

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DONTRELL LANE,

Defendant-Appellant.

UNPUBLISHED

October 19, 2006

No. 260102

Calhoun Circuit Court

LC No. 04-002094-FC

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of involuntary manslaughter, MCL 750.321, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 71 months to 15 years' imprisonment for his involuntary manslaughter conviction, and to two years' imprisonment for his felony-firearm conviction. We affirm.

On May 11, 2004, the victim died of a single gunshot wound to the right chest. Several months before the shooting, in November 2003, a friend of both the victim and defendant witnessed defendant ask the victim for a cigarette. Defendant then pointed a gun at the victim's neck and said, "I shoot you if you don't give me no cigarette." The victim's girlfriend testified that, on a separate occasion, in November 2003, defendant informed her that the victim "had owed him money for something . . . and if he didn't get it, he would . . . shoot him and leave him swimming with the fishes." Defendant said that, "he wasn't playing." The victim's mother, sister, and cousin also recounted an incident, in October or November 2003, when defendant said that, he was going to "smoke" the victim and that "he was serious, and he wasn't playing."

On May 11, 2004, the victim and defendant were left alone in a bedroom at the home of mutual friends after "rapping" with those friends. Within moments of being left alone, defendant shot the victim. Defendant explained that, "it was an accident" and that "he set the gun on the dresser and the gun went off." Later, however, defendant informed police officers that, as he removed the gun from his sweatpants' pocket, the gun fired. Defendant repeated, several times, that he was going to prison. He said, "go ahead and take me to jail; I just killed my best friend." At trial, the prosecution's theory was that defendant intentionally shot the victim with premeditation and deliberation. Defendant asserted that he shot the victim by accident.

Defendant first argues on appeal that the trial court abused its discretion when it admitted evidence of defendant's prior bad acts pursuant to MRE 404(b). We review a trial court's

decision to admit evidence for a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). “An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made.” *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

MRE 404(b) provides that evidence of an individual's crimes, wrongs, or bad acts is inadmissible to show a propensity to commit such acts. *Crawford, supra* at 383. To be admissible pursuant to MRE 404(b), bad-acts evidence must meet three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Additionally, the trial court may provide a limiting instruction upon request. *Id.*

The trial court admitted testimony that defendant pointed a gun at the victim in November 2003, pursuant to MRE 404(b). Defendant argues that this evidence was admitted in error because it was not offered for a proper purpose. Evidence of bad acts, however, may be admissible for purposes “such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity or absence of mistake or accident” MRE 404(b). The trial court correctly determined that the challenged evidence revealed defendant’s familiarity with the type of gun used to shoot the victim, and, therefore, served to show intent and lack of accident. Therefore, we conclude that the trial court admitted the evidence for a proper purpose pursuant to MRE 404(b). We note that the trial court also found that this evidence suggested previous ill will toward the victim. Although defendant argues that his behavior was in jest, and does not suggest ill will, questions of fact are for the jury. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

Defendant additionally argues that the challenged evidence was irrelevant. We disagree. The prosecutor initially bears the burden of establishing relevance. *Knox, supra* at 509. To be relevant, evidence must be material to a fact of consequence to the action. *People v Ackerman*, 257 Mich App 434, 439; 669 NW2d 818 (2003). Here, the prosecutor argued that this evidence was relevant to rebut defendant’s claim of accident, and to show intent, premeditation, and deliberation, all of which were issues of consequence at trial. We agree that the evidence was relevant for those reasons. Moreover, the trial court correctly found that, although the incident occurred several months before the victim’s death, the “remoteness of an act only affects the weight of the evidence rather than its admissibility.” *McGhee, supra* at 611-612. Additionally, whether any dispute between the victim and defendant was resolved amicably before the shooting is a question of fact for the jury. See *Lemmon, supra* at 637. Thus, the trial court did not err when it found the evidence relevant to show intent, premeditation, deliberation, and an absence of mistake or accident.

Further, defendant argues that the evidence of his prior action was unfairly prejudicial. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001); MRE 403. Contrary to defendant’s argument, although this evidence may have been damaging to defendant’s position, it was highly probative because it was relevant to issues of consequence at trial. Moreover, the trial court offered a cautionary instruction to the jury, eliminating any unfair prejudice. Therefore, we disagree with defendant’s position.

Finally, defendant argues that the admission of the evidence was not harmless error. Because we have concluded that the trial court has not erred in admitting the evidence at issue, we need not address defendant's claim of harmless error.

On appeal, defendant also argues that the trial court abused its discretion when it admitted testimony in violation of MRE 404(b) that he verbally threatened to shoot the victim on several previous occasions. Prior statements by a defendant, however, do not constitute prior bad acts pursuant to MRE 404(b) because they are just that, prior statements, and not prior acts. *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988). Therefore, the appropriate analysis is whether defendant's prior statements are relevant, and if so, whether their probative value outweighs their potential prejudicial effect. *Id.* at 518.

Defendant's statements suggested prior ill will toward the victim, and therefore, we find that they were obviously relevant to show intent, premeditation, and deliberation. Again, the remoteness of the statements only goes to the weight of the evidence, and whether defendant made the statements in jest is a question for the jury. *McGhee, supra* at 611-612; *Lemmon, supra* at 637. Furthermore, the probative value of defendant's statements far outweighed any unfair prejudice to defendant. MRE 403. Therefore, the trial court did not abuse its discretion when it admitted the challenged statements. We also note that defendant's statements would otherwise be admissible pursuant to MRE 801(d)(2) because they were admissions of a party opponent. *Goddard, supra* at 518 n14.

Defendant next argues on appeal that he was denied his Sixth Amendment, US Const, Am VI, right to a jury drawn from a fair cross-section of the community because the number of African-Americans included in his jury venire was unfair and unreasonable. Because defense counsel raised this issue prior to jury selection, it is preserved for review. *People v Hubbard (After Remand)*, 217 Mich App 459, 465; 552 NW2d 493 (1996). We review questions concerning the systemic exclusion of minorities in jury venires de novo. *Hubbard, supra* at 472.

"A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community." *Hubbard, supra* at 472. The Sixth Amendment guarantees an opportunity for a representative jury by requiring that the arrays from which juries are drawn do not systematically exclude distinctive groups in the community. *Id.* at 472-473. However, a particular jury array need not mirror the community exactly. *People v Howard*, 226 Mich App 528, 532-533; 575 NW2d 16 (1997); *Hubbard, supra* at 472.

To establish a prima facie violation of the fair cross-section requirement, defendant bears the burden of showing: "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Defendant's claim satisfies the first prong of the *Duren* test because "African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes." *Hubbard, supra*, at 473.

We find, however, that defendant has not satisfied the second prong of the *Duren* test. Defendant asserts that a distinctive group in the community was substantially underrepresented in his jury venire, but he bases his assertion solely on defense counsel's statement at trial that only two African-Americans were included in the jury venire and that Calhoun County is comprised of 12 or 13 percent African-Americans. Although there is apparently some disparity between the number of African-Americans included in defendant's jury venire and the number residing in the community, "[m]erely showing one case of alleged underrepresentation does not rise to a 'general' underrepresentation that is required for establishing a prima facie case." *Howard, supra* at 533. Therefore, because defendant relies entirely upon unsupported statistics provided by defense counsel during argument at trial and presents no evidence of jury venires in Calhoun County in general, the second prong of the *Duren* test is not satisfied. See *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000).

Even assuming that African-Americans are underrepresented in jury venires in Calhoun County, to satisfy the third prong of the *Duren* test, defendant had to show that the underrepresentation was due to a systematic exclusion of African-Americans from jury selection. *Hubbard, supra* at 473. "Furthermore, it is well settled that systematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate." *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997) Rather, there must be a demonstrated problem inherent in the selection process that results in systematic exclusion. *Id.* Because defendant failed to present any evidence regarding the jury selection process in Calhoun County, we cannot conclude that African-Americans are systematically excluded from jury service. Defendant's "bald assertion" that systematic exclusion occurred is insufficient to satisfy the third prong of the *Duren* test. *Id.* Defendant has clearly failed to establish a prima facie violation of the Sixth Amendment.

In lieu of reversing his convictions, defendant requests that this Court remand for further fact-finding. MCR 7.211 provides a means for requesting a hearing in the trial court to develop evidence. Within the time for filing a brief, an appellant may move to remand the case when development of a factual record is required for appellate consideration, but the motion must be supported by an affidavit or offer of proof regarding the facts to be established. MCR 7.211(C)(1)(a)(ii). Defendant failed to avail himself of this procedure.

We affirm.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto