

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 16, 2012

v

CALVIN LIPSCOMB,
Defendant-Appellant.

No. 304298
Oakland Circuit Court
LC No. 2010-234672-FH

Before: GLEICHER, P.J., and OWENS and BOONSTRA, JJ.

MEMORANDUM.

A jury convicted defendant Calvin Lipscomb of assaulting a jail employee in violation of MCL 750.197c(1). Defendant asserts that his trial counsel should have requested a self-defense jury instruction. The record does not support such an instruction as defendant admitted that he provoked the combative situation by assaulting and battering the jail employee. We affirm.

With only hours left in his jail sentence, defendant misappropriated cafeteria food and insulted a jail guard. The guard ordered defendant to his cell to pack up his belongings so he could be transported for discipline. When the guard picked up defendant's bag of belongings, defendant admittedly "snatched" it from the guard's hands. The guard attempted to subdue defendant with force and a physical fight ensued.

Defense counsel cannot be deemed ineffective for failing "to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). And a criminal defendant is only entitled to a jury instruction if it is supported by the evidence. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). Defendant's proposed self-defense jury instruction is unsupported by the record evidence and counsel had no ground to request it.

The self-defense act provides:

An individual who has not or *is not engaged in the commission of a crime at the time he or she uses force* other than deadly force *may use force* other than deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if he or she honestly and reasonably believes that the use of that force is necessary to defend himself or herself or another individual from the imminent *unlawful use of force by another individual*. [MCL 780.972(2) (emphasis added).]

Defendant was “engaged in the commission of a crime at the time he . . . use[d] force” against the guard. Defendant committed an assault and battery when he “snatched” the bag from the guard’s hands. *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005) (an assault may be established by showing either “an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery” and a battery is “an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person”).

Further, defendant could not reasonably believe that the guard’s use of force was unlawful. MCL 800.41(1) requires a corrections officer to “use all suitable means to defend [himself], to enforce discipline, to secure offenders, and to prevent any escape” in the event “a prisoner assaults or batters a corrections officer or any other person.” Defendant assaulted and battered the guard by “snatching” the bag from the guard’s hands. The guard responded with “suitable means to defend” himself and to secure defendant. Accordingly, defendant was not the victim of the “unlawful use of force by another individual,” and could not rely on self-defense.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Donald S. Owens
/s/ Mark T. Boonstra