

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER LOUIS WINBUSH,

Defendant-Appellant.

UNPUBLISHED

June 8, 1999

No. 210043

Bay Circuit Court

LC No. 97-001332 FH

Before: Gribbs, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of assault on an employee of a jail, MCL 750.197c; MSA 28.394(3), and sentenced as an habitual offender-third, MCL 769.11; MSA 28.1083, to thirty-six to ninety-six months' imprisonment. We affirm.

Defendant first contends that the trial court should have granted a mistrial when it was revealed, at the conclusion of the first day of trial, that the prosecutor had failed to turn over two police reports. This Court reviews a trial court's decision regarding a prosecutor's noncompliance with a discovery agreement for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). This Court considers whether (1) suppression was deliberate, (2) the evidence was requested, and (3) in retrospect, the defense could have significantly used the evidence. *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). A trial court's denial of a motion for a mistrial is likewise reviewed for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Defendant requested prior to trial that the prosecutor turn over copies of all police reports. The prosecutor could not explain why the two reports in question had not been turned over with the rest of the police reports. However, it does not appear, and defendant does not maintain, that the reports were intentionally withheld. In any event, defendant is not entitled to a reversal of his conviction on this ground because the trial court correctly ruled that defendant could not have significantly used the reports. Each report consisted of a one paragraph summary that was consistent with the police officer's testimony. Defendant did not ask to recall the witnesses for further cross-examination, despite the trial court's indication that it was willing to do so. On appeal defendant does not point to any inconsistency

that he could have used for impeachment. Defendant presents no concrete example of how his cross-examination was affected, and he does not indicate how his trial strategy would have differed had he received the reports before trial. Accordingly, the trial court did not abuse its discretion by denying defendant's request for a mistrial.

Defendant next contends that the trial court committed error requiring reversal when it refused to give a requested jury instruction on self-defense. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 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.* A trial court is required to give a requested instruction, except where the theory is not supported by evidence. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Defendant would have been entitled to have the trial court give an instruction to the jury on his theory of self-defense if it had been supported by the evidence. *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978). However, defendant asserted in his testimony that he did not strike anyone and that, even while the deputies allegedly beat him, he did not struggle or strike them. He therefore was not entitled to a self-defense instruction because he never presented any evidence that he acted in self-defense. *People v Droste*, 160 Mich 66, 80; 125 NW 87 (1910).

Defendant finally contends that his minimum sentence of thirty-six months was disproportionate. This Court reviews a sentence to determine if the court abused its discretion by imposing a sentence that was not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The same standard is applied to an habitual offender sentence. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995).

Defendant argues that his sentence is excessive when considered in light of the sentence he was already serving and the circumstances of the offense. However, this Court considers the proportionality of each separate sentence rather than the cumulative effect of consecutive or concurrent sentences. *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997); *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). We will therefore consider the circumstances of the offense and the offender, *Milbourn*, *supra*, without regard to defendant's prior sentence.

Defendant had two prior felony convictions, a prior misdemeanor conviction, and a juvenile adjudication. He had accumulated a number of major misconduct violations during a previous incarceration. He had violated his probation for one of the prior convictions. He had committed the two offenses in this case while he was in jail. The testimony at trial indicated that defendant had persistently verbally abused the guards in the jail. Under these circumstances, we

find that defendant's sentence was proportionate. *People v Terry*, 217 Mich App 660, 663-664; 553 NW2d 23 (1996).

Affirmed.

/s/ Roman S. Gibbs

/s/ Michael J. Kelly

/s/ Harold Hood