

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN K. LEWIS,

Defendant-Appellant.

UNPUBLISHED

November 15, 2002

No. 234027

Wayne Circuit Court

LC No. 99-007836

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of second-degree murder, MCL 750.317. He was sentenced to twenty-two to forty years' imprisonment. We affirm.

Defendant first argues that the trial court erred in admitting various alleged hearsay statements of the victim. We disagree. The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Over defendant's repeated objections, the trial court admitted testimony from several witnesses concerning numerous statements made by the victim before his death. In admitting the statements, the trial court relied on *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995), finding that the victim's statements were admissible as hearsay exceptions demonstrating the victim's state of mind, discord in the relationship, and as evidence of motive. Defendant points to the testimony of four witnesses, arguing that their testimony regarding statements made to them by the victim that defendant had previously threatened or hurt him was inadmissible hearsay. However, we note that defendant fails to articulate which specific statements were inadmissible. Defendant may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claim. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Nevertheless, we hold that the trial court did not abuse its discretion in admitting the statements.

The prosecution moved to admit statements made by the victim, including statements that defendant was trying to kill him, that defendant broke into his apartment, that the victim wanted defendant out of his apartment, that defendant physically assaulted him, that defendant threatened to kill him, that the victim was afraid of defendant, that the victim anticipated his

death. The trial court ruled that the statements were admissible under MRE 803(3), the state of mind exception to the hearsay rule.

The then-existing state of mind exception to the general rule against the admission of hearsay applies to statements “of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed” MRE 803(3). In *Fisher, supra*, the Michigan Supreme Court found it well accepted “that evidence that demonstrates an individual’s state of mind will not be precluded by the hearsay rule.” *Id.* at 449. The Supreme Court went on to make the following observations regarding this exception:

Specifically, statements made by murder victims regarding their plans and feelings have been admitted as hearsay exceptions in a number of jurisdictions. In *United States v Donley*, 878 F2d 735, 737-739 (CA 3, 1989), cert den 494 US 1058 (1990), a statement by the victim’s wife that she intended to move out of the apartment and separate from the defendant-husband was found admissible to show marital discord and motive. Likewise, in *Whitmire v State*, 789 SW2d 366 (Tex App, 1990), statements of the decedent-husband that he wanted to end the marriage with the defendant-wife were found admissible. See also *United States v Hartmann*, 958 F2d 774, 782 (CA 7, 1992), in which statements made by the victim-husband about the “dismal state of his marriage” to the defendant-wife, his removal of her as beneficiary from his life insurance policy, and statements of his fear of being killed by the defendant-wife and her codefendant lover all were found admissible under a state of mind exception to the hearsay rule.

In the case at hand, martial discord, motive, and premeditation are all at issue. Thus, the statements of the victim-wife are admissible to show the effect that had on the defendant-husband. This testimony will not offend the hearsay rule because it does not constitute hearsay.

The victim-wife’s statements that were not known to the defendant about her plans to visit Germany to be with her lover and her plans to divorce the defendant upon her return are hearsay. They are admissible, however, because they satisfy the exception to the hearsay rule for “statement[s] of the declarant’s then existing . . . intent, plan . . . [or] mental feeling” MRE 803(3). [*Id.* at 450.]

Similarly, in *People v Ortiz*, 249 Mich App 297, 307; 642 NW2d 417 (2002), another panel of this Court found that the trial court did not abuse its discretion in admitting statements made by a murder victim,

including statements that the victim was afraid of defendant, that she thought defendant was stalking her, that defendant physically assaulted her, that defendant threatened to kill her, that defendant threatened to kill her in such a manner that no one would find out that he did it, that defendant warned the victim that her life was like the O.J. Simpson story, that the victim was changing her will, that the victim anticipated her death, that he victim was going to try to enforce the child

support order, that the victim did not want to get back together with defendant, that the victim made arrangements to be away from home on the weekend of July 4, 1998, specifically because she did not want to be around when defendant came to her home to pick up his Grand Am, and that after defendant broke into her house in October 1998, she changed the locks.

In that case, this Court also relied on *Fisher*, holding that these statements by the victim were admissible under MRE 803(3) as evidence of (1) the victim's state of mind, (2) the victim's plans, which demonstrated motive, and (3) statements that defendant made to cause the victim fear. This Court observed that the statements were relevant to numerous issues in the case, including motive, deliberation, and premeditation. *Id.* at 308-310. Significantly, and contrary to defendant's argument, this Court in *Ortiz* noted that "the proposition that the decedent's state of mind must itself be 'at issue,' was not the approach taken by the Supreme Court in [*Fisher*,] *supra*." *Id.* at 308 (citations omitted). Nor did the Supreme Court find it necessary that the statements be communicated to the defendant in order to qualify under the state of mind exception to the hearsay rule. *Fisher, supra* at 450. Rather, the Supreme Court found the victim-wife's statements that were not know to the defendant admissible because they satisfied MRE 803(3). *Id.*

Turning to the issue in this case, the trial court properly concluded that the victim's statements were admissible under MRE 803(3) in light of the holding in *Fisher*. This conclusion is further supported by this Court's decision in *Ortiz*. Similar to the issues in *Fisher* and *Ortiz*, the victim's statements in this case were admissible under MRE 803(3) as evidence of the victim's state of mind, emotion, and mental feeling. They were relevant to numerous issues in the case, such as the discord in the relationship between the victim and defendant, motive, premeditation, and deliberation. See *Fisher, supra* at 450; *Ortiz, supra* at 310. Thus, the trial court's ruling in this case was not an abuse of discretion.

Defendant also argues that the Confrontation Clause of the United States Constitution was violated by the admission of the victim's statements. However, because defendant failed to raise this issue in the lower court, it is not preserved for appellate review. *People v Smith*, 243 Mich App 657, 681-682; 625 NW2d 46 (2000). We review such issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "Where statements fall within a firmly rooted exception to the hearsay rule, they presumptively have sufficient indicia of reliability to fulfill Confrontation Clause guarantees." *Ortiz, supra*. In this case, because the victim's statements fell within the firmly rooted exception of MRE 803(3), the requisite indicia of reliability was present and the admission of such evidence did not violate defendant's right to confront witnesses against him. See *id.* at 310-311. Thus, we find no plain error.

Defendant last argues that there was insufficient evidence to convict defendant of second-degree murder beyond a reasonable doubt. We disagree. Due process requires that, when determining whether sufficient evidence has been presented at a bench trial to sustain a conviction, this Court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

The offense of second-degree murder requires proof that (1) a death occurred, (2) that the death was caused by the defendant, (3) that the killing was done with malice, and (4) without justification or excuse. *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). Malice is the mental state required for murder and includes the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will be the probable result. *Kemp, supra; People v Lewis*, 168 Mich App 255, 270; 423 NW2d 637 (1988). Malice may be inferred from the facts and circumstances of the killing, including the violent nature of the killing and the instruments used. *Kemp, supra; People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991).

The crux of defendant's argument appears to focus on the lack of direct evidence linking him to the crime. However, it is well established that "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Carines, supra* at 757 (citations omitted). Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. The victim and defendant were involved in a relationship that ended in March 1999. The evidence established that the relationship between the victim and defendant was of a violent nature. The victim feared defendant and indicated that he thought defendant was going to kill him. The victim was found dead in his apartment on May 19, 1999. The cause of death was ligature strangulation using a necktie and telephone cord. It was estimated that the victim had been dead for three to seven days. Apartment residents saw defendant carrying a television and what appeared to be a stereo or a television out of the victim's apartment on May 17, 1999. Thus, the manner in which the victim was killed and the evidence of the couple's tumultuous and violent relationship together with defendant's presence at the victim's apartment during the time period when the victim was killed provides sufficient circumstantial evidence from which a rational trier of fact could find the elements of second-degree murder proven beyond a reasonable doubt. Accordingly, there was sufficient evidence to sustain defendant's conviction.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra