IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-150626 C-150628
Plaintiff-Appellee,	:	C-150629 TRIAL NOS. C-15TRC-8414-A
vs.	:	C-15TRC-8414-B C-15TRC-8414-C
SANDY MCCOY,	:	
Defendant-Appellant.	:	*JUDGMENT ENTRY.*

We consider these appeals on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Following a trial, a jury found Sandy McCoy guilty of operating a vehicle while under the influence of alcohol or drugs ("OVI"), in violation of R.C. 4511.19(A)(1)(a); OVI with a refusal to take a chemical test within 20 years of a prior conviction ("OVI with a chemical-test refusal"), in violation of R.C. 4511.19(A)(2); and failure to maintain an assured clear distance, in violation of R.C. 4511.21. The OVI counts were merged for sentencing purposes, and the state elected to proceed on the R.C. 4511.19(A)(1)(a) violation. Consequently, we dismiss the appeal related to the OVI with a chemical-test refusal, in the case numbered C-150626. In addition, McCoy has advanced no assignments of error in the case numbered C-150629, which is related to her assured-clear-distance violation. Therefore, we dismiss that appeal.

In her first and second assignments of error, McCoy challenges the weight and sufficiency of the evidence supporting her OVI conviction. To find her guilty of OVI, in violation of R.C. 4511.19(A)(1)(a), the jury had to find that McCoy had operated a motor vehicle while under the influence of alcohol or drugs.

The state presented evidence that, without braking or otherwise slowing as she approached a stop sign, McCoy drove into the back of a car that had been lawfully stopped at the stop sign, despite the other driver's efforts to move out of the way. McCoy's vehicle shoved the other car into a roadside ditch, continued off the road, and struck a sign and a mailbox. McCoy's vehicle then travelled back across the road and struck a fence, finally coming to rest against a telephone pole.

McCoy smelled strongly of alcohol, slurred her speech, and fell to the ground when she got out of her vehicle. During a horizontal-gaze-nystagmus ("HGN") test, she swayed from side to side despite an officer's repeated instructions to remain still, and she exhibited six out of six clues of intoxication. Following her arrest, she agreed to take a chemical breath test, but impeded the test by failing to properly blow into the testing machine. Consequently, we hold that a rational trier of fact, viewing the evidence in a light most favorable to the state, could have found that the state had proved beyond a reasonable doubt that McCoy had committed the offense of OVI. *See State v. Colyer*, 1st Dist. Hamilton Nos. C-120347, C-120348 and C-120349, 2013-Ohio-1316; *State v. Bakst*, 30 Ohio App.3d 141, 506 N.E.2d 1208 (1st Dist.1986). Therefore, the evidence was legally sufficient to sustain her conviction. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

The jury was entitled to reject the testimony of the defense witnesses. *See State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Moreover, our review of the record fails to persuade us 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. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We overrule the first and second assignments of error.

In her third assignment of error, McCoy argues that she was deprived of the effective assistance of counsel. Reversal of a conviction for ineffective assistance requires that the defendant show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the proceeding would have been different. *Strickland* at 694; *Bradley* at paragraph three of the syllabus.

McCoy argues that defense counsel's failure to secure material witnesses deprived her of a fair trial. She notes that defense counsel had documentation from the Ohio Department of Health that would have negated the element of refusal with respect to the R.C. 4511.19(A)(2) charge. However, McCoy was not convicted of that charge, so we need not address the argument.

Next, McCoy argues that counsel's failure to disclose her daughters as witnesses prior to the commencement of trial had resulted in their exclusion. However, as the trial court pointed out, the daughters' proffered testimony about seeing bruising on McCoy's face would not impeach the testimony of the police officers. The officers testified that "they could observe no visible injuries, and that's not the same as saying that she was not injured. It's saying that they could not see evidence of an injury." In addition, as the trial court noted, defense counsel's effective cross-examination of the

officers had demonstrated that some injuries resulting from a car accident, such as concussions, are not immediately or visibly apparent. Given the minimal probative value of the daughters' proffered testimony, we cannot say that counsel's performance in failing to secure their testimony was deficient.

Finally, McCoy argues that the jury was tainted by defense counsel's references to her two prior OVI convictions, because a single prior conviction would suffice for purposes of R.C. 4511.19(A)(2) and the jury would assume that she "had a propensity for drunk driving." She directs us to four references in the record, none of which was made by defense counsel in the presence of the jury. Consequently, McCoy's ineffective-assistance claim fails, and we overrule the third assignment of error. The trial court's judgment is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., CUNNINGHAM and **STAUTBERG, JJ.**

To the clerk:

Enter upon the journal of the court on October 19, 2016

per order of the court _____.

Presiding Judge