

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
	:	CASE NO. CA2014-10-131
Plaintiff-Appellee,	:	
	:	<u>OPINION</u>
	:	6/1/2015
- VS -	:	
	:	
KELSEY A. ERICKSON,	:	
	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 13CR28888

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Ruschau & Lehman, Maria L. Rabold, 443 East Central Avenue, Miamisburg, Ohio 45342, for defendant-appellant

S. POWELL, P.J.

{¶ 1} Defendant-appellant, Kelsey A. Erickson, appeals from her conviction in the Warren County Court of Common Pleas after a jury found her guilty of operating a vehicle while under the influence of alcohol (OVI), her forth such conviction within the past six years. For the reasons outlined below, we affirm.

{¶ 2} On December 27, 2012, Trooper Sidney Michael Steele of the Ohio State

Highway Patrol filed a complaint in the Lebanon Municipal Court charging Erickson with OVI and failure to control. The charges stemmed from a single-car accident on Interstate 75 earlier that morning. Although denying she was the driver of the vehicle, it is undisputed that Erickson was the only individual located at the scene of the crash. It is also undisputed that a blood draw administered after the crash measured Erickson's blood alcohol content at .181, a concentration over twice the legal limit. After holding a pretrial hearing on the matter, the case was then transferred to the Warren County Court of Common Pleas.

{¶ 3} On February 25, 2013, a Warren County Grand Jury returned an indictment against Erickson charging her with two counts of OVI in violation of R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(f), both fourth-degree felonies due to her three prior OVI convictions. Erickson then filed a motion to suppress and a motion to quash the indictment. As part of these motions, Erickson argued the indictment should be dismissed "because one or more of the essential convictions that are used to enhance Defendant's OVI to a felony, were obtained in violation of Defendant's Due Process rights" and Crim.R. 11(E). Specifically, as it relates to Miamisburg Municipal Court Case No. 08TRC07728, Erickson claimed she never "appeared in front of any Court," never "personally pled guilty or entered any other plea," and was never informed of the consequences of entering a guilty plea. Similarly, as it relates to Miamisburg Municipal Court Case No. 09TRC05426, Erickson claimed she "saw no Judge nor entered no personal plea." According to Erickson, "[w]hatever purportedly happened in that case was done off the record, and not in a courtroom." The trial court denied Erickson's motions in a written decision issued on May 14, 2013.

{¶ 4} Shortly after the trial court issued its decision, on May 23, 2013, Erickson filed a motion in limine arguing the documents relating to her two prior OVI convictions from the Miamisburg Municipal Court failed to comply with Crim.R. 32(C). As Erickson stated in that motion:

In an examination of the Miamisburg Municipal Court case 08TRC07728-A, it appears that someone marked on the docket entry that there was a plea of guilty. However, there is no finding of guilty. Incidentally there is no transcript of the plea, so there is no further explanation of what was done by the Court since neither of these pleas that are subject to this motion were done in a courtroom. Therefore there is no transcript. Crim.R. 32(C) provides that a judgment of conviction shall set forth the plea, the verdict of findings and the sentence. It further states that the Judge shall sign the judgment and the Clerk shall enter in on the journal. The judgment is effective only when it is entered on the journal. The case at bar there is no finding, there is no signature and no indication that the judgment was enter (sic) onto a journal.

In case no. 09TRC05426-A there is no plea marked, nor is there any finding marked, nor is there a signature by a Judge. * * *

{¶ 5} On June 19, 2013, the trial court entered an amended entry granting Erickson's motion in limine, which also included language transferring the matter back to the Lebanon Municipal Court. In so holding, the trial court stated:

The court held a hearing on the motion, wherein the state conceded that the documents it produced in discovery as evidence of the two prior OVI convictions are not final appealable orders. Therefore, the state cannot proceed on those two prior convictions to raise the level of offense of this current OVI charge to a felony. The state requested additional time to determine how to proceed on the matter, however the court has received no further information regarding this matter.

Accordingly, the motion in limine is granted to the extent that the documents produced to date by the state will not be admissible to prove prior OVI convictions against the defendant. Pursuant to Crim.R. 21(A), the court hereby orders this case transferred to the Lebanon Municipal Court and there be dealt with according to law.

{¶ 6} Two days later, on June 21, 2013, the state filed a motion to reconsider with the trial court, wherein it stated:

While the State did in fact concede that the two Miamisburg convictions were defective in that they failed to contain a judge's signature, it was decided that the State would be given additional time to determine how to proceed. On June 20, 2013, the Miamisburg Municipal Court informed the State that a nunc pro

tunc signature had been procured from the Judge involved in the two prior OVI cases, Judge Messham. The State will have in its possession the two signed and notarized copies of the judgment entries in question.

The state also requested the trial court to reconsider its decision transferring the case to the Lebanon Municipal Court given the fact that "it did not amend the case on the record to reflect it had been reduced to a misdemeanor."

{¶ 7} On July 12, 2013, the trial court granted the state's motion to reconsider upon finding it improperly transferred the case to the Lebanon Municipal Court. In so holding, the trial court stated:

The court failed to reduce the felony charge to a misdemeanor prior to the transfer. Thus, the court attempted to divest the municipal court of jurisdiction over a felony charge, something the municipal court does not have jurisdiction to resolve. Therefore, this court retained jurisdiction over this case despite its attempt to transfer the matter.

{¶ 8} Several months later, on December 2, 2013, the trial court stayed the proceedings while Erickson appealed the validity of the nunc pro tunc entries relating to her two prior OVI convictions from the Miamisburg Municipal Court to the Second District Court of Appeals in *State v. Erickson*, 2d Dist. Montgomery Nos. 25843 and 25844, 2014-Ohio-1536. In support of her appeal, Erickson argued "she was denied due process at her two disposition hearings when the trial court failed to engage her in the plea colloquy required by Crim.R. 11." *Id.* at ¶ 1. Erickson also argued the "trial court violated her right to due process when it issued nunc pro tunc entries several years after her convictions and sentences." *Id.* In addition, just as she argued as part of her motion to suppress, motion to quash, and motion in limine here, Erickson argued she:

never appeared in front of any Court, never personally pled guilty, or entered any other plea on the record or in open court. *
* * The Defendant was never informed of the consequences of her plea and there is no evidence that the Defendant understood the effects of her guilty plea.

Id. at ¶ 7, quoting Erickson's Appellate Brief, p. 8.

{¶ 9} The Second District, however, overruled both of Erickson's assignments of error. In so holding, the Second District stated:

While the [nunc pro tunc] entries were filed well after Erickson served her sentences and paid her fines, Erickson has not directed our attention to any prejudice that has resulted from the trial court's delay in journalizing the judgments of conviction and sentence. Erickson focuses instead on what the trial court allegedly failed to do on the dates of the disposition hearings. Without transcripts or statements of evidence relating to those disposition hearings, we cannot find prejudicial error.

Id. at ¶ 11.

{¶ 10} Once the trial court's stay was lifted, the matter then proceeded to a two-day jury trial that concluded on August 22, 2014. Following deliberations, the jury found Erickson guilty of both charges. The jury also found Erickson had been convicted of three prior OVI offenses within the past six years. Merging the charges for purposes of sentencing, the trial court then sentenced Erickson to serve three years of community control that specifically included a mandatory 120 days in jail and a \$1,350 fine. The trial court also suspended Erickson's driver's license for a period of ten years.

{¶ 11} Erickson now appeals from her conviction, raising three assignments of error for review. For ease of discussion, Erickson's second assignment of error will be addressed out of order.

{¶ 12} Assignment of Error No. 2:

{¶ 13} THE TRIAL COURT ERRED BY GRANTING STATE'S MOTION TO RECONSIDER.

{¶ 14} In her second assignment of error, Erickson argues the trial court erred by granting the state's motion to reconsider its decision granting her motion in limine, thereby transferring the case back to the Lebanon Municipal Court. However, although Erickson is

correct in her assertion that there is no authority for filing a motion for reconsideration of a final judgment at the trial court level in a criminal case, see *State v. Leach*, 12th Dist. Clermont No. CA2004-02-011, 2005-Ohio-2370, ¶ 6, the state's motion for reconsideration was not taken from a final judgment, but rather, from Erickson's motion in limine. It is well-established that a motion in limine, if granted, "is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue." *State v. Vore*, 12th Dist. Warren No. CA2011-08-093, 2012-Ohio-2431, ¶ 37, citing *State v. Grubb*, 28 Ohio St.3d 199, 201-202 (1986). Therefore, as an interlocutory order, Erickson's motion in limine was not a final appealable order since "[f]inality does not attach when the motion is initially granted." *State v. Simpson*, 5th Dist. Knox No. 06CA27, 2007-Ohio-1959, ¶ 16; *Teffer v. Hornbeck*, 8th Dist. Cuyahoga No. 80477, 2002-Ohio-3788, ¶ 34. Accordingly, we find the trial court's decision granting the state's motion for reconsideration from Erickson's motion in limine was proper and did not constitute a legal nullity as Erickson now suggests.

{¶ 15} In reaching this decision, we further find the trial court's decision transferring the case back to the Lebanon Municipal Court was defective and invalid. As noted above, upon concluding the documents produced by the state as evidence of Erickson's two prior OVI convictions from the Miamisburg Municipal Court were not final appealable orders, the trial court attempted to transfer the case back to the Lebanon Municipal Court. However, just as the trial court found, prior to this attempted transfer, the trial court failed to reduce the fourth-degree felony charges to misdemeanors. Besides some preliminary matters in felony cases, Ohio municipal courts may exercise jurisdiction only over misdemeanors occurring within its territorial limits. *State v. Harack*, 197 Ohio App.3d 157, 2011-Ohio-6021, ¶ 10 (12th Dist.), citing R.C. 2901.20(A)(1). The trial court, therefore, correctly concluded that it retained jurisdiction over this matter resulting from its failed attempt to properly transfer this matter – both fourth-degree felonies – back to the Lebanon Municipal Court. Erickson's second

assignment of error is overruled.

{¶ 16} Assignment of Error No. 1:

{¶ 17} THE STATE'S EVIDENCE WAS INSUFFICIENT TO SATISFY ITS BURDEN TO PROVE EACH AND EVERY ELEMENT OF THE CRIME BEYOND A REASONABLE DOUBT.

{¶ 18} In her first assignment of error, Erickson argues her conviction must be reversed because the state provided insufficient evidence to prove she had been convicted of three prior OVI offenses within the past six years. In support of this claim, Erickson argues the two nunc pro tunc entries issued by the Miamisburg Municipal Court evidencing two of her three prior OVI convictions "changed what the Court actually did." Erickson also argues these two prior OVI convictions are "invalid because the Court did not follow what was prescribed in Crim.R.11(E) when entering a plea."

{¶ 19} However, as noted above, the Second District Court of Appeals has already reviewed the validity of her two prior OVI convictions from the Miamisburg Municipal Court in *State v. Erickson*, 2d Dist. Montgomery Nos. 25843 and 25844, 2014-Ohio-1536. Again, as the Second District stated in overruling Erickson's two assignments of error:

While the [nunc pro tunc] entries were filed well after Erickson served her sentences and paid her fines, Erickson has not directed our attention to any prejudice that has resulted from the trial court's delay in journalizing the judgments of conviction and sentence. Erickson focuses instead on what the trial court allegedly failed to do on the dates of the disposition hearings. Without transcripts or statements of evidence relating to those disposition hearings, we cannot find prejudicial error.

Id. at ¶ 11.

{¶ 20} As the Second District has already affirmed Erickson's two prior OVI convictions from the Miamisburg Municipal Court on appeal, we find her claims regarding the validity of those two prior convictions are barred by the doctrine of res judicata. Pursuant to that

doctrine, "a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Wagers*, 12th Dist. Preble No. CA2011-08-007, 2012-Ohio-2258, ¶ 10, citing *State v. Szefcyk*, 77 Ohio St.3d 93 (1996), syllabus. This doctrine "encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." *State v. Redwine*, 12th Dist. Brown No. CA2009-12-045, 2010-Ohio-3468, ¶ 14, quoting *State ex rel. Schacter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, ¶ 27.

{¶ 21} In so holding, we note that as part of Trooper Steele's dash-cam video played for the jury, Erickson specifically admitted to having three prior OVI convictions within the past six years. We also note that Erickson never objected to Trooper Steele's testimony regarding the two nunc pro tunc entries establishing her two prior OVI convictions from the Miamisburg Municipal Court in Case Nos. 08TRC07728 and 09TRC05426 at trial, nor did she object to Trooper Steele's testimony regarding a third judgment entry resulting in her most recent OVI conviction from the Middletown Municipal Court in Case No. 11TRC02290. Moreover, just as in her appeal to the Second District, Erickson did not provide this court with transcripts or statements of evidence relating to the supposed faulty disposition hearings. Therefore, because we find the state provided sufficient evidence to establish the fact that Erickson had three prior OVI convictions within the past six years, Erickson's first assignment of error is overruled.

{¶ 22} Assignment of Error No. 3:

{¶ 23} APPELLANT'S CONVICTION OF FELONY OVI WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 24} In her third assignment of error, Erickson argues her conviction must be reversed as it was against the manifest weight of the evidence.

{¶ 25} A manifest weight of the evidence challenge examines the "inclination of the greater amount of credible evidence, offered at a trial, to support one side of the issue rather than the other." *State v. Barnett*, 12th Dist. Butler No. CA2011-09-177, 2012-Ohio-2372, ¶ 14. To determine whether a conviction is against the manifest weight of the evidence, the reviewing court must look at the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving the conflicts in the evidence, the trier of fact 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. Graham*, 12th Dist. Warren No. CA2008-07-095, 2009-Ohio-2814, ¶ 66. However, "[w]hile appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, 'these issues are primarily matters for the trier of fact to decide.'" *State v. Barnes*, 12th Dist. Brown No. CA2010-06-009, 2011-Ohio-5226, ¶ 81, quoting *State v. Walker*, 12th Dist. Butler No. CA2006-04-085, 2007-Ohio-911, ¶ 26. An appellate court, therefore, will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances when the evidence presented at trial weighs heavily in favor of acquittal. *State v. Morgan*, 12th Dist. Butler Nos. CA2013-08-146 and CA2013-08-147, 2014-Ohio-2472, ¶ 34.

{¶ 26} As noted above, Erickson was convicted of OVI in violation of R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(f). Pursuant to R.C. 4511.19(A)(1)(a), no person shall operate any vehicle if, at the time of the operation, "[t]he person is under the influence of alcohol, a drug of abuse, or a combination of them." Similarly, pursuant to R.C. 4511.19(A)(1)(f), no person shall operate any vehicle if, at the time of the operation, "[t]he person has a concentration of seventeen-hundredths of one per cent or more by weight per

unit volume of alcohol in the person's whole blood." Erickson does not dispute that she was under the influence of alcohol on the morning of December 27, 2012, nor does she dispute that a blood draw administered later that morning measured her blood alcohol content at .181. Rather, although she was the only individual found at the scene, Erickson argues the jury clearly lost its way by finding she was the driver of the vehicle found crashed and inoperable on the side of Interstate 75. We disagree.

{¶ 27} At trial, Trooper Steele testified that he was dispatched to a single car accident on Interstate 75 at approximately 2:00 a.m. on the morning of December 27, 2012. Once he arrived at the scene, Trooper Steele testified he saw a heavily damaged vehicle crashed next to the guardrail facing towards oncoming traffic. Upon approaching the vehicle, Trooper Steele testified he made contact with Erickson as she sat in the driver's seat speaking to AAA on her cellphone. According to Trooper Steele, Erickson exhibited slurred speech, red and glassy eyes, and had a strong odor of alcoholic beverage on her person.

{¶ 28} Continuing, Trooper Steele testified Erickson was uneasy on her feet and stumbled into him as she exited the vehicle. Believing Erickson may be intoxicated, Trooper Steele testified he attempted to conduct field sobriety tests, but "[i]t was real hard to do the HGN because she couldn't even follow the pen." Trooper Steele then testified he abandoned any other field sobriety tests after noticing a large blood stain on the side of Erickson's leg that was seeping through her pants. As a result, instead of conducting any additional tests, Trooper Steele testified that he escorted Erickson to the back of his cruiser where she waited for an ambulance to arrive.

{¶ 29} Once Erickson was placed in the back of his cruiser, Trooper Steele testified he ran her information through his computer, which indicated she had three prior OVI convictions. Trooper Steele then testified that he informed Erickson that "this is going to be a fourth offense OVI which is a felony." To this, Trooper Steele testified Erickson immediately

responded claiming she was not the driver of the vehicle. Trooper Steele then testified, in pertinent part, as follows:

At that point, you know, you look into further things when she says nobody's driving. I asked her who was driving and she would not tell me. She stated it would get him in trouble if she told me. She had mentioned something about a restraining order I believe when she was sitting in the back seat. And so we were – I told her we were just going to sit and wait for the EMS to get here.

{¶ 30} After she was transported to the hospital, Trooper Steele testified Erickson consented to a blood draw stating "go ahead because I wasn't driving." As noted above, it is undisputed that the blood draw measured Erickson's blood alcohol content at .181. According to Trooper Steele, Erickson again denied she was driving, claiming that it was actually her boyfriend, Robert Free, who had been driving. In order to investigate Erickson's claims, Trooper Steele testified he went back to the scene at approximately 4:30 a.m. to check the surrounding area for any evidence that Robert Free, or another person, may have been driving. However, when asked if he was able to find any evidence to support Erickson's claim, Trooper Steele testified "[n]one, whatsoever."

{¶ 31} Expounding on this testimony, Trooper Steele testified that "[w]e checked the area, because it did snow real bad that day, looking for footprints and we never found anything. I had a fire person on scene there with me. We both checked, we didn't find anything." Trooper Steele further testified the "only footprints there were me and Ms. Erickson when she got out of the driver's side." In addition, as it relates to the three businesses open in the area – a Speedway gas station, a Waffle House restaurant, and a Shell gas station – Trooper Steele testified he did not see anybody "standing around looking, standing inside the businesses, anything." Thereafter, when asked why he believed Erickson was the driver, Trooper Steele testified:

[n]o footprints, on what the passenger side looked like, the seat,

the floor. The floor was not wet. The seat she was sitting in, she was actually in the driver's seat. That would lead you to believe she was driving.

{¶ 32} Trooper Steele also testified that he told Erickson "if there was another driver she wanted to send to the post to talk to me, send him." Trooper Steele, however, did not hear from anybody until he saw Robert Free testify at the pretrial hearing before the Lebanon Municipal Court. Yet, even then, Trooper Steele testified, "[o]nce I saw [Robert] at the pre-trial in Lebanon, which they had, I saw how tall he was. There's no way on earth he could have fit in that driver's seat at that time to drive that vehicle." Trooper Steele also testified he gave Robert "every chance in the world to come to me, and he did not come to me." Several photographs of the scene and Trooper Steele's dash-cam video were subsequently admitted into evidence. As noted above, the dash-cam video includes statements made by Erickson wherein she specifically admitted to having three prior OVI convictions within the past six years.

{¶ 33} Erickson testified in her own defense. As Erickson testified, on the evening of December 26, 2012, she and her boyfriend Robert went bowling at Woodman Lanes in Kettering, Ohio. Erickson then testified that she and Robert went to several local bars where she drank a number of beers and consumed several shots. After leaving the bar, Erickson testified "Rob took my keys and I just gave them up willingly because I knew I was intoxicated." The couple then went to a nearby Waffle House to eat.

{¶ 34} Once they finished eating, Erickson testified Robert suggested going to another bar for one final drink, to which she agreed. Erickson then testified that as they were driving on Interstate 75, "the car was sliding and we hit the guardrail. According to the pictures and everything we hit twice but I only remember once because the airbag deployed and I think I got a little dazed." Continuing, Erickson testified:

[ERICKSON:] I remember Rob leaving. I remember him asking

if I was okay. I was still kind of fuzzy. But I know I sat there for a minute because I didn't go directly when he went over the guardrail. He had time to try to flag down cars and go over the guardrail before I got out of the car. And I tried to follow him just because I wasn't thinking. I figured, well, he's going to get help. I'm going to go wherever he's going to get help.

[DEFENSE COUNSEL:] So what happened?

[ERICKSON:] So I fell down the hill. I got maybe two steps down the hill and I fell all the way to the bottom. And I had to crawl back up because it was icy.

[DEFENSE COUNSEL:] You made it back up?

[ERICKSON:] Barely.

[DEFENSE COUNSEL:] What did you do when you got back up?

[ERICKSON:] I walked around. I got back up to the passenger's side from behind it and walked around to the driver's side. I remember falling and hitting my knee, but I don't remember cutting my leg because I fell down onto my left knee.

{¶ 35} Erickson then testified she called AAA after finding her cellphone under the driver's seat when Trooper Steele arrived. When asked why she was sitting in the driver's seat at that time, Erickson testified, "[b]ecause I was still there, I wasn't going to get back out and go to the passenger seat, I wasn't driving." Erickson then testified:

[DEFENSE COUNSEL:] Okay. Now, did the trooper ever ask you if you were driving?

[ERICKSON:] No, not while I was in the car.

[DEFENSE COUNSEL:] After you got out of the car did he ask you? He just assumed you were driving because you were in the driver's seat. Did you ever tell him you weren't driving?

[ERICKSON:] Not until we were in the back of his car, when he asked and he – because he said he was going to charge me with a felony, a felony DUI. First of all, it wouldn't matter if it was a felony or not, just the fact that he's charging me with a DUI, I wasn't driving. I didn't know it was going to be a felony.

[DEFENSE COUNSEL:] What did you tell him?

[ERICKSON:] I told him I wasn't the driver.

[DEFENSE COUNSEL:] Did he ask you who was driving?

[ERICKSON:] Yes.

[DEFENSE COUNSEL:] Did you tell him?

[ERICKSON:] I told him I couldn't tell him because I was afraid to get that person in trouble.

[DEFENSE COUNSEL:] Did you eventually ever tell him who was driving?

[ERICKSON:] I did at the hospital quite a few times.

According to Erickson, she told Trooper Steele that she was not the driver "[c]ountless numbers, 20, 30 times. I don't know, a lot."

{¶ 36} Robert Free, Erickson's boyfriend, also testified in Erickson's defense. Similar to Erickson's testimony, Robert testified that Erickson picked him up from his father's house on the evening of December 26, 2012 to go bowling at Woodman Lanes in Kettering, Ohio. Once they were done bowling, Robert testified he and Erickson went to several local bars where he consumed a total of three beers. However, upon noticing Erickson was intoxicated, Robert testified he "snatched" her car keys and proceeded to drive to a nearby Waffle House to eat.

{¶ 37} Upon leaving the Waffle House, however, Robert testified that he was driving on Interstate 75 when he "hit a patch of ice and lost control, smacked the guardrail." After hitting the guardrail, Robert testified he asked Erickson if she was okay, to which she responded that she was fine. After seeing Erickson was not injured, Robert testified he got out of the car and tried to wave down a passing car for help. Yet, when no one stopped, Robert, who admittedly was wearing only a tank top and jeans, testified he "took off toward the closest open place which was a hotel and tried to use the phone there." When

questioned as to why he left Erickson in the car, Robert testified:

[DEFENSE COUNSEL:] Weren't you worried she was in the car hurt?

[ROBERT:] She said she was okay. I looked back up that hill and I seen the trooper's lights and at the time I had no idea she had jumped in the driver's seat. So I figured everything was taken care of. I wasn't going to go back and say arrest me, you know.

[DEFENSE COUNSEL:] Why could they arrest you?

[ROBERT:] Because I didn't have a license. I was drinking.

[DEFENSE COUNSEL:] And you didn't want to face that that night?

[ROBERT:] Nope.

{¶ 38} Robert then testified that Trooper Steele would have seen his footprints in the snow if they had looked further down the road because "I didn't just run down the hill, I fell down this hill, so there was footprints and a body print down there[.]" Robert also testified that he was "frantically trying to get a ride out of there" because he assumed Erickson would simply "point in my direction and there'd be cops all over the place" trying to track him down for driving without a license.

{¶ 39} Continuing, Robert testified he was eventually able to use the phone at a nearby Speedway gas station to call his father, Richard Free, leaving him several voicemail messages to come pick him up. A document purporting to show the voicemail messages left on Richard's phone that morning was later admitted into evidence. According to Robert's testimony, each of the voicemail messages left on his father's phone were from him calling from the gas station. Robert's father, Richard Free, also testified that the voicemail messages he received that morning were from his son. After calling the gas station Richard – who referred to his son Robert as a "troublesome drunk to be honest with you" – testified he picked his son up from the gas station later that morning around 8:00 a.m.

{¶ 40} Upon rebuttal, Trooper Steele again testified that he went back to the scene to investigate Erickson's claims she was not the driver. However, upon returning to the scene, Trooper Steele testified he did not find any evidence to support Erickson's claim that she was not the driver. Although conceding that he did merely look around as he drove through the parking lot, Trooper Steele also testified that he did not see anybody besides the gas station attendant at the nearby Speedway gas station. Finally, Trooper Steele testified it was a cold morning that necessitated some type of winter clothing to stay warm given the fact that the snow plows were still working on the entrance and exit ramps to Interstate 75.

{¶ 41} After a thorough review of the record, we find Erickson's conviction for OVI was not against the manifest weight of the evidence. As noted above, Erickson, who was sitting in the driver's seat when Trooper Steele arrived, was the only individual located at the scene. Trooper Steele also testified that he did not locate any footprints leading from the scene, nor anybody at the nearby Speedway gas station. Nevertheless, Erickson argues her conviction must be reversed based on her own testimony, as well as the testimony of her own witnesses, Robert and Richard Free.

{¶ 42} However, as this court has consistently stated, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony. See *Morgan*, 2014-Ohio-2472 at 36; *State v. Lunsford*, 12th Dist. Brown No. CA2010-10-021, 2011-Ohio-6529, ¶ 17; *State v. Guzzo*, 12th Dist. Butler No. CA2003-09-232, 2004-Ohio-4979, ¶ 13. It is well-established that it is the trier of fact who makes determinations of credibility and the weight to be given to the evidence. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. Therefore, as the trier of fact, the jury was free to believe or disbelieve all, part, or none of the testimony of the witnesses presented at trial. *State v. Birt*, 12th Dist. Butler No. CA2012-02-031, 2013-Ohio-1379, ¶ 47. This includes Erickson's own testimony, as well as the testimony from Trooper Steele and Robert and

Richard Free.

{¶ 43} In addition, as it relates to Erickson's claim that her conviction must be reversed due to the inconsistencies between Trooper Steele's trial testimony and his testimony at the suppression hearing, Erickson was given ample opportunity to cross-examine Trooper Steele regarding his alleged inconsistent statements, something which she failed to do. The jury, therefore, could not have clearly lost its way and created a manifest injustice requiring her conviction be reversed based on alleged inconsistent statements that it never even heard. Again, the jury was free to believe or disbelieve all, part, or none of the testimony of the witnesses presented at trial. In turn, upon returning its guilty verdict, the jury clearly found Erickson's testimony that she was not the driver of the vehicle lacked credibility. This does not render the jury's guilty verdict to be against the manifest weight of the evidence. Accordingly, having found her conviction was not against the manifest weight of the evidence, Erickson's third assignment of error is overruled.

{¶ 44} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.