[Cite as *State v. Hatcher*, 2017-Ohio-7631.]

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

STATE OF OHIO,	:	Case No. 17CA5
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
SHARON L. HATCHER,	:	
Defendant-Appellant.	:	RELEASED 09/11/2017

APPEARANCES:

Sharon L. Hatcher, Bedford Heights, Ohio, pro se appellant.

Paul G. Bertram, III, Marietta City Law Director, and Daniel Everson, Marietta City Assistant Law Director, Marietta, Ohio, for appellee.

Hoover, J.

{¶1} Defendant-appellant, Sharon L. Hatcher ("Hatcher"), appeals her conviction in the Marietta Municipal Court. Hatcher was convicted of one count of speeding, a minor misdemeanor, in violation of R.C. 4511.21(D)(4) following a bench trial. On appeal, Hatcher contends that the evidence presented by the State at her bench trial was insufficient to support a conviction beyond a reasonable doubt, and that her conviction is against the manifest weight of the evidence. After a careful review of the record, we find Hatcher's assignment of error to be meritless. Accordingly, we affirm the judgment of the trial court.

I. Facts and Procedural History

{¶2} On September 19, 2016 at approximately 11:27 p.m., Ohio State Highway Patrol Trooper Luke Forshey cited Hatcher for driving 92 miles per hour in a 70 mile per hour zone in

violation of R.C. 4511.21(D)(4). On September 29, 2016, Hatcher filed a written plea of not guilty.

{¶3} A bench trial was held on January 9, 2017. Prior to the presentation of evidence, the trial court took judicial notice of the scientific reliability of the BEE III Radar device used to determine Hatcher's speed. Following trial, the trial court found Hatcher guilty and ordered that she pay a fine of $65.00 plus court costs. Hatcher then filed a timely notice of appeal.

II. Assignment of Error

{¶4} Hatcher assigns the following error for our review:

Assignment of Error:

> The trial court committed reversible error when it found defendant-appellant, Sharon Hatcher guilty of R.C. 4511.21 because the judgment was against the sufficiency and manifest-weight of the evidence.

III. Law and Analysis

{¶5} In her sole assignment of error, Hatcher contends that her conviction should be overturned because it is not supported by sufficient evidence, or alternatively, is against the manifest weight of the evidence because her speed was not unreasonable, or unsafe for the conditions.

{¶6} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins,* 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt." *State v. Davis,* 4th Dist. Ross No. 12CA3336, 2013–Ohio–1504, ¶ 12. "The standard of review is whether, after viewing

the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *Id.*, citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Therefore, when we review a sufficiency of the evidence claim in a criminal case, we review the evidence in a light most favorable to the prosecution. *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. Grant*, 67 Ohio St.3d 465, 477, 620 N.E.2d 50 (1993). A reviewing court will not overturn a conviction on a sufficiency of the evidence claim unless reasonable minds could not reach the conclusion the trier of fact did. *State v. Tibbetts*, 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

{¶7} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *State v. Topping*, 4th Dist. Lawrence No. 11CA6, 2012–Ohio–5617, ¶ 60. "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." *Id.* The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. *Id.*, citing *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶8} "Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, when resolving the conflicts in evidence, clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." (Quotations omitted.) *Id.* "A reviewing

court should find a conviction against the manifest weight of the evidence only in the exceptional case in which the evidence weighs heavily against the conviction." (Quotations omitted.) *Id.* at ¶ 61.

{¶9} Hatcher, in the case sub judice, was found guilty of speeding in violation of R.C. 4511.21(D)(4). R.C. 4511.21 states, in relevant part, as follows: "(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[.]" In turn, R.C. 4511.21(B)(15) states as follows: "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; * * *". Furthermore, the statute defines "rural" as "outside urbanized areas, as designated in accordance with 23 U.S.C. 101, and outside of a business or urban district." R.C. 4511.21(O)(5).

{¶10} At the trial, Trooper Forshey testified that he was seated in his marked cruiser at or near milepost 15 on Interstate 77 in Washington County when he observed Hatcher. He testified that the posted speed limit on that portion of Interstate 77 was 70 miles per hour and that that portion of Interstate 77 has four lanes, two in each direction, divided by a grassy median. According to Trooper Forshey, he utilized his Bee III Radar speed measuring device and recorded Hatcher's speed at 92 miles per hour. He further testified, prior to the radar measurement, he had visually estimated Hatcher's speed at 90 miles per hour. He noted that Hatcher's vehicle was the only vehicle on the road at the time.

{¶11} Trooper Forshey testified that he turned around and proceeded northbound to catch up with Hatcher's vehicle. He testified that he never lost sight of the vehicle and that the tracking history of the vehicle was consistently between 92-93 miles per hour. Upon catching up to the vehicle, Trooper Forshey testified that he activated his pursuit lights and stopped the vehicle. Trooper Forshey testified that Hatcher had disputed his characterization of her speed by admitting that she may have been going up to 80 miles per hour.

{¶12} Trooper Forshey also testified as to his training, operation, certification, and calibration of the radar device prior to and during operation on the date in question. The State then rested its case.

{¶13} Hatcher testified in her defense. She testified that the stretch of Interstate 77 at issue has poor lighting and no street lights, and she questioned how Trooper Forshey could see her vehicle and visually estimate her speed considering the conditions. She noted that given the conditions, she did not see the posted speed limit. She also testified that "according to the Ohio Department of Transportation in Washington County, Interstate 77 at mile post 15 is not considered rural." She testified that that information came from an individual named Bob Zwick, who she maintained was a "roadway services engineer for District 10." She further testified that according to the Ohio Department of Transportation classification system, Interstate 77 "is deemed a[n] interstate and not a highway", and therefore is not a "rural highway". A copy of a document entitled "Ohio Department of Transportation Highway Functional Classification System Concepts, Procedures and Instructions" was offered as an exhibit in an attempt to corroborate Hatcher's testimony. Finally, Hatcher acknowledged that the official citation lists the conditions as pavement dry, area rural, and visibility night.

{¶14} Here, substantial testimony was given to reasonably support the trial court's guilty verdict; and the verdict is not against the manifest weight of the evidence. Specifically, we note that Trooper Forshey testified that he visually observed Hatcher's vehicle travelling in Washington County well over the posted speed limit, and that his Bee III radar device measured Hatcher's vehicle traveling 92 miles per hour in a posted 70 miles per hour speed zone. Trooper Forshey indicated that he was in a marked cruiser, was trained and certified in the operation of electronic speed measuring devices, and that the radar device used in this case had been calibrated both immediately before and after the incident and found to be in proper working order. Additionally, we note that Trooper Forshey testified that during the stop, Hatcher stated that she was not traveling more than 80 miles per hour, thus implicitly indicating that she was traveling above 70 miles per hour. A video recording of the traffic stop played at trial corroborates this testimony. That admission, if believed, is alone sufficient to prove beyond a reasonable doubt that Hatcher operated her vehicle at a speed exceeding 70 miles per hour. *State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416, 868 N.E.2d 1018, ¶ 22 (4th Dist.).

{¶15} The gist of Hatcher's argument on appeal seems to be that in addition to proving that she exceeded the speed limit, the State was also required to prove that her speed was unsafe for the road conditions. "However, we note that [Hatcher] was charged under R.C. 4511.21(D), which constitutes a per se violation." *Id*. at ¶ 23, and cases cited therein. "Thus, the [S]tate was not required to prove that [her] speed was unsafe for the conditions." *Id*.

{¶16} Finally, in her reply brief, Hatcher argues that there was insufficient evidence that she had operated her motor vehicle on a "rural freeway" as provided under R.C. 4511.21(B)(15). However, the purpose of a reply brief is to afford the appellant an opportunity to respond to the appellee's brief, not to raise an issue for the first time. *State v. Mitchell,* 10th Dist. Franklin No.

10AP–756, 2011–Ohio–3818, ¶ 47. " 'The appellant cannot raise an issue for the first time in a reply brief, and thus effectively deny the appellee an opportunity to respond to it.' " *State v. Nguyen*, 4th Dist. Athens No. 12CA14, 2013–Ohio–3170, ¶ 34, quoting *Nemeth v. Nemeth,* 11th Dist. Geauga No. 2007–G–2791, 2008–Ohio–3263, ¶ 22. Thus, " '[a]ppellate courts generally will not consider a new issue presented for the first time in a reply brief.' " *State v. Spaulding*, —– Ohio St.3d ——, 2016–Ohio–8126, ——N.E.3d ——, ¶ 179, quoting *State v. Quarterman,* 140 Ohio St.3d 464, 2014–Ohio–4034, 19 N.E.3d 900, ¶ 18; *see also State v. Murnahan,* 117 Ohio App.3d 71, 82, 689 N.E.2d 1021 (2d Dist.1996) (refusing to consider error asserted in reply brief, because "[a]n appellant may not use a reply brief to raise new issues or assignments of error"); *State v. McComb,* 2d Dist. Montgomery No. 26481, 2015–Ohio–2556, ¶ 14 (again refusing to consider error raised for the first time in reply brief.); *State v. Shaffer,* 11th Dist. Portage No. 2002–P–0133, 2004–Ohio–336, ¶ 39 (refusing to consider issue that trial counsel was ineffective in failing to object to testimony of police officers, where issue was raised only in appellant's reply brief); *State ex rel. Petro v. Gold,* 166 Ohio App.3d 371, 2006–Ohio–943, 850 N.E.2d 1218, ¶ 76 (10th Dist.) (refusing to consider issue that was raised only in reply brief). *Accord State v. Coleman,* 4th Dist. Highland No. 16CA11, 2017-Ohio-1067, ¶ 11. We therefore decline to consider Hatcher's contention that the State failed to prove that she had operated her motor vehicle on a "rural freeway" as provided under R.C. 4511.21(B)(15).

{¶17} In light of the foregoing, we cannot conclude that the trial court lost its way and created a manifest miscarriage of justice by finding Hatcher guilty of speeding. Further, we conclude that substantial evidence exists upon which the trial court could have reasonably concluded that all the essential elements of the crime charged had been proven beyond a reasonable doubt. Accordingly, Hatcher's sole assignment of error is overruled.

IV. Conclusion

{¶18} Having overruled Hatcher's sole assignment of error for the reasons stated above, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Marietta Municipal Court to carry this judgment into execution.

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

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

Abele, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

By: _____
Marie Hoover, Judge

NOTICE TO COUNSEL

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