[Cite as *State v. Chancey*, 2015-Ohio-5585.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
	:	Case No. 15CA17
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
EDWARD R. CHANCEY,	:	
	:	
Defendant-Appellant.	:	**Released: 12/24/15**

APPEARANCES:

Robert W. Bright, Middleport, Ohio, for Appellant.

James E. Schneider, Washington County Prosecuting Attorney, and Nicole Tipton Coil, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for Appellee.

McFarland, A.J.

{¶1} Edward R. Chancey appeals from the judgment entry of conviction entered on April 23, 2015 in the Washington County Court of Common Pleas. Appellant contends his conviction should be reversed because the State did not prove beyond a reasonable doubt that he committed a violation of R.C. 4511.19(A)(1)(h) and (G)(1)(e), a third degree felony, and that his conviction is against the manifest weight of the evidence. Appellant also contends he received ineffective assistance of

counsel. Upon review, we find no merit to Appellant's assignments of error. Accordingly, we affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} On July 4, 2014, Appellant was traveling on Colgate Drive in Marietta, Ohio, when he was stopped by Sergeant Warner of the Ohio State Highway Patrol. Prior to the stop, Sergeant Warner observed Appellant's car traveling up on a curb, almost onto a sidewalk. After determining Appellant was driving on a suspended license and observing a beer can and spilled beer inside the car, Sergeant Warner asked Appellant to exit his vehicle. After further investigation, Sergeant Warner transported Appellant to the Marietta Patrol Post to administer the Breath Alcohol Concentration (BAC) Datamaster Breathalyzer. Appellant tested .231 BAC and was subsequently charged with operating a vehicle while under the influence (OVI), driving under suspension, an open container violation and a marked lanes violation.

{¶3} On February 5, 2015, Appellant proceeded to a jury trial on the OVI charge and was found guilty.[1] On April 6, 2015, Appellant was sentenced to 120 days at the Orient Reception Center to be followed by a

[1] Appellant was convicted of R.C. 4511.19(A)(1)(h). Due to his prior record of violations under this section, Appellant was sentenced pursuant to R.C. 4511.19(G)(1)(e), which made his current violation a third-degree felony.

mandatory three-year prison term. This timely appeal followed. Additional relevant facts will be set forth below.

ASSIGNMENT OF ERROR ONE

> "APPELLANT'S CONVICTION SHOULD BE REVERSED BECAUSE THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE APPELLANT COMMITTED THE OFFENSE AND THE APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

A. STANDARD OF REVIEW

{¶4} Whether the evidence presented at trial is legally sufficient to sustain a verdict is a question of law. *State v. Grinstead*, 194 Ohio App.3d 755, 958 N.E.2d 177, 2011-Ohio-3018, ¶ 10 (12th Dist.); *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). When reviewing the sufficiency of the evidence claim, this court examines the evidence in order to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Paul*, 12th Dist. Fayette No. CA2011-10-026, 2012-Ohio-3205, ¶ 9. In turn, "[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. Tenace*, 109 Ohio St.3d 255, 847 N.E.2d 386, 2006-Ohio-2417, ¶ 37, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574

N.E.2d 492 (1991), paragraph two of the syllabus. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(E).

{¶5} It is well-established that in reviewing a claim challenging the sufficiency of the evidence, "this court defers to the trier of fact which is in the best position to judge the credibility of witnesses, and to determine the weight to be given the evidence." *Ross, supra,* at ¶ 10, quoting *State v. Florence*, 12th Dist. Butler No. CA2013-05-070, 2014-Ohio-167, ¶ 18, quoting *State v. Renner,* 12th Dist. Clinton No. CA2002-08-033, 2003-Ohio-6550, ¶ 16.

{¶6} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *State v. Griffin*, 4th Dist. Scioto No. 12CA3484, 2013-Ohio-3309, ¶ 17, quoting *Thompkins* at 387. When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider the credibility of witnesses. The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. *State v.*

Issa, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. DeHass*, 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212 (1967), paragraph one of the syllabus; *State v. Murphy*, 4th Dist. No. 07CA2953, 2008-Ohio-1744, ¶ 31. "The trier 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.' " *State v. Pippen*, 4th Dist. No. 11CA342, 2012-Ohio-4692, at ¶ 31, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶7} Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the jury, when resolving the conflicts in evidence, "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Griffin, supra*, at ¶ 18, quoting *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983).

{¶8} If the prosecution presented substantial evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. *Griffin, supra*, at ¶ 19; *State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus.

A reviewing court should find a conviction against the manifest weight of the evidence only in the "exceptional case in which the evidence weighs heavily against the conviction." *Thompkins,* 78 Ohio St.3d at 387, quoting *Martin,* 20 Ohio App.3d at 175; see also *State v. Lindsey,* 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

LEGAL ANALYSIS

{¶9} We construe Appellant's first assignment of error as combining "sufficiency-of-the-evidence" and "manifest-weight-of-the-evidence" arguments. In *Prokos v. Hines,* 4th Dist. Athens No. 10CA51, 10CA57, 2014-Ohio-1415, ¶ 63, we quoted *Grimes v. Grimes,* 975 N.E.2d 496, 2012-Ohio-3562 (4th Dist.), at ¶ 15, fn.4, wherein this court noted "[t]hough appellate courts have the option to address two or more assignments of error at once, the parties do not. See, also, *Powell v. Vanlandingham,* 4th Dist. Washington No. 10CA24, 2011-Ohio-3208, ¶ 24; *Keffer v. Cent. Mut. Ins. Co.,* 4th Dist. Vinton No. 06CA652, 2007-Ohio-3984, ¶ 8, fn.2. Parties must comply with the Ohio Rules of Appellate Procedure. *Grimes,* at ¶ 15, fn.4. If not, App.R. 12(A)(2) permits us to disregard those assignments of error that are not separately argued. *Id.* However, in the interests of justice, we will address both arguments.

{¶10} Appellant first argues the State did not prove beyond a reasonable doubt that he committed the offense of OVI. He contends that at trial, his counsel forwarded the theory that Appellant's BAC was unexplainably high when he took the Datamaster Breathalyzer test, based on the fact that Appellant had a foreign object (a dental plate) in his mouth. Appellant actually removed the dental plate from his mouth so that the jury could view it. Appellant maintained the dental plate would or could have caused him to blow a higher BAC than his actual BAC because a foreign object in the mouth could retain alcohol and thus show a higher concentration in the breath coming through the mouth than was actually contained in his blood.

{¶11} Appellant also points to his extensive cross-examination of the State's trooper witnesses, Sergeant Garic Warner and Trooper Steven Rogers, on the issue of foreign objects. Appellant's counsel elicited testimony that as a practice, troopers instruct suspects to remove foreign objects from their mouths before taking breathalyzer tests. Sergeant Warner testified the reason they have suspects wait at least 20 minutes before blowing into the Datamaster is to ensure there is no alcohol trapped in the suspect's mouth. Appellant concludes that the above evidence was sufficient to create reasonable doubt as to whether the test was accurate and

further, creates reasonable doubt as to his guilt. Appellant also directs us to the trial transcript where some favorable testimony was elicited that, such as the fact that Sergeant Warner testified Appellant's speech was not slurred and that the HGN[2] test demonstrated Appellant's pupils were of equal size and tracked equally.

{¶12} Appellant was convicted of R.C. 4511.19(A)(1)(h) which provides in pertinent part:

> A)
>
> (1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:
>
> (h) The person has a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath.

{¶13} At trial, the State presented two law enforcement witnesses and several exhibits. Sergeant Garic Warner's testimony began with his description of Appellant's traffic stop. He testified he was traveling eastbound on Colgate Drive when he saw Appellant's vehicle approaching

[2] Horizontal gaze nystagmus (HGN) is an involuntary jerking of the eyes that occurs as the eyes move to the side. When a person has consumed alcohol, nystagmus is exaggerated and may occur at lesser angles depending on the degree of impairment. United States Department of Transportation, National Highway Traffic Safety Administration "Standardized Field Sobriety Tests," www.nhtsa.gov (March 1999). The HGN test is considered "the single most accurate field test to use in determining whether a person is alcohol impaired." *State v. Martin*, 4th Dist. Pickaway No. 04CA24, 2005-Ohio-1732, at ¶ 6, quoting *State v. Bresson*, 51 Ohio St.3d 123, 554 N.E.2d 1330 (1990), citing U.S. Department of Transportation, National Highway Safety Administration, Improved Sobriety Testing (1984) .

in the westbound lane at 9:40p.m. on July 4, 2014. He noticed Appellant's car go up onto the curb, almost onto the sidewalk, and then come back onto the roadway traveling westbound. He had no doubt as to what he had seen, so he turned his vehicle around and initiated a traffic stop with his overhead lights. Appellant did not pull over immediately but eventually pulled over in front of the Washington State Community College entranceway.

{¶14} Sergeant Warner approached the driver's side and requested the driver's information. He immediately noticed Appellant had bloodshot, glassy eyes. He also smelled the odor of an alcoholic beverage coming from the inside of the vehicle. He noticed a female passenger. Appellant informed Sergeant Warner he did not have a driver's license. Sergeant Warner later determined Appellant was under a lifetime license suspension. Sergeant Warner identified Appellant in the courtroom.

{¶15} Sergeant Warner testified he next proceeded to the passenger side to talk to the female, Appellant's wife Jannette Chancey. Her window would not roll down, so Mrs. Chancey opened the door and the trooper noticed a can of beer on the floorboard that had been spilled. Sergeant Warner inquired as to whom the beer belonged to and Appellant admitted it was his.

{¶16} Sergeant Warner returned to his patrol car and ran Appellant's information through the Law Enforcement Automated Data System (LEADS) to see why Appellant was suspended and to check the vehicle tags. He then asked Appellant to exit the vehicle so he could administer field sobriety tests. He detected a moderate odor of alcohol on Appellant even after he exited his vehicle and was some distance away from the car, the spilled beer, and his wife.

{¶17} Sergeant Warner took Appellant to the side of the roadway in order to administer the HGN test. The test checked for lack of smooth pursuit, nystagmus at maximum deviation and nystagmus prior to 45 degrees. Sergeant Warner found all six clues and based on his training and experience, concluded that there was a 77% likelihood that Appellant had been consuming alcohol and would test over .10. That was the only field sobriety test administered.

{¶18} Having found six clues, Sergeant Warner would have normally proceeded to ask Appellant to perform other balance tests, but due to the area where they were standing and Appellant's use of a cane, he didn't feel like he could safely request walk and turn or one-legged stand tests. Sergeant Warner offered and administered a portable breath test and subsequently placed Appellant under arrest.

{¶19} At the highway patrol post, Sergeant Warner offered Appellant a BAC Datamaster breath test. He first observed Appellant 20 minutes prior to giving the test to make sure Appellant didn't place anything in his mouth. Sergeant Warner next performed a calibration test of the machine and determined it was working correctly. The test was administered at 10:57p.m. Appellant tested .231 grams of alcohol per 210 liters of breath in his system. The test was taken within three hours of the stop.

{¶20} Sergeant Warner further testified there was no reason a person with dental work (bridges, plates, dentures) could not take an accurate BAC Datamaster test. During the 20-minute observation period, troopers make sure nothing is placed in the mouth, but they do not check for anything already inside the mouth, such as dental work.

{¶21} At this point in the trial, the State played Exhibit C, a CD of the traffic stop. The jury was able to view and hear testimony regarding approximately the first 20 minutes of interaction between Appellant and Sergeant Warner. Due to lack of sound, Sergeant Warner added testimony as to what the jury was seeing. Sergeant Warner acknowledged that he did not consider Appellant's speech to be slurred.

{¶22} During his testimony, Sergeant Warner testified as to his training, experience, employment with the Ohio State Highway Patrol, and

relevant certifications. The State offered State's Exhibit A, Sergeant Warner's certification from the Ohio Department of Health; Exhibit B, the BAC Datamaster subject test form; and State's Exhibit C, the CD video of the traffic stop.

{¶23} On cross-examination, Sergeant Warner testified that Appellant was polite and answered all questions. He reiterated that Appellant admitted he drank 2-3 beers, 3-4 hours prior to the stop. Appellant explained to him during the stop that the car he was driving was new and he was trying to eject a cassette tape when he drove up onto the curb. Sergeant Warner testified he did not recall what type of beer Appellant had in the vehicle.

{¶24} The State's next witness was Trooper Steven Rogers. As senior operator for the BAC Datamaster, with special certification, Trooper Rogers testified he performs the weekly calibration check. Trooper Rogers identified State's Exhibits D, E, and F: a certificate from the Department of Health for the solution used in the breathalyzer machine; an instrument check form showing the calibration check on the particular breathalyzer machine between July 1, 2014 and July 8, 2014; and Appellant's two page breath test report. Trooper Rogers testified the BAC Datamaster was a properly functioning machine at the time of Appellant's test and there was no reason to doubt the accuracy of the results the machine produced.

{¶25} On cross-examination, Trooper Rogers testified he does not inquire about dentures when administering a breath test. He testified gum, food, tobacco, and tongue rings are foreign objects which are required to be removed prior to a breathalyzer test.

{¶26} As noted earlier, Appellant asserts the theory that Appellant's dental plate, which the officers did not ask him to remove, would or could have caused him to blow a higher BAC than his actual BAC because the dental plate, a foreign object, could retain alcohol. Courts have implicitly recognized that testimony regarding dentures' effect on the accuracy of breath alcohol test results could, within the court's discretion, be considered at trial by the trier of fact, be it a jury or the trial judge. *State v. Arledge,* 4th Dist. Hocking No. 91CA8, 1991 WL271343, *5. See, generally, *State v. Dehner* (June 4, 1991), Ross App. No. 1635, unreported; *State v. Porter* (March 16, 1988), Wayne App. No. 2316, unreported; *People v. Jennette* (N.Y.App.1987), 128 A.2d 955. Appellant directs us to *State v. Dehner, supra,* for his proposition that this court has previously considered evidence from an expert witness which appeared to prove that dental plates "would retain a significant level of ethyl alcohol" after 20 minutes. However, that is a misreading or a mischaracterization of *Dehner.*

{¶27} In *Dehner*, the defendant was convicted of operating a motor vehicle under the influence of alcohol. Prior to trial, she was examined by Larry M. Dehus, a practicing forensic scientist, who conducted an experiment and prepared a report which indicated:

> "(1) [B]ased upon Mrs. Dehner's stated weight of 168 pounds and the known average rate of metabolism for alcohol, the three drinks that she would have had between 1:30 and 3:45p.m. on May 9th would have been completely metabolized out of her system before she had the three additional drinks in the evening;
>
> (2)[B]ased upon her weight and the time period over which the drinks were consumed, it is the opinion of this examiner that the highest blood alcohol level that Mrs. Dehner could have had at the time of her test at 1:37a.m. on May 10, 1989 would have been 0.04%."

{¶28} The State filed a motion in limine requesting that Dehus's testimony and his report be excluded from evidence. Dehner then filed a motion to suppress the result of the intoxilyzer test for the reason that the test was flawed because alcohol was retained by Mrs. Dehner's partial dental plate. The parties made several stipulations as to what the expert would have testified. The court sustained the motion in limine and overruled the motion to suppress. The trial court's reason was that there was "no substantial similarity with the conditions as existed at the time of the breath test." At trial the court refused to admit the portion of the stipulated

testimony that Dehus would have given, that the breath test was inaccurate because of the retention of alcohol by the partial denture.

{¶29} On appeal, the defendant argued that the trial court erred by refusing to admit the result of the experiment by the expert witness. Citing Evid.R. 702, admissibility of scientific testimony, and this court's decision in another case prior to the adoption of the evidence rules, we observed:

> "Evidence of experiments preformed out of court, tending to prove or disprove a contention in issues, is admissible if there is a substantial similarity between conditions existing when the experiments are made and those existing at the time of the occurrence in dispute; dissimilarities, when not so marked as to confuse and mislead the jury, go to the weight rather than the admissibility."

{¶30} We also noted the admission or rejection of evidence as to such experiments as a matter peculiarly within the discretion of the trial judge. We affirmed the trial court's decision excluding the evidence, stating:

> "We deem it significant that the expert fails to discuss or elucidate as to how long after twenty minutes of consumption of alcohol, the alcohol purportedly held back by the denture would continue to affect the test result. The critical question is whether the test result was inaccurate when given at 1:37 a.m., which is fifty-two minutes after appellant's last drink."

{¶31} Therefore, we disagree with Appellant's conclusion that in *Dehner* this court considered evidence from an expert "which appeared to prove dental plates would retain a significant level of alcohol after 20 minutes. *Dehner* discusses the admissibility of scientific evidence in the

context of an issue raised which concerned dental plates, and discusses the correct standard of review for a trial court's decision to admit or exclude scientific evidence.

{¶32} We also disagree with Appellant's argument that a dental plate, without question, is a foreign object in one's mouth. In *State v. Withers*, 5th Dist. Licking No. 08CA116, 1999 WL 436787, the appellate court affirmed the trial court's overruling of a motion to suppress, observing that a dental plate is not a substance that produces ingredients nor is it ingested nor is it a substance foreign to one's mouth. *Id.* at *3. The insertion or removal of a dental plate does not constitute ingestion or intake as contemplated under Ohio Adm.Code 3701-53. *State v. Rennick*, 7th Dist. Belmont No. 02BA19, 2003-Ohio-2560, at ¶ 22, citing *Withers*, *supra*. In *Arledge, supra*, at *4, we noted that "[a]lthough the twenty minute observation period precludes the oral ingestion of any foreign material during that period, * * * the regulation does not require the removal of foreign material such as dentures prior to the beginning of the observation period." (Emphasis added and citations omitted.) The removal of dentures is not synonymous to the ingestion of material into the system. *State v. Birkhold*, 5th Dist. Licking No. 01CA104, 2002-OHIo-2464, *3. Further, the "potential effect of dentures in the test subject's mouth impacts the weight, not the admissibility, of the test results."

Id., quoting *State v. McVey* (December 28, 2000), Athens App. No. 00CA36, unreported; *State v. Arledge* (December 6, 1991), Hocking App. No. 91CA8, *5.

{¶33} In our research we have been unable to locate any cases, statutory law, or administrative regulations which support Appellant's argument that his dental plate is a foreign object.[3] Nor have we found cases wherein actual expert testimony definitively established that a dental plate caused a defendant to test higher on the BAC. Therefore, we do not agree that Appellant's theory created a reasonable doubt on this issue.

{¶34} As noted above, Sergeant Warner testified to his observations of Appellant which included his driving up onto a curb, the moderate odor of alcoholic beverage on his person, and the 6 clues he observed on Appellant's HGN test. Furthermore, Sergeant Warner testified he observed the open container of beer in Appellant's vehicle, which Appellant admitted was his.

---

[3] In seeking guidance on a related issue, in *State v. Gibbs*, 995 N.E.2d 1236, 2013-Ohio-38210, at ¶ 21, we recently looked to an Indiana Supreme Court decision, *Guy v. State*, 823 N.E.2d 274 (Ind. 2005), which expounded on what it means to "put" something into one's mouth during the [20-minute] wait period:

"The concern over foreign substances a [sic] person's mouth is the potential for the substances to absorb and retain alcohol in the mouth, which could falsely elevate the breath alcohol concentration. See *Patrick M. Harding et al.*, The Effect of Dentures and Denture Adhesives on Mouth Alcohol Retention, 37 J. Forensic Sci. 999, 999-1000 (1992). A number of studies have shown, though, that a fifteen to twenty-five minute waiting period during which nothing is placed in a person's mouth allows sufficient time for any mouth alcohol to dissipate. See, *Id.* at 999; Barry K. Logan & Rodney G. Gullberg, Lack of Effect of Tongue Piercing on an Evidential Breath Alcohol Test, 43 J. Forensic Sci. 239, 239-40 (1998); Ronald L. Moore & J. Guillen, The Effect of Breath Freshener Strips on Two Types of Breath Alcohol Testing Instruments, 49 J. Forensic Sci. 1, 1-3 (2004). These studies support the department of toxicology's decision to require that nothing be "put" in a person's mouth within twenty minutes of a breath test." *Id.* at 277.

We have reviewed the video of Appellant's traffic stop which verifies that Appellant did drive onto the curb and did admit the open container of beer belonged to him.

{¶35} Sergeant Warner also testified as to the procedures he utilized when performing Appellant's breath test and Trooper Rogers testified as to the proper functioning of the BAC Datamaster and the accuracy of the results. The trial court instructed the jury as to the burden of proof, the definition of "reasonable doubt," and direct and circumstantial evidence. Viewing all the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved that Appellant operated his motor vehicle under the influence of alcohol. We reject Appellant's argument that his conviction is based on insufficient evidence.

{¶36} Appellant next contends his conviction for OVI was against the manifest weight of the evidence. Appellant relies on the same arguments made as to "sufficiency of the evidence" to support his claim that the conflicts in the evidence caused the jury to lose its way and create a manifest miscarriage of justice requiring reversal. We disagree. Again, the trial court instructed the jury on the concepts of "credibility," "weight of the evidence," and the fact that a jury is free to believe all, part, or none of any witness's testimony. A verdict is not against the manifest weight of the evidence

because the finder of fact chose to believe the State's witnesses. *State v. Wilson,* 9th Dist. Lorain No. 12CA010263, 2014-Ohio-3182, at ¶ 24, citing *State v. Martinez,* 9th Dist. Wayne No. 12CA0054, 2013-Ohio-3189, at ¶ 16. Our review convinces us Appellant has not shown that the jury lost its way by believing the officers' testimony and by concluding Appellant was guilty. As such, we overrule Appellant's first assignment of error and affirm the judgment of the trial court.

ASSIGNMENT OF ERROR TWO

"THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL COURT LEVEL WHICH REQUIRES REVERSAL OF THE APPELLANT'S CONVICTION."

A. STANDARD OF REVIEW

{¶37} Criminal defendants have a right to counsel, and this includes a right to the effective assistance from counsel. *State v. Sinkovitz,* 4th Dist. Hocking No. 20 N.E.2d 1206, 2014-Ohio-4492, at ¶ 16; citing *McMann v. Richardson,* 397 U.S. 759, 770, 90 S.Ct. 1441, (1970) (Internal citations omitted.) To establish constitutionally ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. *Sinkovitz, supra*. See *Strickland v. Washington,* 466 U.S. 668, 687, 104

S.Ct. 2052 (1984); see also *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Goff*, 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998).

{¶38} Both prongs of the *Strickland* test need not be analyzed if the ineffective assistance claim can be resolved under one. *Sinkovitz, supra,* at ¶ 17. See *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). To establish the latter element, (the existence of prejudice), a defendant must show a reasonable probability exists that, but for counsel's alleged error, the result of the trial would have been different. *Sinkovitz, supra*; *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), at paragraph three of the syllabus.

B. LEGAL ANALYSIS

{¶39} Appellant argues his trial counsel was ineffective for failing to retain an expert witness to testify as to whether having a dental plate in one's mouth would result in a higher BAC than if one did not have a dental plate in one's mouth. Because no expert was retained, Appellant argues, his trial argument was limited to only being able to allege that a dental plate was a foreign object in his mouth that might possibly have caused a higher BAC on the test than would have occurred if he had not had a dental plate in his mouth.

{¶40} Appellant again directs us to *State v. Dehner*, 74 Ohio App.3d

431, 599 N.E. 2d 309. Appellant indicates again, by way of misreading or mischaracterization, that in *Dehner*, this court considered testimony that a forensic scientist "conducted a test which appeared to prove that dental plates would retain a 'significant level of ethyl alcohol' after 20 minutes." We have, however, rejected that reading of *Dehner*.

{¶41} In *State v. Delawder*, 4th Dist. Lawrence No. 14CA12, 2015-Ohio-1857, at ¶ 34, we observed that " '[C]ounsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.' " *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, at ¶ 203, quoting *State v. Treesh*, 90 Ohio St.3d 460, 490, 739 N.E.2d 749 (2001). "Because calling witnesses is within the realm of trial tactics, defense counsel did not have a duty to call an expert witness." *Delawder, supra*, quoting *State v. Goza*, 8th Dist. Cuyahoga No. 89032, 2007-Ohio-6837, at ¶ 58.

{¶42} In *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, at ¶ 245, the Supreme Court of Ohio held that the defendant's claim that an expert would have assisted him was purely speculative. See also *State v. Madrigal*, 87 Ohio St.3d 378, 390, 721 N.E.2d 52 (2000). In *State v. Sinkovitz, supra*, the appellant was convicted of felonious assault and domestic violence. As one of the errors assigned on appeal, he argued

that his trial counsel was ineffective for failing to request funds for a firearms expert. Sinkovitz argued that a gunshot residue analysis "might" have offered insight, that an expert "could have" assisted defense counsel and that a reconstructionist "may have" bolstered his case. We held at ¶ 19:

> "Courts generally will not simply assume the existence of prejudice in an effective assistance of counsel claim. Instead, courts must require that prejudice be affirmatively demonstrated. See, *State v. Ruppen*, 4th Dist. Washington No. 11 CA22, 2012-Ohio-4234, at ¶ 34; *State v. Hairston*, 4th Dist. No. 06CA3089, 2007-Ohio-3707, ¶ 16."
>
> **{¶43}** Specifically, Appellant contends in his brief:
>
> "If Appellant's trial counsel had retained and called an expert witness to testify on the issue of the dental plate - and assuming that the expert witness would have testified that the dental plate would have caused a higher BAC - then Appellant asserts that such testimony would have had a substantial effect upon the jury in its deliberations. Here appellant failed to show that the employment of experts would have resulted in a different outcome, and we cannot conclude that appellant was deprived of constitutionally effective assistance of trial counsel."

{¶44} As in the above-cited cases, Appellant urges us to engage in speculation. Appellant asserts that "if trial counsel had retained and called an expert" and "assuming the expert would have testified that the dental plate would have caused a higher BAC," then such testimony "would have had a substantial effect" upon the jury. As in the above-cited cases, we cannot assume the existence of prejudice. Appellant has not demonstrated that the use of an expert would have resulted in a different or favorable

outcome. As such, we cannot find that Appellant was deprived of the effective assistance of counsel. Having found no merit to the second assignment of error, we hereby overrule it and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.