[Cite as *State v. Rich*, 2015-Ohio-2917.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- PEGGY RICH Defendant-Appellant	JUDGES: Hon. Sheila G. Farmer, P. J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. 14 CA 102 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Municipal Court, Case No. 14 TRC 07629
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 13, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
J. MICHAEL KING ASSISTANT LAW DIRECTOR 40 West Main Street, Fourth Floor Newark, Ohio 43055	ANDREW T. SANDERSON BURKETT & SANDERSON 73 North Sixth Street Newark, Ohio 43055

Wise, J.

{¶1} Appellant Peggy Rich appeals her conviction and sentence entered in the Licking County Municipal Court following a jury trial.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} The relevant facts are as follows:

{¶4} Appellant, Peggy Rich, was charged with violating R.C. §4511.19(A)(1)(a) and (A)(2).

{¶5} On October 30, 2014, a jury trial was held in this matter. At trial, the jury heard the following:

{¶6} On July 12, 2014, at approximately 5:00 a.m., Appellant Peggy Rich entered the Shell gas station on East Broad Street, Harrison Township, Licking County, Ohio, and told the clerk she had been in an accident and to "call the cops on me," asking "I fucked up, didn't I?" (T. at. 58, 60, 63). The clerk testified that Appellant was clearly impaired, i.e. drunk, based upon the odor of alcohol, her behavior, walking, and standing. (T. at 62, 69).

{¶7} Deputies Doelker, Thomas and Wilson from the Licking County Sheriff's office, along with Pataskala Officer Reitz responded to the accident. (T. at 72). Appellant spoke first to Dep. Doelker and told him she had driven her car into a fence, that she was alone in the vehicle, and that she was not injured. (T. at 76). The Deputy noted Appellant had a flushed face, glassy eyes, slurred speech and a strong odor of an alcoholic beverage on her person. She stated she had been drinking whiskey and had consumed "way too much." (T. at 77-79). Deputy Doelker testified as to his training

in administering field performance tests, the manner in which he administered the tests to the Appellant, and that she failed them all. A video was shown to the jury and admitted into evidence. (T. at 81-87; 93). He stated that it was his opinion that Appellant was impaired by alcohol and was unfit to operate a vehicle. (T. at 88-89).

{¶8} Once arrested, Appellant's attitude changed in that she kicked Dep. Doelker in the chest, tried to kick Dep. Thomas, and then began kicking the cruiser window. (T. at 90-91). At no time did Appellant ever indicate that she had been drugged, or that someone else had been driving her vehicle.

{¶9} Deputy Thomas also testified that Appellant stated she wrecked the vehicle, and that she should not have been driving. He, too, observed that Appellant was very unsteady on her feet, had slurred speech, and he smelled the odor of an alcoholic beverage from 5 to 10 feet away. (T. at 117-119). She did not claim anyone else was driving, nor that she had been drugged. In his opinion, Appellant was under the influence of alcohol. (T. at 120-121). Once she was arrested, Appellant was transported to the Pataskala Police Department, where she was read the applicable portions of the BMV 2255 form. (T. at 121-122). Deputy Thomas had a Senior Operator's Permit, and gave Appellant two (2) opportunities to give a breath sample. On each occasion, she would start to blow then quit, despite his request for her to keep blowing. Because she kept placing her tongue over the mouthpiece, he determined that she was not making a good faith effort,so he deemed her to have refused after the second attempt. (T. at 123-125).

{¶10} The State then rested its case-in-chief. Appellant's Criminal Rule 29 motion to dismiss was denied.

{¶11} Appellant called Elizabeth Fisher, an employee of the last bar where Appellant claimed she was drinking alcoholic beverages. The bar is located "catty corner" from the Shell station where the accident occurred. Although she observed Appellant drinking with a male patron, she did not notice how much Appellant had to drink. She did not observe the man place anything into Appellant's drink. (T. at 140-145).

{¶12} Appellant's sister, Deborah Martine, was also called to testify. She testified that when she went to retrieve Appellant's impounded vehicle, she noticed that the floor of the vehicle was "muddy;" the seat was pushed back, there was a brown lighter on the floor, and a foul, urine smell coming from the passenger's seat. (T. at 147-148). She admitted that her sister smoked, that the car had been impounded between 4-5 days, and that she did not know whether any employees of the impound lot had been inside the vehicle. (T. at 149-150).

{¶13} Appellant also testified. She stated that she went with her sister about 5 days after the incident to get her vehicle out of the impound lot, which is when she discovered the brown lighter, mud on the floor, and the seat pushed back. She claimed that that is when, over the following 5-10 days "it came back to me what happened that night." (T. at 183). She then indicated that she believed the male at the bar must have been driving her vehicle when the accident occurred. She also testified that she had no memory of what happened from being at the last bar until her daughter picked her up from the Pataskala Police Department. (T. at 159, 161).

{¶14} Upon cross-examination, she testified that her memory "comes and goes." She admitted that she waited until August 1, 2014, before she reported being drugged

and sexually assaulted. (T. at 192). She further claimed she offered to wear a "wire" so she could record the assailant, and that she wanted her car and the lighter examined for fingerprints. (T. at 164, 167-168). She further alleged that she had a sexually transmitted disease and had executed a medical release. (T. at 164).

{¶15} The two detectives refuted her offer of assistance. Det. Crider testified that Appellant told him she did not want to pursue the matter. (T. at 197).

{¶16} Following the conclusion of the evidence and after deliberations, the jury found Appellant guilty as charged.

{¶17} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶18} “I. THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

{¶19} "II. THE CONVICTION OF THE DEFENDANT-APPELLANT WAS BASED ON INSUFFICIENT EVIDENCE TO SUSTAIN THE SAME.

{¶20} "III. THE CONVICTION OF THE DEFENDANT-APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED."

I.

{¶21} In her First Assignment of Error, Appellant argues that she was denied the effective assistance of counsel. We disagree.

{¶22} The standard this issue must be measured against is set out in *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. Appellant must establish the following:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)
>
> 3. 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 trial would have been different.

{¶23} In the instant case, Appellant specifically argues that her counsel was ineffective in failing to raise issues as to the admissibility of her multiple, prior OVI convictions and in failing to secure the admission of her medical diagnosis and treatment.

{¶24} Because Appellant was charged with a "refusal with a prior" under R.C. 4511.19(A(2), Appellant herein concedes that admission of a prior OVI offense was proper herein as such was an element of the offense charged. Appellant argues, however, that admission of her entire BMV record which revealed that she had three prior OVI convictions (2002, 1997, and 1995) was unnecessary and was prejudicial. Appellant argues that her trial counsel should have objected to the introduction of such evidence.

{¶25} Upon review, this Court finds that Appellant has failed to show a reasonable probability that, were it not for counsel's (alleged) errors, the result of the trial would have been different.

{¶26} At trial, Appellant herself testified that she had made mistakes in the past and had pled guilty on those occasions but that such was not the case here. (T. at 159). Add to that the testimony as set forth above, we find that sufficient evidence of guilt existed without the consideration of the two additional prior OVI convictions.

{¶27} Appellant, in her brief, even admits that "evidence of a single prior conviction [which the state was required to prove as an essential element of the crime charged] presents a nearly insurmountable burden for the defendant in a 4511.19(A(2) prosecution."

{¶28} Appellant also argues that her counsel was ineffective because he failed to secure admission of her diagnosis and treatment for a sexually transmitted disease.

{¶29} It is well-established that “decisions regarding what stipulations should be made, what evidence is to be introduced, what objections should be made, and what pretrial motions should be filed, primarily involve trial strategy and tactics.” *State v. Cline,* 10th Dist. Franklin No. 05AP–869, 2006–Ohio–4782, ¶ 22, citing *State v. Edwards,* 119 Ohio App.3d 106 (10th Dist.1997). “Even debatable trial strategies and tactics do not constitute ineffective assistance of counsel.” *In re Z.C.,* 12th Dist. Warren Nos. CA2005–06–065, CA2005–06–066, CA2005–06–081, and CA2005–06–082, 2006–Ohio–1787, ¶ 24.

{¶30} Here, based on the fact that Appellant waited until August 1, 2014, before she raised any claims as to having been sexually assaulted, together with inconsistent

statements as to whether she had contracted a sexually transmitted disease, and the lack of any evidence that she had been drugged as claimed, we find that the decision to not fight the objection raised by the State as to the admission of her medical records does not rise to the level of incompetence.

{¶31} Based on the foregoing, because both of the alleged deficiencies raised by Appellant fall squarely within the confines of trial strategy and tactics, her First Assignment of Error is without merit and overruled.

II., III.

{¶32} In her Second and Third Assignments of Error, Appellant argues that her conviction was against the manifest weight and sufficiency of the evidence. We disagree.

{¶33} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and “in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in 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.’ " *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983).

{¶34} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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,* 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus (1991).

{¶35} Appellant was convicted of violating R.C. §4511.19(A)(1)(a) and (2)(b):

{¶36} "(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:

{¶37} "(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.

{¶38} "(2) No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) or (B) of this section, or any other equivalent offense shall do both of the following:

{¶39} "(a) Operate any vehicle, streetcar, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them;

{¶40} "(b) Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests."

{¶41} Appellant herein concedes the state produced sufficient evidence of impairment and sufficient evidence that she operated a vehicle which was involved in an accident. Appellant argues that the state failed to prove that she was impaired when the

vehicle operation occurred because no one can prove where she was between 10:00 p.m. and 5:00 a.m.

{¶42} The store clerk at the Shell station testified that Appellant told him that she was driving and had been in accident. He further testified that Appellant was "drunk" when she came into the store. (T. at 60-62). Deputy Doelker testified that Appellant admitted to him that the vehicle belonged to her and that she had been driving. (T. at 76, 88). He further testified that Appellant disclosed to him that she had "way too much" to drink and that she should not have been driving." (T. at 77).

{¶43} Further, it should be noted that Appellant never claimed that she had consumed any alcohol after the accident occurred.

{¶44} Appellant also argues that the jury lost its way in convicting her based on her testimony as to position of the driver's seat, the brown lighter found in the car which she denies owning, the fact that she had been seen in the company of an unidentified man earlier in the evening, and her claim that she had been drugged weigh against conviction in this case.

{¶45} 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).

{¶46} 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 its way, nor created a miscarriage of justice in convicting Hardman of the charge.

{¶47} Based upon the foregoing and the entire record in this matter, and viewing this evidence in a light most favorable to the State, a rational trier of fact could have found that Appellant was operating a motor vehicle while under the influence of alcohol. Further, the judgment is not against the manifest weight of the evidence.

{¶48} Appellant's Second and Third Assignments of Error are overruled.

{¶49} For the forgoing reasons, the judgment of the Municipal Court of Licking County, Ohio, is affirmed.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

JWW/d 0626