court finds to be the assault in this case.

Respondent argues that the evidence was insufficient to support the verdict because the evidence showed that he and his brother engaged in a mutual fight.

This Court reviews de novo a challenge to the sufficiency of the evidence at a bench trial. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). The evidence is viewed in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Domestic violence is a specific intent crime that is proved by establishing that the accused and the victim were related to each other in a manner described by MCL 750.81(2) and that the accused either intended to batter the victim or the accused's unlawful act placed the victim in reasonable apprehension of being battered. *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996). "The theory of 'mutual fight' may be asserted not for purposes of showing a justification or an excuse for what would otherwise be an assault, but rather to characterize the affray for purposes of negating a specific intent such as the intent to do great bodily harm." *People v Sherman*, 14 Mich App 720, 722; 166 NW2d 22 (1968).

Although respondent disputes the trial court's determination that the altercation included a second "fray" started by respondent, the court's findings are consistent with Gibbons's testimony. The theory of mutual fight is directed at negating specific intent, but offers no basis for relief on appeal, inasmuch as the question of respondent's intent was a matter for the trier of fact to resolve. *People v Osantowski*, 274 Mich App 593, 613; 736 NW2d 289 (2007), lv pending. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support the trial court's determination that the initial "mutual fray" had ceased and that respondent initiated the "second fray."

Affirmed.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood