

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANCE TRAVIS,

Defendant-Appellant.

UNPUBLISHED

August 16, 2002

No. 226728

Ingham Circuit Court

LC No. 99-747097-FC

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for second-degree murder, MCL 750.317, for which he was sentenced to 25 to 50 years' imprisonment. We affirm.

Defendant first argues that the trial court erred in refusing to allow a defense witness to testify about a telephone conversation she heard. We agree with defendant that the testimony was improperly excluded; however, the error was harmless. The decision to admit or exclude evidence is within the trial court's discretion and should be reversed only where there is a clear abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists where a decision insults both fact and logic, reflects a perverse exercise of will, defies the exercise of judgment, or is based on passion or bias, rather than reason. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). Nonverbal conduct may constitute a statement as contemplated by the prohibition against hearsay, but only if the person intended the nonverbal conduct to be an assertion. MRE 801(a).

In this case, a prosecution witness testified to a telephone conversation between herself and defendant, in which the witness alleged defendant threatened to kill the victim. The defense witness would have testified that she heard the entire telephone conversation via a speakerphone, and defendant never made such a statement. The trial court excluded the defense witness' testimony as hearsay; however, the witness' testimony involved the *absence* of an assertion. Therefore, the trial court erred in excluding the witness' testimony because the substance of the proposed testimony was not hearsay.

However, because the improperly excluded evidence did not prejudice defendant, the error was harmless. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). The prosecution witness' testimony supported the prosecution's theory that defendant deliberately, and with premeditation, killed the victim, while the defense witness' testimony would have refuted the element of premeditation. The jury convicted defendant of *second-degree* murder; thereby implicitly rejecting the prosecution's theory of premeditation.

Defendant next contends that he was denied a fair trial because the trial court refused to allow him to present evidence of the victim's superior physical capabilities and previous athletic accomplishments. We disagree. Again, our review is for abuse of discretion. *Starr, supra* at 494.

During the trial, defendant sought to admit character evidence regarding the victim; specifically his involvement in football and wrestling ten years before his death, and, more recently, bodybuilding. The trial court excluded any evidence regarding the victim's involvement in football or wrestling, but did allow evidence of his bodybuilding activities.

Defendant sought to admit evidence of the victim's activities through the questioning of the victim's sisters to show his physical abilities to support defendant's self-defense theory. When asserting self-defense, to determine the level of a defendant's apprehension, the jury may appropriately consider the deceased's strength and whether he routinely carried a weapon or possessed one at the time of the incident. *People v Harris*, 458 Mich 310, 316-317; 583 NW2d 680 (1998).

We do not believe that the victim's participation in either football or wrestling ten years before his death was relevant to his strength on the day he died.¹ However, evidence of the victim's recent bodybuilding activities, if known by defendant, was relevant. Therefore, we conclude that the trial court properly excluded reference to the victim's football and wrestling activities and properly allowed evidence of the victim's bodybuilding.

Defendant's argument that this evidence should have been allowed to be elicited from witnesses other than defendant is without merit. Our Supreme Court succinctly stated the reason for this limitation in cases where the defendant is asserting self-defense.

The purpose of this evidence [victim's character evidence] is to show the defendant's state of mind; therefore, it is obvious that the victim's character, as affecting the defendant's apprehensions, must have become known to him, otherwise it is irrelevant. [*Harris, supra* at 317.]

Lastly, defendant next assigns error requiring reversal to the trial court's refusal to instruct the jury that defendant had no duty to retreat from his own dwelling, CJI2d 7.17, because the incident occurred at his dwelling. We disagree. Claims of instructional error are reviewed de novo by considering the instructions as a whole to determine whether a defendant's rights were sufficiently protected. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998).

¹ The victim was twenty-seven years old when he died. The evidence indicated that the victim played football and wrestled while in high school.

“The determinative factor in cases involving the ‘no retreat’ rule is the location where a person resides.” *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996), quoting *People v Fisher*, 166 Mich App 699, 712; 420 NW2d 858 (1988). The evidence clearly established that defendant no longer resided in the house “in any meaningful way.” *Davis*, *supra* at 55.² Defendant’s own testimony established that he previously used the home as his primary residence, but was in the process of moving out, having already removed half of his property. Defendant continued to have access to the home as he moved his belongings to his new residence, but he no longer slept there and did not have access to telephone services at the home. Therefore, we hold that the trial court did not err in refusing to give this jury instruction. Regardless, we find that the jury instructions given on self-defense adequately protected defendant’s rights.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski

² The *Davis* Court held that the defendant did not reside at the dwelling for purposes of CJI2d 7.17, even though he “continued to have a key to the residence, used it as a mailing address, and occasionally slept there on a couch.” *Id.* at 55.