[Cite as *State v. Finley*, 2006-Ohio-2357.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff- Appellee	:	C.A. Case No. 20974
vs.	:	T.C. Case No. 03-CR-4661
KEITH DARNELL FINLEY	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

. . . . . .

O P I N I O N

Rendered on the 12th day of May, 2006.

. . . . . .

MATHIAS H. HECK, JR., Prosecuting Attorney, By: CARLEY J. INGRAM, Assistant Prosecuting Attorney, Atty. Reg. #0020084, Appellate Division, P.O. Box 972, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorneys for Plaintiff-Appellee

WILLIAM T. DALY, Atty. Reg. #0069300, 120 W. Second Street, Suite 1717, Dayton, Ohio 45402
Attorney for Defendant-Appellant

. . . . . .

FAIN, J.

{¶ 1} Defendant-appellant Keith Finley appeals from his conviction and sentence for Murder. Finley first contends that he received ineffective assistance of counsel. Finley asserts that he and his attorney did not effectively communicate in order to prepare his defense, that Finley did not want to stand next to his attorney at a pretrial hearing, that the trial court denied Finley's motion for ineffective assistance of counsel, which the trial

court construed as a motion for substitute counsel, that the trial court disallowed Finley's dual representation, and that the trial court denied Finley's own representation. We conclude that Finley received effective assistance of counsel.

{¶ 2} Finley next contends that the judgment of the trial court is against the manifest weight of the evidence. Finley claims that the State's evidence is insufficient to support a finding of guilt. We conclude that there is ample evidence in the record to support the conviction, and that the judgment of the trial court is not against the manifest weight of the evidence. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} In July, 2003, Sherry Dyer's dead body was found beneath her van in the 2600 block of Gregory Street in Dayton, Ohio. Following an investigation, the police determined that Keith Finley caused Dyer's death by twice stabbing her in the neck with a knife and then running over her with her van.

{¶ 4} Finley was indicted on one count of Purposeful Murder, in violation of R.C. 2903.02(A), and one count of Felony Murder, in violation of R.C. 2903.02(B). Dyer was the victim in both counts. The trial court appointed William G. Knapp, III, to represent Finley after Finley's relationship with his original attorney broke down. After the trial court appointed Knapp to represent him, Finley began filing pro se motions.

{¶ 5} The trial court held a pretrial hearing to address Finley's various pro se motions.

{¶ 6} The court asked Knapp to state the actions he had undertaken in preparing Finley's defense. Knapp did so, and then explained why he had not filed

some of the motions that Finley wanted him to file.

{¶ 7} The court addressed Finley's pro se "Ineffective Assistance By Counsel" motion and construed it as a motion for new counsel. The court stated that it had already allowed substituted new counsel for Finley once. The court also noted that it had analyzed Finley's pro-se motions, one by one, and found no basis to conclude that Knapp was performing incompetently as Finley's attorney. The court further found that Finley and Knapp merely disagreed about tactics and strategy, and that there was no basis to remove Knapp as counsel.

{¶ 8} During a subsequent pretrial hearing, the court addressed Finley's pro se motions "For Secondary Counsel" and "To Be Co-Counsel To My Lawyer." Regarding Finley's Secondary Counsel Motion, the court stated that a defendant is normally appointed secondary counsel only when he faces the death penalty or when he is charged with Aggravated Murder, and neither of those situations applied to Finley's case. With respect to Finley's "Co-Counsel" Motion, the court stated that, based on *State v. Martin*, 103 Ohio St.3d 385, 816 N.E.2d 227, 2004-Ohio-5471, Finley had no right to act as co-counsel. Thus, the court denied both of these motions. The record does not reflect that Finley requested to represent himself.

{¶ 9} Louise Cole, a friend of Dyer, testified that approximately three weeks before Dyer's death, she overheard a phone conversation between Dyer and Finley, while visiting Dyer at her home. She testified that during the phone conversation Finley became agitated when he learned that Dyer was seeing another man, and she heard Finley tell Dyer he was going to kill her and the other man.

{¶ 10} Dyer's son, Sean, testified for the State. He testified that by July 4th, the

eve of Dyer's death, Dyer and Finley had discontinued their relationship and Dyer was seeing another man. He further testified that Finley called Dyer's residence numerous times the evening of July 4th. During the third or fourth telephone call, Finley became disturbed and told Sean that Dyer was making him mad, and she was going to make him hurt her. Sean further testified that Dyer left home with her young son, of whom Finley was the father, around 4:00 p.m. on July 5th, the day of her death, to pick up Finley for the fireworks downtown and a visit with their son.

{¶ 11} David Leroy testified that around 5:00 p.m. on July 5th, just a few hours before Sherry Dyer's body was found, she picked up Finley at Leroy's residence. Leroy testified that just before Finley walked out the door to get into Dyer's van, Finley said, "I'm going to kill her."

{¶ 12} Joyce Finley, Finley's aunt, also testified for the State. She testified that Finley appeared on her doorstep around 6:00 p.m. on Saturday, July 5th, approximately an hour after Dyer picked up Finley at Leroy's residence, with blood dripping from his hands onto his pants. Joyce Finley further testified that defendant cleaned himself up and then asked for a ride, which Joyce Finley provided. Joyce Finley drove home after giving Finley a ride. As she approached her house, she saw a van parked in the middle of the small street directly behind her home. She testified that it appeared that someone was underneath the front of the van, presumably doing some work on it.

{¶ 13} Joyce Finley testified that approximately forty-five minutes after she initially saw the van behind her home, she sent a neighbor to check on the van, because neither it nor the person beneath it had moved. The neighbor found a young child in the van and a dead body underneath it. The police were called to the scene.

The child was the two-year-old son of Finley and Sherry Dyer. The van belonged to Dyer. Dyer's body was underneath the van. She had been stabbed to death and run over with her own van.

{¶ 14} After several Dayton police officers and crime scene investigators testified about their observations and actions at the crime scene, including finding a blood-soaked knife handle, Detective Christen Beane testified for the State. After testifying about her own observations and actions at the crime scene, she testified that approximately one month after Dyer's death, Gina Moore contacted Beane. Gina Moore came to Beane's office and gave Beane an envelope, addressed to Gina Moore, containing another envelope, addressed to Darryl Tory, with a two-page letter enclosed. The envelope addressed to Tory had Keith Finley's name and address at the Greene County Jail as the return address. After subjecting the envelope and letter addressed to Tory, with Finley's return address on it, to fingerprint and DNA tests, the crime scene investigators determined that Thomas Galdeen's DNA was on the envelope.

{¶ 15} Darryl Tory, the man to whom Finley addressed the letter, testified for the State. He testified that he knew Gina Moore, because she was his girlfriend and the mother of his child. He also testified that he had known Finley for about sixteen years, and thought of Finley as a brother. Tory and Finley were incarcerated in the London Correctional Facility together and, while incarcerated, discussed their personal lives, but only with each other. Tory testified that Finley was released from the London Correctional Facility before he was, and that Tory wrote a letter to Finley once Tory heard what happened to Dyer.

{¶ 16} Tory then testified that he received a reply letter from Finley. On the envelope was Finley's return address and prisoner number at the Greene County Jail. The letter was postmarked July 31, 2003, which was about three weeks after Tory sent his initial letter to Finley. Tory testified that the letter contained things known only to Tory and Finley. Tory read portions of the letter at the trial. The letter mentioned Tory's girlfriend, Gina Moore, and Tory testified that Finley was the only person at the London Correctional Institute who knew about Moore. The letter further stated, "Me (Finley) and the bitch (Dyer) was fighting. If you need me to kill Gina, just let me know...I know she's (Gina Moore) not sending you shit, not writing you and no pictures. You still can't call her. I know. Just do what I did. Kill something. Be a man, step up."

{¶ 17} Tory testified that he sent Finley's letter and envelope in another envelope to Gina Moore, who later gave both envelopes and the Finley letter to Detective Beane. Gina Moore testified that she received both envelopes and the Finley letter from Tory, and that she took these items to Detective Beane.

{¶ 18} Thomas Galdeen testified that he was incarcerated with Finley at the Greene County Jail. Galdeen testified that Finley asked him to write the above-quoted letter to Darryl Tory – the letter that Gina Moore gave to Detective Beane. Galdeen said that before Finley asked him to write the letter, he had no idea who Darryl Tory was. Galdeen testified that Finley asked him to write Finley's name for the return address. Galdeen further testified that he wrote Finley's dictation word for word, paraphrasing nothing. Galdeen read a portion of the letter to the court. Of relevance, and not quoted above, is the statement in the letter that, "I (Finley) felt good killin' her.

Man I got to raise my kids. I got to be a mama and a daddy, but I can handle that." Galdeen again testified that he knew none of the people referred to in the letter and that he simply wrote exactly what Finley said.

{¶ 19} After both sides presented their closing arguments, the jury deliberated and returned with a finding of guilty on both Murder counts. The State elected to have the Felony Murder count merged into the Purposeful Murder count. Finley was sentenced to imprisonment from fifteen years to life for Purposeful Murder. From his conviction and sentence, Finley appeals.

II

{¶ 20} Finley's First Assignment of Error is as follows:

{¶ 21} "APPELLANT ASSERTS INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 22} To demonstrate ineffective assistance of trial counsel, a defendant must establish that counsel's performance was deficient, falling below an objective standard of reasonable representation, and that the defendant was prejudiced by counsel's performance; i.e. that there is a reasonable probability that but for counsel's unprofessional errors, the result of the trial would have been different. *State v. Armstrong*, 2006-Ohio-1805, Montgomery App. No. 20964, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Trial counsel is afforded a strong presumption that his conduct falls within the wide range of reasonable assistance. *Id.*

{¶ 23} An indigent defendant has a right to competent representation by his court-appointed attorney. *State v. Coleman*, 2004-Ohio-1305, Montgomery App. No.

19862. He has no right to have a particular attorney represent him, and must demonstrate "good cause" to warrant substitution of court-appointed counsel. *State v. Murphy* (2001), 91 Ohio St.3d 516, 523, 747 N.E.2d 765. "Good cause" for this purpose includes a complete breakdown in communication between attorney and client. *State v. Gordon*, 149 Ohio App.3d 237, 241, 2002-Ohio-2761, 776 N.E.2d 1135. Hostility, tension, or personal conflicts between attorney and client are insufficient to justify a change in appointed counsel when they do not interfere with the preparation and presentation of a competent defense. *Id.* If the defendant's complaint regarding court-appointed counsel is unreasonable, the trial judge may deny the requested substitution, and the trial court's decision in this regard is reviewed under an abuse-of-discretion standard. *Murphy,* at 523. Abuse of discretion implies an arbitrary, unreasonable, unconscionable attitude of the court. *Coleman* at ¶26.

{¶ 24} A criminal defendant in Ohio possesses the right either to be represented by competent counsel or to proceed pro se, with standby counsel, but these two rights are mutually exclusive, and may not be asserted simultaneously. *State v. Martin*, 103 Ohio St.3d 385, 391, 2004-Ohio-5471, 816 N.E.2d 227.

{¶ 25} Applying these principles to Finley's contention of ineffective assistance of counsel, we conclude that Finley received competent, effective assistance of counsel. Regarding Finely's allegation that he and his attorney, Knapp, did not effectively communicate and regarding Finley's desire not to stand next to Knapp at the pretrial hearing, we conclude that although some hostility, tension, or personal conflicts may have existed between Finley and his attorney, any hostility, tension, or personal conflicts did not prevent Knapp from preparing and presenting a competent

defense.

{¶ 26} The trial judge addressed the situation between Finley and Knapp by asking Knapp to state for the record all the actions he had undertaken on Finley's behalf, up to the point of the pretrial hearing on November 18, 2004. Knapp stated that he had undertaken the following activities as of the time of the pretrial hearing: met with Finley numerous times at jail, filed a motion for the use of investigative services, which the court granted, contacted all witnesses Finley asked him to contact and procured statements from them, filed a motion seeking the use of a handwriting expert, which the court ultimately granted, and discussed all of Finley's pro se motions with Finley, and why he thought those motions should not be filed.

{¶ 27} Additionally, preceding Finley's trial, Knapp met with Finley, Knapp discussed more of Finley's pro se motions with him, Knapp explained why he thought they should ultimately not be filed, and Knapp filed four motions in limine, all of which were granted. During Finley's trial, Knapp attempted to rebut the State's case as best he could by objecting at appropriate times, by cross-examining most of the State's witnesses, including all key witnesses, and by presenting expert testimony from a handwriting specialist regarding the letter Galdeen wrote for Finley. All of these facts surrounding Knapp's representation of Finley suggest that Knapp and Finley communicated well enough for Knapp to prepare and present a competent defense for Finley. Furthermore, these facts show that Knapp's performance was not deficient, did not fall below an objective standard of reasonable representation, but was, to the contrary, competent. Even if we were to assume that Knapp's representation was deficient in some respect, the second prong of the *Strickland* test – sufficient prejudice

– has not been demonstrated.

{¶ 28} Regarding Finley's arguments that he received ineffective assistance of counsel because his pro se motions for self-representation, dual representation, and ineffective assistance of counsel, which the trial court construed as a motion for substitute counsel, were denied, we find no merit to this argument. First, upon review of the entire record, there is no indication that Finley ever asked to represent himself. He never filed a pro se motion seeking to invoke his right to self representation, nor did he make any statement expressing a desire to represent himself.

{¶ 29} Regarding Finley's argument that he was denied effective assistance of counsel because his motions for dual representation and substitute counsel were denied, we conclude that the trial court did not abuse its discretion in denying Finley's motion for substitute counsel and that the trial court properly denied Finley's dual representation motion, pursuant to *State v. Martin*, supra.

{¶ 30} Finley's First Assignment of Error is overruled.

III

{¶ 31} Finley's Second Assignment of Error is as follows:

{¶ 32} "THE TRIAL COURT DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 33} When reviewing a judgment under a manifest-weight-of-the-evidence standard of review, an appellate court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence the [factfinder] clearly lost its way and created such a manifest

miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which evidence weighs heavily against the conviction." *State v. Travis*, 2006-Ohio-787, Montgomery App. No. 20936, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 34} Based upon our review of the evidence in this record, we conclude that Finley's conviction is not against the manifest weight of the evidence. One witness testified that she overheard a phone conversation approximately three weeks before Dyer's death in which Finley told Dyer that he was going to kill her. Another witness testified that the night before Dyer's death, Finley repeatedly called Dyer's home and when Finley learned that Dyer was out with her new boyfriend, Finley said that Dyer was going to make him hurt her. Another witness testified that Finley said, "I'm going to kill her," as Finley was walking out the door to get into Dyer's van hours before Dyer's dead body was found. Another witness, who said Finley was like a brother to him, testified that he received a letter from Finley that said "I felt good killin' her."

{¶ 35} Given this testimony, and the fact that all the witnesses seem credible and possessed no apparent motive to lie, we conclude the jury did not clearly lose its way in finding Finley guilty of Purposeful Murder and Felony Murder and there is no manifest miscarriage of justice necessitating a reversal and new trial. Furthermore, the proximity between where Dyer's body was found and where Finley next appeared – his aunt's house, blood dripping from his hands, seeking a ride out of the neighborhood – is consistent with the finding of guilt. This is not an "exceptional case where the evidence weighs heavily against the conviction."

{¶ 36} Finley's Second Assignment of Error is overruled.

IV

{¶ 37} Both of Finley's assignments of error having been overruled, the judgment of the trial court is Affirmed.

. . . . . .

GRADY, P.J., and BROGAN, J., concur.

Copies mailed to:

Carley J. Ingram
William T. Daly
Hon. Dennis J. Langer