

[Cite as *State v. Crank*, 2015-Ohio-1909.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2014CA00175
CHESTER RAY CRANK	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Stark County Court of Common Pleas, Case No. 2013CR1468

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 18, 2015

APPEARANCES:

For Plaintiff-Appellee

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Gwin, P.J.

{¶1} Appellant Chester Ray Crank (“Crank”) appeals his convictions and sentences after a jury trial in the Stark County Court of Common Pleas on aggravated murder, R.C. 2903.01(B), aggravated burglary, R.C. 2911.11(A)(a) and/or (A)(2), aggravated robbery, R.C. 2911.01(A)(1) and/or (A)(3) and aggravated arson, R.C. 2909.02(A)(2). Crank was also convicted and sentenced upon three firearm specifications.

Facts and Procedural History

{¶2} A Stark County grand jury indicted Crank for several crimes arising from the robbery and killing of Bennie Angelo including aggravated murder, R.C. 2903.01(B), aggravated burglary, R.C. 2911.11(A)(a) and/or (A)(2), aggravated robbery, R.C. 2911.01(A)(1) and/or (A)(3) and aggravated arson, R.C. 2909.02(A)(2). The indictment contained firearm specifications.

{¶3} The state called seventeen witnesses and introduced several exhibits, including a tape recording containing excerpts of Crank’s conversations with his cousin, Regina Lyons.

A. The crime.

{¶4} On Sunday, January 7, 2007, about 1:00 a.m., Canton City Firefighter, William Mobilian was dispatched to a home on Endrow Avenue N.E. in Canton in response to a structure fire call. He donned an oxygen mask for a "search and rescue" and entered the smoke filled home looking for any occupants.

{¶5} He went to one of the back bedrooms and found Bennie Angelo. Mr. Angelo was laying on the bed perpendicular and fully clothed with his feet on the floor.

{¶6} Mr. Angelo died of multiple gunshot wounds; one in the left forehead, a cluster of three in the left upper chest and one on the back of the left hand. Murthy found no exit wound for the one in the forehead; the one in the hand was an in and out and superficial and the three in the chest all exited in the left upper back.

{¶7} Mr. Angelo's hyoid bone in the throat was also fractured meaning that pressure was applied to the base of the neck until he could not breathe. There were contusions of the abdomen, meaning that force was applied to the abdomen. Mr. Angelo also had multiple blunt impact injuries caused by an impact from a fist, a foot or an object. There were abrasions to the left side of his neck and left leg. His body was covered with soot from the fire and first and second degree burns.

B. The investigation.

{¶8} Mr. Angelo's family cooperated and gave Detective George the lead investigator from the Canton Police Department information about the family, neighborhood and friends. Indeed, they circulated a poster offering a \$15,000 reward for information leading to the arrest and conviction of the person or persons who killed their father. The poster generated many tips and George investigated all leads.

{¶9} Detective George learned from Michael Angelo, Mr. Angelo's son that his dad owned a Harrington and Richardson .32 caliber revolver, which he kept in his bedroom.

{¶10} In July, 2007, Ernest Schwab, who lived about a block away from Mr. Angelo's home on Endrow reported finding a wallet in the bushes by his yard while he was mowing the lawn.

{¶11} The wallet contained Mr. Angelo's ID card from the VFW. Police officers arrived to search the area and found a brown leather holster in the vicinity by a large open field separating the Schwab's home from Mr. Angelo's home. The wallet and holster were also located in a straight line from the home Crank shared with his mother.

C. Alicia Culberson.

{¶12} In May 2012, Alicia Culberson was in the Stark County Jail for a theft charge. She sent a "kite" that she wanted to talk with George about the Bennie Angelo killing. George went to the jail and took her statement. Culberson reported that in the Fall of 2011, she was at the home of her boyfriend, Robert Cassidy. Crank was there talking with Tony Tucker about the killing and robbery Culberson heard the conversation: They broke into the home on Endrow, stole money, went back a third time, there was a struggle and that Crank shot Mr. Angelo and set the house on fire.

{¶13} In March 2013, Culberson was released from jail. George contacted her and asked her to contact Crank wearing a recording device. She agreed but was not successful in making a tape because the noise was too loud and the tape did not pick up the conversation.

D. Brenda Haywood.

{¶14} In July 2012, Brenda Haywood contacted George about a homicide case involving Mr. Angelo. Haywood was cleaning cells at the jail and saw the Angelo reward poster. She memorized the phone number on the poster and called George when she got out of jail to tell him about the conversations she overheard. Haywood came to the Canton Police Department and agreed to a taped interview. Haywood knew Crank for

several years as well as his mother, Billie. Indeed, Haywood would go "boosting" with Crank and his mother.

{¶15} Haywood went to a home on Fulton to make a drug transaction and was sitting at the end of a couch where Crank and Tony Tucker were sitting. Haywood observed Crank with tears in his eyes saying, "I don't know how long more [sic.] I can take this." Crank said he had "offed" some man. The name "Angelo" was mentioned and something about not giving up the government check money.

{¶16} Later, while "boosting" with Crank, he would start drinking and talk about killing a man who was a child molester and later during a road trip to New York after drinking, Crank told Haywood's minor son in her presence that he killed a child molester.

{¶17} Later, on a trip back from Mansfield, Crank again told Haywood he killed a child molester. Haywood confronted Crank and said he was a fucking liar; he killed him for money.

E. Robert Cassidy.

{¶18} George never had any dealings with Crank and tried to follow up to find out where he was living. Then, he got a call from Rob Cassidy with information that "paralleled" what George was told by Culberson and Haywood. George still believed there were four persons involved in the killing and now believed that Crank was one of them. In January 2013, George heard from Robert Race. After speaking with him and others, Crank was still a suspect.

F. Regina Lyons taped Crank saying, "I killed an old man."

{¶19} Regina Lyons is Crank's first cousin and lived with him on and off during her life. In 2013, she lived with him and saw him almost every day until she went to stay at Stark County Regional Correction Center (SRCCC) for a forgery charge.

{¶20} In 2013, Crank asked her to "hang out" with him at a party. She agreed and his mother drove her to the party. Crank was there already drunk and started talking saying "I'm going to prison for the rest of my life, you know." When Lyons asked why, Crank replied that he killed somebody - shot somebody. Lyons knew whom he meant because of a prior conversation with Crank's brother, Casper - the Bennie Angelo murder.

{¶21} When Lyons went to SRCCC, she told someone who told one of the staff members. The staff member called Detective George and he came to see Lyons during her stay. Lyons confirmed her conversation with Crank and agreed to wear a digital recording device and tape future conversations with Crank. When Crank started drinking, he would freely talk about it. After some reluctance, Lyons agreed to wear the recording device.

{¶22} George would meet with Lyons prior to the times she was going out drinking with Crank. Lyons would put the recorder in her bra and turn it on when the opportunity arose and at the end of the evening call George and he would pick up the tape and transfer its contents to a CD. There were close to twenty hours of recordings. Lyons made three or four recordings in August 2013. Excerpts of the recordings were played during the testimony of Lyons. On the tapes, Crank can be heard saying, "I killed somebody, they can never prove it." "I took a life; I took his life a [sic.] bitch. I let my

homeys watch it. They want to tell on me." "This old man, right, I took his fucking life." "I fucked up, they are going to send me to jail, I will go for the rest of my life, so you got to tell those motherfuckers I didn't do it. Where are my fingerprints? They can't prove it, where are my fingerprints, get them out of the house."

{¶23} Crank talked about the killing with Lyons at other times that were not recorded. He mentioned that the man he killed was named "Bennie," that he shot him and watched him bleed out, and how he enjoyed that. Another time, he said he had beaten him and that they burned the house down.

G. Mark Villegas.

{¶24} Mark Villegas, a friend of Crank, heard that he was charged with the murder of Mr. Angelo. Villegas knew Crank when he lived across the street from him. Crank drank a lot and got emotional when he drank. He would start to cry and tell Villegas that he killed someone, went into a house on Endrow and killed the old man, Bennie. He said he was beaten and shot. He took some money and a gun. The conversations took place several times - at least six.

{¶25} Villegas thought Crank was lying but when he heard he was charged with the crime, he contacted Detective George. George visited him in prison, where Villegas was serving time for burglary, and gave him a written statement.

{¶26} Crank was interviewed by George on September 18, 2013. Crank denied any part in the killing and robbery.

{¶27} After the state rested, and Crank's motion for acquittal was overruled, he rested without submitting any evidence.

{¶28} On July 25, 2014, the jury returned with a verdict of guilty to all of the crimes alleged in the indictment. The trial court then proceeded to sentencing. After considering allied offenses, the jury merged the aggravated burglary, aggravated robbery and aggravated murder charges but found the aggravated arson offense was committed with a separate animus. The trial court also discussed the firearm specifications and concluded that the three firearm specifications would be served consecutive. In all, Crank received the following sentence:

Aggravated arson - 8 years

Firearm Specification - 3 years each for a total of 9 years;

Aggravated Murder - Life without the possibility of parole.

Assignments of Error

{¶29} Crank raises six assignments of error,

{¶30} "I. APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶31} "II. APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS VIOLATED WHEN THE TRIAL COURT PERMITTED THE ADMISSION OF HEARSAY STATEMENTS.

{¶32} "III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT OVERRULED DEFENSE COUNSEL'S MOTION FOR A MISTRIAL.

{¶33} "IV. APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL DUE TO THE CUMULATIVE ERROR THAT OCCURRED DURING HIS TRIAL.

{¶34} "V. APPELLANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND OF ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND

FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

{¶35} “VI. APPELLANT WAS IMPROPERLY SENTENCED WHEN THE TRIAL COURT SENTENCED HIM TO MULTIPLE CONSECUTIVE GUN SPECIFICATIONS ARISING FROM ONE CONTINUOUS COURSE OF CONDUCT.”

I.

{¶36} In his first assignment of error, Crank challenges the sufficiency of the evidence; he further contends his conviction is against the manifest weight of the evidence produced by the state at trial.

{¶37} Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court of appeals to determine whether “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.*; see also *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 673, 175 L.Ed.2d 582(2010) (reaffirming this standard); *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010–Ohio–1017, ¶146; *State v. Clay*, 187 Ohio App.3d 633, 933 N.E.2d 296, 2010–Ohio–2720, ¶68.

{¶38} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668, 1997-Ohio–355. Weight of the evidence concerns “the

inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue, which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.” (Emphasis sic.) Id. at 387, 678 N.E.2d 541, *quoting* Black's Law Dictionary (6th Ed. 1990) at 1594.

{¶39} 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 fact finder’s resolution of the conflicting testimony. Id. at 387, 678 N.E.2d 541, *quoting* *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). However, an appellate court may not merely substitute its view for that of the jury, but must find that “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.” *State v. Thompkins, supra*, 78 Ohio St.3d at 387, *quoting* *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721 (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.

“[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.

* * *

“If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.”

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, *quoting* 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶40} There is no dispute in the case at bar that a shooting had in fact occurred. Crank does not contest that an aggravated murder, aggravated burglary, aggravated robbery, and an aggravated arson occurred in the case at bar. Crank also does not contest that a firearm was used during the commission of those offenses. Crank’s argument focuses on his contention that there was insufficient evidence to identify him as the assailant in the shooting of Mr. Angelo and in the other offenses charge in the indictment.

{¶41} The jury heard Crank himself confess to the killing of Mr. Angelo. In tape recordings made by his cousin, Regina Lyons. Crank said "I killed somebody... yes I did, yes I did, I promise you they can never prove it.... yep, yep, took his fucking life, took him like a bitch,let my homies watch it ...I did it for a reason, that motherfucker touched a kid.. . This old man right I took his fucking life... the man was gonna buy some kids, I took care of him... got away with it bro... I’m a murderer man.... I'm dirt...I killed somebody.... I fucked up my life, I'm a killer.... We got away with it... I got away with it... You gonna tell on me. .. I'm the one that did what I did... they can't do nothin...I made that much money... old man child molester.... I need to be locked up. State’s Ex 27, 3T. at 660-665.

{¶42} Crank gave his cousin other details - he told Lyons he went in to rob, shot "Bennie" beat him, watched him bleed out and enjoyed that. He said he burned the house down and watched it burn. He found the gun under the mattress and showed Lyons where he threw it. He told Lyons there were reward posters everywhere.

{¶43} Alicia Culberson heard Crank say he broke into a home on Endrow, stole money off the man, shot him and "got the house on fire."

{¶44} Brenda Haywood offered similar testimony. She heard Crank say he "offed some man." The name Angelo was mentioned. Later, after Crank had been drinking, he told Haywood he killed a man and "rid the world of a child molester." In a later conversation, Crank said he killed an old man but would not be caught because he did the perfect crime.

{¶45} Crank made similar confessions to Mark Villegas. Crank said he killed someone. He told Villegas that he went into a house on Endrow and killed the old man, Bennie. Crank said he was beaten and shot and that he took some "stuff" - a little bit of money and a gun. Crank told Robert Race that he got away with murder before. When Race told him he was crazy, Crank asked him if he ever heard about the guy over by the school. Race asked him if he meant the veteran and he replied yes." We got away with it and we took jars of money and some cash off the old man."

{¶46} Crank rests his sufficiency challenge on attacks on the credibility of the witnesses who were convicted felons. Crank notes that the state did not produce any forensic or physical evidence linking him to the scene of the killing and robbery. No blood or DNA from Crank was found; no fingerprints of Crank were found and no items were found that would link him to the crimes.

{¶47} If the state relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for “such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.” *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E. 2d 492(1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668(1997). “Circumstantial evidence and direct evidence inherently possess the same probative value [.]” *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. Furthermore, “[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt.” *Jenks*, 61 Ohio St.3d at 272, 574 N.E. 2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott*, 51 Ohio St.3d 160, 168, 555 N.E.2d 293(1990), citing *Hurt v. Charles J. Rogers Transp. Co*, 164 Ohio St. 329, 331, 130 N.E.2d 820(1955). Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott*, 51 Ohio St.3d at 168, 555 N.E.2d 293, citing *Hurt*, 164 Ohio St. at 331, 130 N.E.2d 820.

{¶48} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Crank committed the crimes. We hold, therefore, that the state met its burden of production regarding each element of the crimes of aggravated murder, aggravated burglary, aggravated robbery and arson, and that a firearm was used, and, accordingly, there was sufficient evidence to support Crank's convictions.

{¶49} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base his or her judgment. *Cross Truck v. Jeffries*, 5th Dist. Stark No. CA–5758, 1982 WL 2911 (Feb. 10, 1982). Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). The Ohio Supreme Court has emphasized: “[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *.” *Eastley v. Volkman*, 132 Ohio St.3d 328, 334, 972 N.E. 2d 517, 2012-Ohio-2179, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978). Furthermore, it is well established that the trial court is in the best position to determine the credibility of witnesses. See, e.g., *In re Brown*, 9th Dist. Summit No. 21004, 2002–Ohio–3405, ¶ 9, citing *State v. DeHass*, 10 Ohio St .2d 230, 227 N.E.2d 212 (1967).

{¶50} Ultimately, “the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact ‘unless it is patently apparent that the fact finder lost its way.’” *State v. Pallai*, 7th Dist. Mahoning No. 07 MA 198, 2008-Ohio-6635, ¶31, quoting *State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, “[w]hen there exist two fairly reasonable views of

the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002-Ohio-1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999).

{¶51} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶52} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig*, 10th Dist. Franklin No. 99AP-739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 WL 284714 (May 28, 1996). Indeed, the jury need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP-1238, 2003-Ohio-2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks, supra*.

{¶53} We find that this is not an “exceptional case in which the evidence weighs heavily against the conviction.” *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The jury neither lost his way nor created a miscarriage of justice in convicting Crank of the charges.

{¶54} Based upon the foregoing and the entire record in this matter, we find Crank’s convictions were not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury as a trier of fact can reach different conclusions concerning the credibility of the testimony of the state’s witnesses and Crank. This court will not disturb the jury’s finding so long as competent evidence was present to support it. *State v. Walker*, 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). The jury heard the witnesses, evaluated the evidence, and was convinced of Crank’s guilt.

{¶55} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crimes beyond a reasonable doubt.

{¶56} Crank’s first assignment of error is overruled.

II.

{¶57} In his second assignment of error, Crank claims that testimony by Detective George during his direct examination that he interviewed Robert Cassidy during his investigation and that Cassidy paralleled the information he learned from others was hearsay and violated his right to confront witnesses and deprived him of a fair trial.

{¶158} “Hearsay” is 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. Evid.R. 801(C). Hearsay is generally not admissible unless it falls within one of the recognized exceptions. Evid.R. 802; *State v. Steffen*, 31 Ohio St.3d 111, 119, 509 N.E.2d 383(1987).

{¶159} “The hearsay rule...is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements-the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine-are generally absent for things said out of court.” *Williamson v. United States*, 512 U.S. 594, 598,114 S.Ct. 2431, 2434(1994).

{¶160} In the case at bar, Detective George did not testify to any specific statement made by Cassidy. Specifically, Detective George testified,

The interview with Mr. Cassidy and the content of that interview paralleled what I was told by the other two women earlier in the year.

The difference there was it was it was told to him by a different person, not Mr. Crank.

2T. at 427. Clearly, this evidence was not admissible as hearsay within hearsay, i.e. George telling the jury that Cassidy told him that some unidentified third person had told Cassidy that Crank was involved in the death of Mr. Angelo. The state offers no

explanation concerning how Crank was suppose to test the credibility of this “other person” or as to how the jury was observe the demeanor of this “other person.”

{¶61} In *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, the Ohio Supreme Court considered the standard to be applied in determining harmless error where a criminal defendant seeks a new trial because of the erroneous admission of evidence under Evid.R. 404(B). The court summarized its analysis in the subsequent decision of *State v. Harris*, 2015-Ohio-166, — N.E.3d —, ¶ 37:

Recently, in *Morris*, a four-to-three decision, we examined the harmless-error rule in the context of a defendant's claim that the erroneous admission of certain evidence required a new trial. In that decision, the majority dispensed with the distinction between constitutional and nonconstitutional errors under Crim.R. 52(A). *Id.* at ¶ 22–24. In its place, the following analysis was established to guide appellate courts in determining whether an error has affected the substantial rights of a defendant, thereby requiring a new trial. First, it must be determined whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict. *Id.* at ¶ 25 and 27. Second, it must be determined whether the error was not harmless beyond a reasonable doubt. *Id.* at ¶ 28. Lastly, once the prejudicial evidence is excised, the remaining evidence is weighed to determine whether it establishes the defendant's guilt beyond a reasonable doubt.

Id. at ¶ 29, 33.

{¶62} In the case at bar, the testimony concerning what the third person had told Cassidy concerning Crank's involvement in the crimes was simply that it paralleled what the other witnesses had told Detective George. No specific statement was mentioned. The only plausible reason for eliciting this testimony was to corroborate what the state witnesses had stated. This was important to the state because their witnesses' credibility were subject to attack because of their criminal convictions.

{¶63} In the case at bar, we find, however, the erroneous admission of the hearsay testimony was harmless beyond a reasonable doubt. In addition to the state's other witnesses, the jury had the benefit of Crank's recorded statements to establish his guilt. There is absolutely no evidence to suggest that the jury abandoned their oaths, their integrity or the trial court's instructions and found Crank guilty of the crimes because of Detective George's testimony concerning Robert Cassidy.

{¶64} Crank's second assignment of error is overruled.

III.

{¶65} In his third assignment of error, Crank argues that the trial court erred and abused its discretion in failing to grant his motion for mistrial. The motion was made during the testimony of Brenda Haywood. While testifying about her conversation with Crank, she said, "I thought to myself, wow, that's all he got out of that conversation that I was worried about him going to jail. And I said, and I truly had it, I said you need help. And I pulled out from the glove compartment pictures of his mom when he beat her up." Crank argues that this testimony was impermissible as evidence of other crimes, wrongs, or acts pursuant to Evid.R. 404(B).

{¶66} The granting of a mistrial rests within the sound discretion of the trial court as it is in the best position to determine whether the situation at hand warrants such action. *State v. Glover*, 35 Ohio St.3d 18, 517 N.E.2d 900(1988); *State v. Jones*, 115 Ohio App.3d 204, 207, 684 N.E.2d 1304, 1306(7th Dist. 1996).

{¶67} "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened * * *." *State v. Reynolds*, 49 Ohio App.3d 27, 33, 550 N.E.2d 490, 497(2nd Dist. 1988). The granting of a mistrial is necessary only when a fair trial is no longer possible. *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1, 9 (1991); *State v. Treesh*, 90 Ohio St.3d 460, 480, 739 N.E.2d 749, 771 (2001). When reviewed by the appellate court, we should examine the climate and conduct of the entire trial, and reverse the trial court's decision as to whether to grant a mistrial only for a gross abuse of discretion. *State v. Draughn*, 76 Ohio App.3d 664, 671, 602 N.E.2d 790, 793-794 (5th Dist. 1992), *citing State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984), *certiorari denied*, 472 U.S. 1012, 105 S.Ct. 2714, 86 L.Ed.2d 728 (1985); *State v. Gardner*, 127 Ohio App.3d 538, 540-541, 713 N.E.2d 473, 475(5th Dist. 1998).

{¶68} In evaluating whether the trial judge acted properly in declaring a mistrial, the court has been reluctant to formulate precise, inflexible standards. Rather, the court has deferred to the trial court's exercise of discretion in light of all the surrounding circumstances:

We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of

public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. * * * But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.

{¶69} *United States v. Perez*, 9 Wheat 579, 22 U.S. 579, 580, 6 L.Ed. 165 (1824). *See, also, United States v. Clark*, 613 F.2d 391,400 (2nd Cir. 1979), *certiorari denied* 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 *State v. Widner*, 68 Ohio St.2d 188, 190, 429 N.E.2d 1065, 1066-1067(1981).

{¶70} In *Bruton v. United States*, 391 U.S. 123, 135-136, 88 S.Ct. 1620, 20 L.Ed.2d 476(1968), the United States Supreme Court noted:

Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. A defendant is entitled to a fair trial but not a perfect one. * * * It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information.

{¶71} In the case at bar, the trial court immediately admonished the jury to disregard the witness's statements. "Juries are presumed to follow their instructions." *Zafiro v. United States* 506 U.S. 534, 540, 113 S.Ct. 933, 122 L.Ed.2d 317(1993). "A presumption always exists that the jury has followed the instructions given to it by the trial court." *Pang v. Minch*, 53 Ohio St.3d 186, 187, 559 N.E.2d 1313(1990), at paragraph four of the syllabus, *rehearing denied*, 54 Ohio St.3d 716, 562 N.E.2d 163, *approving and following State v. Fox*, 133 Ohio St. 154, 12 N.E.2d 413(1938); *Browning v. State*, 120 Ohio St. 62, 165 N.E. 566(1929).

{¶72} In the case at bar, the testimony was inadvertent, fleeting and immediately corrected by the trial court. Prior bad acts of Crank were never admitted into evidence.

{¶73} Crank has not cited any evidence in the record that the jury failed to follow the trial court's instruction. Accordingly, we find that Crank has failed to rebut the presumption that the jury followed the trial court's instructions to disregard the statements.

{¶74} Because we find there is no reasonable possibility that testimony cited as error by Crank contributed to a conviction, any error is harmless. *State v. Kovac*, 150 Ohio App.3d 676, 782 N.E.2d 1185, 2002-Ohio-6784, ¶ 42; *State v. Lindsay*, 5th Dist. Richland No. 2010-CA-0134, 2011-Ohio-4747, ¶75.

{¶75} Crank's third assignment of error is overruled.

IV.

{¶76} In his fourth assignment of error, Crank maintains assuming arguendo that his arguments under Assignments of Error II and III are deemed harmless individually

he was deprived of his right to a fair trial based upon the cumulative effect of those errors.

{¶77} In *State v. Brown*, 100 Ohio St.3d 51, 2003–Ohio–5059, 796 N.E.2d 506, the Ohio Supreme Court recognized the doctrine of cumulative error. However, as explained in *State v. Bethel*, 110 Ohio St.3d 416, 2006–Ohio–4853, 854 N.E.2d 150, ¶ 197, it is simply not enough to intone the phrase “cumulative error.” *State v. Sapp*, 105 Ohio St.3d 104, 2004–Ohio–7008, 822 N.E.2d 1239, ¶ 103.

{¶78} Here, Crank cites the doctrine of cumulative error, lists or incorporates the previous assignments of error, and gives no analysis or explanation as to why or how the errors have had a prejudicial cumulative effect. Thus, this assignment of error has no substance under *Bethel* and *Sapp*. See, *State v. Markwell*, 5th Dist. Muskingum No. CT2011-0056, 2012-Ohio-3096, ¶80.

{¶79} Further, where we have found that the trial court did not err, cumulative error is simply inapplicable. *State v. Carter*, 5th Dist. No.2002CA00125, 2003–Ohio1313 at ¶ 37. To the extent that we have found that any claimed error of the trial court was harmless, we conclude that the cumulative effect of such claimed errors is also harmless because taken together, they did not materially affect the verdict. *State v. Leonard*, 104 Ohio St.3d 54, 89–90, 2004–Ohio–6235, 818 N.E.2d 229, 270 at ¶ 185.

{¶80} Crank’s fourth assignment of error is overruled.

V.

{¶81} In his fifth assignment of error, Crank argues that his trial counsel was ineffective because the two attorneys appointed to represent him were not pursuing the same strategy and were ineffective in cross-examining Detective George.

{¶82} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180(1993); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373(1989).

{¶83} In order to warrant a finding that trial counsel was ineffective, the petitioner must meet both the deficient performance and prejudice prongs of *Strickland* and *Bradley*. *Knowles v. Mirzayance*, 556 U.S. 111, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251(2009).

{¶84} Recently, the United States Supreme Court discussed the prejudice prong of the *Strickland* test,

With respect to prejudice, a challenger must demonstrate “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, 104 S.Ct. 2052. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.*, at 693, 104 S.Ct. 2052. Counsel's errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*, at 687, 104 S.Ct. 2052.

“Surmounting Strickland’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. —, —, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689–690, 104 S.Ct. 2052. Even under de novo review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” *Id.*, at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Harrington v. Richter, __U.S.__, 131 S.Ct. 770, 777-778, 178 L.Ed.2d 624(2011).

{¶185} Crank first complains that his trial counsel - two attorneys - were "not on the same page." As an example, Crank points to one of his counsel objecting to alleged

hearsay testimony by Detective George and the other counsel using that testimony during cross-examination.

{¶86} Crank cites Detective George's testimony concerning Robert Cassidy, as outlined in our analysis of Crank's Second Assignment of Error. We note that the trial court overruled defense counsel's objection and allowed Detective George's testimony. Accordingly, it was a proper subject of cross-examination.

{¶87} Crank's second example of alleged ineffectiveness also involves the cross examination of Detective George and faults counsel for asking George if "in high profile cases, people confess to crimes they did not commit." Detective George repeatedly answered he was not familiar with anyone ever confessing to a crime they did not commit.

{¶88} A defendant has no constitutional right to determine trial tactics and strategy of counsel. *State v. Cowans*, 87 Ohio St.3d 68, 72, 717 N.E.2d 298 (1999); *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 150; *State v. Donkers*, 170 Ohio App.3d 509, 2007-Ohio-1557, 867 N.E.2d 903,(11th Dist.), ¶183. Rather, decisions about viable defenses are the exclusive domain of defense counsel after consulting with the defendant. *Id.* When there is no demonstration that counsel failed to research the facts or the law or that counsel was ignorant of a crucial defense, a reviewing court defers to counsel's judgment in the matter. *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189(1980), citing *People v. Miller*, 7 Cal.3d 562, 573-574, 102 Cal.Rptr. 841, 498 P.2d 1089(1972); *State v. Wiley*, 10th Dist. Franklin No. 03AP-340, 2004- Ohio-1008, ¶ 21.

{¶89} The scope of cross-examination falls within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel. *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 45; *State v. Campbell*, 90 Ohio St.3d 320, 339, 738 N.E.2d 1178(2000). In addition, to fairly assess counsel's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶90} We cannot say that counsel's line of questioning constituted deficient or unreasonable performance. His trial counsel may have sought to demonstrate the unreasonableness of Detective George's belief by citing examples with which counsel hoped the jury would be aware.

{¶91} Crank has failed to demonstrate that trial counsel's cross-examination of Detective George was an unreasonable trial strategy. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984).

{¶92} Crank next contends that his trial counsel was deficient because he brought to the attention of the jury the fact that Crank was incarcerated.

{¶93} The United States Supreme Court has held that a defendant's right to due process is violated when he is compelled to appear at trial wearing identifiable prison clothing. *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126(1976). The court reasoned, in part, "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Id.* at 504-05. The Supreme Court, however, declined to establish a per se rule that invalidated a conviction whenever the accused wore jail clothing at trial. *Id.* Rather, when a defendant

wears prison attire before the jury, the relevant inquiry is whether he was compelled to do so. *Estelle v. Williams*, 425 U.S. at 507, 96 S.Ct. 1691, 48 L.Ed.2d 126. See, also, *State v. Reese*, 5th Dist. Richland No. 2007-CA-0097, 2008-Ohio-2512, ¶ 11.

{¶94} The *Estelle* court stated as follows, “The reason for this judicial focus upon compulsion is simple; instances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury.” *Estelle*, 425 U.S. at 508, 96 S.Ct. 1691, 48 L.Ed.2d 126.

{¶95} The *Estelle* court further stated that, “Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.” *Estelle v. Williams*, 425 U.S. at 512, 96 S.Ct. 1691, 48 L.Ed.2d 126,

{¶96} Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995-Ohio-171. Even if the wisdom of an approach is questionable, “debatable trial tactics” do not constitute ineffective assistance of counsel. *Id.* “(p)oor tactics of experienced counsel, however, even with disastrous result, may hardly be considered lack of due process * * * .” *State v. Clayton*, 62 Ohio St.2d 45, 48, 402 N.E.2d 1189(1980)(quoting *United States v. Denno*, 313 F.2d 364(2nd Cir. 1963), *certiorari denied* 372 U.S. 978, 83 S.Ct. 1112, 10 L.Ed.2d 143.

{¶97} In the case at bar, it was defense counsel who brought Crank’s incarceration to the jury’s attention. While the strategy of bringing this to the jury’s

attention may be debatable, Crank was not compelled to appear in jail attire and was not shackled or restrained during the proceedings. *See, Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353(1970).

{¶198} Upon review, we are unpersuaded that Crank suffered demonstrable prejudice via defense counsel's eliciting testimony that Crank was incarcerated.

{¶199} Crank's fifth assignment of error is overruled.

VI.

{¶100} In the Table of Contents to Crank's brief, he lists his nine-year sentence to three firearm specifications as his last assignment of error.

{¶101} Initially we note a deficiency in Crank's appellate brief; it does not comply with App.R. (A)(7), which provides,

The appellant shall include in its brief, under the headings and in the order indicated, all of the following: * * * An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary.

{¶102} "If an argument exists that can support [an] assignment of error, it is not this court's duty to root it out." *Thomas v. Harmon*, 4th Dist. Lawrence No. 08CA17, 2009-Ohio-3299, at ¶14, *quoting State v. Carman*, 8th Dist. Cuyahoga No. 90512, 2008-Ohio-4368, at ¶31. "It is not the function of this court to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." *Catanzarite v. Boswell*, 9th Dist. Summit No.

24184, 2009-Ohio-1211, at ¶16, *quoting Kremer v. Cox*, 114 Ohio App.3d 41, 60, 682 N.E.2d 1006(9th Dist. 1996). Therefore, “[w]e may disregard any assignment of error that fails to present any citations to case law or statutes in support of its assertions.” *Frye v. Holzer Clinic, Inc.*, 4th Dist. Gallia No. 07CA4, 2008-Ohio-2194, at ¶12. See, also, App.R. 16(A)(7); App.R. 12(A)(2); *Albright v. Albright*, 4th Dist. Lawrence No. 06CA35, 2007-Ohio-3709, at ¶16; *Tally v. Patrick*, 11th Dist. Trumbull No. 2008-T-0072, 2009-Ohio-1831, at ¶21-22; *Jarvis v. Stone*, 9th Dist. Summit No. 23904, 2008-Ohio-3313, at ¶23; *State v. Paulsen*, 4th Dist. Hocking Nos. 09CA15, 09CA16, 2010-Ohio-806, ¶6; *State v. Norman*, 5th Dist. Guernsey No. 2010-CA-22, 2011-Ohio-596, ¶29; *State v. Untied*, 5th Dist. Muskingum No. CT20060005, 2007 WL 1122731, ¶141.

{¶103} According to App. R. 12(A) (2), "The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App. R. 16(A)." An appellate court may rely upon App.R. 12(A) in overruling or disregarding an assignment of error because of "the lack of briefing" on the assignment of error. *Hawley v. Ritley*, 35 Ohio St.3d 157, 159, 519 N.E.2d 390, 392-393(1988); *Abon, Ltd. v. Transcontinental Ins. Co.*, 5th Dist. Richland No. 2004-CA-0029, 2005 WL 1414486, ¶100; *State v. Miller*, 5th Dist. Ashland No. 04-COA-003, 2004-Ohio-4636, ¶41. "Errors not treated in the brief will be regarded as having been abandoned by the party who gave them birth." *Uncapher v. Baltimore & Ohio Rd. Co.*, 127 Ohio St. 351, 356, 188 N.E. 553, 555(1933).

{¶104} In the case at bar, the assignment of error only appears in the table of contents of appellant's brief. Crank has wholly failed to provide any explanation

concerning the legal reasons in support of his argument that the trial court was wrong to impose consecutive firearm specifications. Crank has cited no authority in support of his claim. Crank has provided no argument in support of his contention that the trial court was wrong to impose consecutive firearm specifications.

{¶105} We are not disposed to review the statutory or constitutional requirements Crank's sentence may implicate to determine whether they were satisfied, absent some specific contention in that regard in Crank's brief, reasons in support of the contentions, and citations to "the authorities, statutes, and parts of the record on which appellant relies." App.R.16 (A) (7). None is presented here.

{¶106} Crank's sixth assignment of error is overruled.

{¶107} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio is affirmed.

By: Gwin, P.J.,
Farmer, J., and
Wise, J., concur