

[Cite as *State v. Thompson*, 2015-Ohio-872.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101382

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KIRK D. THOMPSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-577679-B

BEFORE: Kilbane, J., Celebrezze, A.J., and Keough, J.

RELEASED AND JOURNALIZED: March 12, 2015

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MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Kirk Thompson (“Thompson”), appeals his convictions for aggravated murder, murder, aggravated robbery, felonious assault, having a weapon while under disability, discharge of firearm on or near prohibited premises, and having a weapon while under disability. For the reasons that follow, we affirm.

{¶2} In October 2013, Thompson was charged in a nine-count indictment arising from the death of Rafael Carter (“Carter”). Counts 1 and 2 charged him with aggravated murder. Count 3 charged him with murder. Counts 4 and 5 charged him with aggravated robbery. Counts 6 and 7 charged him with felonious assault.¹ Count 8 charged him with having a weapon while under disability. Count 9 charged him with discharge of firearm on or near prohibited premises. On March 13, 2014, the matter proceeded to a jury trial, at which the following evidence was adduced.²

{¶3} On the morning of April 29, 2013, Carter traveled with Marcos DeJesus (“DeJesus”) to Saywell Avenue in Cleveland, Ohio. DeJesus was driving an orange Saturn Ion and Carter was in the passenger seat. DeJesus parked the vehicle on the street in front of a house located at 12347 Saywell Avenue. After approximately five minutes, DeJesus exited the vehicle and walked across the street to a white house with yellow trim. Moments later, an individual later identified by Kimberly Brickers (“Brickers”) as Thompson, walked up to the passenger side of the vehicle, where Carter was sitting, raised his gun, and fired two shots at

¹Counts 1-7 and Count 9 each carried one- and three-year firearm specifications.

²Prior to the start of trial, the court, at the state’s request, dismissed Counts 2, 4, and 5. Count 8 — the having a weapon while under disability charge was tried to the bench.

Carter. Carter managed to get into the driver's seat of the car and drive away. Thompson then flagged down an approaching Buick Regal, and jumped in as the car sped away.

{¶4} Meanwhile, Carter continued to drive for a few blocks. He eventually pulled over to the side of the road when he was no longer able to control the car because of his injuries. Cleveland police officers, who were responding to an unrelated incident, observed the Saturn coming down the street with a shattered window and immediately responded to that car. Upon their arrival, the officers discovered Carter near death in the driver's seat. Carter was taken from the scene in ambulance to the hospital, where he was pronounced dead. DeJesus arrived while officers were processing the crime scene.

{¶5} DeJesus was taken downtown for an interview with detectives because of some inconsistencies in his rendition of events to the police. Cleveland Police Detective Thomas Lynch ("Lynch") interviewed DeJesus about the evening before and the morning of Carter's death and had him complete a written statement. DeJesus stated that Carter was his best friend.

He was with Carter in the orange Saturn on Saywell Avenue where they both smoked marijuana. DeJesus left the vehicle for one minute and the shooting occurred while he left. He described the shooter as wearing a black Nike tracksuit with a white stripe on the sides and a hood pulled over his head. He further stated that the shooter fled east on Saywell Avenue. The information provided by DeJesus was very different than the information police gathered from Brickers and Christopher Maddox ("Maddox"), two witnesses who live on Saywell Avenue.

{¶6} Brickers, who lives across the street from where the shooting occurred, testified that she was outside on her porch waiting for a repairman when she observed the orange Saturn park across the street from her home. After several minutes, she witnessed a male, later

determined to be DeJesus, exit from the driver's side of the vehicle and walk to the white house with yellow trim. She then observed Thompson walking down the sidewalk toward the Saturn.

Thompson was wearing a blue polo shirt and jeans.

{¶7} She turned her back momentarily and heard gunshots. When she turned back around, she observed the Saturn driving away and Thompson standing on the sidewalk. Thompson put his gun in his pocket and signaled for a dark purple colored Buick to drive forward. Thompson got into the Buick and that car drove away in the same direction as the Saturn. At trial, Brickers identified Thompson as the individual who shot Carter. She further identified a photograph of the deep purple Buick as the vehicle she observed Thompson get into moments after the shooting.

{¶8} Maddox, another resident of Saywell Avenue, testified that on the morning of the incident, he heard gunshots outside, which prompted him to call 911. Maddox was looking outside his front window while on the phone with the 911 operator. He observed a young man standing in his neighbor's driveway. He then observed a two-toned Buick pull up, the young man jump into the car, and the Buick speed away. Maddox described this to the operator as it was happening.

{¶9} In the course of their investigation, Cleveland police completed an extraction report of Carter's cell phone. From this report, Lynch obtained a phone number for a contact titled "Little Marc." Lynch learned from an interview with Carter's girlfriend that DeJesus went by the nickname of "Little Marc." The phone number assigned to "Little Marc" was 216-800-2221, which was different than the number DeJesus provided to homicide detectives the day of his interview. Detectives determined that one of the numbers belonged to DeJesus's mother. Detectives obtained extraction reports for both of these phone numbers and learned

that DeJesus's phone number was in fact 216-800-2221. In looking at the calls from this number on the morning of Carter's murder, detectives observed several phone calls to and from Carter's cell phone and a large volume of calls from 216-902-1407 (referred to as the "target phone number"). There were 33 phone calls between DeJesus and the target phone number either before, during, or after the time Carter was killed. The first three or four phone calls placed after Carter's murder were to the target phone number.

{¶10} Based on this information, Cleveland police detectives shifted their investigation to identifying the user of the target phone number. Lynch testified that the detectives utilized several databases to identify the user of that number. In addition to these databases, the detectives interviewed DeJesus about the target phone number. DeJesus initially stated he did not know that number. When confronted with the phone records, however, DeJesus stated that number belonged to someone named "Jay the weed man."

{¶11} Detectives reached out to the Northern Ohio Law Enforcement Task Force ("NOLETF"), seeking assistance in identifying the target phone number and another phone number that appeared in the records. Detectives were concerned about 216-925-xxxx because there were 169 phone calls between the target phone number and this number over the course of four days around the time of the murder. The phone records revealed that this number belonged to Mary Corbin ("Corbin"), who was dating Thompson at the time of the murder. The detectives' investigation revealed that Corbin owned a two-toned 2001 Buick Regal, which she allowed Thompson to use.

{¶12} Lynch testified that he was advised by Detective James Cudo ("Cudo"), who was working surveillance for NOLETF, that Thompson was the owner of the target phone number. Cudo was conducting surveillance on Thompson's half-brother, Keith Ricks ("Ricks"). Ricks

placed a call to the target phone number, which was recorded as a part of the wiretap. There was also video that correlated to the phone call. When the phone call was placed, a voice said, “Hey Kirk,” and then a conversation followed regarding a car outside of the home. Cudo compared the video to a photograph of Thompson, and after listening to and observing the telephone call placed to the target phone number, he concluded that the individual in the video was Thompson.

{¶13} At trial, Cudo testified that he had additional time to compare Thompson’s photograph with the video and was not 100 percent positive that Thompson was the individual in the video. He was certain, however, that Thompson was a user of the target phone number. Cudo further testified that as part of his investigation, he learned that Thompson’s birthday is on May 31st. He observed two text messages from Ricks to the target phone number, stating, “HBD” and “Bro.”

{¶14} Lynch and his partner now focused their investigation on Thompson. The detectives learned that Thompson had received a ticket a couple weeks after the murder while driving a 2001 Buick Regal. The detectives realized that this vehicle matched the description of the vehicle used during the shooting. The detectives put together a photo array, which included Thompson’s BMV photograph. Detectives showed the array to Brickers and Maddox. Brickers identified Thompson’s picture as the individual she observed walk up to the orange car, fire shots, get into the deep purple Buick, and then drive away. She also recognized a photograph of DeJesus as the individual who exited the orange Saturn moments before Thompson shot Carter. Maddox was unable to identify the shooter. He did note, however, that three of the individuals who were in the photo array looked similar to the man he observed standing in his neighbor’s driveway the morning of the shooting. Maddox was further shown a

photograph of a two-toned Buick. He identified this as the vehicle he witnessed pull up moments after the shooting, in which the shooter leaped into just prior to it leaving the scene.

{¶15} At trial, Lynch testified that he learned that he could utilize Facebook to search phone numbers. Subsequently, Lynch entered the target phone number into the search box on Facebook. This search returned only one name — Kirk Thompson.

{¶16} As a result of their investigation and after Brickers identified Thompson as the individual who murdered Carter, Thompson was arrested in Atlanta, Georgia by the U.S. Marshals and extradited to Ohio for Carter's murder.

{¶17} At the conclusion of trial, the jury found Thompson guilty of aggravated murder, with the firearm specifications (Count 1); murder, with the firearm specifications (Count 3); felonious assault, with the firearm specifications (Counts 6 and 7); and discharge of firearm on or near prohibited premises, with the firearm specifications (Count 9). The trial court found him guilty of having weapons while under disability (Count 8). The matter proceeded to sentencing on April 23, 2014.

{¶18} At the sentencing hearing, the court merged Counts 3, 6, 7, 8, and 9 into Count 1 for purposes of sentencing. The court sentenced Thompson to three years in prison on the firearm specification to be served consecutive and prior to life in prison on Count 1 (aggravated murder), with parole eligibility after 28 years.

{¶19} Thompson now appeals, raising the following four assignments of error for review.

Assignment of Error One

The trial court erred by convicting [Thompson] despite insufficient evidence.

Assignment of Error Two

[Thompson's] conviction is against the manifest weight of the evidence.

Assignment of Error Three

The trial court denied [Thompson] due process when it found [him] guilty despite the evidence.

Assignment of Error Four

[Thompson] received ineffective assistance of counsel.

Sufficiency of the Evidence

{¶20} In the first assignment of error, Thompson argues that there is insufficient evidence that he is the individual who killed Carter.

{¶21} The Ohio Supreme Court in *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 113, explained the standard for sufficiency of the evidence as follows:

Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. In reviewing such a challenge, “[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶22} We are mindful that in considering the sufficiency of evidence, a certain perspective is required. *State v. Eley*, 56 Ohio St.2d 169, 172, 383 N.E.2d 132 (1978). “This court’s examination of the record at trial is limited to a determination of whether there was evidence presented, ‘which, if believed, would convince the average mind of the defendant’s

guilt beyond a reasonable doubt.” *Id.*, quoting *Atkins v. State*, 115 Ohio St. 542, 546, 155 N.E. 189 (1926). It is the minds of the jurors, rather than a reviewing court, that must be convinced. *State v. Thomas*, 70 Ohio St.2d 79, 80, 434 N.E.2d 1356 (1982).

{¶23} Thompson argues that his guilty verdict must be overturned because Brickers’s identification was “shaky,” the color identification of the Buick Regal was conflicting, and Cudo was uncertain that Thompson was the individual he observed while completing surveillance on Ricks. The state, on the other hand, argues there was sufficient evidence presented at trial to sustain Thompson’s convictions. We agree.

{¶24} The state presented Brickers’s eyewitness identification of Thompson as the shooter. Brickers testified that she observed Thompson walking down Saywell Avenue toward the orange Saturn. She turned around to go back into her house when she heard gunshots. She immediately turned back around and observed the Saturn drive away with Thompson standing on the sidewalk. She observed Thompson put a gun into his pocket and get into the front-passenger side of a deep purple-colored Buick, which sped away.

{¶25} Brickers provided a statement to Cleveland police detectives and was shown a photo array, in which she identified Thompson as the shooter. At trial, Brickers explained that she was not uncertain as to who the shooter was. Rather, she merely stated that Thompson had a similar appearance to the male in the fourth position in the photo array. Brickers also identified Thompson, at trial, as the person she observed holding the gun that morning, who then jumped into the Buick that drove away from the scene. Brickers also identified several photographs of the Buick Regal as the vehicle that picked up Thompson immediately after the shooting.

{¶26} Maddox testified that, after he heard gunshots, he looked outside his window to see a male standing in his neighbor's driveway. A bluish-gray Buick Regal pulled up and the male jumped into that vehicle, which then sped away. At trial, Maddox viewed several photographs of Corbin's Buick Regal and testified that her car was similar to the one he observed the shooter get into immediately after the shooting. He noted that Corbin's vehicle was two-toned and so was the Buick from the morning of the shooting.

{¶27} Corbin testified that she was dating Thompson and allowed him to use her 2001 Buick Regal. Corbin testified that her vehicle was black and silver. Lynch testified that Thompson received a traffic ticket while driving a 2001 Buick, which was the same year, make, and model of the vehicle used on the morning of the shooting. Lynch obtained pictures of Corbin's 2001 Buick Regal from National Vehicle Location Services ("NVLS") and testified that the vehicle appeared to be bluish-green in color on top, with a lighter color on the bottom, which had a special molding. Lynch testified that

[t]he color of the vehicle changes. I know it sounds crazy, but the color of the vehicle changes. If you saw the picture from the NVLS, it looks bluish-green. We attempted to have Detective Raynard capture it from different angles to show that it looks purple. Mostly it looks purple. If you step backward away from it, it will look black. And if you step away from the rear, it will appear a blue-green color.

This explains the different descriptions as to the color of the vehicle.

{¶28} Furthermore, Thompson was identified as the user of the target phone number. The target phone number is directly linked to Thompson by his own Facebook page. Additionally, the detectives' analysis of the target phone number revealed a high volume of calls between Thompson and DeJesus on the morning of the incident. The analysis also revealed a high volume of calls to Corbin. The first person DeJesus called after the shooting is Thompson.

While Cudo was uncertain of his initial identification of Thompson as the person in the video, he was certain that Thompson was the user of the target phone number. The state also presented evidence that Thompson fled after hearing that a warrant for his arrest was issued. U.S. Marshals located him in Atlanta and arrested him.

{¶29} When viewing the foregoing evidence in a light most favorable to the state, we conclude that the state presented sufficient evidence to sustain Thompson’s convictions.

{¶30} Accordingly, the first assignment of error is overruled.

Manifest Weight of the Evidence

{¶31} In the second assignment of error, Thompson argues his convictions are against the manifest weight of the evidence. For the same reasons argued in the first assignment of error, Thompson contends that his convictions must be reversed.

{¶32} In contrast to a sufficiency argument, a manifest weight challenge questions whether the state met its burden of persuasion. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13, citing *Thompkins*, 78 Ohio St.3d at 390, 1997-Ohio-52, 678 N.E.2d 541. The Ohio Supreme Court in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, has stated:

[T]he reviewing court asks whose evidence is more persuasive — the state’s or the defendants? * * * “When 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.” [*Thompkins* at 387], citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶33} Moreover, an appellate court may not merely substitute its view for that of the jury, but must find that “in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial

ordered.” *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). Accordingly, reversal on manifest weight grounds is reserved for “the exceptional case in which the evidence weighs heavily against the conviction.” *Id.*, quoting *Martin*.

{¶34} We note that when considering a manifest weight challenge, the trier of fact is in the best position to take into account inconsistencies, along with the witnesses’s manner, demeanor, gestures, and voice inflections, in determining whether the proffered testimony is credible. *State v. Kurtz*, 8th Dist. Cuyahoga No. 99103, 2013-Ohio-2999, ¶ 26; *see also State v. Lilliard*, 8th Dist. Cuyahoga Nos. 99382, 99383, and 99385, 2013-Ohio-4906, ¶ 93 (In considering the credibility of witnesses on a manifest weight challenge, an appellate court is “guided by the presumption” that the jury, or the trial court in a bench trial, 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.” *Id.*, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984)). Therefore, we afford great deference to the factfinder’s determination of witness credibility. *State v. Ball*, 8th Dist. Cuyahoga No. 99990, 2014-Ohio-1060, ¶ 36.

{¶35} In reviewing the record, weighing the evidence, and considering the credibility of the witnesses, we do not find that Thompson’s convictions are against the manifest weight of the evidence. Brickers identified Thompson in a photo array and in court as the person who shot and killed Carter. Both Brickers and Maddox observed Thompson get into a two-toned Buick. Thompson’s girlfriend owned a two-toned Buick, which she allowed Thompson to drive. Thompson received a traffic ticket while driving his girlfriend’s Buick. Furthermore, the

detectives were able to link Thompson to the target phone number. Thompson then fled to Atlanta after a warrant for his arrest had been issued.

{¶36} Based on this evidence, we cannot say the jury clearly lost its way. The evidence offered at trial does not weigh heavily against Thompson's convictions.

{¶37} Therefore, the second assignment of error is overruled.

Due Process

{¶38} In his third assignment of error, Thompson argues that he was denied due process when he was found guilty despite the evidence. He further argues that he was denied due process because of evidentiary issues during the trial.

{¶39} The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits any state from depriving "any person of life, liberty, or property, without due process of law * * * ." "A fair trial in a fair tribunal is a basic requirement of due process."

In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness is essential to the very concept of justice. In order to declare a denial of it[,] we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."

Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941).

{¶40} Thompson argues he was denied due process when the state did not disclose all of the evidence against him until after trial started. He focuses on the following three instances: (1) Cudo's testimony regarding text messages between Thompson and Ricks; (2) testimony regarding Thompson's jail phone calls; and (3) testimony regarding Thompson's Facebook profile page. Thompson contends that his defense strategy was unfairly affected when these items were not timely disclosed.

Text Messages

{¶41} Thompson first complains that the state never disclosed to the defense that Cudo had observed texts from Ricks to Thompson on the day before his birthday that read, “HBD” and “Bro.” On cross-examination, Cudo testified that these texts were never discussed with the state until the day before he testified. He further testified that he never included these texts in a report to the state. These texts were just one of the many pieces linking Thompson to the target phone number. The state also presented evidence of the phone records, the recorded conversation between Ricks and Thompson, and the Facebook page that directly linked Thompson to the target phone number. Therefore, Cudo’s testimony regarding these texts did not lead to an unfair trial when the state had ample evidence to support the link between Thompson and the target telephone number.

Jail Phone Calls

{¶42} Thompson claims the state did not disclose to the defense that they would be using his jail phone calls until after the jury was empaneled. At trial, the state introduced a jail phone call between Thompson and his mother. The state maintains that on Monday, March 17, 2014, it provided the defense with copies of phone calls made by Thompson while he was in county jail. The state focused on 13 calls, but only utilized one of these calls during trial. The state did not utilize the calls until Thursday, March 20, 2014. Therefore, Thompson was in possession of the calls for three days prior to the state utilizing them during trial.

{¶43} In addressing the matter, the trial court stated: “[t]he number one goal of any trial is to do justice. And even — you know, many, many times deadlines are not adhered to by either side and evidence still comes in. Let me think about this overnight and see. I’ll let you know in the morning.” On the next morning of trial, the court allowed the state to utilize the

one phone call where Thompson asked his mother to take down his pictures from his Instagram account. The trial court found that this evidence went “to consciousness of guilt.”

Thompson’s Facebook Page

{¶44} On Wednesday, March 19, 2014, the state gave the defense notice that it intended to use Thompson’s Facebook page as evidence. Thompson claims that if he had this information sooner, it would have changed the defense strategy. Thompson’s Facebook page linked Thompson to the target phone number. During trial, Lynch testified that he learned on March 19, 2013, that a Facebook profile page can be linked to a specific telephone number. When he typed the target phone number into the Facebook search bar, Thompson’s Facebook page was the only result of that search. Lynch was unaware of this capability during his investigation. The state created copies of Thompson’s Facebook page and immediately turned them over to defense counsel.

{¶45} It was clear, however, from the discovery that had been given to the defense, that the state was linking Thompson to the target phone number. The state did not withhold Thompson’s Facebook page because Lynch discovered the link between the Facebook profile and the target phone number during the middle of trial. The state then disclosed this information to the defense. Moreover, Thompson was aware of the existence of the Facebook page because it was created in April 2013. The trial court allowed the Facebook page to be used in trial, stating that

[w]ell, unfortunately everything doesn’t come up before trial always because, as you mentioned, strategies change, new evidence comes, testimony changes, witnesses forget, they’re afraid, they don’t testify truthfully. All of that happens through every trial. And the finding of the phone number on Facebook was a fortuitous circumstance, frankly, that evolved through the preparation of a witness.

{¶46} Based on the foregoing, we find that the trial court did not deny Thompson a fair trial when it allowed the text messages, jail phone calls, and Facebook page as evidence. This evidence did not fatally infect the fairness of Thompson's trial.

{¶47} Therefore, the third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶48} In the fourth assignment of error, Thompson contends that he received ineffective assistance of counsel. Specifically, he argues defense counsel was ineffective for failing to investigate the location data of Thompson's cell phone and failing to properly cross-examine the state's witnesses, who claimed the cell phone records linked Thompson to Carter's murder.

{¶49} In order to establish a claim of ineffective assistance of counsel, Thompson must demonstrate that (1) counsel's performance was deficient or unreasonable under the circumstances, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Ohio, a properly licensed attorney is presumed competent. *State v. Lott*, 51 Ohio St.3d 160, 174, 555 N.E.2d 293 (1990). Therefore, the 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. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶50} In the instant case, Thompson contends that defense counsel should have requested the cellular tower location information to determine whether the target phone number was in the area of the murder. However, if the records revealed that Thompson's cell phone was in the area of the murder, this would have been detrimental to his defense. Thus, the decision to not seek the cellular location records was within the realm of defense counsel's trial strategy. We note that Thompson has the burden of proof and must overcome the strong presumption that

counsel's action might be sound trial strategy. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). It is not the duty of a reviewing court to analyze trial counsel's legal tactics and maneuvers. *State v. Quinones*, 8th Dist. Cuyahoga No. 100928, 2014-Ohio-5544, ¶ 18, citing *State v. Gau*, 11th Dist. Ashtabula No. 2005-A-0082, 2006-Ohio-6531, ¶ 35, citing *Strickland*. Thompson cannot overcome the presumption that this was a sound trial strategy.

{¶51} Thompson further contends that defense counsel was ineffective because counsel did not cross-examine the state's witnesses regarding the cell phone tower locations. He claims that this evidence could have tipped the balance in his favor. However, the extent and scope of cross-examination falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel. *State v. Patterson*, 8th Dist. Cuyahoga No. 100086, 2014-Ohio-1621, ¶ 33 (“the scope of cross-examination falls within the realm of trial strategy and, therefore, debatable trial tactics do not establish ineffective assistance of counsel.” *Id.*, citing *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810). Here, the record demonstrates that defense counsel extensively cross-examined Lynch regarding the cell phone records.

{¶52} After reviewing the record, we find that Thompson has not demonstrated “reasonable probability” that the outcome of the proceedings would have been different but for defense counsel's alleged deficient performance.

{¶53} Therefore, the fourth assignment of error is overruled.

{¶54} Accordingly, judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
KATHLEEN ANN KEOUGH, J., CONCUR