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**IN THE  
COURT OF APPEALS OF INDIANA**

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MARY C. LOVBERG,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 29A02-0810-CV-940

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APPEAL FROM THE HAMILTON SUPERIOR COURT  
The Honorable Wayne A. Sturtevant, Judge  
The Honorable David K. Najjar, Magistrate  
Cause No. 29D05-0806-OV-3695

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**JULY 22, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SHARPNACK, Senior Judge**

## STATEMENT OF THE CASE

Defendant-Appellant Mary Lovberg appeals the trial court's judgment against her and in favor of the State.

We affirm.

## ISSUES

Lovberg presents three issues for our review, which we restate as:

- I. Whether the trial court erred by granting the State's motion to amend the complaint.
- II. Whether the State nullified its amendment by eliciting certain testimony during trial.
- III. Whether the complaint was defective on its face.

## FACTS AND PROCEDURAL HISTORY

On May 16, 2008, Lovberg was stopped by Deputy James Engle of the Hamilton County Sheriff's Office for speeding. Deputy Engle noted on the ticket the vehicle speed of 29 miles per hour and the prima facie speed of 20 miles per hour. Lovberg contested the ticket, and the trial court set the matter for a bench trial. On September 23, 2008, the trial court held a bench trial in this matter. Prior to trial, the State moved to amend the complaint to indicate that Lovberg was driving 39 miles per hour in a 30 mile per hour zone rather than driving 29 miles per hour in a 20 mile per hour zone which was a school zone. The trial court granted the amendment over Lovberg's objection. Following the presentation of witnesses and evidence, the trial court found in favor of the State. The court suspended the fine and imposed only court costs. This appeal ensued.

## DISCUSSION AND DECISION

### I. AMENDMENT TO COMPLAINT

Lovberg first contends that the trial court erred by allowing the State to amend the complaint. Specifically, Lovberg claims that the State should not have been allowed to amend its complaint from alleging that she was traveling 29 miles per hour in a 20 mile per hour zone which was a school zone to an allegation that she was traveling 39 miles per hour in a 30 mile per hour zone. Appellant's Appendix at 3.

Ind. Trial Rule 15(B) provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

The rule embodies two distinct procedures. The first applies when the parties consent, either expressly or impliedly, to the trial of issues not raised by the pleadings. The second procedure, and the one the trial court applied in this case, operates when a party objects on the ground that the proffered evidence is outside the issues framed in the pleadings.

The second portion of Trial Rule 15(B) is clear. Where it will aid in the presentation of the merits of the case, the court may freely allow the amendment, unless the objecting party can demonstrate that he will be prejudiced in maintaining his action or defense. ““To justify the exclusion of the evidence, the rule contemplates that the objecting party be put to some serious disadvantage; it is not enough that he advances an imagined grievance or seeks to protect some tactical advantage.”” *Bank of New York v. Bright*, 494 N.E.2d 970, 974 (Ind. Ct. App. 1986) (*quoting* 6 C. Wright & A. Miller, *Federal Practice & Procedure*, § 1495 (1971)). In addition, when the objecting party’s claim of prejudice is based upon the argument that he was not prepared to address the new theory, the proper course for the trial court is to permit the amendment and grant a continuance to allow for adequate preparation. *Kirtley v. McClelland*, 562 N.E.2d 27, 32 (Ind. Ct. App. 1990) (*citing Bank of New York*, 494 N.E.2d at 974). A failure to request a continuance under these circumstances has been held to constitute waiver. *Id.*

The ticket that was issued to Lovberg by Deputy Engle stated that the vehicle speed was 29 miles per hour and the prima facie speed was 20 miles per hour with the remark that she was “speeding in a school zone.” Appellant’s App. at 3. Deputy Engle also made a notation of “39 ACT” on the ticket above the box containing the vehicle speed and the prima facie speed.<sup>1</sup> *See* Appellant’s App. at 3. Prior to commencement of

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<sup>1</sup> In response to questions posed by Lovberg following the trial, the trial court explained its understanding of the ticket notations as follows:

Generally it is my experience that there may be two different speeds on the tickets. There is the speed that they are citing. The speed that they are alleging as uh, what is written on your ticket, 29 m.p.h. [miles per hour] with a prima facie speed of 20 m.p.h. There is

the trial, the State moved the court to amend the speed from going 29 miles per hour in a 20 mile per hour zone to going 39 miles per hour in a 30 mile per hour zone, without the allegation of a school zone. *See* Transcript at 19. The following dialogue then transpired between the court and Lovberg regarding the State's motion to amend:

COURT: Ms. Lovberg do you understand that amendment?

DEFENDANT: I do, but I question how that can be done. My ticket here says that the prima facie speed was 20 and I was going 29. Is not the officer obliged to put the facts down on the complaint?

Transcript at 19. Lovberg further questioned the amendment, as follows:

COURT: Do you have any objection to that amendment?

DEFENDANT: Yes I do.

COURT: What is your objection?

DEFENDANT: My objection is that the ticket, the complaint specifically says speeding in a school zone. Speeding in a school zone would indicate that the prima facie speed should be that of the speed that was indicated during school time. That was what was written on the ticket at the time.

Transcript at 20-21.

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also in parentheses, 39 AC[T] which stands for 39 actual. Generally officers will write this on their tickets as a way of letting judges know and people know and also prosecutors, letting everybody know that there was an actual speed that was higher than the speed that they are citing. It is a signal to the person who has been cited as well as to judges and prosecutors or other people that may be looking at the ticket. That if there is nothing else that happens there may be some indication there that the officer has used his discretion in citing a lower speed than they could have.

Transcript at 31-32.

Here, there has been no showing of prejudice by Lovberg. She claims that the amendment resulted in “material prejudice” to her defense of this matter but fails to demonstrate any prejudice beyond this bald statement. Appellant’s Brief at 9. In fact, she testified at trial that she “cannot prove anything about the speed [she] was going.” Transcript at 27. Therefore, it appears that Lovberg did not have evidence to defend against the speeding claim no matter what speed she was alleged to have been going.

In addition, in these circumstances, it would have been proper for the trial court to grant a brief continuance. *See Kirtley*, 562 N.E.2d at 32. However, Lovberg did not request a continuance. Therefore, she cannot now assert that she was prejudiced in her defense against the State’s claim because she has waived this issue by not requesting a continuance. *See id.* Moreover, we are mindful that a litigant who chooses to proceed *pro se* will be held to the same rules of procedure as trained legal counsel and must be prepared to accept the consequences of his or her action. *Thacker v. Wentzel*, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003).

Furthermore, to the extent that Lovberg mentions conflicting evidence and questions the veracity of Deputy Engle’s testimony in the argument section of her brief regarding this first issue, she is challenging the sufficiency of the evidence. When we review a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *Elkhart Community Schools v. Yoder*, 696 N.E.2d 409, 413 (Ind. Ct. App. 1998). Therefore, we decline any invitation by Lovberg to do so here.

## II. NULLIFICATION OF AMENDMENT

Lovberg asserts that the State nullified the amendment to its complaint when the attorney for the State elicited testimony from Deputy Engle regarding the existence of a school zone and his knowledge as to whether school was in session on the day he issued the ticket to Lovberg.

Not only does this contention lack merit, but also it establishes no basis for relief. The State's questioning of Deputy Engle regarding whether Lovberg was traveling in a school zone and whether school was in session on that particular day do not negate the State's amendment to its complaint. It is clear from the trial transcript that the State was not abandoning its allegation that Lovberg was traveling 39 miles per hour in a 30 miles per hour zone. Rather, the State was utilizing this line of questioning merely to explain why Lovberg was initially stopped. *See* Transcript at 23-24. Although the original complaint/ticket was issued for driving 29 miles per hour in a 20 miles per hour school zone, Deputy Engle testified unequivocally that Lovberg's vehicle registered 39 miles per hour on his radar. Additionally, he testified that he had no knowledge as to whether school was in session on that day but that the speed limit in that particular zone when it is not a school day is 30 miles per hour.

## III. DEFECTIVE COMPLAINT

Lastly, Lovberg maintains that the complaint against her for speeding was invalid because it presented conflicting allegations. Specifically, she is referring to the fact that

the ticket shows her vehicle speed as 29 miles per hour and the prima facie speed as 20 miles per hour, and it also contains a notation of “39 ACT.”

Lovberg’s argument is unsupported. Deputy Engel filled in the blanks on the ticket as follows:

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Vehicle Speed \_\_\_\_29\_\_\_\_ Prima Facie Speed \_\_\_\_20\_\_\_\_

Immediately above the words “vehicle speed” and the unbroken line, Deputy Engel inserted the notation “(39 ACT).” *See* Appellant’s App. at 3. Deputy Engel’s notation has been explained as denoting Lovberg’s actual speed. It does not somehow invalidate the allegation of the complaint, which is that Lovberg was speeding. Rather, as explained by the court at the end of trial, the deputy was merely advising all parties involved that Lovberg’s actual speed was 39 miles per hour and that the deputy had exercised his discretion in issuing the citation. Moreover, prior to the commencement of trial, the trial court properly allowed the State to amend the complaint to a vehicle speed of 39 miles per hour and a prima facie speed of 30 miles per hour. Thus, had any conflict existed previously, it was eliminated by the amendment.

#### CONCLUSION

Based upon the foregoing discussion and analysis, we conclude that the trial court properly allowed the State to amend its complaint prior to trial. In addition, we conclude that the State’s amendment was not nullified by testimony elicited at trial, and the State’s complaint was not defective. Accordingly, we affirm.

Affirmed.

NAJAM, J., and BARNES, J., concur.