[Cite as *State v. Cass*, 2018-Ohio-4405.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 2018CA0003
NICHOLAS J. CASS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Morrow County Municipal Court, Case No. 2018TRD414
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 22, 2018

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
AMY INZINA 60 East High Street Mt. Gilead, OH 43338	NICHOLAS J. CASS, PRO SE 6751 Forest Glen Avenue Solon, OH 44139

Gwin, P.J.

{¶1} Defendant-appellant Nicholas J. Cass [“Cass”] appeals the February 8, 2018 Judgment Entry of the Morrow County Municipal Court finding him guilty after a bench trial of speeding, a minor misdemeanor.

Facts and Procedural History

{¶2} On January 16, 2018, Trooper David Flanagan of the Ohio State Highway Patrol was on duty enforcing the traffic laws. He was parked on the median around Mile Marker 152 on I-71 South when he noticed a "gold or tan" SUV that he visually estimated over the posted speed limit of 70 mph. Trooper Flanagan proceeded to use his Ultra Lyte LTI 20/20 laser device to clock the speed of this "gold or tan" SUV at 83 and then 84 mph. Trooper Flanagan checked the rate of speed of the vehicle Cass was driving several times with the laser device. Trooper Flanagan testified that he was trained and certified to use the laser speed detector known as an LTI 20/20 and that he had been recertified to use that speed-measuring device yearly since 1997. Trooper Flanagan further testified that he had calibrated the laser device to ensure that it was accurate and working properly on the day in question before going on the road. He further testified that he calibrated the device again on the next day and it was still properly calibrated. Trooper Flanagan testified that the tracking history of the laser showed that the vehicle Cass was driving going between 83 and 84 mph at the time. Trooper Flanagan testified that he never lost sight of the vehicle that he was tracking.

{¶3} Trooper Flanagan testified that he followed the vehicle finding it was parked at a pump of a gas station just off the Exit 151 ramp of I-71 South. Trooper Flanagan pulled in to detain and cite Cass for speeding in violation of R.C. 4511.21(D)(4).

{¶4} On cross-examination, Trooper Flanagan backtracked from his earlier testimony that the vehicle was “gold,” averring that he may not have correctly remembered the color of the SUV whose speed he had clocked that day. He also stated that, regardless of the color of the SUV, he had never lost sight of Mr. Cass' vehicle. Trooper Flanagan explained that the citation in the case at bar was an E-ticket. The color of the vehicle on the ticket was completed by selecting a color from a drop-down menu. Trooper Flanagan testified that he might have incorrectly selected the color because of hitting the wrong button in the menu.

{¶5} Matthew Basch testified that he was sitting in the passenger's seat of his "brownish grey" SUV, which Mr. Cass was driving southbound on I-71. Basch testified that he is the owner of the vehicle that Cass was driving at the time of the traffic stop. Basch testified that he had been continually monitoring the speedometer that day, including just minutes before Trooper Flanagan approached him and Cass. Each time, the speedometer showed that they were travelling around 70 mph. There were also approximately ten other vehicles around them—a few of which were SUVs. He testified that a few of the vehicles around them had passed up their "brownish grey" SUV, but that they had not passed up any other vehicles that were around them at that time.

{¶6} On cross-examination, Basch testified that he was not aware of Trooper Flanagan's presence on the highway before Cass exited off the highway and parked at a gas station near the exit ramp. Basch further testified that the speedometer in his vehicle was not certified for accuracy. T. at 42-43. Basch agreed that for all he knew, his vehicle could have been going 84 mph while the speedometer read 70 mph. T. at 43. From his position in the front passenger seat, the analog reading of the speedometer needle could

read far differently from the driver's perspective in the driver's seat directly behind the speedometer gauge. T. at 44. Accordingly, Basch agreed that his memory of Cass driving "around 70" could have "been a different number entirely from the driver's perspective." T. at 44.

{¶7} The trial judge overruled Cass' Criminal Rule 29 motion and found him guilty.

Assignments of Error

{¶8} Cass raises five assignments of error,

{¶9} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. CASS WHEN IT IMPROPERLY OVERRULED HIS OBJECTION TO THE ULTRA LYLE LASER EVIDENCE.

{¶10} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. CASS WHEN IT IMPROPERLY TOOK JUDICIAL NOTICE OVER HIS OBJECTION THAT ALL OF I-71 SOUTH IS "RURAL," WHICH IS A TERM SPECIALLY DEFINED UNDER R.C. 4511.21(0)(5) AND AN ESSENTIAL ELEMENT OF THE OFFENSE UNDER R.C. 4511.21(D)(4).

{¶11} "III. THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO CONVICT MR. CASS OF SPEEDING IN VIOLATION OF R.C. 4511.21(D)(4).

{¶12} "IV. MR. CASS' CONVICTION AT TRIAL FOR SPEEDING IN VIOLATION OF R.C. 4511.21(D)(4) WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO CONVICT HIM.

{¶13} "V. THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. CASS WHEN IT FAILED TO STATE MR. CASS' SPEED IN THE SENTENCING JOURNAL

ENTRY AND ALSO FAILED TO SENTENCE MR. CASS TO TWO POINTS ON HIS LICENSE IN THE SENTENCING JOURNAL ENTRY WHEREIN SUCH FAILURE ENHANCED MR. CASS' PUNISHMENT, IN DEROGATION OF THE DUE PROCESS CLAUSES OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

Pro se Appellants

{¶14} We understand that Appellant has filed this appeal pro se. Nevertheless, "like members of the bar, pro se litigants are required to comply with rules of practice and procedure." *Hardy v. Belmont Correctional Inst.,* 10th Dist. No. 06AP-116, 2006-Ohio-3316, ¶ 9. See, also, *State v. Hall,* 11th Dist. No. 2007-T-0022, 2008-Ohio-2128, ¶11. We also understand that "an appellate court will ordinarily indulge a pro se litigant where there is some semblance of compliance with the appellate rules." *State v. Richard,* 8th Dist. No. 86154, 2005-Ohio-6494, ¶4 (internal quotation omitted).

{¶15} In *State v. Hooks*, 92 Ohio St.3d 83, 2001-Ohio-150, 748 N.E.2d 528(2001), the Supreme Court noted, "a reviewing court cannot add matter to the record before it that was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter. See, *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500(1978)." It is also a longstanding rule "that the record cannot be enlarged by factual assertions in the brief." *Dissolution of Doty v. Doty,* 4th Dist. No. 411, 1980 WL 350992 (Feb. 28, 1980), citing *Scioto Bank v. Columbus Union Stock Yards*, 120 Ohio App. 55, 59, 201 N.E.2d 227(1963). New material and factual assertions contained in any brief in this court may not be considered. See, *North v. Beightler,* 112 Ohio St.3d 122, 2006-Ohio-6515, 858 N.E.2d 386, ¶7, quoting *Dzina v. Celebrezze,* 108 Ohio St.3d 385, 2006-Ohio-1195, 843

N.E.2d 1202, ¶16. Therefore, we have disregarded facts and documents in the parties' briefs that are outside of the record.

I.

{¶16} In his First Assignment of Error, Cass maintains the state was required to lay a foundation that Trooper Flanagan had been using a vehicle that comports with R.C. 4549.13 before he could have been deemed a competent witness to testify to the Ultra Lyte laser evidence pursuant to R.C. 4549.14 and Evid.R. 601(C).

STANDARD OF APPELLATE REVIEW.

{¶17} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty*., 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). An abuse of discretion exists where the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice, or where the judgment reaches an end or purpose not justified by reason and the evidence. *Tennant v. Gallick,* 9th Dist. Summit No. 26827, 2014-Ohio-477, ¶35; In *re Guardianship of S .H*., 9th Dist. Medina No. 13CA0066–M, 2013–Ohio–4380, ¶ 9; *State v. Firouzmandi,* 5th Dist. Licking No.2006–CA–41, 2006–Ohio–5823, ¶54.

ISSUE FOR APPEAL.

Whether the party offering the witness has the burden of offering proof on the subject of the qualification of the witness to testify.

{¶18} R.C. 4549.13 provides,

> Any motor vehicle used by a member of the state highway patrol or by any other peace officer, while said officer is on duty for the exclusive or

main purpose of enforcing the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, shall be marked in some distinctive manner or color and shall be equipped with, but need not necessarily have in operation at all times, at least one flashing, oscillating, or rotating colored light mounted outside on top of the vehicle. The superintendent of the state highway patrol shall specify what constitutes such a distinctive marking or color for the state highway patrol.

{¶19} R.C. 4549.14 provides,

Any officer arresting, or participating or assisting in the arrest of, a person charged with violating the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, such officer being on duty exclusively or for the main purpose of enforcing such laws, is incompetent to testify as a witness in any prosecution against such arrested person if such officer at the time of the arrest was using a motor vehicle not marked in accordance with section 4549.13 of the Revised Code.

{¶20} Evid.R. 601 provides, in relevant part,

Every person is competent to be a witness except:

* * *

(C) An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined

by statute or was not wearing a legally distinctive uniform as defined by statute.

{¶21} This section must be read in light of Evid.R. 104(A), which reads:

(A) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

{¶22} As provided by the Rules of Evidence, all adult witnesses begin with the presumption of competency. If the issue is then raised, competency becomes a preliminary question for the court. *Kornreich v. Industrial Fire Ins. Co*., 132 Ohio St. 78, 5 N.E.2d 153(1936). The object of Evid.R. 601 is to declare all persons competent to testify in all cases, civil or criminal, unless specifically designated as incompetent on one of the grounds in paragraphs (A) through (E). *State v. Johnson,* 2nd Dist. Montgomery No. 20624, 2005-Ohio-1367, ¶13.

{¶23} In *State v. Rau*, 65 Ohio App.3d 478, 481, 584 N.E.2d 788 (3rd Dist. 1989), Court of Appeals observed,

The state introduced no explicit testimony establishing that Trooper Brown was in uniform and in a marked vehicle. However, the general rule is that, under Evid.R. 601, an adult witness is presumed competent to testify and therefore the burden of demonstrating the incompetency of a traffic officer is on the accused. See 29 Ohio Jurisprudence 3d (1981) 92, Criminal

Law, Section 2203. See, also, 1 Weissenberger, Ohio Evidence (1985), 6, Section 601.5.

Milnark v. Eastlake (1968), 14 Ohio Misc. 185, 186, 43 O.O.2d 417, 418, 237 N.E.2d 921, 923, well states the issue and the applicable rule:

"The real question this appeal raises is which party has the burden of offering proof on the subject of the qualification of a witness to testify. Must he who calls him prove him competent? Or must he who challenges him show incompetency?

"Without doubt the burden rests on the latter. This defendant was obliged to present evidence, either by cross-examination of the officers or by testimony of other witnesses that the conditions which disqualify an arresting officer, i.e., an unmarked motor vehicle or a nondistinctive uniform, existed at the time of his arrest."

Although *Milnark, supra*, was a court of common pleas decision, it has been cited with approval by the Ninth District Court of Appeals in *State v. Heimberger* (Jan. 15, 1986), Summit App. No. 12190, unreported, 1986 WL 844.1 In a case similar to the one before us, the appellant in *Heimberger, supra*, argued that his motion for acquittal should have been granted based on the incompetency of the testifying officer due to the failure of the state to introduce evidence at trial that the officer was in uniform and in a marked car at the time of the arrest.

The court of appeals expressly rejected this argument with the following language:

> "The state concedes that it introduced no explicit testimony establishing that Sgt. Kidd was in uniform and in a marked vehicle. The general rule however, is that an adult witness is competent to testify and the burden is upon the objecting party *to establish to the contrary*. *State v. Warnick*, Nov. 11, 1975, Summit App. No. 7830, unreported. The appellant 'was obliged to present evidence, either by cross-examination of the [officer] or by testimony of other witnesses, that the conditions which disqualify an arresting officer, i.e., an unmarked motor vehicle or a non-distinctive uniform, existed at the time of arrest.' *Milnark v. Eastlake* (1968), 14 Ohio Misc. 185, 186-87 [43 O.O.2d 417, 418, 237 N.E.2d 921, 923]. The appellant in the present case offered no proof of incompetency. The testimony was properly received. The trial court did not err, therefore, in overruling appellant's motion for acquittal." (Emphasis added.)

65 Ohio App.3d at480-481, 584 N.E.2d 788. This Court has adopted the rationale of *Rau,*

> The general rule is that an adult witness is presumed competent to testify, and the burden is on the objecting party to establish to the contrary. *State v. Rau* (1989), 65 Ohio App.3d 478, 480. Appellant presented no evidence by cross-examination or testimony that the officers were not driving a marked car.
>
> Further, the State produced testimony that the officers were in winter uniform, were on routine patrol, and were driving a "cruiser." Based on this evidence, the court did not abuse its discretion in concluding that they were competent to testify pursuant to Evid. R. 601. *Columbus v. Robbins* (1989),

> 61 Ohio App.3d 324, 327 (testimony that officers were in a cruiser, on uniform patrol, and activated a beacon was sufficient for court to conclude that they were competent to testify).

Village of Newcomerstown v. Martino, 5th Dist. Tuscarawas No. 92AP080060, 1993 WL 135690(Apr. 27, 1993). *Accord, State v. Johnson,* 2nd Dist. Montgomery No. 20624, 2005-Ohio-1367, ¶13; *State v. Moore,* 8th Dist. Cuyahoga No. 93042, 2010-Ohio-518, ¶18; *State v. Kazmierczak,* 6th Dist. Wood No. WD-02-024, 2003-Ohio-2909, ¶7; *Columbus v. Robbins,* 61 Ohio App.3d 324, 326-327, 572 N.E. 2d 777(10th Dist. 1989).

{¶24} In the case at bar, Trooper Flanagan testified that at the time of the traffic stop he was wearing, "[t]he uniform of the day, this uniform, very similar to this." T. at 6. Further Trooper Flanagan testified he was driving a marked patrol car. T. at 6. This testimony was sufficient to enable the trial court to infer that the testimony was in compliance with Evid.R. 601(C). Cass elicited no testimony on direct or cross-examination to rebut the inference that Trooper Flanagan was competent to testify. Cass offered no proof of incompetency. Therefore, the trial court's decisions to permit Trooper Flanagan to testify was not clearly untenable, legally incorrect, nor did the decision amount to a denial of justice, or reach an end or purpose not justified by reason and the evidence.

{¶25} Cass' First Assignment of Error is overruled.

II.

{¶26} In his Second Assignment of Error, Cass argues that "rural" freeway is an essential element of the offense of Speeding in violation of R.C. 4511.21(D)(4); and therefore the court erred in taking judicial notice of this fact.

STANDARD OF APPELLATE REVIEW.

{¶27} "When a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." *Medical Mutual of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13 (*citing, Swartzentruber v. Orrville Grace Brethren Church,* 163 Ohio App.3d 96, 2005-Ohio-4264, 836 N.E.2d 619 (9th Dist.), ¶ 6; *Huntsman v. Aultman Hosp*., 5th Dist. Stark No. 2006 CA 00331, 2008-Ohio-2554, 2008 WL 2572598, ¶ 50. Because the assignment of error involves the interpretation of a statute, which is a question of law, we review the trial court's decision de novo. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13; *Accord, State v. Pariag,* 137 Ohio St.3d 81, 2013-Ohio-4010, 998 N.E.2d 401, ¶ 9; *Hurt v. Liberty Township, Delaware County, OH,* 5th Dist. Delaware No. 17 CAI 05 0031, 2017-Ohio-7820, ¶ 31.

ISSUE FOR APPEAL.

Whether "rural" freeway is an element of the offense of Speeding in violation of R.C. 4511.21(D)(4) that the state has the burden of proving beyond a reasonable doubt.

{¶28} Cass was convicted of Speeding in violation of R.C. 4511.21(D)(4), which provides,

> (D) No person shall operate a motor vehicle, trackless trolley, or streetcar upon a street or highway as follows:
>
> * * *
>
> (4) At a speed exceeding seventy miles per hour upon a freeway as provided in division (B)(15) of this section;
>
> * * *

{¶29} R.C. 4511.21(B)(15) provides,

(B) It is prima-facie lawful, in the absence of a lower limit declared or established pursuant to this section by the director of transportation or local authorities, for the operator of a motor vehicle, trackless trolley, or streetcar to operate the same at a speed not exceeding the following:

* * *

(15) Seventy miles per hour for operators of any motor vehicle at all times on all rural freeways;

* * *

{¶30} R.C. 4511.21(O)(5) provides,

(O) As used in this section:

* * *

(5) "Rural" means outside urbanized areas, as designated in accordance with 23 U.S.C. 101, and outside of a business or urban district.

{¶31} We note that the Legislature has determined what information is to be contained in the charging document. R.C. 4511.21(E) provides,

(E) *In every charge of violation of this section the affidavit and warrant shall specify the time, place, and speed at which the defendant is alleged to have driven,* and in charges made in reliance upon division (C) of this section also the speed which division (B)(1)(a), (2), (3), (4), (6), (7), (8), or (9) of, or a limit declared or established pursuant to, this section declares is prima-facie lawful at the time and place of such alleged violation, except that in affidavits where a person is alleged to have driven at a greater

> speed than will permit the person to bring the vehicle to a stop within the assured clear distance ahead the affidavit and warrant need not specify the speed at which the defendant is alleged to have driven.

Emphasis added. In the case at bar, the citation issued to Cass designated Cass' speed, specified the location and time that Cass drove at that speed, and indicated that Cass' was in excess of the posted speed limit.

{¶32} "Rural" is simply not an element of the offense of Speeding; rather the offense of Speeding occurred in the case at bar when Cass exceeded the *posted speed limit* "declared or established pursuant to [R.C. 4511.21] by the director or local authorities." R.C. 4511.21(B); R.C. 4511.21(C); R.C. 4511.21(H); R.C. 4511.21(I); R.C. 4511.21(J); R.C. 4511.21 (K) (3); R.C. 4511.21(L); R.C. 4511.21(M); R.C. 4511.21(N). In other words, the director or local authorities determined that the portion of Interstate 71 Southbound in the Township of Franklin in Morrow County is a "rural" freeway. The authorities therefore posted the speed limit on Interstate 71 in this location as seventy miles per hour in accordance with R.C. 4511.21(B)(15). This is therefore the prima facie lawful speed limit on that roadway.

{¶33} In *Village of Bellville v. Kieffaber*, the defendant was cited for travelling 41 mph in a 25 mph zone. 114 Ohio St.3d 124, 2007-Ohio-3763, 870 N.E.2d 697, ¶3. On appeal, the defendant argued that the citation failed to properly charge the offense under the local ordinance which read,

> (A) No person shall operate a motor vehicle at a speed greater or less than is reasonable or proper, having due regard for the traffic, surface, and width of the street or highway and any other conditions, and no person

> shall drive any motor vehicle in and upon any street or highway at a greater speed than will permit him or her to bring it to a stop within the assured clear distance ahead.
>
> (B) It is prima facie lawful, in the absence of a lower limit declared pursuant to this section by the Director of Transportation or local authorities, for the operator of a motor vehicle to operate the same at a speed not exceeding the following:
>
> * * *
>
> (2) Twenty-five miles per hour in all other portions of the municipality, except on state routes outside business districts, through highways outside business districts, and alleys;
>
> * * *
>
> (C) It is prima facie unlawful for any person to exceed any of the speed limitations in [division (B)] of this section or any declared pursuant to this section by the Director or local authorities and it is unlawful for any person to exceed any of the speed limitations in division (D) of this section.

114 Ohio St.3d 124, 2007-Ohio-3763, 870 N.E.2d 697, 9 - ¶14. The Ohio Supreme Court noted,

> As noted on Kieffaber's citation, he was traveling at 41 m.p.h. in a 25 m.p.h. zone and the box marked "over limits" was checked. If proved, these facts would establish the village's prima facie case under the ordinance. *Keah*, 157 Ohio St. at 331, 47 O.O. 195, 105 N.E.2d 402, paragraphs one and two of the syllabus.

Kieffaber at ¶18. The ordinance violated in *Kieffaber* is identical to R.C. 4511.21(A) and R.C. 4511.21(B)(2) and R.C. 4511.21(C).

{¶34} In the absence of a posted speed limit, it would seem that the state would be required to establish the nature of the roadway under R.C. 4511.21(B)(1) – (B)(17) in order to establish the prima facie lawful speed upon the roadway where the speeding violation is alleged to have occurred; however, where the speed limit is established by the director of transportation or local authorities and is posted, such a showing is unnecessary.

{¶35} In the case at bar, Trooper Flanagan testified that the posted speed limit in the area where Cass was driving at the 152 Mile Post on I-71 South, Morrow County is seventy miles per hour. T. at 6. He further testified that Cass exceed the posted speed limit. These facts would establish the state's prima facie case under R.C. 4511.21(D)(4). *Keah*, 157 Ohio St. at 331, 105 N.E.2d 402, paragraphs one and two of the syllabus.

{¶36} Because "rural" freeway is not an element of the offense, the state was not required to prove beyond a reasonable doubt that the area where the traffic offense was alleged to have occurred was "rural." Therefore, Cass suffered no prejudice as a result of the trial court taking judicial notice of this fact. We must be mindful of the " * * * elementary proposition of law that an appellant, in order to secure reversal of a judgment against him, must not only show some error but must also show that that error was prejudicial to him." *Smith v. Flesher*, 12 Ohio St. 2d 107,110, 233 N.E. 2d 137(1967); *State v. Stanton*, 15 Ohio St.2d 215, 217, 239 N.E.2d 92, 94(1968). *See, also*, App.R. 12(D).

{¶37} Cass' Second Assignment of Error is overruled.

III. & IV.

{¶38} In his Third Assignment of Error, Cass argues that there was insufficient evidence to convict him of Speeding. In his Fourth Assignment of Error, Cass contends that the courts findings are against the manifest weight of the evidence.

STANDARD OF APPELLATE REVIEW.

A. Sufficiency of the Evidence.

{¶39} The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." This right, in conjunction with the Due Process Clause, requires that each of the material elements of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. __, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013); *Hurst v. Florida*, 136 S.Ct. 616, 621, 193 L.Ed.2d 504 (2016). The test for the sufficiency of the evidence involves a question of law for resolution by the appellate court. *State v. Walker,* 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.3d 1124, ¶30. "This naturally entails a review of the elements of the charged offense and a review of the state's evidence." *State v. Richardson,* 150 Ohio St.3d 554, 2016-Ohio-8448, 84 N.E.3d 993, ¶13.

{¶40} When reviewing the sufficiency of the evidence, an appellate court does not ask whether the evidence should be believed. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Walker,* at ¶30. "The relevant inquiry is 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 proven beyond a reasonable doubt." *Jenks* at paragraph two of the syllabus. Emphasis added. *State v. Poutney,* 152 Ohio St.3d 474, 2018-Ohio-22, 97 N.E.3d 478, ¶19. Thus, "on review for

evidentiary sufficiency we do not second-guess the jury's credibility determinations; rather, we ask whether, '*if believed*, [the evidence] would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001), *quoting Jenks* at paragraph two of the syllabus (emphasis added); *Walker* at ¶31. We will not "disturb a verdict on appeal on sufficiency grounds unless 'reasonable minds could not reach the conclusion reached by the trier-of-fact.'" *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 94, *quoting State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997); *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶74.

ISSUE FOR APPEAL

Whether, after viewing the evidence in the light most favorable to the prosecution, the evidence, "if believed, would convince the average mind of the defendant's guilt on each element of the crime beyond a reasonable doubt."

1. Cass was convicted of Speeding in violation of R.C. 4511.21(D)(4).

{¶41} In addition to visually estimating the vehicle to be travelling in excess of the posted speed limit of seventy miles per hour, Trooper Flanagan used a laser speed-measuring device before issuing the citation. He testified that he was trained and certified to use the laser speed detector known as an LTI 20/20 and that he had been recertified to use that speed measuring device yearly since 1997. T. at 7. Trooper Flanagan testified that he had calibrated the laser device to ensure that it was accurate and working properly on the day in question before going on the road. T. at 7-8. He further testified that he calibrated the device again on the next day and it was still properly calibrated. T. at 9.

Trooper Flanagan testified that the tracking history of the laser showed that Cass was driving between 83 and 84 miles per hour at the time in question. T. at 9-10.

{¶42} In the case at bar, Trooper Flanagan testified that the posted speed limit in the area where Cass was driving at the 152 Mile Post on I-71 South, Morrow County is seventy miles per hour. T. at 6. He further testified that Cass exceeded the posted speed limit. These facts would establish the state's prima facie case under R.C. 4511.21(D) (4). *Keah*, 157 Ohio St. at 331, 105 N.E.2d 402, paragraphs one and two of the syllabus.

{¶43} We have held in our disposition of Cass' First Assignment of Error that Trooper Flanagan was competent to testify. We have held in our disposition of Cass' Second Assignment of Error that "rural" freeway is not an element of the offense of Speeding in violation of R.C. 4511.21(D)(4) where the testimony at trial established that the accused has exceeded the posted speed limit.

{¶44} 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 Cass had committed the offense of Speeding. We hold, therefore, that the state met its burden of production regarding each element of the offense of Speeding and, accordingly, there was sufficient evidence to support Cass' conviction.

B. Manifest Weight of the Evidence.

{¶45} 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. *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.

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. Murphy*, 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶ 31. Because the trier of fact sees and hears the witnesses and is particularly competent to decide whether, and to what extent, to credit the testimony of particular witnesses, the appellate court must afford substantial deference to its determinations of credibility. *Barberton v. Jenney*, 126 Ohio St.3d 5, 2010–Ohio–2420, 929 N.E.2d 1047, ¶ 20, *superseded by statute on other grounds as stated in In re Z.E.N., 4th Dist. Scioto No. 18CA3826, 2018-Ohio-2208, ¶27* .

> "[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). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact finder, as long as a rational basis exists in the record for its decision. *State v. Picklesimer,* 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282, ¶ 24.

{¶46} Once the reviewing court finishes its examination, 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.

ISSUE FOR APPEAL

Whether the trier of fact court clearly lost her way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

{¶47} Cass contends that Trooper Flanagan noted the wrong colored vehicle on the citation and therefore the state failed to prove that Cass' vehicle was the vehicle Trooper Flanagan had clocked traveling in excess of the speed limit. Cass cites inconsistencies in Trooper Flanagan's testimony, and conflicting testimony between Trooper Flanagan and Cass' witness Basch.

{¶48} 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 trier of fact 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 trier of fact 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,* 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, 102 at n. 4, 684 N.E.2d 668 (1997).

{¶49} In the case at bar, the judge heard the witnesses, viewed the evidence and heard Cass' arguments and explanations about Trooper Flanagan and the evidence presented by the state. The judge was able to see for herself Trooper Flanagan subject to cross-examination and, because he was representing himself, Cass. Thus, a rational basis exists in the record for the Judge's decision.

{¶50} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. Based upon the foregoing and the entire record in this matter we find Cass' conviction is not against the sufficiency or the manifest weight of the evidence. To the contrary, the judge appears to have fairly and impartially decided the matters before her. The judge heard the witnesses, evaluated the evidence, and was convinced of Cass' guilt. The judge neither lost her way nor created a miscarriage of justice in convicting Cass of speeding.

{¶51} 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 offense for which Cass was convicted.

{¶52} Cass' Third and Fourth Assignments of Error are overruled.

V.

{¶53} In his Fifth Assignment of Error, Cass argues the sentencing journal entry neither states the speed that Cass was originally charged with nor the speed the trier-of-fact found him to have been travelling at the time of the offense. Cass maintains that this is a critical element because the speed the trier-of-fact ostensibly found is an aggravating factor of the offense since it is the basis for whether the Ohio BMV will assign any points to Cass' license as a sanction for the offense. Without a finding in the journal entry as to Cass' speed and a sentence in the journal entry assessing two points on his license, Cass' contends that his punishment should be for the least possible under the law, which is a no-point violation.

STANDARD OF APPELLATE REVIEW

{¶54} "When a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." *Medical Mutual of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13 (*citing, Swartzentruber v. Orrville Grace Brethren Church,* 163 Ohio App.3d 96, 2005-Ohio-4264, 836 N.E.2d 619 (9th Dist.), ¶ 6; *Huntsman v. Aultman Hosp*., 5th Dist. Stark No. 2006 CA 00331, 2008-Ohio-2554, 2008 WL 2572598, ¶ 50. Because the assignment of error involves the interpretation of a statute, which is a question of law, we review the trial court's decision de novo. *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-

Ohio-2496, 909 N.E.2d 1237, ¶ 13; *Accord, State v. Pariag,* 137 Ohio St.3d 81, 2013-Ohio-4010, 998 N.E.2d 401, ¶ 9; *Hurt v. Liberty Township, Delaware County, OH,* 5th Dist. Delaware No. 17 CAI 05 0031, 2017-Ohio-7820, ¶ 31.

ISSUE FOR APPEAL

Whether the trier of fact must assess points in the Judgment Entry of sentencing for a traffic offense.

{¶55} A system assessing points for various motor vehicle violations has been established by statute. R.C. 4510.036. R.C. 4510.03 provides,

> (A) Every county court judge, mayor of a mayor's court, and clerk of a court of record shall keep a full record of every case in which a person is charged with any violation of any provision of sections 4511.01 to 4511.771 or 4513.01 to 4513.36 of the Revised Code or of any other law or ordinance regulating the operation of vehicles, streetcars, and trackless trolleys on highways or streets.

{¶56} As it pertains to the case at bar, R.C. 4510.036 mandates,

> (B) Every court of record or mayor's court before which a person is charged with a violation for which points are chargeable by this section shall assess and transcribe to the abstract of conviction that is furnished by the bureau to the court the number of points chargeable by this section in the correct space assigned on the reporting form....
>
> * * *
>
> (C) A court shall assess the following points for an offense based on the following formula:

* * *

(12) A violation of any law or ordinance pertaining to speed:

* * *

(b) When the speed exceeds the lawful speed limit of fifty-five miles per hour or more by more than ten miles per hour ..... 2 points

* * *

{¶57} R.C. 4510.035 provides,

> The purposeful failure or refusal of any person to comply with any provision of section 4510.03, 4510.032, 4510.034, 4510.036, or 4510.037 of the Revised Code constitutes misconduct in office and is a ground for removal of the person from the office.

{¶58} Two points were assessed against Cass' license. However, the trial court's Judgment Entry of sentencing does not contain an order that assess points against him. The identical situation was addressed by the court in *State v. Kowal,* 7th Dist. Mahoning No. 09 MA 72, 2009-Ohio-6402. In *Kowal* the court observed,

> When the trial court mistakenly found Kowal guilty of R.C. 4511.19(B), underage consumption while operating a motor vehicle, according to Kowal, points were assessed against him. *The record before this court does not contain an order from the court assessing points against Kowal, nor does the judgment entry that mistakenly finds him guilty of R.C. 4511.19(B) contain an order that assesses points against him.* That said, R.C. 4510.036 dictates the point system for motor vehicle violations. In section (B) it provides that when a person is charged with a traffic offense

> "for which points are chargeable," the court "shall assess and transcribe to the abstract of conviction that is furnished by the bureau to the court the number of points chargeable by this section in the correct space assigned on the reporting form." R.C. 4510.036(B). Section (C) then provides the number of points "a court shall assess" for each of the traffic offenses listed in that section. R.C. 4510.036(C)(1)-(13). *Thus, from these sections it is clear that the trial court assesses the points on the abstract of conviction, not through a conviction and sentencing judgment entry. See, also, R.C. 4510.037(D) (stating court charges points against a person).*
>
> Furthermore, we note that since the assessment of points is a penalty ordered by the trial court, if that assessment is incorrect it can be appealed to this court. *State v. Baldauf* (1990), 67 Ohio App.3d 190, 196, 586 N.E.2d 237 (direct appeal finding that the trial court's assessment of points was incorrect).

Kowal, 2009-Ohio-6402, ¶8- ¶9 (emphasis added).

{¶59} We find the reasoning in *Kowal* to be sound. The Legislature has determined that the trial court will assess and report the assessment of points to the Bureau of Motor Vehicles in the manner and upon the forms prescribed. The statutes make clear that the trial court assesses the points on the abstract of conviction, not through a conviction and sentencing judgment entry. In the event of an error, that error can be appealed to this Court. *In re S.J.K.,* 114 Ohio St.3d 23, 2007-Ohio-2621, 867 N.E.2d 408, syllabus("The imposition of points on a traffic offender's driving record is a statutorily imposed penalty sufficient to create a collateral disability as a result of the

judgment and preserves the justiciability of an appeal even if the offender has voluntarily satisfied the judgment.").

{¶60} The trier of fact determined Cass exceeded the speed limit by more than ten miles per hour. R.C. 4510.036(C)(12)(B). Cass was informed in open court that the trial court found that he exceeded the speed limit by more than ten miles per hour. No other findings of fact are required. Rather, the trial court simply assesses the statutorily determined number of points against Cass' driver license in the abstract upon the form approved and furnished by the bureau. R.C. 4510.03(C). The trial court does not exercise any discretion on whether to assess points or as to the number of points to assess in any given case. Accordingly, the trier of fact having already found beyond a reasonable doubt that Cass exceeded the posted speed limit by more than ten miles per hour, the presence of one or more additional elements is not required in order to assess two points against Cass' driver license. It is a simple ministerial duty for the trial court to assess and report the points as mandated by the statute.

{¶61} Cass' Fifth Assignment of Error is overruled.

{¶62} The judgment of the Morrow County Municipal Court is affirmed.

By Gwin, P.J., and

Baldwin, J., concur

Hoffman, J., concurs in part

dissents in part

Hoffman, J., concurring in part and dissenting in part

{¶63} I concur in the majority's analysis and disposition of Appellant's first, third and fourth assignments of error. I respectfully dissent from the majority's analysis and disposition of Appellant's second assignment of error.[1]

{¶64} Unlike the majority, I find proof the area where Appellant was speeding was "rural" is an essential element to prove a violation of R.C. 4511.21(D)(4). I concede Appellant exceeded the posted speed limit declared or established pursuant to [R.C. 4511.21] by the director or local authorities. And, while it may very well be the director or local authorities determined the portion of Interstate 71 Southbound in the Township of Franklin in Morrow County to be a "rural" freeway, such determination is not a substitute for proof of a statutorily created element at trial.

{¶65} Appellant was not charged with violating R.C. 4511.21(D)(5). That section prohibits operating a motor vehicle at a speed exceeding the posted speed limit upon a highway, expressway, or freeway for which the director has determined and declared to be the speed limit. Because Appellant was charged with violating R.C. 4511.21(D)(4), not (D)(5), I conclude proof of the area as being "rural" is an essential element of the offense.

{¶66} When this issue was specifically raised by Appellant via a Crim. R. 29(A) Motion for Judgment of Acquittal at the close of the evidence, the state, while not explicitly conceding "rural" was an element of the offense, argued the traffic citation stated Mile Maker 152 is in a "rural" area. Appellant properly responded the traffic citation is not

[1] In light of my disposition of Appellant's second assignment of error, I would find Appellant's fifth assignment of error moot.

evidence of the offense. At this juncture, the trial court, sua sponte, took judicial notice the place the violation occurred was "rural" and all of I-71 in Morrow County is a "rural" freeway.

{¶67} While I have no doubt the trial court's statement is accurate, the issue Appellant presents is whether the trier-of-fact can take judicial notice of an essential element of an offense. The Seventh, Eighth and Ninth District Courts of Appeals have all concluded a trial court may not take judicial notice of an element of the offense. See *St. v. Shaw*, 7th Dist. Jefferson, 2004-Ohio-5121, *St. v. Langford*, 8th Dist. Cuyahoga, 2003-Ohio-159, and *St. v. Kareski*, 9th Dist. Summit, 2012-Ohio-2173, respectfully. See also, *Cleveland v. Bardwell*, 8th Dist. Cuyahoga, 2017-Ohio-7072 and for analogous results see *St. v. Lovejoy*, 79 Ohio St.3d 440 (1997) and *St. v. Kareski*, 137 Ohio St.3d. 92, 2013-Ohio-4008.

{¶68} In response, the state proffers an "Imagine" testimony of the Trooper as being required to meet Appellant's contention, concluding, "This reduces the Appellant's argument to its absurd meaning." I find the state's response unpersuasive.

{¶69} While the state argues the trial court's sua sponte taking of judicial notice of an adjudicative fact was proper under Evid. R 201, notably absent from the state's response is any critique or attempt to distinguish the cases cited by Appellant for the proposition a trial court may not take judicial notice of an element of the charged offense. The only case cited by the State involves the taking of judicial notice of the reliability of laser speed measuring device. While taking judicial notice of its reliability was permissible, it was not an element of the offense. *St. v. Kim*, 9th Dist. Summit, 2008-Ohio-6928.

{¶70} The state notes the 70 mph [speed] limit is the highest in the state and all Ohio judges know this and presumably all Ohio motorists do, too. When I first read Appellant's brief on this issue, my initial thought was Appellant cannot demonstrate prejudicial error for that very reason. However, after further consideration, although the legislature's inclusion of the term "rural" in R.C. 2511.21(D)(4) may have been superfluous, it, nevertheless, chose to include the term in the statute. When strictly construing the statute against the state, I conclude "rural" is an essential element of the charged offense and, as such, cannot be judicially noticed.

{¶71} I would sustain Appellant's second assignment of error and order the case dismissed.