[Cite as *State v. Phelps*, 2015-Ohio-539.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 14AP-4
v.	:	(C.P.C. No. 13CR-464)
Antwan L. Phelps,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 12, 2015

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

Sydow Leis, LLC, and *Anastasia L. Sydow*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by defendant-appellant, Antwan L. Phelps, from a judgment of sentence and conviction entered by the Franklin County Court of Common Pleas following a jury trial in which appellant was found guilty of murder with a firearm specification.

{¶ 2} On January 29, 2013, appellant was indicted on one count of murder, in violation of R.C. 2903.02. The count also carried a firearm specification. Prior to trial, appellant filed a motion in limine regarding a dying declaration. The trial court conditionally granted appellant's motion ruling that the "state has to elicit the necessary evidence before it is admissible as a dying declaration." (Tr. 7-8.)

{¶ 3} The matter was tried before a jury beginning December 9, 2013. The first witness for the state was Columbus Police Officer Ryan Fowler. On October 1, 2012, at

approximately 7:00 p.m., Officer Fowler responded to a dispatch regarding shots fired; he drove his cruiser to the intersection of Cleveland Avenue and Belcher Drive. The officer arrived at the scene "within approximately a minute" of the dispatch. (Tr. 30.) Upon arriving at the scene, the officer observed a shooting victim, a black male, between 18 to 20 years of age. The victim was lying on the ground and was conscious.

{¶ 4} The officer observed the victim "moaning." (Tr. 32.) The victim told Officer Fowler that his name was Jaquan White. Medical personnel arrived a short time later, and medics informed the officer that the victim's condition was "[l]ife-threatening, critical." (Tr. 34.)

{¶ 5} After the victim was transported by medics from the scene, Officer Fowler attempted to secure the scene and find any possible witnesses to the shooting. Officer Fowler talked to several individuals that evening, including John Ray and Michael Sherman who were able to describe the events of the evening.

{¶ 6} On October 1, 2012, Ray drove to a convenience store located on the southwest corner of Cleveland Avenue and Belcher Drive. Ray went inside the store and purchased an item. He returned to his vehicle and began to drive home when he received a text message. Ray stopped his vehicle to check his phone, at which time he noticed two black males "standing on the hill facing each other on the hill." (Tr. 49.) One of the men "had anger on his face like he was mad about something." (Tr. 52.) As Ray began to turn left on Belcher Drive he observed "the gentleman that was facing towards the complex turn and take off running." (Tr. 51.) The man ran "anywhere from * * * 5 to 10 feet maybe before I heard the first gunshot in the back." (Tr. 53.) Ray "slammed on [his] brakes to stop from hitting him as he crossed the road." (Tr. 53.)

{¶ 7} Ray heard a second shot before the man "got to the street," and then heard a third shot "fired shortly after that one." (Tr. 54.) The man with the weapon was approximately 15 to 20 feet from Ray during this time. Ray had a "good look" at the man with the weapon. (Tr. 55.) Ray made eye contact with the shooter. Ray testified that the man "just stood there. I'm * * * looking at him; he looking at me. And when the young man fell on the other side, he turned and ran." (Tr. 56.) Ray then phoned 911.

{¶ 8} Police officers arrived within minutes of Ray's call. Police officers subsequently took Ray to police headquarters where he spoke with a detective. Police officers showed him a photo array of six individuals. Ray picked out photograph No. 6

from the array and testified he was "100 percent sure" of the identification. (Tr. 58.) At trial, Ray identified appellant as the individual he observed firing the shots.

{¶ 9} On October 1, 2012, Sherman resided at 2341 Belcher Drive. Early that evening, Sherman walked to a nearby convenience store and "hear[d] a commotion." (Tr. 95.) Sherman looked around and saw "Quan, the guy who got shot." (Tr. 95-96.) Sherman estimated there may have been five to seven other individuals in the area at the time. Sherman entered the store and made a purchase. As he was walking back home, he again heard the commotion. Sherman, who knew appellant from the neighborhood, looked up and "seen Twan up there" in the area of the commotion. (Tr. 99.)

{¶ 10} Sherman went inside his house, and approximately 30 seconds later heard three gunshots. Sherman went outside and observed a car leaving the area and saw the victim lying on the ground. Sherman went over and knelt down by the victim, who was conscious. Sherman heard the shooting victim state: "Where they at? What's taking them so long?" in reference to the paramedics. (Tr. 108.)

{¶ 11} Sherman later told police officers that he observed a Mazda pulling away from the scene. Sherman told the officers "it looked like Twan's girlfriend's car." (Tr. 105.) Following the shooting, police officers showed Sherman a photo array and he picked out an individual in photograph No. 6, identifying that individual as the person who was arguing with the victim that evening.

{¶ 12} Tiffany Lee was in a car with a friend, Kim Tally, on the evening of October 1, 2012. Tally was appellant's girlfriend. Tally was giving Lee a ride home after picking up Lee's daughter from daycare. Tally told Lee about an incident that occurred earlier in the day involving the victim. (Tr. 157.)

{¶ 13} Instead of taking Lee and her daughter home, Tally and Lee "go to pick up Antwan." (Tr. 148.) They drove to the back of an apartment complex. Lee testified that "Antwan is out the car and walked to the back of us." (Tr. 150.) Approximately five or ten minutes later, Lee heard gunshots. After hearing the gunshots, "Antwan [got] back in the car and we pull off." (Tr. 150.) As they pulled away, "[a] car hit us." (Tr. 151.) Lee and her daughter got out of the car and Lee called someone else to pick them up and take them home.

{¶ 14} The next day, "the victim's people came to my house." (Tr. 153.) Lee testified that "[t]hey jumped on me and smashed out my front windows to my house." (Tr. 153-54.) Lee phoned the police.

{¶ 15} A detective later interviewed Lee. Lee told the detective that when appellant exited the car he started walking toward the store. Lee also told the detective that appellant made a statement after returning to the vehicle.

{¶ 16} Kurt Dietz is a firefighter/paramedic with the Clinton Township Division of Fire. On October 1, 2012, Dietz responded to the scene of a shooting at the intersection of Cleveland Avenue and Belcher Drive. Dietz and the medical personnel placed the victim in the emergency vehicle and transported him to The Ohio State University Hospital. Dietz testified that the victim, who had sustained three gunshot wounds, was in "[p]retty serious" condition at the time. (Tr. 176.)

{¶ 17} The victim was having trouble breathing, and he had "cool, clammy skin." (Tr. 177.) Dietz testified that such a condition indicated a "[s]ign of shock." (Tr. 178.) During the transport, the victim said to Dietz: "Please don't let me die." (Tr. 178.) Dietz asked him what had happened, and the victim said that "he had been shot by Twan." (Tr. 179.)

{¶ 18} Columbus Police Detective Ronda Siniff responded to the report of a shooting on the date of the incident. After returning from the scene, Detective Siniff prepared a photo array comprised of six photographs, including the photograph of appellant, which appeared as photograph No. 6 on the array. After preparing the array, Detective Siniff gave the array to a "blind administrator," an individual who was not involved in creating the array. (Tr. 203.)

{¶ 19} Columbus Police Detective James Porter showed the photo array, identified as State's exhibit No. 2B, to Ray. Ray "selected the individual in position number six" as the individual who "looked like the suspect from the incident." (Tr. 205.)

{¶ 20} Columbus Police Detective Robert Connor investigated the shooting. During the investigation, Detective Connor interviewed Sherman. During the interview, Sherman "indicated that he didn't see the actual shooting. But prior to the shooting, he had walked to the corner store and saw the alleged defendant and the victim arguing." (Tr. 212-13.) While returning from the store, Sherman "saw them arguing in the parking

lot as well." (Tr. 213.) Sherman identified the victim as "Jaquan." (Tr. 214.) Sherman only knew the potential suspect by his street name.

{¶ 21} Detective Connor showed Sherman a photo array, and Sherman "selected the person in position number six on the array." (Tr. 220.) Sherman wrote the following statement at the time: "Person number six was arguing with the victim." (Tr. 221.)

{¶ 22} Columbus Police Detective William Miller responded to the crime scene at 10:00 p.m. Detective Miller took photographs of the scene. Police personnel discovered shell casings in the area but did not find a firearm.

{¶ 23} Kenneth Gerston, M.D., is a deputy coroner with the Franklin County Coroner's Office. Dr. Gerston was recognized as an expert witness. Dr. Gerston performed an autopsy of the shooting victim, Jaquan White. The victim died approximately six hours after arriving at the hospital for treatment. The autopsy revealed that the victim had been shot three times. The victim suffered entrance wounds to the left arm and back, with the bullet from the arm wound entering the chest area. Dr. Gerston opined that the victim died of gunshot wounds to the chest and back.

{¶ 24} Following the presentation of evidence, the jury returned a verdict finding appellant guilty of murder. The jury also returned a verdict finding that appellant did have a firearm on or about his person or under his control while committing the offense. By judgment entry filed December 23, 2013, the trial court sentence appellant to life imprisonment, with the possibility of parole after 15 years, plus three consecutive years incarceration for the firearm specification.

{¶ 25} On appeal, appellant sets forth the following four assignments of error for this court's review:

> [I.] THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING HEARSAY TESTIMONY PREJUDICIAL TO APPELLANT THEREBY DEPRIVING HIM OF HIS RIGHT OF CONFRONTATION GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION.
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> [II.] THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY ENTERING JUDGMENTS OF CONVICTION AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES

> CONSTITUTION AND ARTICLE 1, SECTION 16, OF THE OHIO CONSTITUTION.
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> [III.] THE JURY'S AFFIRMATIVE FINDING THAT DEFENDANT-APPELLANT COMMITTED THE OFFENSE OF MURDER IS NOT SUPPORTED BY EVIDENCE SUFFICIENT TO SATISFY THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
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> [IV.] DEFENDANT-APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶ 26} Under the first assignment of error, appellant contends the trial court improperly allowed the admission of hearsay evidence. Specifically, appellant challenges the admissibility of testimony by two witnesses, Sherman and Dietz, regarding statements the victim made to them.

{¶ 27} The trial court has broad discretion in the admission or exclusion of evidence and, in the absence of an abuse of discretion which results in material prejudice to a defendant, an appellate court should be slow to reverse evidentiary rulings. *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 66 (1991). An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Evid.R. 801(C) defines hearsay as 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." A "statement," as included in the definition of hearsay, is an oral or written assertion or non-verbal conduct of a person, if intended as an assertion. Evid.R. 801(A). Generally, hearsay is inadmissible unless the statement falls within an exception. Evid.R. 802. Conversely, statements that are not intended to prove the truth of what was said are not hearsay. *State v. Davis*, 62 Ohio St.3d 326, 343 (1991).

{¶ 28} Appellant notes that the trial court sustained defense counsel's objection to Sherman's testimony that he heard the victim state: "Twan shot me," but allowed the jury to consider Sherman's testimony that he heard the victim ask "Where they at?" (Tr. 119.) The trial court allowed Sherman to testify that the victim said "Where they at?" as an

excited utterance, an exception to the hearsay rule. The state argues that the question "Where they at?" was not offered to prove the truth of the matter asserted, and therefore no hearsay exception was required. We agree. The victim's statement "Where they at?" was not offered for the truth of the matter asserted and is not hearsay. Thus, no exception to the hearsay rule was necessary to render the statement admissible and the trial court properly allowed the testimony.

{¶ 29} Appellant also notes that the firefighter/paramedic, Dietz, was permitted to testify that the victim stated "Please don't let me die," and that "he had been shot by Twan." (Tr. 178-79.) Appellant maintains this testimony was inadmissible hearsay. The state argues that Evid.R. 804(B)(2) provides an exception to the hearsay rule for "dying declarations." The trial court admitted the statements as a dying declaration exception to the hearsay rule. Appellant argues that the testimony was insufficient to determine the circumstances of what the declarant believed.

{¶ 30} Evid.R. 804(B)(2) states in part, "[i]n a prosecution for homicide * * * a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death," is not excluded by the hearsay rule if the declarant is unavailable as a witness. In order to fall under this exception, "the evidence must show that the deceased's statements were made under a sense of impending death that excluded from the mind of the dying person all hope or expectation of recovery." *State v. Kennedy*, 1st Dist. No. C-120337, 2013-Ohio-4221, ¶ 41. The declarant, however, "is not required to state that he believes that he will not survive; rather, the necessary state of mind can be inferred from circumstances at the time of the declaration." *Id*. at ¶ 42.

{¶ 31} Dietz testified that the victim, who suffered multiple gunshot wounds, was severely wounded and the medic considered his condition to be extremely critical. The victim had been moaning in pain and was having difficulty breathing. He showed signs of shock. The victim said to Dietz, "Please don't let me die." (Tr. 168.) When Dietz asked the victim what had happened, he responded that "he had been shot by Twan." (Tr. 179.) Under these circumstances, the trial court reasonably concluded that the victim believed his death was imminent, and properly allowed the testimony. Appellant's first assignment of error is overruled.

{¶ 32} Under the second and third assignments of error, appellant contends his conviction was against the manifest weight of the evidence and not supported by sufficient evidence. In reviewing a sufficiency of the evidence claim, the relevant inquiry is whether any rational finder of fact, viewing the evidence in a light most favorable to the state, could have found all of the essential elements of the crime proven beyond a reasonable doubt. *State v. Jones*, 90 Ohio St.3d 403, 417 (2000), citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). On review for sufficiency, courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id*. at 390. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* at 319. Consequently, a verdict will not be disturbed based on insufficient evidence unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001); *Jenks* at 273.

{¶ 33} This court's function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *Thompkins* at 387. In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Id*., citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). If we find that the trier of fact clearly lost its way, we must reverse the conviction and order a new trial. *Id*. On the other hand, we will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-94 (1998).

{¶ 34} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. *See Martin* at 175. However, in conducting our review, we are guided by the principle that the finder of fact is best able to view the

witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Seasons Coal Co., v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). Thus, a reviewing court must defer to the factual findings of the jury or the judge in a bench trial, regarding the credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. Concerning the issue of assessing witness credibility, the general rule of law is that "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). Indeed, the fact finder is free to believe all, part or none of the testimony of each witness appearing before it. *Hill v. Briggs*, 111 Ohio App.3d 405, 411 (10th Dist.1996). If evidence is susceptible to more than one construction, reviewing courts must give it the interpretation that is consistent with the verdict and judgment. *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19 (1988).

{¶ 35} In order to convict appellant of murder with a firearm specification, the state was required to prove beyond a reasonable doubt that appellant purposely caused the death of the victim and he had a firearm on or about his person and/or used the firearm to facilitate the murder. R.C. 2903.02; 2941.145.

{¶ 36} Appellant argues that the evidence regarding Sherman and Ray was contradictory, that the state failed to prove appellant was the shooter, and that the evidence was unreliable and uncertain. Appellant argues that Sherman's direct testimony was inconsistent, including statements allegedly made by the victim. In response, the state argues that the jury heard Sherman's alleged inconsistencies but still found him credible.

{¶ 37} Appellant does not specify the inconsistencies in Sherman's direct testimony. However, in response to questions during direct examination, it was unclear when Sherman saw appellant, i.e., whether it was during his trip to the store or during his trip home from the store. He did testify that he saw five or six people involved in the commotion on his way to the store and the victim was one of those people. Sherman was not 100 percent sure that he recognized anyone on his way home from the store, but he did tell the police he saw appellant that night. Then, upon further questioning, he did testify that he saw appellant while he was returning from the store.

{¶ 38} During questioning, it became clear that Sherman was not sure what the victim actually said when Sherman testified the victim stated, "Twan shot me." (Tr. 125.) He testified that the "[o]nly thing for sure I heard him say is 'Where they at? Where they at?' I can't say * * * what I thought I heard him say was verified through everybody standing there." (Tr. 126-27.) His testimony was not inconsistent, but initially confusing. However, defense counsel's objection was sustained as to statements Sherman testified the victim had made other than, "Where they at?" Sherman testified that is the only statement he heard.

{¶ 39} Upon review, we find unpersuasive appellant's contention that Sherman's testimony was inconsistent. Further, the trial court sustained objections to his testimony regarding statements he did not hear the victim say.

{¶ 40} Appellant also contends Ray's identification testimony was inconsistent because he indicated at the time he reviewed the photo array that the individual he picked out "looks like him," while Ray testified at trial he was 100 percent certain it was appellant. (Tr. 72.) In response, the state argues that appellant misrepresents Ray's testimony noting that Ray testified at the time of the photo array he was 100 percent certain appellant was the shooter and he remained 100 percent certain at trial. Further, Ray stated there was no doubt in his mind that appellant was the shooter. Ray explained that he did not tell the detective at the time he identified appellant in the photo array that he was 100 percent sure appellant was the shooter because the question asked of him was not phrased in that manner.

{¶ 41} The jury heard Sherman's and Ray's testimony and made a credibility determination. As stated above, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *Awan* at 123. Thus, we will not substitute our judgment for that of the finder of fact.

{¶ 42} Appellant argues that the state failed to prove appellant was the shooter, pointing to the lack of physical evidence, including the absence of a weapon. Appellant also argues that statements by Sherman and Dietz regarding "Twan" do not prove that Twan was appellant. Finally, appellant challenges the identification testimony of Ray, arguing that Ray (1) stopped his vehicle to check a text message, (2) indicated another individual was present at the time of the shooting, (3) admitted that he overheard a

witness giving a statement to police, and (4) merely indicated that the photo of appellant "looks like him." (Tr. 72.)

{¶ 43} Ray testified that he was 100 percent certain appellant was the shooter. Ray stated he was less than 20 feet away from the shooter and made eye contact. Ray saw appellant run in the direction behind the apartment complex where Lee testified she and Tally were waiting for him in the car. Further, Lee testified that appellant's nickname was "Twan," that appellant was present at the apartment complex at the time of the shooting, and returned to the car immediately after Lee heard gunshots. (Tr. 157.) Sherman testified that he knew both appellant and the victim, White, and that he saw them involved in a "commotion" near the apartment complex immediately prior to the shooting. Sherman also observed a vehicle he associated with appellant leaving the parking lot after the shooting. Sherman testified that he saw appellant that evening and picked appellant out from a photo array as the individual who was arguing with the victim.

{¶ 44} When considering Ray's testimony, there is no support for appellant's argument that Ray was so distracted by texting that he was incapable of identifying the shooter. Ray testified that as he got in his vehicle upon leaving the convenience store, he immediately received a text message. He then stopped his vehicle and sent a reply. He again started to leave and then saw the two men. When the victim ran into the street, Ray had to slam on his brakes to avoid hitting him. While his car was stopped, he made eye contact with the shooter. Ray testified he was not asked for his level of certainty at the time he was shown the array, but that he was 100 percent certain that night that appellant was the shooter. At trial, Ray testified he had no doubt that appellant was the shooter.

{¶ 45} With respect to Ray's testimony about another individual in the parking lot, Ray did not identify this individual as the shooter. Ray also testified that he overheard someone tell the police they saw appellant get into a car but he did not observe that. Here, the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. A conviction is not against the manifest weight of the evidence because the trier of fact believed the state's version of events over the appellant's version. *State v. Gale,* 10th Dist. No. 05AP-708, 2006-Ohio-1523, ¶ 19. Appellant's second assignment of error is overruled.

{¶ 46} Appellant's sufficiency argument essentially raises a challenge to the credibility of the testimony. He contends there is no reliable evidence to support the identification of him as the shooter, asserting that no one identified the name, "Twan" as referring to appellant, and there was no physical evidence tying appellant to the crime.

{¶ 47} Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶ 15, citing *State v. Roberts*, 9th Dist. No. 96CA006462 (Sept. 17, 1997). "[T]hus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Id*.

{¶ 48} We have already considered appellant's challenges to the credibility of the witnesses, and appellant makes no additional arguments regarding the sufficiency of the evidence that we did not address in finding that the conviction was not against the manifest weight of the evidence. Upon review, there was sufficient evidence to support the conviction. Appellant's third assignment of error is overruled.

{¶ 49} Under the fourth assignment of error, appellant argues that he received ineffective assistance of counsel. Appellant contends his trial counsel was ineffective for failing to cross-examine Sherman and that counsel should have attempted to impeach Lee on her conviction for a felony forgery charge. Finally, appellant argues that his counsel failed to pursue other available defenses, including alibi, nor did counsel call any witnesses on behalf of appellant.

{¶ 50} The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel. *State v. Banks*, 10th Dist. No. 10AP-1065, 2011-Ohio-2749, ¶ 12. In order to demonstrate that his counsel's representation was ineffective, appellant must demonstrate that: (1) counsel's performance was deficient, and (2) this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A defendant does not state a claim for ineffective assistance of counsel unless his attorney acted unreasonably given the facts of the case, and the unreasonable conduct was prejudicial to the defense." *State v. Mills*, 62 Ohio St.3d 357, 370 (1992). Counsel need not raise meritless issues. *State v. Hill*, 75 Ohio St.3d 195, 211 (1996).

{¶ 51} In *State v. Johnson*, 10th Dist. No. 99AP-753 (May 30, 2000), this court discussed the applicable standard for addressing a claim of ineffective assistance of counsel, as follows:

> Initially, defendant must show that counsel's performance was deficient. To meet that requirement, defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Defendant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. [*Strickland*] at 690.
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> Next, if defendant successfully proves that counsel's assistance was ineffective, the second prong of the *Strickland* test requires defendant to prove prejudice in order to prevail. *Id*. at 692. To meet that prong, defendant must show counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. *Id*. at 687. See, also, *State v. Underdown* (1997), 124 Ohio App.3d 675, 679, 707 N.E.2d 519. A defendant meets the standard with a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

{¶ 52} In determining whether counsel was deficient, "[t]he defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy." *Banks* at ¶ 13. In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell*, 2 Ohio St.2d 299, 301 (1965). Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 101. An appellate court must be "highly deferential to counsel's performance and will not second-guess trial strategy decisions." *State v. Tibbetts*, 92 Ohio St.3d 146, 166 (2001).

{¶ 53} Appellant contends his trial counsel was ineffective for failing to cross-examine Sherman. However, the decision whether to cross-examine a witness falls within the realm of trial strategy. *State v. Otte*, 74 Ohio St.3d 555, 565 (1996). Here, appellant

attempted to use the fact that Sherman was reluctant to testify to his advantage. During closing, counsel told the jury: "We didn't need to cross-examine Michael Sherman because he didn't do anything." (Tr. 346.)

{¶ 54} We find no prejudice to appellant in defense counsel's failure to attack the credibility of Lee by cross-examining her about her previous felony conviction for forgery. On direct examination, Lee testified that she was in jail for a probation violation for testing positive for powder cocaine. She was on probation for a forgery conviction. She also had a couple other convictions, including burglary in 2006. Appellant's counsel did not cross-examine her about her convictions. Under the circumstances of this case, we cannot agree that defense counsel's failure to address her prior convictions constituted ineffective assistance of counsel. The information that Lee had prior convictions and was in jail at the time of trial was already before the jury. Appellant provides no argument about what further discussions of Lee's criminal record would have added. Thus, we find no prejudice.

{¶ 55} Finally, appellant argues that his counsel failed to pursue other available defenses, including alibi, and did not call any witnesses on behalf of appellant. The state argues the record is devoid of any evidence of an alibi or potential witness, and therefore this claim is not reviewable on direct appeal. Upon review, we agree with the state's contention that the record on appeal is insufficient to establish ineffective assistance of counsel on the issues of an alibi defense or potential witnesses. Thus, appellant's fourth assignment of error is overruled.

{¶ 56} For the foregoing reasons, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK and KLATT, JJ., concur.

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