STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRENNIER MANDRELL SHAW,

Defendant-Appellant.

UNPUBLISHED
July 9, 1996

No. 166926
LC No. D 93-0039-FC

Before: Markey, P.J., and Holbrook, Jr., and M.J. Matuzak,* JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He appeals as of right and we affirm.

Defendant argues that he was denied a fair trial because his jury array did not contain a representative cross-section of the community. Defendant argues that African-Americans were systematically excluded from jury arrays in Kalamazoo County. We find defendant's claim to be without evidentiary support.

A criminal defendant is entitled to a jury composed of a fair cross-section of the community. *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979); *People v Hubbard*, ___ Mich App ___; ___ NW2d ___ (Docket No. 145054, released this date). To establish a prima facie violation of this right, a defendant must show that (1) the allegedly excluded group is a "distinctive" group in the community, (2) the representation of the group in jury venires is unfair and unreasonable in relation to the number of those persons in the community, and (3) the underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren*, *supra* at 364. In this case, defendant has failed to establish a prima facie violation of his right to a representative jury because he has not provided sufficient evidence under the third prong of the *Duren* test. We note that the jury selection procedure in Kalamazoo County that was found unconstitutional by this Court in *Hubbard*,

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

supra, was changed in 1992, well *before* defendant's trial in this case. Although defendant's 43-member jury array included only one African-American, defendant did not present evidence that African-Americans were systematically excluded from the jury selection process. Accordingly, we conclude that the trial court did not err in denying defendant's challenge to the jury array.

Next, the trial court did not err in refusing defendant's request for a jury instruction on self-defense.[1] Although there was evidence that the victim was allegedly involved in an assault and robbery upon defendant earlier in the evening, the uncontroverted evidence was that at the time of the shooting incident, defendant sought out and confronted the victim, pulled a gun from his waistband, and aimed and fired the gun toward the victim. There was no evidence that at the time of the shooting defendant believed that his life was in imminent danger or that there was a threat of serious bodily harm. See *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). There was no evidence that at the time of the shooting the victim threatened defendant, that the victim was an aggressor, that the victim was armed, or that defendant was afraid that the victim would harm him. Accordingly, because the evidence did not support an instruction on self-defense, the trial court properly refused to give the instruction.

Neither did the trial court err in refusing defendant's request for a jury instruction on the misdemeanor offense of reckless discharge of a firearm. A person may be convicted of the careless, reckless, or negligent use of a firearm if that person, because of carelessness, recklessness, or negligence, but not willfully and wantonly, causes or allows any firearm under his immediate control to be discharged so as to kill or injure another person. MCL 752.861; MSA 28.436(21); CJI2d 11.20. The police officers' testimony, as well as defendant's own recorded statement to police, established that defendant fired the gun intentionally several times, causing the victim's injury. There was no evidence by which a rational trier of fact could determine that defendant discharged the gun accidentally, negligently, or recklessly. See, e.g., *People v Dabish*, 181 Mich App 469; 450 NW2d 44 (1989), citing *People v Stephens*, 416 Mich 252, 255; 330 NW2d 675 (1982). Accordingly, the trial court did not err in refusing to give the misdemeanor offense instruction.

Next, defendant asserts that insufficient evidence was presented to establish his intent to kill or harm the victim, and that the trial court erred in denying his motion for a directed verdict at the close of plaintiff's proofs on the charges of assault with intent to commit murder and assault with intent to commit great bodily harm.[2] We find no error. Defendant's intent to commit murder or great bodily harm against the victim may be inferred from any facts in evidence, including circumstantial evidence. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). The evidence at trial established that defendant asked his friend for a gun, that he was angry when he left the house with the fully loaded gun, and that he went looking for one of the three people who was involved in his earlier beating and robbery to let him know that "it's not over and, you know, that they got me now but I'm going to get all of them back." Defendant walked up to the victim, confronted him about the earlier attack, pointed the gun at him, and fired several shots in his direction. Accordingly, viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the essential elements of the charged offenses were proven beyond a reasonable doubt.

Next, we find that defendant was not denied a fair trial because of prosecutorial misconduct. Defendant's failure to object to the police officer's testimony that some witnesses are reluctant to identify their attacker out of fear of retaliation precludes appellate review absent a miscarriage of justice. *People v Grant*, 445 Mich 535, 552-554; 520 NW2d 123 (1994). We conclude that this testimony did not deny defendant a fair trial, especially since no evidence was presented that defendant threatened retaliation against the victim if he identified defendant as his attacker. Although the prosecutor improperly elicited the police officer's statement that he obtained defendant's photograph from the juvenile detention facility, the trial court's two cautionary instructions to the jury were sufficient to overcome any prejudice that might have resulted from the officer's statement. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Finally, defendant argues that he was denied a fair trial by the prosecutor's argument to the jury that it would be a "travesty of justice" or an "extreme miscarriage of justice" for them to find defendant guilty of a crime less than assault with intent to commit murder. Defendant's failure to object to the challenged statements precludes appellate review absent a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Having reviewed the prosecutor's comments in context, we conclude that, although strongly worded at times, they did not deny defendant a fair trial. See *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995).

Affirmed.

/s/ Jane E. Markey
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Matuzak

[1] The trial court granted defendant's request for an instruction on imperfect self-defense.

[2] Defendant has waived appellate review of the issue regarding his motion to quash the assault with intent to commit murder charge because he failed to provide this Court with a transcript of the hearing on the motion to quash or to state the issue in his questions presented. See *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995).