

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOLAN CURTIS DUNCAN,

Defendant-Appellant.

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UNPUBLISHED  
December 8, 2000

No. 211083  
Genesee Circuit Court  
LC No. 97-000469-FC

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to a term of twenty-five to seventy years' imprisonment for the murder conviction and a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant's convictions arise from the shooting death of Anthony Morris, which occurred in front of the home of Sandra Clark, the decedent's sister. Morris had allegedly confronted defendant about an earlier confrontation between defendant and Clark's daughter.

Defendant first argues that the trial court abused its discretion in allowing the prosecutor to introduce evidence that he was selling drugs out of Clark's home, where there was no evidence that the killing was related to any drug activity. The trial court determined that this evidence was admissible because it tended to show why defendant may have shot the victim as well as defendant's opportunity to possess a gun. The admissibility of other acts evidence is governed by MRE 404(b), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other 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 when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

All elements of the charged offenses were at issue. The prosecution had the burden of proving every element of the charged crimes beyond a reasonable doubt and, therefore, evidence regarding the elements of the charged offenses was material. *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998). The elements of second-degree murder are: “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). Because the prosecution was required to prove that the shooting death of Anthony Morris was caused by an act of defendant and that defendant acted with malice, defendant’s possession of a weapon and his motive for carrying that weapon were at issue during trial. Therefore, the trial court did not abuse its discretion in ruling that evidence showing that defendant was selling drugs at the location of the shooting was relevant in determining defendant’s guilt, or degree of guilt, with regard to the charged offense.

We must still determine whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Admittedly, defendant’s drug dealing was not directly related to the shooting, which instead apparently stemmed from an argument between defendant and the decedent’s niece. However, during the argument, the niece threatened to call the police on defendant. Defendant acknowledged in his trial testimony that part of the reason he did not want the police to come, beyond his general mistrust of the police, was the fact that he had both a weapon and crack cocaine in his possession at the time. This would help explain what may have caused defendant to escalate that argument to the point of slapping the girl, which in turn led to the altercation between defendant and the decedent. Therefore, while the evidence of drug dealing was prejudicial because it connected defendant to unrelated bad acts, the evidence was also probative of the circumstances that led to the confrontation between the decedent and defendant. Although a closer question, “[a] decision upon a close evidentiary question by definition ordinarily cannot be an abuse of discretion.” *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26 (1999), amended 459 Mich 1276 (1999). Thus, we find that the trial court did not abuse its discretion in admitting the challenged evidence.

Defendant next argues that the trial court abused its discretion in admitting expert testimony from a police officer to show that people who sell crack cocaine often carry guns. The admissibility of expert testimony is governed by a three-part test:

(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline. [*People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993).]

The “critical inquiry” is “whether such testimony will aid the factfinder in making the ultimate decision in the case.” *Id.* at 541-542 (citation omitted). Because the prosecution was required to prove that the victim’s shooting death was caused by an act of the defendant and that defendant acted with malice, the trial court did not abuse its discretion in ruling that evidence tending to show defendant’s possession of a weapon, his motive for carrying that weapon, and his intent in using the weapon was relevant and admissible.

Defendant points to this Court’s determination in *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995), that “drug profile evidence is not admissible as substantive evidence

of guilt.” The *Hubbard* panel also questioned the reliability of such evidence and “question[ed] its value to the trier of fact in deciding the ultimate issue of guilt.” *Id.* at 241-242. However, the defendant in *Hubbard* was charged with a drug offense, and the prosecutor argued to the jury that the drug profile testimony demonstrated the defendant’s guilt. In the present case, the expert testimony was relevant only to the issue whether defendant possessed a gun and his intent in carrying that gun. However, this testimony alone was not dispositive of the issue of defendant’s guilt, and the prosecutor made no attempt to so indicate. The trial court did not abuse its discretion in allowing this testimony.

Next, defendant argues that the trial court’s exclusion of evidence establishing the decedent’s violent character and history of carrying weapons deprived him of the right to present his defense that he acted in self-defense when he shot the decedent. During the prosecution’s case-in-chief, defense counsel stated that a potential defense witness, Anthony Holmes, was imprisoned and a writ would be needed to secure his testimony regarding the decedent’s violent character. The trial court observed that there had been no evidence at that point that would support a claim of self-defense and, therefore, the testimony would not be allowed. The court indicated, however, that if defendant presented evidence minimally supporting a theory that the victim was the first aggressor, it would reconsider its decision. Although defendant later presented evidence supporting a self-defense theory, defendant did not renew his request to present the testimony of Anthony Holmes.

“The actual violent character of the deceased, even though it is unknown to the defendant, is admissible as evidencing the deceased’s probable aggression toward the defendant.” *People v Harris*, 458 Mich 310, 315; 583 NW2d 680 (1998), citing 2 Wigmore, Evidence (Chadbourn rev), § 246, p 60. “The sole purpose for which evidence of this type is admissible is, from the victim’s general turbulent or violent character, to render more probable the evidence that tends to show an act of violence at the time he was killed.” *Harris*, *supra* at 316. This probability is not affected by the defendant’s lack of knowledge of the character trait because the issue is what the victim did, not what the defendant thought the victim was doing. *Id.* However, where a defendant claims that he killed in self-defense, “his state of mind at the time of the act is material because it is an important element in determining his justification for his belief in an impending attack by the deceased.” *Id.*, citing 2 Wigmore, Evidence (Chadbourn rev), § 246, p 50. The reputation of the deceased for violence, if known to the defendant, is relevant to determining whether the defendant acted in self-defense. *Harris*, *supra*. The deceased’s strength, his habit of carrying weapons, or his possession of weapons at the time of the killing, if known to the defendant, is admissible evidence to show the defendant’s state of mind. *Id.* at 316-317.

At the time the trial court ruled, it did not abuse its discretion in precluding the proffered testimony Anthony Holmes regarding the decedent’s propensity for violence because there was no evidence at that point tending to show that the deceased committed an act of physical aggression or that he possessed a weapon. The decedent’s propensity for violence is admissible solely “to render more probable the evidence that tends to show an act of violence at the time he was killed.” *Id.* at 316.

Furthermore, there is no indication in the record that defendant renewed the issue later. As it turned out, evidence of the decedent’s character was admitted at trial, including the fact that

he had been released from prison just two months earlier, and that a mutual friend had told defendant that the decedent was good with knives and could shoot. Under these circumstances, defendant has not shown that the trial court abused its discretion in its evidentiary ruling, or that he was deprived of his right to present a defense.

Next, defendant argues that he was denied a fair trial because the trial court allowed the prosecutor to question a witness about his knowledge of defendant's prior crimes. Defendant had surrendered to Flint Police Sergeant George Evans, a former neighbor. Under cross-examination, Evans testified that he had known defendant for about fifteen years. Evans described defendant as a "good kid." Defense counsel asked, "Kind, respectful kid?," and Evans responded, "I would say so. From what I remember of him, sir." The trial court agreed that the defense had placed defendant's good character into evidence and, therefore, allowed the prosecutor to inquire into specific instances of defendant's conduct. Over defense objection, the prosecutor asked Evans if he knew that defendant had been convicted of fleeing and eluding the police in 1994, and of attempted receiving or concealing stolen property in 1991.

MRE 404(a) governs the admissibility of character evidence and provides:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

MRE 405 details the methods of proving character when such evidence is admissible. Only when character or a character trait is "an essential element of a charge, claim, or defense" may proof of specific instances of conduct be admitted. MRE 405(b). In all other cases where evidence of a character or character trait is admissible, "proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct." Under these rules, the trial court abused its discretion in allowing the prosecutor to question the witness about his knowledge of defendant's prior convictions. Even though defendant may have opened the door to character evidence in cross-examining Evans, the proper method of introducing contrary character evidence during redirect examination was through testimony as to reputation or by testimony in the form of an opinion. Further, evidence of defendant's prior crimes was not introduced for any "proper purpose" under MRE 404(b), nor relevant to the issues at trial.

Although we conclude that the trial court abused its discretion in allowing the prosecutor's to question the witness about his knowledge of defendant's prior crimes, the error does not require reversal. Reversal of a conviction may not be predicated upon an evidentiary ruling unless "a substantial right of the party is affected," MRE 103(a), or if refusal to reverse the conviction would appear to be "inconsistent with substantial justice," MCR 2.613(A), or would result in "a miscarriage of justice," MCL 769.26; MSA 28.1096. "[T]he appropriate inquiry 'focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.'" *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999), quoting *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). "In other words, the effect of the

error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error.” *Lukity, supra*.

In this case, there were eyewitnesses who testified that defendant and the decedent left Sandra Clark’s house together. Shortly thereafter, two shots rang out. Several witnesses saw defendant standing over the decedent with a small gun in his hand. Others testified that they did not see a weapon in the decedent’s hand or possession. Under direct testimony, defendant acknowledged shooting the decedent but stated that the decedent had threatened him and that he saw a silver object in the decedent’s hand before pulling the trigger. Two additional defense witnesses also testified that on leaving the house decedent briefly went to his car, reaching inside, before returning to continue the altercation with defendant. However, neither of these witnesses conclusively testified that decedent was in possession of any weapon, and neither testified to any overtly threatening behavior on the part of decedent in the moments before defendant pulled his gun and shot.

The weight and strength of the untainted evidence was accordingly sufficient for the jury to find beyond a reasonable doubt that defendant did not act in self-defense when he shot Anthony Morris. We conclude that the erroneous admission of the evidence of defendant’s prior crimes was harmless because, after reviewing the record, it does not “‘affirmatively appear’ that it is more probable than not that the error was outcome determinative.” *Lukity, supra* at 495-496.<sup>1</sup>

Next, defendant presents two issues regarding the racial composition of his jury. He first argues that he was denied his right to a jury drawn from a fair cross-section of the community. Defendant, who is African American, contends that the jury venire from which his trial jury panel was drawn was not representative of the community because African Americans were underrepresented. This Court reviews de novo questions about the exclusion of minorities from jury venires. *People v Williams*, 241 Mich App 519, 525; 616 NW2d 710 (2000); *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996).

A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community. US Const, Am VI; *People v Howard*, 226 Mich App 528, 532; 575 NW2d 16 (1997). However, a defendant is not entitled to a petit jury that exactly mirrors the community. *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975); *Howard, supra* at 532-533. In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (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

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<sup>1</sup> Defendant also complains that the prosecutor improperly asked about his prior convictions during redirect examination of two other prosecution witness, Latoya Brown and Deborah Holmes. In each instance, however, defense counsel promptly objected and the trial court sustained the objections. Therefore, there was no abuse of discretion by the court in connection with the testimony of these witnesses.

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); *Howard*, *supra* at 533.

While defendant has satisfied the first part of the fair cross-section test, because African Americans are considered a distinctive group for purposes of fair cross-section analysis, *Hubbard (After Remand)*, *supra* at 473, he has not established either the second or third portions of the test. Like the defendants in *Howard* and *Williams*, *supra*, defendant “asserts that African-Americans were underrepresented in his particular array, but presents no evidence on jury venires in general.” *Williams*, *supra* at 526. “Merely 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. Defendant has also not shown that there was “systematic exclusion” of African Americans from the jury venire, which “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, as in *Williams*, *supra*, defendant did not make any record in the trial court to demonstrate systematic exclusion of African Americans from Genesee County jury venires.

The trial court also did not abuse its discretion in denying defendant’s request for additional peremptory challenges in an attempt to balance the jury’s racial and geographical composition. A criminal defendant charged with an offense punishable by life imprisonment is entitled to twelve peremptory challenges. MCR 6.412(E)(1). On a showing of good cause, however, a trial court may grant one or more parties an increased number of peremptory challenges. MCR 6.412(E)(2). Although defendant made a proper request for additional peremptory challenges, the alleged good cause was the underrepresentation of African Americans and Flint residents on the jury venire. As noted above, however, defendant made no showing of any systematic exclusion of minorities. The Sixth Amendment fair cross-section requirement did not entitle defendant to a petit jury that mirrored his community and reflected the various distinctive groups in the population. *Hubbard (After Remand)*, *supra* at 472. There was therefore no necessity for additional peremptory challenges, and the trial court did not abuse its discretion in denying defendant’s motion.

Defendant also argues that he was denied his right to a fair trial because the prosecution used its peremptory challenges to exclude African American jurors. Defendant has forfeited this issue because he did not object to the prosecutor’s use of peremptory challenges until after the jury was impaneled and sworn, and because he did not make an adequate record for this Court to determine the validity of this claim. “[U]nless it is clear from the record that the prosecution is using its peremptory challenges in a discriminatory fashion, a defendant who fails to raise the issue or otherwise develop an adequate record of objections forfeits appellate review of the issue.” *People v Vaughn*, 200 Mich App 32, 40; 504 NW2d 2 (1993).

Finally, defendant argues that the trial court abused its discretion in denying him a continuance to secure counsel of his choice and compelling him to go to trial with an unprepared court-appointed attorney. Defendant’s retained counsel was allowed to withdraw before trial because defendant filed a grievance against him. Defendant informed the court that, although he wanted his counsel to withdraw, he did not want a court-appointed attorney. However, money to hire retained counsel was a problem. The court indicated that an attorney would be appointed for

defendant in the event he did not hire his own replacement attorney. Defendant never moved for a continuance to find new retained counsel. Therefore, defendant's argument that the trial court abused its discretion in not granting a continuance is without merit.

Defendant also contends that his court-appointed attorney did not have sufficient time to prepare for trial, thereby depriving him of the effective assistance of counsel. Effective assistance of counsel is presumed, and a criminal defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to what is contained in the record.<sup>2</sup> *Id.* at 77. Our review of the available record fails to reveal support for defendant's claim that counsel was unprepared or otherwise ineffective. On the contrary, the record reveals that that counsel presented a vigorous defense on defendant's behalf. Further, defendant has not pointed to any alleged trial errors that would render his appointed counsel's representation constitutionally defective. The fact that the defense was unsuccessful does not mean that defendant was denied the effective assistance of counsel.

Affirmed.

/s/ Jane E. Markey

/s/ William B. Murphy

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<sup>2</sup> Defendant filed a motion to remand with this Court, but the motion was denied because it was not supported by an affidavit or offer of proof regarding the facts to be established at the evidentiary hearing on remand, and because defendant failed to persuade this Court of the need for remand.