STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE TERRELL CLEMONS,

Defendant-Appellant.

UNPUBLISHED
January 23, 1998

No. 198611
Kent Circuit Court
LC No. 95-003103-FC

Before:. Neff, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial judge sentenced defendant to life imprisonment without parole for the first-degree felony murder conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right from his conviction and sentence. We affirm.

Defendant was convicted for the shooting death of Jason Stanfield in the parking lot of the Fulton Heights Grocery Store in Grand Rapids on October 16, 1995. The prosecution argued that defendant shot Stanfield while he was attempting to rob him. The defense theory of the case was that there was a confrontation between defendant and Stanfield, and that after Stanfield attempted to hit defendant, defendant shot him. In order to establish that defendant intended to rob Stanfield, the prosecutor offered evidence of two prior robberies committed by defendant in the same area as the Fulton Heights Grocery Store. Additionally, David Nelson, an acquaintance of defendant, testified that defendant said on the day of the incident that he was going to rob someone.

Defendant first argues that he was denied a fair trial because the jury was selected from an array drawn by procedures that systematically excluded African-Americans from the jury venire. We disagree. Questions of systematic exclusion of minorities from venires are reviewed de novo by this Court. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996). Although defendant is entitled to a jury drawn from a fair cross section of the community, he is not entitled to a jury that mirrors the community and reflects the various distinctive groups in the population.

Id. at 472. To establish a prima facie case of the fair-cross-section requirement, defendant must show (1) that the group alleged to have been excluded is a distinctive group in the community, (2) that the representation of the group in jury venires is not fairly and reasonably related to the number of such persons in the community, and (3) that the underrepresentation of the distinctive group is due to a systematic exclusion of the group in the jury-selection process. *Id*. at 473. Systematic exclusion, however, 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). Further, a bald assertion that systematic exclusion must have occurred because no African-Americans were in the array is insufficient to support a challenge to the fair-cross-section requirement. *Id*. In this case, defendant has failed to present evidence in support of his argument that African-Americans were systematically excluded from the jury venire. Accordingly, defendant has failed to show a prima facie violation of the fair-cross-section requirement.

Defendant also argues that the trial court abused its discretion by admitting evidence of the two prior robberies committed by defendant. We disagree. MRE 404(b) governs admission of evidence of bad acts. Our Supreme Court, in *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994), held that to be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant to an issue or fact of consequence at trial; and (3) its prejudicial effect must not substantially outweigh its probative value.

A proper purpose is one other than establishing the defendant's character to prove that the defendant committed the conduct in question. *VanderVliet, supra*. "[T]he prosecutor must offer the other acts evidence under something other than a character to conduct theory." *Id.* In this case, the prosecutor argued that evidence of the prior robberies was admissible to show identity, intent, and motive. In *People v Bradford*, 69 Mich App 583, 589; 245 NW2d 137 (1976), this Court held that evidence of a robbery that the defendant committed forty minutes after the robbery for which he was charged was properly admitted to show that the defendant intended to rob the victim.

Here, the prosecutor also argued that evidence regarding the prior robberies demonstrates defendant's manner and method of committing robberies. During closing argument, the prosecutor argued that in the two previous robberies, like the instant robbery, defendant engaged in innocuous conversation with the victims, attempted to rob them, and then used a gun if it was needed. In *People v Lee*, 212 Mich App 228, 245-246; 537 NW2d 233 (1995), this Court held that evidence of the defendant's prior attempt to abduct two young girls six days before he abducted and killed the victim in the case for which he was charged was properly admitted to show the defendant's manner and circumstances of stalking and attracting victims. Accordingly, we conclude that the prior bad acts evidence at issue was offered for a proper purpose.

Regarding the second element of relevance, all relevant evidence is generally admissible, and irrelevant evidence is not. MRE 402; *VanderVliet, supra*. Evidence is logically relevant if it has any tendency to make the existence of any fact which is of consequence to the action more or less probable than it would be without the evidence. *Id.* at 60; MRE 401. MRE 401 and 402 define evidence that is logically relevant, while MRE 404 is a rule of legal relevance. *VanderVliet, supra*. "[I]f the proffered

other acts evidence is logically relevant, and does not involve the intermediate inference of character, Rule 404(b) is not implicated. . . . The question is not whether the evidence falls within an exception to a supposed rule of exclusion, but rather whether the 'evidence [is] in any way relevant to a fact in issue' other than by showing mere propensity. . . . Put simply, the rule is *inclusionary* rather than exclusionary.'" *Id.* at 64 (citations omitted). In this case, based on defendant's admission that he was involved in the incident, but that he did not intend to rob Stanfield, evidence of defendant's prior robberies was relevant to his intent. Moreover, because the prejudicial effect of this evidence does not outweigh its probative value, we find that the trial court did not abuse its discretion by admitting the evidence.

Defendant also argues that his alleged statement to a witness on the day of the incident that he was going to "hit a lick," which means that he was going to rob someone, was inadmissible hearsay. We disagree. MRE 801(d)(2) provides that "[a] statement is not hearsay if . . . the statement is offered against a party and is (A) the party's own statement. . . ." Accordingly, defendant's statement is not hearsay. See *People v Kowalak (On Remand)*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996).

Defendant also argues that the trial court erred by denying defendant's motion for a directed verdict. We disagree. When a court rules on a motion for directed verdict, the court must examine, in the light most favorable to the prosecution, the evidence produced by the prosecutor to assess whether a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). After the prosecution rested its case, defendant moved the court for a directed verdict, arguing that no evidence was presented that defendant was attempting to rob Stanfield at the time of the incident.

However, we conclude that there was sufficient evidence from which a reasonable juror could conclude that defendant was attempting to rob Stanfield. First, Paul Kerkstra, the only witness to the incident, said that Stanfield's hands were in the air, waving back and forth, and that he did not get out of his car because he thought that Stanfield was being robbed. Additionally, according to Kerkstra, Stanfield said to "get out of here, leave me alone." Next, on the day of the incident defendant allegedly told a witness that he was going to "hit a lick," which means that he was going to rob someone. Last, evidence of the two prior robberies committed by defendant was properly introduced to demonstrate that defendant intended to rob Stanfield.

Finally, defendant argues that the prosecutor improperly commented upon his failure to testify and improperly shifted the burden of proof. We note that defendant failed to object below to the alleged improper remarks. Because we find that no miscarriage of justice will result if we withhold our review of this issue and that a cautionary instruction could have cured any prejudicial effect, appellate review of this issue is precluded. *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1994).

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ William B. Murphy