

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM OTIS MILLER,

Defendant-Appellant.

UNPUBLISHED

August 5, 1997

No. 184296

Monroe Circuit Court

LC No. 94-026241

Before: Young, P.J., and Gribbs and S. J. Latreille*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault on a jail employee, MCL 750.197c; MSA 28.394(3). Defendant was sentenced to enhanced concurrent terms of five to fifteen years' imprisonment for each conviction, pursuant to MCL 769.12; MSA 28.1084. He appeals as of right, and we affirm.

I

First, defendant argues that it was error for the trial court to permit the prosecutor to bring in evidence of a prior assault which defendant allegedly committed against another inmate. We decline to address this issue because defendant failed to object at trial. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Miller (After Remand)*, 211 Mich App 30, 42; 535 NW2d 518 (1995); *People v Burch*, 170 Mich App 772, 776; 428 NW2d 772 (1988). Moreover, it was defense counsel who, on cross-examination of corrections officer Larry Frederick, first inquired about the incident. Defendant may not assign error on appeal to something that his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

II

* Circuit judge, sitting on the Court of Appeals by assignment.

Next, defendant argues that the trial court's jury instruction regarding an inmate's duty to follow the lawful order of a corrections officer, read along with the instruction on self-defense, improperly shifted the burden of proof to defendant. We disagree.

The trial court must instruct on all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Moreover, the trial court must fully and fairly present the case to the jury in an understandable manner. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). When a defendant introduces evidence supporting the defense of self-defense, the burden of proof that the offense was not done in self-defense rests on the prosecution. *People v Jackson*, 390 Mich 621, 626; 212 NW2d 918 (1973).

We conclude that the jury instructions, read as a whole, adequately presented the burden of proof regarding self-defense. The trial court told the jury that the "the prosecutor must prove, beyond a reasonable doubt, that the defendant did not act in self defense." Although the trial court did not follow the standard jury instruction, it was not required to do so. *People v Moore*, 176 Mich App 555, 556; 440 NW2d 67 (1989). Moreover, instructing the jury that defendant had the right to resist an unlawful order, the trial court did not improperly direct the jury's attention to a determination whether defendant's conduct prior to the incident was lawful. The trial court instructed the jury that if defendant honestly and reasonably believed that he could resist arrest, defendant could properly act in self-defense, regardless of whether defendant was correct in his belief. On the whole, we conclude that the jury instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *Daniel*, *supra* at 53. No reversible error was committed.

III

Defendant also argues that the prosecutor failed to exercise due diligence in helping to locate three defense witnesses: Julius Holston, Jeffrey Schultz and Richard Minton. We disagree. We review a trial court's finding of due diligence for clear error. *People v Wolford*, 189 Mich App 478, 484; 473 NW2d 767 (1991).

Under the current res gestae witness statute, MCL 767.40a; MSA 28.980(1), a prosecuting attorney must provide reasonable assistance to a defendant in locating and serving process upon witnesses. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995); *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990). In general, in order to show due diligence in helping defendant to locate a res gestae witness, this Court requires that the prosecutor "to do everything reasonable, not everything possible" to obtain the presence of a res gestae witness. *People v Cadle*, 204 Mich App 646, 650-651; 516 NW2d 520, remanded on other grounds, 447 Mich 1009 (1994); *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988).

The prosecutor in this case made a good faith effort to procure the witnesses' presence at trial. First we note that defense counsel waived Minton's presence at trial. Thus, defendant cannot use his absence as a basis for a claim of error. *People v Hughes*, 217 Mich App 242, 247; 550 NW2d 871

(1996). As to Holston and Schultz, the prosecutor took reasonable steps to locate them. Their last known addresses were given to defendant, subpoenas were issued, and the police went to their last known addresses. While service of a subpoena is not dispositive on the

due diligence issue, this Court considers it an important factor of consideration. *People v Phillips*, 61 Mich App 138, 147; 232 NW2d 333 (1975). Further, there was no evidence that the prosecutor kept information about witnesses secret, delayed in trying to find witnesses, or promised defendant that all witnesses would attend trial. Indeed, prior to trial, the prosecutor revealed to defendant any information he had about Holston and Schultz. Having reviewed the record, we conclude that the trial court's finding that the prosecutor exercised due diligence was not clearly erroneous.

IV

Lastly, defendant argues that his sentence was disproportionate. We disagree. Appellate review of habitual offender sentences is limited to a determination whether the sentence imposed violates the principle of proportionality enunciated in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *People v Zinn*, 217 Mich App 340, 349; 551 NW2d 704 (1996). The sentencing guidelines may not be used in any fashion in reviewing a habitual offender sentence. *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996); *People v Gatewood*, (on remand), 216 Mich App 559; 560; 550 NW2d 265 (1996).

After a thorough review of the record, we conclude that the sentence imposed on defendant is proportionate to the offense and the offender. Notably, defendant's criminal record reflects eight prior felony and seven prior misdemeanor convictions in nine years. Defendant has been found guilty in the past of possession of a firearm, assault and battery, fleeing and eluding, drug possession, receiving and concealing stolen property, and numerous other offenses. Accordingly, we find no abuse of the sentencing court's discretion. See *People v Terry*, 217 Mich App 660, 663-664; 553 NW2d 23 (1996).

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Roman S. Gribbs
/s/ Stanley J. Latreille