

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LESLIE JAMES WARNSLEY,

Defendant-Appellant.

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UNPUBLISHED  
February 20, 2007

No. 265201  
Calhoun Circuit Court  
LC No. 2004-002817-FH

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced as an habitual offender, second offense, MCL 769.11, to 3 to 15 years' imprisonment. He appeals as of right. We affirm.

Defendant first argues on appeal that the trial court erred by refusing to provide a jury instruction on self-defense. This Court reviews de novo the constitutional claim that defendant was denied his right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). We also review de novo claims of instructional error. *Id.* The failure to give an instruction on a theory of defense, which is supported by the evidence, deprives a defendant of his due process right to present a defense. *Id.* at 327-328.

During trial, defendant did not testify, but his counsel attempted to argue that he stabbed the victim in self-defense. The jury heard testimony that both men were arguing about the victim tracking dirt into a kitchen where defendant was laying new flooring. During the argument, defendant swung at the victim with the knife he had been using for his task. Defendant then chased the victim across the street and stabbed him in the back. When the victim fell, defendant kicked him in the head repeatedly.

Near the conclusion of trial, defense counsel requested that the jury be instructed on self-defense based on the following record evidence: (1) the victim's testimony that he initially shoved defendant, (2) the victim's testimony regarding his own reputation in the neighborhood for possessing and carrying firearms, (3) the testimony of police officers regarding their suspicion that a broken bottle found on the scene was used as a weapon, and (4) testimony from the victim and a police officer regarding the victim's statement that he intended to kill defendant. The statement was made after the altercation. The trial court denied the request because the evidence presented did not justify a self-defense instruction.

On appeal, defendant asserts that the trial court's ruling on the self-defense instruction was erroneous in light of our Supreme Court's decision in *People v Harris*, 458 Mich 310; 583 NW2d 680 (1998). However, we conclude that defendant has not persuasively translated the rule of evidence from *Harris* into an argument in favor of his requested jury instruction. The question in the instant case is whether there was sufficient evidentiary support for a self-defense instruction, whereas *Harris* concerned the admissibility of character evidence in cases involving a theory of self-defense.<sup>1</sup>

Defendant correctly states that *Harris* distinguishes between evidence of the victim's reputation for violence and evidence of specific acts of violence by the victim. *Id.* at 320. However, defendant's assertion that *Harris* allows for a theory of self-defense resting entirely on evidence that the victim was the initial aggressor is inaccurate. *Harris* holds that a defendant claiming self-defense may introduce "character evidence tending to show the victim's violent character . . . to show (1) that the victim was the likely aggressor, and (2) the defendant acted out of self-defense." *Id.* at 321. Where his purpose is to show that victim was the aggressor, the defendant is not required to prove that he had knowledge of the defendant's reputation. "However, . . . the deceased's violent reputation must be known to the defendant if he is to use it to show that he acted in self-defense." *Id.* at 316.

The trial court correctly found that the evidence of the victim's affinity for firearms was not relevant to defendant's self-defense theory because there was no evidence tending to show that defendant was actually aware that the victim owned or carried firearms. Evidence that the victim was the aggressor is not sufficient evidence of self-defense standing alone. To establish a claim of self-defense a defendant must have an honest and reasonable belief that his life is in danger, or that there is a threat of serious bodily harm. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). As the *Harris* Court noted, "it is obvious that the victim's character, as affecting the defendant's apprehensions, must have become known to him, otherwise it is irrelevant." *Harris, supra* at 317, citing *People v Walters*, 223 Mich 676; 194 NW 538 (1923).

At trial, trial counsel argued that defendant should not be forced to testify in order to establish that he knew of the victim's character. Indeed, our Supreme Court has held that a defendant need not testify to merit an instruction on self-defense. *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978). However, the Court subsequently rejected the contention that "a defendant may have the jury instructed on his state of mind without an evidentiary basis because '(a) ruling to the contrary compromises a defendant's privilege against self-incrimination and his right to have the prosecutor prove beyond a reasonable doubt that he was not acting in self defense.'" *People v Mills*, 450 Mich 61, 81 n 14; 537 NW2d 909 (1995). Rather, the Court emphasized that "a defendant must consider the strength of the prosecutor's evidence and the

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<sup>1</sup> In this case, the trial court did not exclude any evidence of the victim's character for violence. In fact, the victim himself brought his reputation for violence and affinity for firearms into evidence. In his trial testimony, the victim replied to a question on direct examination regarding whether defendant knew that he was running to get his gun. The victim replied, "Most of the people around there that know me know I have guns. He probably had a good idea."

importance of putting in evidence a basis for a jury instruction when determining whether to testify.” *Id.*

After a comprehensive review of the record, we conclude that the evidence presented at trial did not support a self-defense instruction. The evidence established that defendant and the victim met for the first time on the day of the incident. There was no evidence that defendant lived in the same neighborhood as the victim. Therefore, the exception mentioned by the *Harris* Court, that “[r]eputation in the neighborhood where both live is sufficient [to prove that defendant was aware of the victim’s character] with nothing more,” is inapplicable. *Harris, supra* at 316. A bystander to the fight testified that she observed defendant chase the victim and stab him in the back. Her testimony, along with the nature of the victim’s injury, supported that defendant stabbed the victim’s back as he was running away. There was no testimony that the victim brandished or threatened to use a weapon against defendant. Moreover, the broken glass bottle that police found by the victim’s blood yielded neither fingerprints nor blood evidence to connect it to the victim or the crime. Furthermore, the victim testified at trial that he was unarmed at the time of the fight. As our Supreme Court has stated, “the touchstone of *any* claim of self-defense, . . . is necessity.” *Riddle, supra* at 127. The evidence presented at trial provided no fair indication that defendant acted out of necessity. The evidence in no way supported that defendant had an honest and reasonable belief that his life was in danger or that there was a threat of serious bodily harm. *Id.* at 119. Consequently, the trial court’s refusal to grant defendant’s request for a self-defense instruction was proper.

Defendant next argues that the trial court erred in scoring 25 points for offense variable (OV) 3, MCL 777.33, at the time of sentencing. “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “Scoring decisions for which there is any evidence in support will be upheld.” *Id.*

MCL 777.33(1) provides that OV 3 “is physical injury to a victim” and is to be scored by determining which statutory description applies to the victim’s injury and “by assigning the number of points attributable to the one that has the highest number of points.” Twenty-five points are to be scored if life threatening or permanent incapacitating injury occurred to a victim. MCL 777.33(1)(c). If “bodily injury requiring medical treatment occurred to a victim” then a trial court is to score only ten points. MCL 777.33(1)(d). Defendant asserts on appeal that there was no record evidence to support a finding that the victim’s injuries were life threatening. The testimony of the doctor who treated the victim, he contends, merely established that his injuries would have been life threatening if left untreated. Therefore, defendant argues that the proper score for this offense variable is ten points under MCL 777.33(1)(d). We disagree.

Defendant suggests that “bodily injuries *requiring* medical treatment,” by definition, have the potential to cause death if left untreated. Consequently, if this Court were to accept the logic of the trial court, any bodily injury serious enough to satisfy MCL 777.33(1)(d) could also be scored under MCL 777.33(1)(c). Defendant asserts that such a result is contrary to the design of MCL 777.33, which created separate categories to reflect the existence of varying degrees of bodily injury. However, our Supreme Court recently recognized that sentencing courts will frequently have the option of choosing between two applicable categories of injury under OV 3. *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005). Where more than one factor might apply, the Court advised that the plain language of MCL 777.33 “requires that trial courts

assess the highest number of points possible.” *Id.* at 402. The Court offered the example that “when a life-threatening injury requires medical treatment . . . the one generating the highest points is the correct one.” *Id.* at 408.

Here, the trial court acknowledged that each side’s argument on the scoring of OV 3 had merit. However, he properly assigned the highest number of points that the facts would support. There was ample record evidence to support the trial court’s scoring of OV 3. The victim’s treating physician testified regarding the serious nature of the injury inflicted by defendant. The physician explained that the victim’s laceration required a multi-stage surgery because of its length and depth. He also explained that the wound was contaminated with debris because the victim fell to the ground and, therefore, that it required significant cleaning prior to the surgery. The physician’s conclusion that the victim may have succumbed to life-threatening blood loss or systemic infection was hardly speculative. In light of the doctor’s testimony describing the victim’s injuries, the trial court clearly did not abuse its discretion by assigning 25 points under OV 3.

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Michael R. Smolenski  
/s/ Christopher M. Murray