IN THE SUPREME COURT OF OHIO

07-1755

STATE OF OHIO	:	
Appellee	:	
-vs-	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals CA: 87701
SAMUEL BREWER	:	
Appellant	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT SAMUEL BREWER

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EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT GENERAL AND PUBLIC INTEREST:

The Eighth District has rendered a decision which establishes a more favorable standard of review of sufficiency arguments and affords greater double jeopardy protection to defendants who waive their constitutional right to a jury trial as opposed to those who exercise their constitutional right to trial by jury. This decision creates a structural flaw which calls into question the voluntariness of jury waivers and the constitutionality of Ohio's appellate review of criminal convictions. This Court should accept this case to correct these constitutional flaws which permeate *every* criminal case.

The constitutional dilemma in this case is a consequence of the Eighth District's attempt to distinguish this Court's decision in *State v. Lovejoy* (1997), 79 Ohio St. 3d 440. In *State v. Lovejoy*, this Court concluded that an appellate court should review sufficiency arguments after excluding any improperly admitted evidence and that a retrial is barred by double jeopardy unless the admissible evidence was legally sufficient. 79 Ohio St. 3d at 449-50. "If the state fails to present sufficient evidence to prove every element of the crime, it should not get a second opportunity to do that which it failed to do the first time." Id. at 450. Such an approach ensures that the defendant is not faced with a retrial after the State had "one fair opportunity to offer whatever proof it could assemble" and failed to present legally sufficient evidence. *Burks v. United States* (1978), 437 U.S. 1, 16.

In deciding *Lovejoy*, this Court departed from the United States Supreme Court's interpretation of the federal Double Jeopardy Clause. Id. at 458-59 (Cook, J. dissenting). With respect to the federal Double Jeopardy Clause, the United States Supreme Court concluded that a second trial is not precluded "where the evidence offered by the State and admitted by the trial

court – whether erroneously or not – would have been sufficient to sustain a guilty verdict." *Lockhart v. Nelson* (1988), 488 U.S. 33, 34. Because *Lovejoy* involves a more expansive view of principles of double jeopardy than the federal standard, its conclusion is necessarily based on state constitutional law. Although *Lovejoy* remains good law, this Court has referenced the federal standard in dicta in a subsequent case. *See State v. Yarbrough* (2002), 95 Ohio St. 3d 227, 240.

Apparently attempting to reconcile *Lovejoy* with the dicta in *Yarbrough*, the Eighth District established separate standards of review for sufficiency arguments, one for bench trials and one for jury trials. For bench trials, the Eighth District concluded that *Lovejoy* required appellate courts to consider only admissible evidence in reviewing sufficiency claims. *State v. Brewer*, Cuyahoga App. No. 87701, 2007 Ohio 4291, ¶¶ 13 ("*Brewer III*"). However, with respect to jury trials, the Eighth District elected to follow the federal rule and consider all evidence (including improperly admitted evidence) in reviewing sufficiency claims. Id. at ¶¶ 14-15. The distinction drawn by the Eighth District between the review of bench trials and jury trials is illogical. There is simply no reasonable basis for limiting *Lovejoy*'s holding to bench trials, and nothing in *Lovejoy* itself suggests that it should be so limited.

Beyond its failure of logic, the Eighth District's different standards of review impermissibly burdens a defendant's constitutional right to a jury trial and undermines the voluntariness of jury waivers. Under the Eighth District's two-tiered standard of review, two identical defendants receive different treatment on appeal depending on whether they exercised their constitutional right to a jury trial. Defendant A, who waived his or her right to a jury trial, will not face a second trial if the conviction is based solely on improperly admitted evidence. Defendant B, who exercised his or her constitutional right to a jury trial, can be retried even if

the conviction was entirely dependent upon improperly admitted evidence. In other words, when a defendant elects a jury trial, he or she is penalized with a less favorable standard of appellate review and more limited protections against retrial. Such a system impermissibly burdens criminal defendants' constitutional right to jury trials and may lead defendants to waive their right to a jury merely to avoid that burden.

The constitutional problems flowing from the Eighth District's decision in this case deserve this Court's attention. By accepting this case, this Court can correct the constitutional flaws created by *Brewer III* and clearly establish the scope of its prior decision in *Lovejoy.*

STATEMENT OF THE CASE

Appellant Samuel Brewer was charged in an eight-count indictment with crimes involving two alleged victims, De'Janae Butler and Latique Barrett. Mr. Brewer was acquitted of all crimes involving De'Janae Butler. With respect to Latique Barrett, Mr. Brewer was acquitted of kidnapping, but convicted of gross sexual imposition. The only admissible evidence of the alleged sexual contact was Latique Barrett's testimony that Brewer kissed her once on the lips. The trial court sentenced Mr. Brewer to two years in prison on his gross sexual imposition conviction and classified him as a sexually oriented offender.

On appeal with the Eighth District, Mr. Brewer raised nine assignments of error related to his conviction, including:[1]

> **ASSIGNMENT OF ERROR I:** THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMMENDMENT OF THE UNITED STATES CONSTITUTION BY ALLOWING THE PROSECUTOR TO INTRODUCE PREJUDICIAL HEARSAY TESTIMONY.

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[1] Mr. Brewer also initially raised two assignments of error related to his sentence. However, after receiving judicial release on July 24, 2006, he withdrew them.

ASSIGNMENT OF ERROR III: APPELLANT'S CONVICTION FOR GROSS SEXUAL IMPOSITION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AS REQUIRED BY DUE PROCESS.

On November 16, 2006, the Eighth District sustained Mr. Brewer's first assignment of error, reversed his conviction because of the improper admission of prejudicial hearsay, and remanded his case for a new trial. *State v. Brewer*, Cuyahoga App. No. 87701, 2006 Ohio 6029, at ¶¶ 9-13 ("*Brewer I*"). Having remanded the case for a new trial, the Eighth District concluded that Mr. Brewer's remaining assignments of error, including his sufficiency argument, were moot. *Brewer I* at ¶ 13.

Mr. Brewer appealed the Eighth District's mootness ruling regarding his sufficiency argument with this Court. On May 16, 2007, this Court accepted the appeal, summarily reversed the mootness ruling, and remanded the case to the Eighth District for consideration of the sufficiency assignment of error. *State v. Brewer* (2007), 113 Ohio St. 3d 375.

On remand, Mr. Brewer requested supplemental briefing and oral argument, which was denied. On July 5, 2007, the Eighth District issued an opinion addressing Brewer's sufficiency argument. In its opinion, the Eighth District considered all the evidence presented at trial, whether or not it was properly admitted. *State v. Brewer*, Cuyahoga App. No. 87701, 2007 Ohio 3407, ¶ 11 ("*Brewer II*"). It then held that "the evidence presented to the trial court – including improperly admitted hearsay evidence – was sufficient to support appellant's conviction." Id. at ¶ 14.

Mr. Brewer filed a motion for reconsideration of *Brewer II* and a suggestion for rehearing *en banc*. With these filings, Brewer pointed out that the Eighth District's consideration of improperly admitted evidence in connection was its sufficiency analysis was inconsistent with both this Court's precedent, *Lovejoy* (1997), 79 Ohio St. 3d 440, and with Eighth District

precedent, *See e.g. State v. Wilson*, Cuyahoga App. No. 87205, 2006 Ohio 4108, ¶ 25; *City of Newburgh Heights v. Cole* (2006), 166 Ohio App. 3d 826, 829; *State v. Garrett*, Cuyahoga App. No. 87112 & 87113, 2006 Ohio 6020, ¶¶ 13-17; *State v. Webb*, Cuyahoga App. 87853, 2007 Ohio 2222, ¶ 14.

The Eighth District granted Mr. Brewer's application for reconsideration and issued a new opinion, *Brewer III*. Upon reconsideration, the Eighth District agreed that this Court, in *Lovejoy*, "considered the sufficiency of the evidence *excluding* consideration of improperly admitted evidence." *Brewer III* at ¶ 13. However, the Eighth District held that *Lovejoy*'s holding applied only to bench trials. Id. at ¶¶ 13-15. Because Brewer's case was tried to a jury, the Eighth District concluded that it must consider all the evidence, *including* improperly admitted evidence. Id. at ¶ 16. Relying on improperly admitted evidence, the Eighth District reaffirmed its holding in *Brewer II* that the evidence was legally sufficient. Id. at ¶¶ 16 and 19. In declining to Brewer's request for a rehearing *en banc*, the Eighth District explained that the cases cited by him as demonstrating an intra-district conflict were "largely distinguishable" because "[b]ench trials were conducted in all but one of these cases." Id. at ¶ 20.[2]

STATEMENT OF FACTS

As recognized by the Eighth District in *Brewer I*, this case was replete with improperly admitted hearsay testimony from Latique Barrett's parents, a social worker, and a detective. The ensuing statement of the facts is confined to the non-hearsay testimony introduced at trial related to the alleged incident involving Latique Barrett.

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[2] The Eighth District did not suggest a basis for distinguishing the one case cited by appellant which involved a jury trial, *State v. Wilson*, Cuyahoga App. No. 87205, 2006 Ohio 4108. Accordingly, an intra-district conflict remains.

At the time of the incident, the defendant, Samuel Brewer, lived with Tiaera Butler, her boyfriend, and her five children. Mr. Brewer, age 20, was a family friend who provided Ms. Butler with a significant amount of child care assistance. Tiaera Butler's niece is five-year old Latique Barrett.

Latique would occasionally go over to the Butler residence for a couple of hours on the weekend to play with her cousins and spent the night at her cousins over Easter weekend 2005. Latique testified that, on one occasion while she was at the Butler's house, Mr. Brewer "kissed [her] on the lips, but did not use his tongue.". After Latique testified about the single kiss, the prosecutor asked her whether Mr. Brewer "touch[ed] [her] someplace when he kissed you?" Latique responded "No." She also testified that Mr. Brewer did not touch her "privacy." Ultimately, after a series of leading questions, Latique stated that Mr. Brewer touched her somewhere above her waist, but did not specify where.[3] Asked whether Mr. Brewer told her anything after he "did that" to her, Latique said "No." The prosecutor eventually led her to testify that Brewer told her not to tell anyone.

LAW AND ARGUMENT

Proposition of Law I: An appellate court, reviewing a criminal conviction for legal sufficiency, should exclude improperly admitted evidence from its analysis, regardless of whether that conviction occurred in a bench trial or jury trial.

Proposition of Law II: Ohio's Double Jeopardy Clause forbids the retrial of a defendant when the State failed to present sufficient admissible evidence at the first trial to support a criminal conviction.

This Court has previously held that a reviewing court should only consider properly admitted evidence in reviewing a criminal conviction for sufficiency. *Lovejoy*, 79 Ohio St. 3d at

450. The question presented by this case is whether *Lovejoy*'s standard of review applies only to bench trials, as held by the Eighth District, or applies with equal force to jury trials, as urged by appellant.

A. Sufficiency of the Evidence and Double Jeopardy

Both the Ohio and United States Constitutions contain protections against double jeopardy. OHIO CONST. ART. I, § 10 ("no person shall be twice placed in jeopardy for the same offense"); U.S. CONST. AMMEND. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"). The principle aim of these constitutional provisions is to "protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States* (1957), 355 U.S. 184, 187. The "underlying idea," deeply engrained in our jurisprudence, is that:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-88. "Repeated prosecutorial sallies . . . unfairly burden the defendant and create a risk of conviction through sheer governmental persistence." *Tibbs v. Florida* (1982), 457 U.S. 31, 41. As such, the Double Jeopardy clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States* (1978), 437 U.S. 1, 11; *State v. Calhoun* (1985), 18 Ohio St. 3d 373, 376 ("It is well-established that the prosecution is only entitled to one opportunity to mount its case against the defendant and its failure to do so adequately will not be permitted to

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[3] Although the Eighth District in *Brewer II* and *Brewer III* (though not *Brewer I*) suggested parenthetically that Latique "apparently point[ed] to her vagina," that suggestion is not supported by the record.

act to the detriment of the defendant.") Put succinctly, double jeopardy does not allow the state a "second bite at the apple." *Burks*, 437 U.S. at 17; *Lovejoy*, 79 Ohio St. 3d 440, 450.

In light of these fundamental principles, both the Ohio and United States Supreme Court have held that Double Jeopardy Clause "precludes a second trial once the reviewing court has found the evidence legally insufficient." *Burks*, 437 U.S. 1, 18; *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 387. For Double Jeopardy purposes, it makes no difference whether the defendant is acquitted by a jury, whether the trial court entered a judgment of acquittal, or whether a reviewing court determined the evidence to be legally insufficient. *Burks*, 437 U.S. at 10-11. In all of those cases, double jeopardy forbids retrial.

Although this Court and the United States Supreme Court agree that a reversal on appeal due to legal insufficiency bars retrial, these courts have reached different conclusions about the evidence to be considered in a sufficiency review. In *Lockhart*, the United States Supreme Court, in a 6-3 decision, held that a conviction is legally sufficient, and does not prohibit retrial, so long as any evidence presented at trial, even if erroneously admitted, supports the verdict. 488 U.S. at 34. Almost ten years after *Lockhart* was decided, this Court reached the opposite conclusion in *Lovejoy*. Specifically, it held that a reviewing court's sufficiency analysis should exclude the erroneously admitted evidence and should focus on whether "the remaining evidence" is sufficient to support a conviction." *Lovejoy*, 79 Ohio St. 3d 440, 450. *Lovejoy* makes clear that double jeopardy prevents retrial when the admissible evidence is legally insufficient. Id. Because, as noted by the dissent, *Lovejoy* represents a divergence from the approach taken by the United States Supreme Court, Id. at 458-59 (Cook, J. dissenting), its holding is necessarily grounded in Ohio's Double Jeopardy Clause. In other words, this Court

has effectively determined that Ohio's Double Jeopardy Clause affords greater protection against retrials than does its federal counterpart.[4]

B. The Eighth District Erred In Establishing a Two-Tiered Standard of Review for Sufficiency Arguments in Bench Trials and Jury Trials.

The Eighth District recognized that this Court held, in *Lovejoy*, that appellate review of the sufficiency of the evidence should "exclude[] consideration of improperly admitted evidence." *Brewer III* at ¶ 13. However, it distinguished *Lovejoy* because it involved a bench trial while the instant case was tried to a jury. Id. This Court should reject the Eighth District's limitation of *Lovejoy* because it is illogical and unconstitutional. Greater double jeopardy protection should not be afforded to defendants merely because they did not exercise their state and federal constitutional rights to a jury trial.

As an initial matter, this Court's decision in *Lovejoy* did not explicitly or implicitly depend on whether the defendant waived his right to a jury trial and tried the case to the bench. The fundamental double jeopardy concern underlying this Court's decision in *Lovejoy* was to prevent the state from getting "a second opportunity to do that which it failed to do the first time." 79 Ohio St. 3d at 450. This concern is equally present whether or not the case involved a

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[4] The Ohio Constitution is:

> [A] document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

State v. Farris (2006), 109 Ohio St. 3d 519, 529 (*quoting Arnold v. Cleveland* (1993), 67 Ohio St. 3d 35, paragraph one of the syllabus).

bench or jury trial, and this Court gave no indication that the sufficiency analysis set out in *Lovejoy* should be limited to bench trials.

Nevertheless, the Eighth District claims that there exists a "critical distinction" between bench trials and jury trials such that the law applied on appeal differs depending on the nature of the trial:

> In a bench trial, it is presumed that the trial court will consider only relevant, material and competent evidence. Thus, in assessing the sufficiency of the evidence in a bench trial, the appellate court properly considers only the admissible evidence. In a jury trial, however, the trial court determines what evidence the jury should consider. Thus, when the trial court rules on the sufficiency of the evidence on a Crim.R. 29 motion, the court considers all evidence that was admitted.
>
> Likewise, an appellate court assessing the sufficiency of the evidence must consider all of the evidence before the jury, even it was improperly admitted.

Brewer III at ¶ 14. The Eighth District's decision is logically flawed. The presumption that a trial court considers only admissible evidence is irrelevant to the sufficiency analysis conducted by an appellate court. Rather, that presumption is employed by appellate courts in assessing the prejudicial nature of improperly admitted evidence in cases where the evidence is otherwise sufficient. *See e.g. State v. Brown*, Cuyahoga App. No. , 2007 Ohio 287, ¶¶ 15-16 (noting that even "without the objectionable evidence, there is ample testimony" to support the conviction). Whether a case is tried to the bench or to a jury, the trial court decides what evidence should be admitted. When evidence is improperly admitted, it is entirely immaterial whether the trial court or a jury is the trier of fact. There is no logical reason to consider improperly admitted evidence in reviewing a jury's verdict but exclude such evidence in reviewing a court's verdict.

In addition to being logically untenable, the Eighth District's separate sufficiency standards of review violates Mr. Brewer's state and federal constitutional right to a jury trial. Both the Ohio and United States Constitutions guarantee criminal defendants the right to a jury

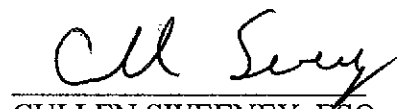
trial. OHIO CONST. ART. I, §§ 5 & 10 (Section 5, Article I of the Ohio Constitution provides that "the right of trial by jury shall be inviolate"); U.S. CONST. AMMEND. VI. The Eighth District's two-tiered sufficiency analysis affords greater double jeopardy protection to criminal defendants who do not assert their constitutional right to a jury by trial. Under the Eighth District's approach, defendants who waive their constitutional right to a jury trial can be subject to a second trial *only if* the properly admitted evidence at the first trial was legally *sufficient*. On the other hand, defendants who assert their constitutional right to a trial by jury can be retried *if* the properly admitted and/or *improperly* admitted evidence, at the first trial, was legally sufficient. In short, criminal defendants who assert their constitutional right to a jury trial receive less double jeopardy protection. Such a result impermissibly burdens Brewer's state and federal constitutional right to a jury trial and is therefore unconstitutional. *Cf. United States v. Jackson* (1968), 390 U.S. 570, 581-84 (striking down statutory provision in the Federal Kidnapping Act which permits the imposition of the death penalty only in cases involving a jury trial).

In sum, the Eighth District misapplied *Lovejoy* by establishing a two-tiered system of appellate review for sufficiency arguments. Moreover, by providing less double jeopardy protections to defendants who exercise their right to jury trials, the Eighth District has established a patently unconstitutional judicial rule which "chill[s] the assertion of constitutional rights by penalizing those who chose to exercise them." *Cf. id.* at 581.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Mr. Samuel Brewer respectfully asks this Court to accept jurisdiction over this matter as it presents substantial constitutional questions for review.

Respectfully Submitted,



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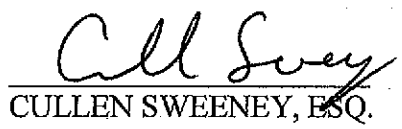
CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum In Support of Jurisdiction was served upon William D. Mason, Esq., Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 17 day of September, 2007.



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Judge Gaul

SEP - 4 2007

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

FILED
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CUYAHOGA COUNTY, OHIO

JOURNAL ENTRY AND OPINION
No. 87701

STATE OF OHIO

PLAINTIFF-APPELLEE

FEE
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TAXED

vs.

SAMUEL BREWER

DEFENDANT-APPELLANT

JUDGMENT:
RECONSIDERATION GRANTED;
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-465703

BEFORE: Rocco, J., Celebrezze, A.J. and Dyke, J.

RELEASED: August 23, 2007

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FILED AND JOURNALIZED
PER APP. R. 22(E)

SEP 4 - 2007

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

AUG 23 2007

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

CA06087701 47163752

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, J.:

Appellant has asked this court to reconsider its July 5, 2007 decision finding that the evidence was sufficient to support his conviction for gross sexual imposition. We grant appellant's motion for reconsideration. Upon reconsideration, we conclude that the evidence was sufficient to support appellant's conviction. We stand by our determination that, in assessing the sufficiency of the evidence, we must consider all of the evidence before the jury, whether or not it was properly admitted. The evidence as a whole was sufficient to support the jury's verdict. Nevertheless, appellant was prejudiced by the admission of hearsay evidence, so we reverse and remand for a new trial.

In a decision entered November 16, 2006, this court concluded that appellant was prejudiced by the admission of hearsay evidence at his jury trial. Accordingly, we reversed and remanded for a new trial, and determined that appellant's other assignments of error were moot. The Ohio Supreme Court reversed our determination that appellant's challenge to the sufficiency of the evidence was moot, and remanded for us to consider that assignment of error.

In our decision of July 5, 2007, this court held that the evidence as a whole was sufficient to support the jury's verdict. Appellant's reconsideration motion challenges the standard this court applied to assess the sufficiency of the evidence, as well as the evidence this court relied upon in reaching its decision.

Procedural History and Evidence

Our November 2006 opinion set forth in some detail the procedural history of this case; we review it again here only insofar as it is relevant to our consideration of the sufficiency of the evidence. Following a jury trial, appellant was found guilty of one count of gross sexual imposition involving a child victim, L.B. The court subsequently sentenced appellant to two years' imprisonment and found him to be a sexually oriented offender.

As relevant to the gross sexual imposition charge, at trial, the state presented the testimony of the victim's aunt, T.B.; the victim, L.B.; the victim's mother, B.G.; the victim's father, Lam.B.; Detective Sherilyn Howard; and social worker Lisa Zanella. The defense presented the testimony of pastor Shirley Miller.

T.B. testified that appellant lived with her and her family when they moved to Warner Road in Cleveland, Ohio, in February 2005. L.B., her niece, visited her house and played with her children. L.B.'s mother, B.G. (who is T.B.'s sister), called T.B. and told her that L.B. "was hurting and she was concerned about that. She said someone in [T.B.'s] house had hurt [L.B.]."

B.G. testified that she received a telephone call from L.B.'s father, Lam.B. on April 30, 2005. He told her that L.B. had done something to "Ro," and said something to Ro. B.G. testified that she then went to L.B., age five, and asked

her if she had anything she wanted to tell B.G. about "Sam," i.e., appellant. B.G. testified that L.B. "really just shut me out," put her head down, and said very little. This was unusual behavior for L.B. L.B. told B.G. that appellant had touched her "private area." B.G. did not seek a medical examination of L.B. Through conversations with Roshawn Sample (Lam.B.'s girlfriend) and others, B.G. learned that appellant had touched her daughter's vagina and chest and kissed her.

L.B. testified that appellant kissed her "on the lips," but she denied that he used his tongue when he did so and denied that he touched her. She indicated where her "privacy" was for the jury. At first, she denied that anyone had touched her "privacy," but when asked whether "Sam" had touched her somewhere, she said yes, pointed to the place where he touched her, and agreed that was "the same place that you just showed us." She said this touching occurred while appellant was kissing her. Appellant also told L.B. not to tell anyone.

L.B.'s father, Lam.B., testified that his girlfriend, Roshawn, told him that when L.B. kissed Roshawn, L.B. "tried to stick her tongue in her mouth." Roshawn told Lam.B. that she asked L.B. where she had learned that, and L.B. told her that appellant kissed her like that. Lam.B. then called B.G. and told her "that someone named Sam had kissed [L.B.]."

Detective Howard testified that she interviewed the appellant, who denied any sexual contact with the victim. There was no evidence of any physical trauma. Social worker Lisa Zanella testified, over objection, that she interviewed L.B., and L.B. told Zanella that "Sam had touched her with his balls in her private area" and "put his balls in her mouth" once.

Law and Analysis

In our November 2006 opinion, we concluded that the trial court had abused its discretion by admitting the hearsay testimony of Lisa Zanella about what L.B. told her during her interviews. The state conceded that this testimony was improperly admitted, and we determined that the admission of Zanella's testimony was not harmless beyond a reasonable doubt. Consequently, we remanded the case for a new trial.

On appellant's appeal of our decision to the Ohio Supreme Court, the court remanded this case to us to consider whether the evidence was sufficient to support appellant's conviction. In our July 5, 2007 decision, we concluded that all of the evidence presented to the jury, including improperly submitted evidence, was sufficient to support the verdict.

Appellant claims that this court may consider only properly admitted testimony in assessing the sufficiency of the evidence. In support of this proposition, he cites *State v. Lovejoy*, 79 Ohio St.3d 440, 1997-Ohio-371. We

agree that the Ohio Supreme Court in *Lovejoy* considered the sufficiency of the evidence *excluding* consideration of improperly admitted evidence. However, there was a critical distinction between the procedural posture of *Lovejoy* and this case: In *Lovejoy*, the case was tried to the bench; in this case, it was tried to a jury.

In a bench trial, it is presumed that the trial court will consider only relevant, material and competent evidence. *State v. Bays*, 87 Ohio St.3d 15, 27, 1999-Ohio-216. Thus, in assessing the sufficiency of the evidence in a bench trial, the appellate court properly considers only the admissible evidence. *Lovejoy*, supra. In a jury trial, however, the trial court determines what evidence the jury should consider. Thus, when the trial court rules on the sufficiency of the evidence on a Crim.R. 29 motion, the court considers all evidence that was admitted.

Likewise, an appellate court assessing the sufficiency of the evidence must consider all of the evidence that was before the jury, even if it was improperly admitted. If the evidence as a whole was insufficient, then the double jeopardy clause precludes retrial. However, the double jeopardy clause does not preclude retrial if the *court* erred by admitting some of the evidence that supported the jury's actions. *Lockhart v. Nelson* (1988), 488 U.S. 33, 40-42. If some evidence was improperly admitted and prejudicial to the appellant but that evidence

supported the verdict, the proper remedy is retrial, not outright reversal. See *Lockhart*, 488 U.S. at 34; *State v. Jeffries*, Lake App. No. 2005-L-057, 2007-Ohio-3366, ¶100.

In evaluating the sufficiency of the evidence to support appellant's conviction, therefore, we must consider all of the testimony that was before the trial court, whether or not it was properly admitted. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶80; *Lockhart*, supra. Thus, even though we have concluded that Zanella's testimony about her interviews with L.B. were improperly admitted and that her testimony was not harmless beyond a reasonable doubt, we nevertheless consider her testimony in determining whether the evidence before the trial court was sufficient to support the conviction.

"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

Appellant was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(4), which is defined as "sexual contact with another, not the spouse of the offender," when "[t]he other person *** is less than thirteen years of age, whether or not the offender knows the age of that person." Sexual contact is statutorily defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

Ms. Zanella's testimony that L.B. told her appellant touched L.B.'s genitals with his genitals and placed his genitals in L.B.'s mouth, if believed, provided ample evidence that appellant had sexual contact with L.B., a five-year-old child. Furthermore, L.B. herself testified that appellant touched her (apparently pointing to her vagina) and kissed her; there was also testimony that she told her mother that appellant had touched her "private area." Finally, there was testimony that L.B. told Lam.B.'s girlfriend that appellant had used his tongue in kissing her. This testimony, if believed, also supports a determination that appellant had sexual contact with a five-year-old child.[1] Accordingly, we find the

[1]In his motion for reconsideration, appellant urges that the state did not offer statements L.B. made to B.G. and Lam.B's girlfriend for the truth of the matter asserted, so that it is improper for this court to consider them as substantive evidence. The jury was not instructed that its consideration of this testimony was limited, however. Cf. *State v. Kelly*, Cuyahoga App. No. 85662, 2006-Ohio-5902. In any event,

evidence presented to the trial court – including improperly admitted hearsay evidence – was sufficient to support appellant's conviction. Nevertheless, for the reasons stated in our previous opinion, we reverse appellant's conviction and remand for a new trial because we cannot say that the admission of Ms. Zanella's hearsay testimony about her interviews with L.B. was harmless beyond a reasonable doubt.

Appellant has requested that we rehear this case en banc. The cases he has cited as demonstrating a conflict within our district are largely distinguishable. Bench trials were conducted in all but one of these cases. *Newburgh Heights v. Cole*, 166 Ohio App.3d 826, 2006-Ohio-2463; *State v. Garrett*, Cuyahoga App. No. 87112-13, 2006-Ohio-6020; *State v. Webb*, Cuyahoga App. No. 87853, 2007-Ohio-2222. As noted above, a different standard applies when a case is tried to the court. Furthermore, we feel obligated to follow the Ohio Supreme Court's pronouncements in *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126. Although not dispositive in that case, the court clearly expressed the standard it intended for the appeals courts to apply. Therefore, we decline to request a rehearing en banc.

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we do not necessarily rely upon this additional testimony. The improperly admitted testimony of Ms. Zanella alone was sufficient to support the conviction.

Reversed and remanded.

It is ordered that appellant recover from appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

KENNETH A. ROCCO, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
ANN DYKE, J., CONCUR