

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR LAMAR WIGFALL,

Defendant-Appellant.

UNPUBLISHED

February 12, 2004

No. 244813

Berrien Circuit Court

LC No. 02-400815-FH

Before: Cooper, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of two counts of assault of a prison employee, MCL 750.197c, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant, a county jail inmate, refused commands to enter a cell, and subsequently struck an officer. The evidence conflicted as to whether defendant struck the first blow. The trial court declined defendant's request to instruct on self-defense. The jury convicted defendant of two counts of assault of a prison employee, and acquitted him of assault with intent to maim, MCL 750.86.

We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). As stated in *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000) (internal citations omitted):

Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction.

To be lawful self-defense, the evidence must show that: (1) the defendant honestly and reasonably believed he was in danger; (2) the danger feared was death or serious bodily harm; (3) the action taken appeared at the time to be immediately necessary; and (4) the defendant was not the initial aggressor. CJI2d 7.22; *People v George*, 213 Mich App 632, 634-635; 540 NW2d 487 (1995). The threatened harm must be imminent. *People v Riddle*, 467 Mich 116, 129 n 21;

649 NW2d 30 (2002). The defendant may use only the force necessary to defend himself. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

The elements of assault on a prison employee are that the defendant: (1) was lawfully imprisoned in a place of confinement; (2) assaulted an employee of the place of confinement; and (3) knew the victim was an employee of the place of confinement. MCL 750.197c. An assault is “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 a forceful or violent touching of another person. CJI2d 17.1(2).

Defendant argues that the trial court erred by failing to instruct the jury on self-defense. We disagree and affirm. Defendant disobeyed reasonable commands to enter the cell, prevented the cell door from being closed, and assumed an aggressive posture toward the officers. The officers were entitled to use reasonable means to defend themselves and preserve order. MCL 800.41(1). Defendant was the initial aggressor, and was not entitled to an instruction on self-defense. *Kemp, supra* at 322. In any event, defendant’s theory that he was not required to tolerate abuse was placed before the jury during closing argument, and yet the jury rejected the defense in finding him guilty. No error occurred. *Canales, supra* at 574.

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O’Connell
/s/ Karen M. Fort Hood