STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of Gregory Davis

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY DAVIS,

Defendant-Appellant.

UNPUBLISHED
August 26, 1997

No. 196170
Wayne Probate Court
LC No. 95-323977

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

Following a probate court jury trial, an adjudication was entered finding defendant had carried a concealed weapon (a five inch knife), MCL 750.227; MSA 28.424, and had committed a felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to intensive probation. He appeals as of right and we affirm.

Defendant first argues that the trial court erred in admitting into evidence an on-the-scene identification that occurred without the benefit of counsel. We disagree. The admission of identification evidence is reviewed for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id*.

Complainant, who had been stabbed, was sitting in the hallway of a mall with a security guard and a police officer. Defendant was escorted past complainant by mall security on the way to the mall security office when complainant identified defendant as the person who stabbed him. The trial court found that the confrontation was inadvertent. This finding was not clearly erroneous. One of the security guards who escorted defendant down the hallway testified that she did not intentionally take defendant past complainant and that she did not even know that complainant was in the hallway. The other guard escorting defendant testified that the hallway was the most direct route to take defendant to the security office and that she did not know anyone was in that hallway. An officer who was with

complainant in the hallway testified that the confrontation was happenstance and that they were not waiting for a lineup. Given this evidence, we do not find clear error in the trial court's finding, and the presence of counsel is therefore not required under *Hampton, supra*.

Defendant relies on the testimony of an officer who was with complainant and who indicated that he had asked complainant whether defendant or another individual who walked past looked familiar to him, and on the testimony of complainant that the police asked him if defendant or the other individual was involved in the incident. This testimony does not cause us to find clear error in the trial court's finding given that this testimony was contradicted by testimony of other security personnel that complainant volunteered the identification and was not asked about defendant. We find no clear error in the trial court's finding that the confrontation was inadvertent.

In addition to the coincidental nature of the confrontation, the identification was also admissible because it occurred in the field. An on-the-scene identification without the presence of counsel is permitted because it allows confirmation or denial of an identification while a witness' memory is fresh and because it expedites the release of innocent suspects. *People v Johnson*, 59 Mich App 187, 189-190; 229 NW2d 372 (1975). Some panels of this Court have allowed on-the-scene identifications without the presence of counsel only where the police do not have more than a mere suspicion that the suspect is wanted for the crime, *People v Dixon*, 85 Mich App 271, 280; 271 NW2d 196 (1978), or where the police do not have "very strong evidence" that the person in custody is the culprit. *People v Turner*, 120 Mich App 23, 36; 328 NW2d 5 (1982).[1] Counsel was not required in the case at bar under either standard. There is no indication on the record that, at the time of the identification, the officer who allegedly asked complainant whether he recognized defendant was aware of very strong evidence, or had more than a mere suspicion, that defendant was the person who had stabbed complainant. There were many fights occurring in the mall that night and defendant made no showing at the pretrial evidentiary hearing that the police had made a connection between him and complainant as of the time of the identification. Counsel, therefore, was not required for this on-the-scene identification.

Defendant next argues that the trial court erred in failing to instruct the jury on his claim of self-defense or defense of others. We disagree. Jury instructions "must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them." *People v Daniels*, 207 Mich App 47, 53; 523 NW2d 830 (1994). "Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id*. The theory of self-defense applies when:

> 1) defendant honestly believed that he was in danger, 2) the degree of danger which he feared was serious bodily harm or death, and 3) the action taken by the defendant appeared at the time to be immediately necessary, i.e., defendant is only entitled to use the amount of force necessary to defend himself. [*People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985).]

In *People v Barker*, 437 Mich 161, 163; 468 NW2d 492 (1991), the Supreme Court made clear that deadly force may be used to repel an imminent forcible sexual penetration and that, "[a]s with any use of deadly force, defendant's belief must be both honest and reasonable." *Id*., n 2. The theory

of self-defense is extended to the right to defend others. *People v Wright*, 25 Mich App 499, 503; 181 NW2d 649 (1970). In *People v Hahn*, 214 Mich 419; 183 NW 43 (1921), the Supreme Court refused to give a self-defense instruction where there was no evidence to support it and where the defendant denied a charge that he had shot a revolver.

In the case at bar, there is no evidence on the record to support defendant's requested instructions. Defendant relies upon testimony of defense witnesses that defendant's girlfriend was struck in the face. However, there is no testimony to establish that the person who struck defendant's girlfriend had any weapon. There is no evidence that defendant honestly and reasonably believed that he, his girlfriend, or anyone else was in danger of serious bodily harm, death, or imminent forcible sexual penetration. Accordingly, the trial court did not err in refusing to instruct the jury on self-defense or defense of others because there was no evidence to support those theories.

Affirmed.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra

[1] See also *People v Purofoy*, 116 Mich App 471, 480; 323 NW2d 446 (1982).