STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELLY ANN GORSLINE,

Defendant-Appellant.

UNPUBLISHED
October 11. 1996

No. 180396
LC No. 94-002995

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE NELSON GRUBER,

Defendant-Appellant.

UNPUBLISHED

No. 181014
LC No. 94-001481

Before: Wahls, P.J., and Murphy and C.D. Corwin,* JJ.

PER CURIAM.

In docket number 180396, defendant Gorsline was convicted in a bench trial of one count of second-degree murder, MCL 750.317; MSA 28.548, and one count of aggravated assault, MCL 750.81a; MSA 28.276(1). Gorsline appeals as of right. We remand for a new competency hearing. In docket number 181014, defendant Gruber was convicted in a bench trial of one count of second-degree murder, MCL 750.317; MSA 28.548. Gruber appeals as of right. We affirm.

Docket no. 181014

Gruber argues that there was insufficient evidence to convict him of second-degree murder. We disagree. This Court reviews a challenge to the sufficiency of the evidence at a bench trial by viewing

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* Circuit judge, sitting on the Court of Appeals by assignment.

the evidence presented in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). To establish the crime of second-degree murder, the prosecutor must show that the defendant caused the death of the victim and that the killing was done with malice and without justification. *Id.* Malice is the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will be the probable result. *Id.* Malice may be inferred from the facts and circumstances of the killing. *Id.*

Gorsline and the decedent had had a relationship which lasted approximately nine years. Soon after their breakup, the decedent moved in with Michelle Pomeroy, and Gorsline began a relationship with Gruber. At trial, Gruber testified that he, Gorsline, and Ronald Smith drove to the apartment of Pomeroy and that he (Gruber) let himself in. Gruber testified that he exchanged words with the decedent. Gruber admitted to repeatedly beating the decedent, first with his hands and feet, then later with a chair. Pomeroy's five-year-old daughter saw Gruber hit the decedent with a cane. Pomeroy saw Gorsline and Gruber leaving the apartment, and then saw the decedent lying in blood.

Smith testified that he waited in the truck while Gruber and Gorsline went into the apartment. When they returned, Gruber stated, "I just knocked this guy out." Gruber explained that he had hit the decedent with a chair three times and kicked him a couple of times. Contrary to Gruber's argument, the trial court did not find the evidence of malice existed solely because of the injuries to the decedent. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant caused the death of the decedent, and that he acted with malice. *Kemp, supra*, p 322. Gruber's voluntary intoxication is not a defense to a general intent crime such as second-degree murder. *People v Langworthy*, 416 Mich 630, 638; 331 NW2d 171 (1982); *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995); *People v Moye*, 194 Mich App 373, 378; 487 NW2d 777 (1992), rev'd on other grounds 441 Mich 864; 491 NW2d 232 (1992).

As to the evidence of justification, Amy Michaud, an evidence technician with the State of Michigan Police Department testified that the blood pattern near the love seat indicated that the person who was hit may have been sitting on the couch, as opposed to standing or lying down. However, a different impact stain in the living room, found on the wall above the couch, showed that the victim could have been hit on the head while lying down. Moreover, after reviewing pictures of the decedent's body, Michaud concluded that he may have been hit while lying on his right side, and that he was not in an upright position after the initial blows took place. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that Gruber did not have a reasonable belief that his life was in imminent danger or that there was a threat of serious bodily harm. *Kemp*, *supra*, p 322. Furthermore, a rational trier of fact could find that Gruber was the aggressor and did not withdraw from his encounter with the decedent. *Id.*, p 323. Accordingly, Gruber was not entitled to a claim of self-defense. *Id.*

As to imperfect self-defense, assuming arguendo that the trial court erred by relying on *People v Springer*, 100 Mich App 418; 298 NW2d 750 (1980), the error was harmless. The trial court

specifically found that Gruber encountered the decedent in a reclined position, and that Gruber kept beating him until he was still. These findings are reasonable when the evidence is viewed in the light most favorable to the prosecution. The defense of imperfect self-defense is not available where the defendant acts with excessive force. *Kemp, supra*, p 325. Unlike the situation in *Kemp* where the trial court did not make any findings in regard to whether the defendant used excessive force, it would not facilitate appellate review in this case to remand for further articulation of facts. See *People v Johnson (On Rehearing)*, 208 Mich App 137, 141-142; 526 NW2d 617 (1994).

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Gorsline also argues that there was insufficient evidence to convict her of second-degree murder. We disagree. The trial court found Gorsline guilty as an aider and abettor. To convict a person as an aider and abettor, the prosecutor must show: (1) that the crime charged was committed either by the defendant or by some other person; (2) that the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) that the defendant either intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving the aid or encouragement. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). An aider and abettor's state of mind may be inferred from all the circumstances. *Id.* Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.*, p 569. The amount of advice, aid, and encouragement is immaterial as long as it had the effect of inducing the crime. *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974); *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992).

Here, as stated *supra*, a rational trier of fact could believe that Gruber committed the crime of second-degree murder. In addition, there was a close relationship between Gorsline and Gruber. Several witnesses testified at trial that Gorsline announced that she wanted to kill the decedent or wanted him dead. Gorsline initiated the plan to "retrieve" her personal items from the decedent. Both Pomeroy and her daughter testified that Gorsline acted violently at the scene. The decedent was beaten with two different objects. Six fake pink fingernails were found near the love seat on which the decedent had been sitting. The fingernails were consistent in structure to fake pink fingernails that were recovered from Gruber's truck Blood stains were found in Pomeroy's bedroom. Although Gorsline entered this bedroom and beat Pomeroy, there was no testimony that Gruber ever entered this bedroom. Gruber and Gorsline left the apartment together. Viewing the evidence in the light most favorable to the prosecution, sufficient evidence was presented for a rational trier of fact to find that Gorsline aided and abetted the murder of the decedent. *Turner, supra*, pp 558-559. Accordingly, there was sufficient evidence to convict Gorsline of second-degree murder.

Gorsline argues that the trial court's failure to ascertain on the record whether Gorsline intelligently and knowingly waived her right to testify requires a new trial. This argument is without merit. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991).

Gorsline argues that the court's verdict was inconsistent. We disagree. In making its findings of fact, the trial court stated that it was not convinced that Gorsline had the specific intent to commit larceny. The trial court did not make findings of fact as to the other elements of felony-murder. In order to convict one charged as an aider and abettor of a first-degree felony murder, the prosecutor must show that the person charged had the intent to commit the underlying felony as well as malice. *People v Flowers* 191 Mich App 169, 178; 477 NW2d 473 (1991). It is not inconsistent to find that Gorsline acted with malice, but without the specific intent to commit larceny. See *People v Cooper*, 168 Mich App 62, 65; 423 NW2d 597 (1988), rev'd on other grounds 433 Mich 862 (1989).

In addition, the counts of first-degree, premeditated murder and felony-murder were in the alternative. Defendant was not subjected to double punishments for the same offense. See *People v Gonzalez*, 197 Mich App 385, 392; 496 NW2d 312 (1992); *People v Passeno*, 195 Mich App 91, 96; 489 NW2d 152 (1992).

Gorsline's final argument is that the trial court erred by holding Gorsline's competency hearing in her absence. We agree. A defendant has a right to be present during the voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of the verdict, imposition of sentence, and any other stage of trial where the defendant's substantial rights might be adversely affected. *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). A hearing to determine competency affects a defendant's substantial rights. *People v Thompson*, 52 Mich App 262, 265; 217 NW2d 63 (1974). A defendant's right to be present at a competency hearing is supported on statutory and constitutional grounds. *Id.*, pp 264-266.

Even an express waiver by defense counsel does not waive a defendant's right to be present at her competency hearing. *Id.*, p 267. Because less than three years have elapsed since the time of trial, we remand for a competency hearing to be held in accordance with the procedure outlined in *Thompson*, *supra*, pp 267-268. *People v Livingston*, 57 Mich App 726, 737; 226 NW2d 704 (1975), remanded on other grounds 396 Mich 818; 238 NW2d 360 (1976); *People v Ponder*, 57 Mich App 94, 99; 225 NW2d 168 (1974). If the defendant is found to have been competent at the time of her trial, then her convictions are affirmed. However, if the defendant is found to have been incompetent at trial, or if the court is unable to adequately determine her competency to stand trial at the time of her trial, then her convictions should be set aside and a new trial granted. *Livingston*, *supra*; *Thompson*, *supra*.

In docket no. 181014, Gruber's conviction is affirmed. In docket no. 180396, we remand for proceedings consistent with this opinion.

/s/ Myron H. Wahls
/s/William B. Murphy
/s/ Charles D. Corwin