

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-50 (C.P.C. No. 10CR-4244)
Rodney M. Hogg,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 15, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Watson Law Group, LLP, *David C. Watson* and *Titus G. Donnell*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Rodney M. Hogg, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty of aggravated murder in violation of R.C. 2903.01. Because (1) sufficient evidence and the manifest weight of the evidence support defendant's conviction, (2) the trial court did not err in applying the Castle Doctrine, and (3) the trial court's exclusion of evidence was harmless, we affirm.

I. Facts and Procedural History

{¶2} By indictment filed July 21, 2010, defendant was charged with one count of aggravated murder and one count of murder, both unclassified felonies, arising out of an incident that occurred on July 12, 2010 at defendant's home.

{¶3} According to the state's evidence, defendant and his girlfriend lived on East 26th Avenue in Columbus, Ohio at the time of the incident. Around 5:15 p.m. on July 12, defendant's girlfriend was getting ready to go to a class at Columbus State Community College; at the same time, defendant was walking down the street. Defendant's girlfriend drove around the block to pick him up and, when she told him she was about to go to school, he stated he wanted to go with her so he could re-enroll in the college. She circled back to their house so defendant could lock the front door.

{¶4} Defendant's girlfriend sat in the car and waited as defendant went into the house. She saw the victim walk up to the couple's house and knock on the front door, but then put her head down, as the victim frequently went to the couple's house. When she looked up, her front door was halfway open, "like [defendant] wanted [the victim] out of the house." (Tr. 93.) She then heard yelling. The victim signaled for her to come into the house where he told her that defendant had "been trying to get with [his] baby's mom and all of the other girls on the block." (Tr. 96.)

{¶5} The victim's attention then focused on defendant's girlfriend; he started grabbing her, "like lustfully," and telling her he wanted to get with her. (Tr. 99.) Defendant's girlfriend told the victim he needed to leave, but the victim refused to do so. She stated the victim "smelled of alcohol," was maybe two feet from the door, and could have left the residence without having to pass either defendant or his girlfriend.

{¶6} Defendant then grabbed his girlfriend and told the victim she was his "baby's mom" and the victim "need[ed] to leave." (Tr. 99.) The victim threw a punch aimed toward defendant, and defendant stabbed the victim in the neck. Defendant's girlfriend never saw defendant get a knife and did not see him with a knife, but she stated the knife defendant used was a steak knife from the couple's kitchen. The victim then tackled defendant, and the girlfriend ran outside where she called 911. The knife wound severed part of the victim's subclavian vein and artery, a portion of the ascending aorta, and the upper lobe of the left lung, as well as nicking the third thoracic vertebra and part of the right atrium. The victim died as a result of the injury.

{¶7} According to defendant's testimony, he went to his neighbor Latanya Locke's house on the morning of July 12 to see if her son was home. Locke told defendant her son was with the victim, so defendant walked down the block to the victim's house. When defendant arrived, the victim and Locke's son were sitting on the victim's back porch, drinking vodka and talking. Defendant stayed at the victim's house most of the day drinking with them. Later in the day, the victim accused defendant of "trying to talk to [his] baby's mom." (Tr. 195.) Defendant denied the accusation, but the victim "had moved his daughter to cause harm" to defendant. (Tr. 195.) At that point, defendant decided to leave the victim's house.

{¶8} Defendant first went to Locke's home and told her the victim "was tripping, talking about" how defendant was "trying to mess with his baby's mom." (Tr. 198.) Defendant then left Locke's house, returned home, and went out again. He called his girlfriend and told her he wanted to go to school with her to see about re-enrolling in college. She picked him up, and they went back to the house so he could freshen up.

Defendant entered the residence, locked the door behind him, but then answered the door when the victim knocked. Defendant testified that once the victim was in the house, he and his girlfriend repeatedly asked the victim to leave the residence; the victim refused to leave.

{¶9} Defendant stated he was "very afraid" and "appalled that [the victim] came to [his] house." (Tr. 207.) According to defendant's evidence, defendant was 135 pounds and five feet seven or eight inches tall, while the victim was 245 pounds and six feet one and a half inches in height. Defendant testified that while the victim and his girlfriend were in the front room, he went to the kitchen and retrieved the knife. When he returned, defendant pulled his girlfriend back toward him. The victim then cocked back with his right fist, exposing his neck; defendant moved his girlfriend out of the way, pulled out the knife, and stabbed the victim in the neck. Defendant stated the victim began to choke him, and the two wrestled on the ground until the police arrived.

{¶10} On the day scheduled for trial, defendant voluntarily waived his right to a jury trial, and the matter was tried to the court. At the conclusion of the trial, the court found defendant guilty of both counts charged in the indictment. Following trial, defendant filed a Crim.R. 33 motion for a new trial, contending he was entitled to a new trial because not only did the state fail to present sufficient evidence to support the verdict, but the verdict was contrary to law because the court failed to recognize the portion of the Castle Doctrine set forth in R.C. 2901.05. The court overruled the motion, noting the referenced portion of the Castle Doctrine did not apply to the facts of the case. At a sentencing hearing held on December 17, 2010, the court merged the charges for purposes of

sentencing and sentenced defendant to a prison term of 20 years to life on the aggravated murder charge.

II. Assignments of Error

{¶11} Defendant appeals, assigning the following errors:

I. THE TRIAL COURT ERROR [sic] BY MISINTERPRETING AND ACCORDINGLY MISAPPLIED THE CASTLE DOCTRINE CODIFIED IN R.C. 2901.05 & 2901.09.

II. DEFENDANT/APPELLANT'S CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED MS. LOCKE'S TESTIMONY.

IV. THE CONVICTION IN THE INSTANT MATTER WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. First, Second, and Fourth Assignments of Error – Sufficiency & Manifest Weight of the Evidence

{¶12} Defendant's first, second, and fourth assignments of error are interrelated and collectively assert that neither sufficient evidence nor the manifest weight of the evidence supports the trial court's judgment, because the trial court erred in applying the Castle Doctrine to the facts of the case, and the state failed to establish that defendant acted with prior calculation and design in stabbing the victim.

A. *Sufficiency of the Evidence*

{¶13} Whether evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. Sufficiency is a test of adequacy. *Id.* The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the

offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387. When reviewing the sufficiency of the evidence the court does not weigh the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79.

{¶14} Similarly, to the extent defendant asserts the trial court erred in denying his Crim.R. 33(A)(4) motion for a new trial, we "apply the sufficiency-of-the-evidence standard to review the trial court's decision to deny appellant's Crim.R. 33(A)(4) motion claiming that the * * * verdict is not supported by the evidence." *State v. Brown*, 10th Dist. No. 10AP-1204, 2011-Ohio-4766, ¶27; Crim.R. 33(A)(4) (providing that a new trial may be granted upon motion of the defendant if the verdict is not sustained by sufficient evidence or is contrary to law).

1. The Castle Doctrine

{¶15} Defendant contends the trial court erred in denying his motion for a new trial because he was entitled to the presumption of self-defense found in R.C. 2901.05(B)(1). Defendant's challenge to the sufficiency of the evidence insofar as it invokes self-defense and the Castle Doctrine is inappropriate. Under Ohio law, self-defense is an affirmative defense. *State v. Calderon*, 10th Dist. No. 05AP-1151, 2007-Ohio-377, ¶30, quoting *State v. Williford* (1990), 49 Ohio St.3d 247, 249, citing *State v. Martin* (1986), 21 Ohio St.3d. 91, affirmed (1987), 480 U.S. 228, 107 S.Ct. 1098, rehearing denied, 481 U.S. 1024, 107 S.Ct. 1913. The "due process 'sufficient evidence' guarantee does not implicate affirmative defenses, because proof supportive of an affirmative defense cannot detract from proof beyond a reasonable doubt that the accused had committed

the requisite elements of the crime." *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶37, quoting *Caldwell v. Russell* (C.A.6, 1999), 181 F.3d 731, 740, abrogated on other grounds by the Antiterrorism and Effective Death Penalty Act, Section 2261 et seq., Title 28, U.S. Code (see *Mackey v. Dutton* (C.A.6, 2000), 217 F.3d 399, 406. Defendant's self-defense contentions thus are addressed in our analysis of the manifest weight of the evidence.

2. Mens Rea of Aggravated Murder

{¶16} Defendant also contends the state failed to offer evidence showing that defendant acted with the requisite prior calculation and design. R.C. 2903.01(A) defines the offense of aggravated murder, providing that "[n]o person shall purposely, and with prior calculation and design, cause the death of another." The term "prior calculation and design" is not statutorily defined but "is generally understood to encompass the calculated decision to kill." *State v. Jackson* (Jan. 20, 2000), 8th Dist. No. 75354, citing *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph one of the syllabus. No bright line test determines whether prior calculation and design are present. "Instead, each case turns on the particular facts and evidence presented at trial." *State v. Taylor*, 78 Ohio St.3d 15, 20, 1997-Ohio-243, cert. denied, 552 U.S. 851, 118 S.Ct. 143.

{¶17} Neither the degree of care nor the length of time the offender takes to ponder the crime beforehand is critical in itself. *State v. Awkal*, 76 Ohio St.3d 324, 330, 1996-Ohio-395 (citations omitted). While momentary deliberation is insufficient, a time span as short as two or three minutes can be sufficient for prior calculation and design. *Taylor* at 22. Where the trial evidence reveals sufficient time and opportunity to plan an act of homicide, and the circumstances surrounding the homicide show a scheme

designed to implement the calculated decision to kill, a trier of fact's finding of prior calculation and design is justified. *State v. Cotton* (1978), 56 Ohio St.2d 8, paragraph three of the syllabus.

{¶18} Defendant contends the evidence was legally insufficient to establish prior calculation and design because defendant armed himself to expel an intruder from his home, only used the weapon when the intruder attacked him, and was not trying to fatally wound the intruder. Defendant's argument draws on his self-defense defense and so is not helpful in analyzing the sufficiency of the evidence. *Hancock*.

{¶19} The state, in addressing defendant's argument, relies on defendant's evidence that he left the confrontation in the front room, went to the kitchen, retrieved the knife, came back to the confrontation in the front room, and ultimately stabbed the victim causing his death. On such facts, the court could infer the requisite intent to kill, given the circumstances, the weapon, and the nature of the wounds the victim suffered. See R.C. 2901.22(A); *State v. Garner*, 74 Ohio St.3d 49, 60, 1995-Ohio-168 (citations omitted) (stating "persons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts"); *State v. Edwards* (1985), 26 Ohio App.3d 199, 200 (concluding that, despite defendant's denying any intention to kill the victim, defendant's entering his house, retrieving a banister railing and hitting the victim allowed the jury to conclude the defendant had the requisite intent to kill, "given the size of the instrument and the force with which the victim was struck").

{¶20} The facts similarly support a finding of prior calculation and design in that defendant left the affray, retrieved a weapon, and used it to kill the victim. Cf. *State v. Norman* (Dec. 23, 1999), 10th Dist. No. 99AP-398, appeal not allowed (2000), 88 Ohio

St.3d 1496, citing *Robbins* at 79 (deciding that where the defendant left as two individuals argued, went upstairs, and retrieved a gun, the defendant's "withdrawal from the confrontation to obtain a weapon was a sufficient lapse of time and provided sufficient opportunity to allow appellant to form a plan to carry out the purpose to kill"); *State v. Martin* (Apr. 19, 2001), 10th Dist. No. 00AP-836 (determining the record contained sufficient evidence of prior calculation and design where the defendant, following an argument with the victim in a bedroom came out of the bedroom, went to the kitchen area, returned to the bedroom, and emerged from the bedroom having stabbed the victim, since by leaving the bedroom, the defendant had a sufficient "cooling off" period in which she could plan her actions).

{¶21} The state, however, did not present all the evidence on which it now relies to support the sufficiency of the evidence. See *State v. Cross-Necas*, 11th Dist. No. 2010-P-0042, 2011-Ohio-2590, ¶32, citing *State v. Lewis*, 11th Dist. No. 2009-L-138, 2010-Ohio-4288, quoting *State v. March* (July 16, 1999), 11th Dist. No. 98-L-065 (stating "the focus of a 'sufficiency analysis is solely upon the state's evidence' "). Rather, its core evidence was that the victim entered defendant's residence, and the situation escalated. Defendant grabbed his girlfriend and told the victim he needed to leave. As the victim began to throw a punch aimed toward defendant, defendant stabbed the victim in the neck with a steak knife. In itself, such evidence arguably is insufficient to prove prior calculation and design.

{¶22} Although the state did not present direct evidence that defendant left the fight, went to the kitchen and returned with a knife, defendant's girlfriend testified that, although she did not see defendant retrieve the knife, it belonged to the couple, was kept

in their kitchen, and was "normally always there." (Tr. 104.) She further stated she never before had seen defendant carry the knife. The additional evidence was sufficient to allow the trial court to conclude defendant retrieved the knife from the kitchen as part of a plan to use it against the victim. Accordingly, the state presented sufficient evidence to support the mental element of aggravated murder.

B. Manifest Weight of the Evidence

{¶23} Sufficiency of the evidence and manifest weight of the evidence are distinct concepts; they are "quantitatively and qualitatively different." *Thompkins* at 386. When presented with a manifest weight argument, we engage in a limited weighing of evidence to determine whether sufficient competent, credible evidence permits reasonable minds to find guilt beyond a reasonable doubt. *Conley*. *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony").

{¶24} In cases involving a bench trial, "the trial court assumes the fact-finding function of the jury." *Cleveland v. Welms*, 169 Ohio App.3d 600, 2006-Ohio-6441, ¶16. To warrant reversal from a bench trial under a manifest weight of the evidence claim, a reviewing court must "review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered." *Id.*, citing *Thompkins* at 387.

{¶25} Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury, or the court in a bench trial, may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67. "The power to reverse on 'manifest weight' grounds should only be used in exceptional circumstances, when 'the evidence weighs heavily against the conviction.' " *State v. Banks*, 10th Dist. No. 09AP-13, 2009-Ohio-4383, ¶14, quoting *Thompkins* at 387.

1. The Castle Doctrine

{¶26} Defendant asserts his aggravated murder conviction is against the manifest weight of the evidence because a reasonable trier of fact only could conclude that defendant not only was lawfully in his home but the victim was unlawfully in it because he obtained entry through deception. With that premise, defendant asserts he was entitled to the presumption that he acted in self-defense when he attempted to expel the victim from his home.

{¶27} Self-defense is an affirmative defense, and the accused has the burden to prove it by a preponderance of the evidence. R.C. 2901.05(A); *State v. Smith*, 10th Dist. No. 04AP-189, 2004-Ohio-6608, ¶16. To establish self-defense through the use of deadly force a defendant must prove (1) he was not at fault in creating the situation giving rise to the affray, (2) he had a bona fide belief that he was in imminent danger of death or great bodily harm and his only means of escape from such danger was the use of such force, and (3) he must not have violated any duty to retreat or avoid the danger. *Robbins* at

paragraph two of the syllabus. A defendant may only use as much force as is reasonably necessary to repel the attack. *State v. Harrison*, 10th Dist. No. 06AP-827, 2007-Ohio-2872, ¶25, citing *State v. Jackson* (1986), 22 Ohio St.3d 281, cert. denied (1987), 480 U.S. 917, 107 S.Ct. 1370. The elements of self-defense are cumulative, so "[i]f the defendant fails to prove *any one* of these elements * * * he has failed to demonstrate that he acted in self-defense." (Emphasis sic.) *Jackson* at 284.

{¶28} Given the three-part test, "a person may not kill in self-defense if he has available reasonable means of retreat from the confrontation." *Williford* at 250, citing *Jackson* at 283-84. The duty to retreat "derives from the common-law rule that the right to kill in self-defense may be exercised only if the person assaulted attempted to 'retreat to the wall' whenever possible." *State v. Thomas*, 77 Ohio St.3d 323, 326-27, 1997-Ohio-269.

{¶29} By contrast, a person attacked in his or her own home has no duty to retreat before using force in self-defense. R.C. 2901.09(B); *Williford* at 250, quoting *State v. Peacock* (1883), 40 Ohio St. 333, 334 (stating that " '[w]here one is assaulted in his home, or the home itself is attacked, he may use such means as are *necessary* to repel the assailant from the house, or to prevent his forcible entry, or material injury to his home, even to the taking of life' "). (Emphasis sic.) Commonly referred to as the Castle Doctrine, this exception to the duty to retreat "derives from the doctrine that one's home is one's castle and one has the right to protect it and those within it from intrusion or attack." *Thomas* at 327.

{¶30} In 2008, the Ohio General Assembly further expanded the reach of the Castle Doctrine through Senate Bill 184, creating a presumption that a person acts in self-

defense "when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used * * * has unlawfully and without privilege to do so entered the residence * * * occupied by the person using the defensive force." R.C. 2901.05(B)(1). The presumption of self-defense may be rebutted if the state establishes by a preponderance of the evidence that the person against whom the defensive force was used had a right to be in, or was a lawful resident of, the residence. R.C. 2901.05(B)(1), (3). Thus, under S.B. No. 184, "a person is presumed to have acted in self-defense" and may use deadly force "when attempting to expel or expelling another from their home who is unlawfully present. * * * There is also no duty to retreat inside one's home." *State v. Johnson*, 8th Dist. No. 92310, 2010-Ohio-145, ¶18.

{¶31} The parties here do not dispute that defendant had no duty to retreat before using force in self-defense, per R.C. 2901.09. Rather, they dispute whether defendant was entitled to the R.C. 2901.05(B)(1) presumption of self-defense. Defendant asserts the trial court focused solely on the "no duty to retreat" portion of the Castle Doctrine in R.C. 2901.09(B) and failed to acknowledge the presumption in R.C. 2901.05(B)(1). The state contends the trial court correctly considered both R.C. 2901.05(B)(1) and 2901.09(B), and found the R.C. 2901.05(B)(1) presumption of self-defense inapplicable because the victim lawfully entered defendant's residence.

{¶32} The only evidence concerning the victim's entry into the home came from defendant. Although defendant's girlfriend stated she saw the victim walk up to the house and knock on the door, "standing to the side of the door," she "put [her] head down because * * * it [was] normal for him to come over." (Tr. 92-93.) She explained that

although the victim had never been inside the house, he often came there to ask for cigarettes.

{¶33} Defendant testified that when he heard a knock on the door, he looked out the peephole and did not see anyone. According to defendant, "no trouble is usually around, so I just opened the door," but when he did, the victim "stepped up on the porch and forced his way in, * * * pushed the door and * * * pushed me out of the way." (Tr. 203.) Defendant said the victim stood to the side of the steps leading up to the front door to prevent defendant from seeing him through the peephole.

{¶34} Although defendant contends the trial court failed to acknowledge R.C. 2901.05(B)(1), defendant's closing argument specifically directed the court's attention to R.C. 2901.05, informing the court that under the statute "a homeowner who is faced with an individual who comes into their home unlawfully is given a self-defense, a presumption." (Tr. 251.) The trial court then expressly addressed the lawfulness of the victim's entry, stating that "[t]he victim knocked on the door of the defendant and he was allowed to enter. * * * The defendant would have you believe that the victim knocked on the door while standing beside the door so as not to be seen through the peephole. I am not convinced that is true." (Tr. 260.) As the court explained, "The victim went to the front door, knocked on the door. He was known by defendant and he [was] allowed to enter defendant's house. In fact, there was testimony that this victim, in fact, went to the defendant's house often to borrow cigarettes." (Tr. 260.)

{¶35} The trial court did not believe defendant's testimony. While a witness's testimony "may not be 'arbitrarily ignored,' a trial court may ignore such testimony if there are 'some reasons * * * objectively present.'" *Coleman v. Hamilton*, 12th Dist. No.

CA2011-03-049, 2011-Ohio-4717, ¶14, quoting *State v. Brown* (1983), 5 Ohio St.3d 133, 135. The trial court here did not arbitrarily ignore the defendant's testimony regarding the lawfulness of the victim's entry, but instead explained why it found defendant's testimony unbelievable. The trial evidence supported the court's reasoning: defendant and the victim were neighbors, had known each other for over a couple of months, spent most of the day prior to the incident drinking together, and frequently encountered each other in the victim's knock on defendant's door and request for cigarettes.

{¶36} Where, as here, the trial court gave reasons to support its decision to disbelieve defendant's testimony, the court's conclusion that defendant permitted the victim to enter his house is not against the manifest weight of the evidence. See *State v. Frett* (June 11, 1998), 8th Dist. No. 72812, appeal not allowed, 83 Ohio St.3d 1461 (stating that although "the only evidence of what actually happened in the room was defendant's testimony that the victim came at him with a knife," the jury, "for a number of reasons, * * * was entitled to disbelieve defendant's testimony that he shot the victim in self-defense"). Because the court found the victim lawfully entered defendant's residence, defendant was not entitled to the R.C. 2901.05(B)(1) presumption of self-defense. See *State v. Madera*, 8th Dist. No. 93764, 2010-Ohio-4884, ¶37-39, appeal not allowed, 127 Ohio St.3d 1548, 2011-Ohio-647 (noting the Castle Doctrine did not apply where the trier of fact determined the victim was lawfully in defendant's house); Cf. *State v. Kozlosky*, 8th Dist. No. 95861, 2011-Ohio-4814, ¶27-29 (concluding a defendant satisfied the elements of self-defense, as altered by the Castle Doctrine, where the victim entered defendant's "home three times without permission," "ignored all demands to

leave," and started beating the defendant's female tenant, causing the defendant to shoot the victim after the victim reached back for his gun).

{¶37} Moreover, other inconsistencies in defendant's evidence gave the trial court reason to question his witnesses' credibility. Although defendant's girlfriend testified defendant stabbed the victim only after the victim took a swing at him, she did not so advise police on the night of the incident when she provided a handwritten statement detailing the events of that evening. Defendant similarly admitted that some of his testimony included information he did not tell police on the night police responded to his house. Although defendant told police on the night of the incident that his girlfriend was between him and the victim when he stabbed the victim, defendant testified at trial that he pushed his girlfriend out of the way before stabbing the victim. Defendant also never told police in his interview immediately following the incident that the victim was known to carry a large knife, but he so testified at trial. Lastly, although the couple testified defendant and the victim knocked the chairs and table over in their struggle, one of the police officers who arrived on the scene stated he threw the table and chairs over in order to handcuff defendant.

{¶38} After concluding that defendant allowed the victim to enter the residence, the trial court found defendant failed to carry his burden of establishing he acted in self-defense. The court explained that the evidence provided "no factual basis whatsoever in this case for the defendant to believe, even if mistaken, that he was in danger of death or great bodily harm by the possible swinging of the fist by the victim toward the defendant. * * * Therefore, he ha[d] no right to use deadly force as he did in defending himself." (Tr. 268.) The court similarly found defendant used excessive force in pulling out the knife to

"kill someone who is without question unarmed and incapable of inflicting deadly force or – death or great bodily harm." (Tr. 268.)

{¶39} Given the evidence, the trial court did not clearly lose its way and create a manifest miscarriage of justice. The trial evidence established that the victim swung his fist at defendant, never actually hitting defendant, and defendant responded by fatally stabbing the victim. Although defendant testified the victim was known to carry a knife, defendant presented no evidence that the victim had a knife on the day of the incident. The trial court's judgment is not against the manifest weight of the evidence. See *State v. Berger*, 8th Dist. No. 87603, 2006-Ohio-6583, ¶19, appeal not allowed, 113 Ohio St.3d 1468, 2007-Ohio-1722 (concluding defendant did not have a bona fide belief she was in danger of death or great bodily harm where "no one else" in the confrontation "had a weapon" and the others were only engaged "in cussing, hair pulling, shoving, and punching).

2. Mens Rea for Aggravated Murder

{¶40} Defendant alternatively asserts his conviction for aggravated murder is against the manifest weight of the evidence because the state failed to establish that defendant acted with prior calculation and design. Defendant contends he did not act with the requisite prior calculation and design because he armed himself with the knife in an attempt to expel an intruder. Although defendant argues he was justified in obtaining the knife, he does not dispute that he left the group during the confrontation in the front room, went to the kitchen, obtained the knife, partially concealed the knife in his shorts, and then used the knife to stab the victim and cause the victim's death. Such facts support the trial court's finding prior calculation and design on the evidence presented.

{¶41} Defendant nonetheless contends he did not intend to kill the victim, but only meant to strike the victim in the shoulder. The trial court was in the best position to judge the credibility of defendant, and we will not substitute our judgment for that of the trial court where, as here, the evidence concerning defendant's actions and the nature of the injuries support the trial court's conclusion that the defendant acted purposely in causing the victim's death. The manifest weight of the evidence supports the trial court's resolution of defendant's self-defense claim and defendant's conviction for aggravated murder.

{¶42} Defendant's first, second, and fourth assignments of error are overruled.

IV. Third Assignment of Error - Hearsay

{¶43} Defendant's third assignment of error asserts the trial court erred when it excluded Locke's testimony as hearsay. A trial court has broad discretion concerning the admission or exclusion of evidence; in the absence of an abuse of such discretion that materially prejudices a defendant, a reviewing court generally will not reverse an evidentiary ruling. *State v. Issa*, 93 Ohio St.3d 49, 64, 2001-Ohio-1290, cert. denied (2002), 535 U.S. 974, 122 S.Ct. 1449; *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66; *State v. Barnes*, 94 Ohio St.3d 21, 23, 2002-Ohio-68 (noting a trial court abused its discretion when it "acted unreasonably, arbitrarily, or unconscionably").

{¶44} Defense witness, Latanya Locke, testified the victim stopped at her house on the day of the incident before going to defendant's house. Locke heard the victim tell her son "he was going next door, he would be back, he was going to kick [defendant's] 'A.' " (Tr. 185-86.) The court sustained the state's hearsay objection to the statement. Defendant contends on appeal that the trial court erred in sustaining the objection because the statement was not offered to prove the truth of the matter asserted but rather

"was offered to show the decedent's intent and motive" when he went to defendant's residence, so the statement fits "squarely within the exception found in Ohio R. Evidence 803(3)." (Appellant's brief, 12.)

{¶45} A statement is inadmissible hearsay when it is (1) an out-of-court statement and (2) offered to prove the truth of the matter asserted. Evid.R. 801(C) and 802. Among the listed exceptions to the hearsay rule set out in Evid.R. 803 is Evid.R. 803(3), providing that "[a] statement 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)," will not be excluded as hearsay. "Under Evid.R. 803(3), statements of current intent to take future actions are admissible for the inference that the intended act was performed." *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶99, cert. denied, 549 U.S. 957, 127 S.Ct. 387 (determining the statement, "I got to kill the present wife and I'll have a lot of money after that," made by an individual hired to kill the defendant's wife "was admissible under Evid.R. 803(3) to prove that [the individual] later acted in conformity with that intention").

{¶46} Here, the victim's statement arguably was a statement of the victim's then current intention to take a future action and thus admissible under Evid.R. 803(3). Even if the statement were admissible, any error in its exclusion was harmless, because the erroneous admission or exclusion of hearsay, cumulative to properly admitted testimony, constitutes harmless error. *State v. Williams* (1988), 38 Ohio St.3d 346, 350, cert. denied (1989), 489 U.S. 1040, 109 S.Ct. 1176.

{¶47} Defendant's testimony presented the same evidence, stating that, while defendant was at the victim's house earlier in the day, the victim accused defendant of

"trying to talk to [his] baby's mom," became aggressive, and moved his daughter out of the way so as to be able to cause harm to defendant. (Tr. 195.) Defendant also testified that when the victim walked in his house later the same day, he stated, "We going to have to handle this, player. You been trying to talk to my baby's mom." (Tr. 203.) The victim's aggressiveness toward defendant thus was apparent apart from the excluded testimony, rendering the victim's statement to Locke cumulative of other evidence presented. Moreover, the excluded evidence did not fortify defendant's self-defense defense, since the other evidence demonstrated that defendant knew the victim and allowed him to enter his house, stabbed the unarmed victim and caused the victim's death. The trial court's decision to exclude the victim's statement to Locke was harmless beyond a reasonable doubt.

{¶48} Defendant's third assignment of error is overruled.

V. Disposition

{¶49} Having overruled defendant's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.
