

IN THE SUPREME COURT OF OHIO
Case No. 2007-1755

STATE OF OHIO :
 :
 Plaintiff-Appellee :
 :
 vs. :
 :
 SAMUEL BREWER :
 :
 Defendant-Appellant :

On Appeal from the Cuyahoga County
Court of Appeals, Eighth District
Case No. 87701

APPELLANT'S MERIT BRIEF

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender
BY: CULLEN SWEENEY, ESQ. (0077187) (COUNSEL OF RECORD)
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113
(216) 443-7583
(216) 443-6911 FAX
COUNSEL FOR APPELLANT

WILLIAM MASON, ESQ.
Cuyahoga County Prosecutor
BY: JON W. OEBKER (0064255) (COUNSEL OF RECORD)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street, Ninth Floor
Cleveland, OH 44113
(216) 443-7800
COUNSEL FOR APPELLEE STATE OF OHIO

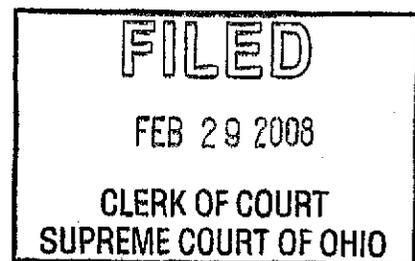


TABLE OF CONTENTS

	<u>PAGES</u>
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	4
A. ADMISSIBLE EVIDENCE	4
B. INADMISSIBLE EVIDENCE.....	5
LAW AND ARGUMENT	6
<i>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.</i>	4
<i>Proposition of Law II: Ohio's Double Jeopardy Clause forbids the retrial of a defendant when the State failed to present legally sufficient admissible evidence at the first trial to support a criminal conviction.</i>	4
A. SUFFICIENCY OF THE EVIDENCE AND DOUBLE JEOPARDY	6
B. THE EIGHTH DISTRICT ERRED IN ESTABLISHING A TWO-TIERED STANDARD OF REVIEW FOR SUFFICIENCY ARGUMENTS IN BENCH TRIALS AND JURY TRIALS.....	13
C. APPELLANT'S CONVICTION IS NOT SUPPORTED BY LEGALLY SUFFICIENT ADMISSIBLE EVIDENCE	14
CONCLUSION.....	19
CERTIFICATE OF SERVICE	19
 APPENDIX	
Notice of Appeal, 2007-1755-----	A-1
<i>State v. Brewer</i> , Cuyahoga App. No. 87701, 2006 Ohio 6029-----	A-3
<i>State v. Brewer</i> , Cuyahoga App. No. 87701, 2007 Ohio 3407-----	A-7
<i>State v. Brewer</i> , Cuyahoga App. No. 87701, 2007 Ohio 4291-----	A-10
R.C. 2907.01 -----	A-14
R.C. 2907.05 -----	A-17
U.S. CONST. AMMEND. V-----	A-19

U.S. CONST. AMMEND. VI-----A-22
OHIO CONST. ART. I, § 5 -----A-23
OHIO CONST. ART. I § 10-----A-24

TABLE OF AUTHORITIES

CASES

<i>Ashe v. Swenson</i> (1970), 397 U.S. 436 -----	8
<i>Burks v. United States</i> (1978), 437 U.S. 1 -----	7, 9, 10
<i>City of Newburgh Heights v. Cole</i> (2006), 166 Ohio App. 3d 826-----	3
<i>Green v. United States</i> (1957), 355 U.S. 184-----	7
<i>In re Anderson</i> (1996), 116 Ohio App.3d 441 -----	17, 18
<i>In re Winship</i> (1970), 397 U.S. 358-----	15
<i>Jackson v. Virginia</i> (1979), 443 U.S. 307-----	15
<i>Lockhart v. Nelson</i> (1988), 488 U.S. 33-----	1, 8, 11, 12
<i>Papachristou v. City of Jacksonville</i> (1972), 405 U.S. 156 -----	17
<i>State v. McGee</i> (1997), 79 Ohio St. 3d 193 -----	15
<i>State v. Brewer</i> , Cuyahoga App. No. 87701, 2006 Ohio 6029-----	2, 4-6
<i>State v. Brewer</i> , Cuyahoga App. No. 87701, 2007 Ohio 3407-----	3, 5
<i>State v. Brewer</i> , Cuyahoga App. No. 87701, 2007 Ohio 4291-----	1, 3-5, 12, 13
<i>State v. Brewer</i> (2007), 113 Ohio St. 3d 375 -----	2
<i>State v. Brown</i> , Cuyahoga App. No. 87947, 2007 Ohio 287 -----	13
<i>State v. Calhoun</i> (1985), 18 Ohio St. 3d 373 -----	10
<i>State v. Edwards</i> , Cuyahoga App. No. 81351, 2003 Ohio 998 -----	17, 18
<i>State v. Farris</i> (2006), 109 Ohio St. 3d 519 -----	8
<i>State v. Garrett</i> , Cuyahoga App. No. 87112 & 87113, 2006 Ohio 6020-----	3
<i>State v. Jenks</i> (1991), 61 Ohio St. 3d 259-----	15
<i>State v. Liberatore</i> (1983), 4 Ohio St. 3d 13 -----	10
<i>State v. Lovejoy</i> (1997), 79 Ohio St. 3d 440-----	1, 3, 6-8, 10-13
<i>State v. Lugo</i> , Licking App. No. 98CA2003, 1998 Ohio App. LEXIS 6515 -----	16, 17
<i>State v. McGee</i> (1997), 79 Ohio St. 3d 193-----	15
<i>State v. Mundy</i> (1994), 99 Ohio App. 3d 275 -----	16-18
<i>State v. Ogletree</i> , Cuyahoga App. No. 84446, 2004 Ohio 6297 -----	18
<i>State v. Robinson</i> (1976), 47 Ohio St. 2d 103 -----	15
<i>State v. Thompkins</i> (1997), 78 Ohio St. 3d 380 -----	7
<i>State v. Valdez</i> , Ottawa App. No. 90-OT-007, 1991 Ohio App. LEXIS 5128-----	16, 17
<i>State v. Webb</i> , Cuyahoga App. 87853, 2007 Ohio 2222 -----	3
<i>State v. Wilson</i> , Cuyahoga App. No. 87205, 2006 Ohio 4108 -----	3, 4
<i>State v. Wise</i> , 1993 Ohio App. LEXIS 283 -----	16, 17
<i>State v. Yarbrough</i> (2002), 95 Ohio St. 3d 227 -----	8
<i>Tibbs v. Florida</i> (1982), 457 U.S. 31 -----	7, 9, 10
<i>United States v. Jackson</i> (1968), 390 U.S. 570 -----	14
<i>United States v. Lanier</i> (1997), 520 U.S. 259 -----	17

STATUTES

R.C. 2907.01 -----	15, 16
R.C. 2907.05 -----	15

CONSTITUTIONAL PROVISIONS

OHIO CONST. ART. I, § 5 -----14
OHIO CONST. ART. I § 10-----6, 14
U.S. CONST. AMMEND. V-----7
U.S. CONST. AMMEND. VI-----14

INTRODUCTION

In the instant case, appellant Samuel Brewer asks this Court to explicitly apply its prior holding in *State v. Lovejoy* (1997), 79 Ohio St. 3d 440 to jury trials. In *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 remaining admissible evidence was legally sufficient. 79 Ohio St. 3d at 449-50. In so doing, this Court afforded criminal defendants greater protection under Ohio's Double Jeopardy Clause than they are afforded under the federal Double Jeopardy Clause. *Id.* at 458-59 (Cook, J. dissenting); *cf. Lockhart v. Nelson* (1988), 488 U.S. 33, 34.

Although *Lovejoy* never indicated that it was limited to jury trials, the Eighth District, in Mr. Brewer's case, concluded that *Lovejoy* only applied to bench trials and held that, in reviewing the sufficiency of the evidence in jury trials, it must consider both admissible and inadmissible evidence. *State v. Brewer*, Cuyahoga App. No. 87701, 2007 Ohio 4291, ¶¶ 13-15 ("*Brewer III*"). With the instant appeal, Mr. Brewer asks this Court to reaffirm the fundamental principle that the State should not get a second opportunity to retry a defendant when the admissible evidence presented at the first trial was legally insufficient and to thus clarify that this double jeopardy principle applies with equal force to bench and jury trials.

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 one count 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. (Tr. at 297-99 and 304-305). 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 amendment of the United States Constitution by allowing the prosecutor to introduce prejudicial hearsay testimony.

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.

After the Eighth District denied Mr. Brewer's motion to reconsider, Mr. Brewer appealed the Eighth District's mootness ruling regarding his sufficiency argument to 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.

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.

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 with 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.

On September 4, 2007, 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 (emphasis in original). 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 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

Mr. Brewer filed a notice of appeal and memorandum in support of jurisdiction with this Court, raising the following two propositions of law:

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 legally sufficient admissible evidence at the first trial to support a criminal conviction.

This Court accepted Mr. Brewer’s appeal on both propositions of law.

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. This statement of facts is therefore separated into the admissible evidence presented at trial and the inadmissible evidence presented at trial on which the Eighth District relied in its decision in *Brewer III*.

A. Admissible Evidence

At the time of the incident, the defendant, Samuel Brewer, lived with Tiaera Butler, her boyfriend, and her five children. (Tr. at 155 and 158). Mr. Brewer, age 20, was a family friend

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

who provided Ms. Butler with a significant amount of child care assistance. (Tr. at 158, 201, 203, 205, and 397). Tiaera Butler's niece is five-year old Latique Barrett. (Tr. at 240, 249 and 340).

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. (Tr. at 168-69, 249-50, 256, and 296). 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." (Tr. at 297, 299, 304-305). After Latique testified about the single kiss, the prosecutor asked her whether Mr. Brewer "touch[ed] [her] someplace when he kissed you?" (Tr. at 296). Latique responded "No." (Tr. at 296). She also testified that Mr. Brewer did not touch her "privacy." (Tr. at 298). Even, after a series of leading questions, Latique merely stated that Mr. Brewer touched her somewhere above her waist, but did not specify where.³ (Tr. at 297-99). Asked whether Mr. Brewer told her anything after he "did that" to her, Latique said "No." (Tr. at 300). The prosecutor eventually led her to testify that Brewer told her not to tell anyone. (Tr. at 300).

B. Inadmissible Evidence

In *Brewer III*, the Eighth District explained that the "improperly admitted testimony of Ms. Zanella alone was sufficient to support the conviction." *Brewer III* at ¶ 19, footnote 1. Ms. Zanella was a social worker who interviewed Latique Barrett as part of the police investigation. (Tr. at 363, 366, 399, 401). She testified that Latique Barrett told her that Brewer touched Latique's vagina and orally raped her. (Tr. at 402-403). On appeal, the State conceded that Ms.

remains.

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. See *Brewer I*, 2006 Ohio 6029 at ¶ 6 (explaining that Latique testified that the appellant "touched her somewhere not apparent from the record.")

Zanella's testimony was hearsay and was "impermissibly entered into the record," though it claimed that her testimony was harmless. (State's Response Br. at 16). The Eighth District, in *Brewer I*, held that Ms. Zanella's testimony was both improperly admitted and prejudicial. *Brewer I* at ¶¶ 10-13 (noting that "Zanella's testimony was the only evidence in the record that appellant touched L.B.'s genitals with his genitals and that he placed his genitals in L.B.'s mouth.") The Eighth District also noted, in *Brewer I*, the trial record included "the hearsay testimony of L.B.'s mother, B.G., and father, Lam.B." 2006 Ohio 6029 at ¶ 13.

LAW AND ARGUMENT

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 holding applies only to bench trials, as held by the Eighth District, or applies with equal force to jury trials, as urged by appellant. Appellant requests that this Court reject the Eighth District's limitation of *Lovejoy* to bench trials and adopt the following propositions of law:

1. 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. See *Lovejoy*, 79 Ohio St. 3d at 450 ("After determining that the evidence of the conviction was erroneously considered by the trial judge, the appellate court should have reviewed the remaining evidence to determine whether it was sufficient to support a conviction.")
2. Ohio's Double Jeopardy Clause forbids the retrial of a defendant when the State failed to present legally sufficient admissible evidence at the first trial to support a criminal conviction. See *Lovejoy*, 79 Ohio St. 3d at 450 ("In fact, this is what the Double Jeopardy Clause was intended to prevent.")

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. 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 because double jeopardy is violated

when the defendant “runs the gauntlet” of a second trial, even where that second trial ends in an acquittal.⁴ *Ashe v. Swenson* (1970), 397 U.S. 436, 446.

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 six-to-three decision, held that a retrial is permissible 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, after excluding the improperly admitted evidence, the remaining evidence that was properly admitted is not sufficient to sustain a conviction.⁵ *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 determined that Ohio’s Double Jeopardy Clause affords greater protection to criminal defendants than does its federal counterpart.⁶

⁴ Thus, Mr. Brewer presents a ripe controversy to this Court because, if he is required to undergo a second trial to be acquitted, his double jeopardy protections will already be violated.

⁵ Although *Lovejoy* remains this Court’s precedent on this issue, this Court has referenced the federal standard in dicta in a subsequent case. See *State v. Yarbrough* (2002), 95 Ohio St. 3d 227, 240.

⁶ 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

The rule of law enunciated by this Court in *Lovejoy*, rather than the federal rule established by *Lockhart*, is more consistent with traditional notions of double jeopardy. At the core of the constitutional prohibition against “double jeopardy” is the concept that the State should be afforded only “one fair opportunity to offer whatever proof it [can] assemble” and should not be afforded “another opportunity to supply evidence which it failed to muster in the first proceeding.” *Burks*, 437 U.S. at 16. When a criminal defendant obtains the reversal of his or her conviction solely because of a defect in the judicial proceeding (i.e. a trial error), these core double jeopardy principles are not implicated by a second trial because the appellate reversal does not necessarily “suggest the government failed to prove its case.” *Id.* at 15. Under such circumstances, a retrial ensures that the defendant receives “a fair readjudication of his guilt from error” without sacrificing society’s “valid concern for insuring that the guilty are punished.” *Id.* However, the balance of the equities changes dramatically when the basis of the reversal is that the State failed to prove its case. When a conviction is reversed “due to a failure of proof at trial,” the core of the Clause’s protections against “the State honing its trial strategies and perfecting its evidence through successive attempts at conviction” are squarely implicated. *Tibbs*, 457 U.S. at 41. Moreover, when the State’s case is so lacking that, as a matter of law, a “jury could not properly have returned a verdict of guilty,” the State can hardly complain of prejudice when it is not afforded the “‘proverbial’ second bite at the apple.” *Burks*, 437 U.S. at 16-17.

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

The question presented by this case is what are the double jeopardy implications flowing from the reversal of a conviction in which the State failed to prove its case with admissible evidence but the evidence is not legally insufficient if one considers improperly admitted evidence. In other words, is such a situation more akin to a defective trial proceeding where the respective interests of the defendant and society require a new trial; or, rather, is it more similar to a failure of proof at trial such that a new trial “would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance”? *Tibbs*, 457 U.S at 42. Appellant submits that, when the State failed to prove its case with admissible evidence at the first trial, principles of double jeopardy are offended by a retrial. As with “pure” sufficiency cases, a conviction based on insufficient *admissible* evidence involves a case in which the government’s proof was so lacking that it should not even have been submitted to the jury. To permit a new trial when the State has not presented sufficient admissible evidence offends the core double jeopardy principle of preventing 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*, 437 U.S. at 11. Indeed, as noted by this Court, a retrial under these circumstances is exactly what the Double Jeopardy Clause was designed to prevent:

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.

Lovejoy, 79 Ohio St. 3d at 450. “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 act to the detriment of the defendant.” *State v. Calhoun* (1985), 18 Ohio St. 3d 373, 376; *see also State v. Liberatore* (1983), 4 Ohio St. 3d 13, 14 (explaining that “the double

St. 3d 35, paragraph one of the syllabus).

jeopardy guarantee serves ‘a constitutional policy of finality for the defendant’s benefit.’”)

Moreover, society has little interest in permitting retrial “when the State’s remaining evidence is, by definition, insufficient.” *Lockhart*, 488 U.S. at 49 (Marshall, J. dissenting). This is particularly true when, as here, the inadmissible hearsay evidence is “deemed defective or nonprobative as a matter of law,”⁷ when such evidence is objected to at trial, and when comparable evidence could not have been presented by other admissible means. *Lockhart* involved a case in which an enhanced sentence was reversed because the defendant had been pardoned of one of the four convictions relied on by the State despite the defendant’s failure to object to use of the pardoned conviction at the time of trial. 488 U.S. at 36-37. The State then sought to reimpose the enhanced sentence by using another prior conviction not offered or admitted at the initial sentencing hearing. *Id.* at 37. In rejecting the defendant’s double jeopardy argument, the United States Supreme Court highlighted both the defendant’s own lack of diligence in objecting to the use of the pardoned conviction and the fact that the State had an alternative means of providing the proof to support the enhanced sentence:

Had the defendant offered evidence at the sentencing hearing to prove that the conviction had become a nullity by reason of the pardon, the trial judge would presumably have allowed the prosecutor an opportunity to offer evidence of another prior conviction to support the habitual offender charge.

Id. at 42.

The highly unique facts of *Lockhart* are thus distinguishable from the much more common circumstance presented by the instant case. In this case, there is no suggestion that the State failed to introduce other admissible evidence because it had been “sandbagged” by defense passivity into believing that it had completely and satisfactorily proven a particular element of

⁷ *Lockhart*, 488 U.S. at 49 (Marshall, J. dissenting)

the offense. To the contrary, the defense objected to the inadmissible evidence. More importantly, unlike the prosecution in *Lockhart*, there was no other evidence that the State could have mustered at the time of the first trial.⁸

Permitting a retrial after the State failed to present sufficient admissible evidence at the first trial has at least two undesirable effects beyond the interests of the criminal defendant. First, it offers a perverse incentive for the State to “insulate” a conviction in “close” cases by introducing inadmissible evidence. As long as the record contains inadmissible evidence pertaining to the elements of the offense, the State will, upon reversal of the first conviction, get another chance to convict the defendant thereby frustrating his double jeopardy rights. Second, it is a waste of public resources to permit a second trial when the first trial suffered from a fundamental failure of proof. When the State fails to prove its case the first time, it is hardly likely to present sufficient *admissible* evidence at the second trial. “It is no answer to say that prosecutors who initially lacked sufficient admissible evidence may gather more before a retrial” as such conduct is “precisely what the Double Jeopardy Clause was designed to guard against.” *Lockhart*, 488 U.S. at 49 (Marshall, J. dissenting) (citing *Tibbs*, 457 U.S. 31, 41).

In short, this Court should adhere to its decision in *Lovejoy* and hold that Ohio’s Double Jeopardy Clause forbids the retrial of a defendant when his or her conviction is not supported by legally sufficient *admissible* evidence.

⁸ While, as discussed *infra*, the circumstances in the instant case are distinguishable from those in *Lockhart*, this Court’s decision in *Lovejoy* demonstrates that *Lockhart*’s rule never applies in Ohio. *Lovejoy* involved a circumstance nearly identical to *Lockhart*. In *Lovejoy*, the trial court erroneously took judicial notice of a critical fact (a prior conviction) at trial which, had the trial court not done so, the State may have been able to prove through the fact through other available evidence. 79 Ohio St. 3d at 449. Nevertheless, this Court held that a retrial was not permitted.

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 acknowledged that *Lovejoy*'s evaluation of the sufficiency of the evidence "exclude[d] consideration of improperly admitted evidence." *Brewer III* at ¶ 13. However, the Eighth District distinguished *Lovejoy* because *Lovejoy* 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 both 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 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 admissible evidence is otherwise sufficient. *See e.g. State v. Brown*, Cuyahoga App. No. 87947, 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 violate appellant'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 are penalized by receiving less double jeopardy protection. Such a result impermissibly burdens appellant'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.

C. Appellant's Conviction Is Not Supported By Legally Sufficient Admissible Evidence.

Excluding the inadmissible hearsay testimony, appellant's gross sexual imposition conviction is not supported by sufficient evidence as the State failed to prove, beyond a reasonable doubt, that he had sexual contact with Latique Barrett.⁹ Specifically, the State failed to prove that he touched an erogenous zone on Latique *and* that he did so for the sexual gratification or arousal of either himself or Latique.

The Due Process Clause of the Fourteenth Amendment requires the State to prove every element of the crime charged beyond a reasonable doubt. *In re Winship* (1970), 397 U.S. 358,

⁹ Sexual contact is 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." R.C. 2907.01(B).

364; see also *State v. McGee* (1997), 79 Ohio St. 3d 193, 196-97; *State v. Robinson* (1976), 47 Ohio St. 2d 103, 108. Evidence is legally sufficient to support a conviction consistent with due process if, "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 beyond a reasonable doubt." *Jackson v. Virginia* (1979), 443 U.S. 307, 319; see also *State v. Jenks* (1991), 61 Ohio St. 3d 259, paragraph two of the syllabus.

To convict appellant of gross sexual imposition (R.C. 2907.05(A)(4)) as charged in this case, the State must prove, beyond a reasonable doubt, the following three essential elements:¹⁰

- 1) Latique is less than thirteen years old; 2) Appellant touched Latique in an erogenous zone; and
- 3) The touching was intended for the specific purpose of appellant or Latique's sexual arousal or gratification. See *State v. Mundy* (1994), 99 Ohio App. 3d 275, 288. In this case, the State failed to prove, with admissible evidence, the second and third essential elements.

1. *Insufficient Evidence of Touching an Erogenous Zone*

Latique Barrett's testimony constitutes the only admissible evidence offered by the State with respect to this element. Latique testified that Mr. Brewer kissed her once on the lips, without using his tongue, and that he touched her in some unspecified location above the waist. (Tr. at 297, 299, 304-305). Such testimony is insufficient to establish, beyond a reasonable doubt, that Mr. Brewer touched an erogenous zone.

¹⁰ R.C. 2907.05(A) provides, in pertinent part:

No person shall have sexual contact with another, not the spouse of the offender . . . when any of the following applies:

* * *

(4) The other person . . . is less than thirteen years of age, whether or not the offender knows the age of that person.

R.C. 2907.01(B) defines an erogenous zone as “including without limitation the thigh, genitals, buttock, public region, or, if the person is a female, a breast.” Kissing someone on the lips does not constitute the touching of an erogenous zone.

Although a few appellate courts have suggested that the mouth *could* be considered an erogenous zone, each of those cases involved circumstances not present here. *State v. Lugo*, Licking App. No. 98CA2003, 1998 Ohio App. LEXIS 6515, * 6; *State v. Valdez*, Ottawa App. No. 90-OT-007, 1991 Ohio App. LEXIS 5128, *25; *State v. Wise*, 1993 Ohio App. LEXIS 283, * 9. In *Lugo*, the court held that a “french kiss” could, under the specific facts and circumstances of the case, constitute contact with an erogenous zone. 1998 Ohio App. LEXIS 6515, *6-8.¹¹ In *Valdez*, the court held that french kissing and touching in between the legs was sufficient evidence of sexual contact. 1991 Ohio App. LEXIS 5128, *2, 6, and 25. In *Wise*, the defendant allegedly grabbed a thirteen-year old girl, pulled her into his home, threw her onto her back on his bed, kissed her on the forehead, cheeks, and lips, and then inserted his tongue into her mouth. *Id.* at *2-3. The defendant then straddled her and started to reach for her chest, but at this point, the girl was able to break free and ran away. *Id.* at *3.¹²

Unlike *Lugo*, *Valdez*, and *Wise*, the alleged touching in this case involved a single kiss on the lips. Such conduct does not constitute the touching of an erogenous zone.¹³

¹¹ The Court in *Lugo* held, however, that a new trial was necessary because the jury was not given an opportunity to make the factual determination of whether the french kiss constitute sexual contact in that case.

¹² The court’s discussion of the mouth in *Wise* was actually superfluous because the defendant was convicted only of *attempted* gross sexual imposition based apparently on the attempted touching of the girl’s chest and not the actual touching of the girl’s mouth (kissing and sticking his tongue inside). *Id.* at *1.

¹³ To the extent that this Court were to determine that lips constitute an erogenous zone because

2. *Insufficient Evidence of Sexual Arousal or Gratification*

Even if this Court were to find sufficient evidence of the touching of an erogenous zone, the record is devoid of evidence that the touching was for the purpose of sexual arousal or gratification.

It is well-established that the specific intent of sexual arousal or gratification is a separate element of the crime of gross sexual imposition. *State v. Edwards*, Cuyahoga App. No. 81351, 2003 Ohio 998, ¶ 21; *see also In re Anderson* (1996), 116 Ohio App.3d 441, 444; *State v. Mundy* (1994), 99 Ohio App. 3d 275, 289. As explained by Eighth District:

Mere proof of the act of touching a described area, however, is insufficient to prove gross sexual imposition. There must be some evidence of sexual gratification as the purpose for the touching.

Edwards, 2003 Ohio 998, ¶ 21; *see also Mundy*, 99 Ohio App. 3d at 289. Although there need not be direct testimony regarding sexual arousal or gratification, there must be sufficient evidence based on the “type, nature, and circumstances of the contact, along with the personality of the defendant” from which a reasonable juror could infer that the touching was undertaken for the purpose of sexual arousal or gratification. *Edwards*, 2003 Ohio 998, ¶ 22; *State v. Ogletree*, Cuyahoga App. No. 84446, 2004 Ohio 6297, ¶¶ 33-35; *In re Anderson*, 116 Ohio App. 3d at 444.

In the instant case, the type of contact, a single kiss on the lips, is not necessarily indicative of a prurient interest. Moreover, the State offered absolutely no evidence about the nature or circumstances of the kiss other than Latique’s ambiguous testimony that Mr. Brewer

of the catch-all provision in the definition of sexual contact, appellant maintains that Ohio’s definition of sexual contact is unconstitutionally vague. The “without limitation” catch-all category cannot constitutionally form the basis for a conviction because it necessarily requires individuals to “guess at its meaning” and permits arbitrary and discriminatory enforcement limited only by the imagination of the prosecutor. *See United States v. Lanier* (1997), 520 U.S. 259, 266; *see also Papachristou v. City of Jacksonville* (1972), 405 U.S. 156, 162.

touched her someplace above her waist. The record is devoid of any context in which the purported kiss occurred. There is no evidence as to when the kiss occurred (day or night), where in the Butler house the kiss occurred, or the events preceding or following the kiss.¹⁴ Given the dearth of evidence regarding the context of the alleged kiss on the lips, no reasonable jury could find, beyond a reasonable doubt, that the kiss was intended for Mr. Brewer or Latique's sexual arousal or gratification.

CONCLUSION

For the foregoing reasons, Appellant Samuel Brewer respectfully asks this Court to adopt his proposed propositions of law and conclude that Ohio's Double Jeopardy provision forbids his retrial.

Respectfully Submitted,



CULLEN SWEENEY, ESQ.
Counsel for Appellant

¹⁴ Latique initially testified that Mr. Brewer did not say anything to her at the time of the kiss. (Tr. at 300). It was only after the prosecutor disregarded that answer and subjected her to a series of leading questions that she testified that appellant told her not to tell anyone. (Tr. at 300).

CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Merit Brief was served upon WILLIAM D. MASON, ESQ., Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 29 day of February, 2008.


CULLEN SWEENEY, ESQ.
Counsel for Appellant

APPENDIX

IN THE SUPREME COURT OF OHIO

07 - 1755

STATE OF OHIO :

Plaintiff-Appellee :

vs :

SAMUEL BREWER :

Defendant-Appellant :

On Appeal from the
Cuyahoga County Court of
Appeals, Eighth Appellate
District CA 87701

NOTICE OF APPEAL OF APPELLANT SAMUEL BREWER

FILED
SEP 24 2007
CLERK OF COURT
SUPREME COURT OF OHIO

COUNSEL FOR APPELLEE:

WILLIAM D. MASON, ESQ.
Cuyahoga County Prosecutor
Justice Center - 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7730

COUNSEL FOR APPELLANT:

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender

BY: CULLEN SWEENEY, ESQ.
0077187
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, Ohio 44113
(216) 443-7583

NOTICE OF APPEAL OF APPELLANT

Appellant Samuel Brewer hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No. 87701 on August 23, 2007 journalized September 4, 2007.

This case involves a felony, raises a substantial constitutional question, and is one of public or great general interest.

Respectfully submitted,


CULLEN SWEENEY, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, OH 44113 on this 19th day of September, 2007.


CULLEN SWEENEY, ESQ.
Counsel for Appellant

LEXSEE 2006 OHIO 6029

**STATE OF OHIO, PLAINTIFF-APPELLEE vs. SAMUEL
BREWER, DEFENDANT-APPELLANT**

No. 87701

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE
DISTRICT, CUYAHOGA COUNTY**

2006 Ohio 6029; 2006 Ohio App. LEXIS 5977

November 16, 2006, Released

SUBSEQUENT HISTORY: Reversed by, in part, Remanded by *State v. Brewer, 113 Ohio St. 3d 375, 2007 Ohio 2079, 2007 Ohio LEXIS 1145 (2007)*

PRIOR HISTORY: **[**1]** Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-465703.

DISPOSITION: REVERSED AND REMANDED.

COUNSEL: FOR APPELLANT: Robert L. Tobik, Chief Public Defender, BY: Cullen Sweeney, Assistant Public Defender, Cleveland, Ohio.

FOR APPELLEE: William D. Mason, Cuyahoga County Prosecutor, BY: Edward J. Corrigan, Assistant Prosecuting Attorney, Cleveland, Ohio.

JUDGES: BEFORE: Rocco, J., Dyke, A.J., Celebrezze, J. KENNETH A. ROCCO, JUDGE. ANN DYKE, A.J., and FRANK D. CELEBREZZE, JR., J., CONCUR.

OPINION BY: KENNETH A. ROCCO

OPINION

JOURNAL ENTRY AND OPINION

KENNETH A. ROCCO, J.:

[*P1] Defendant-appellant Samuel Brewer appeals from his conviction for gross sexual imposition, raising nine assignments of error for our review. He contends that the court improperly allowed the state to introduce hearsay testimony and to bolster the credibility of the child-victim; the evidence was insufficient; his conviction contravened the manifest weight of the evidence; the statutory definition of "sexual contact" is unconstitutionally vague; the court erred by failing to sever counts relating to two different alleged victims; prosecutorial misconduct deprived him of a fair trial; and the residency **[**2]** restrictions on sexually oriented offenders violate due process. We find appellant was prejudiced by the admission of hearsay evidence. Accordingly, we reverse and remand for a new trial.

1 Although his brief lists eleven assignments of error, appellant has withdrawn the two assignments concerning his sentencing.

Procedural History and Evidence

[*P2] Appellant was charged in an eight count indictment filed May 13, 2005. In counts one through six, he was charged with three counts of rape and three counts of kidnapping with a sexual motivation, all relating to a single alleged child victim; counts seven and eight charged him with kidnapping with a sexual motivation and gross sexual imposition involving another child victim. Among other things, appellant moved the court to sever counts seven and eight from counts one through six for trial purposes. The court orally denied this motion immediately before trial.

[*P3] Appellant's jury trial began on October 31, 2005. At trial, the state presented the [**3] testimony of the alleged rape victim, D.B. and her mother, T.B.; the GSI victim, L.B., her mother, B.G., and father Lam.B.; Dr. Saadiya Jackson, who examined D.B.; Detective Sherilyn Howard; and social worker Lisa Zanella. The defense presented the testimony of pastor Shirley Miller. At the conclusion of all of the evidence, the court granted the appellant's motion for a judgment of acquittal with respect to one of the rape counts and one of the kidnapping counts relating to D.B. The jury returned verdicts finding appellant guilty of gross sexual imposition, but not guilty of any of the other charges. The court subsequently sentenced appellant to two years' imprisonment and found him to be a sexually oriented offender.

[*P4] We limit our review of the evidence to that relating to the one charge of which appellant was found guilty. 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. is her niece and visited at her house and played with her children. L.B.'s mother, B.G. (who was also T.B.'s sister), called T.B. and told her that L.B. "was hurting and she was concerned about that. She said someone [**4] in [T.B.'s] house had hurt [L.B.]."

[*P5] L.B.'s mother, 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. then called T.B. and told her that L.B.'s father said that appellant touched L.B. T.B. said she "couldn't believe it." 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.

[*P6] L.B. testified that appellant kissed her, but she denied that he used his tongue when he did so, and denied that he touched her. She specifically denied that appellant touched her "privacy," but did say that he touched her somewhere not apparent from the record. Appellant also told [**5] L.B. not to tell anyone.

[*P7] 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.]."

[*P8] Detective Howard testified that she interviewed the appellant, who denied any sexual contact with the victims. 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

[*P9] Appellant first complains that the court allowed the state to introduce hearsay testimony against him. We review trial court decisions concerning the admission or exclusion of evidence for abuse of discretion. *Peters v. Ohio State Lottery Commn.* (1992), 63 Ohio St.3d 296, 299, 587 N.E.2d 290. We consider only alleged hearsay testimony to which appellant objected at trial.²

2 Some of the alleged hearsay testimony about which appellant complains was elicited on cross-examination; appellant did not object to some of the alleged hearsay testimony.

[**6] [*P10] The state concedes that Zanella's testimony about her interview with L.B. was improperly admitted, but argues that this testimony did not unduly prejudice appellant. We disagree.

[*P11] "In deciding whether admission of these hearsay statements was unduly prejudicial to [the defendant], [o]ur judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the * * * [statements] on the minds of an average jury.' *Harrington v. California* (1969), 395 U.S. 250, 254, 89 S. Ct. 1726, 23 L. Ed. 2d 284. In the final analysis, the evidence in favor of conviction, absent the hearsay, must be so overwhelming that the admission of those statements was harmless beyond a reasonable doubt. *Id.*; *United States v. Hasting* (1983), 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96; *State v. Williams* (1983), 6 Ohio St. 3d 281, 290, 6 OBR 345, 353, 452 N.E. 2d 1323, 1333." *State v. Kidder* (1987), 32 Ohio St.3d 279, 284, 513 N.E.2d 311.

[*P12] 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," [**7] 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." Based on the erroneously admitted testimony of Ms. Zanella alone, the jury could have found that appellant had sexual contact with L.B., a five-year old child. Zanella's testimony was the only evidence in the record that appellant touched L.B.'s genitals with his genitals and that he placed his genitals in L.B.'s mouth. This testimony is not cumulative of L.B.'s testimony or any other testimony in the record.

[*P13] While there was other evidence of sexual contact, that evidence was not so overwhelming that the admission of Zanella's testimony can be considered harmless. The child herself, L.B., testified only that appellant kissed her. She denied that he used his tongue, and denied that he touched her "privacy." The only other evidence of sexual contact was the hearsay testimony of L.B. [**8] 's mother, B.G., and father, Lam.B. B.G. testified, over objection, that L.B. told her appellant touched L.B.'s "private area." L.B.'s father testified, again over objection, that his girlfriend reported to him that L.B. had said "Sam" used his tongue to kiss L.B. These hearsay accounts of different statements the child made to different persons at different times are not overwhelming evidence that appellant touched an erogenous zone or acted with a purpose of sexual arousal or gratification. Therefore, we are compelled to reverse appellant's conviction and remand for a new trial. This conclusion renders moot appellant's remaining assignments of error.

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

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

3 of 92 DOCUMENTS

**STATE OF OHIO, PLAINTIFF-APPELLEE vs. SAMUEL
BREWER, DEFENDANT-APPELLANT**

No. 87701

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE
DISTRICT, CUYAHOGA COUNTY**

2007 Ohio 3407; 2007 Ohio App. LEXIS 3164

July 5, 2007, Released

SUBSEQUENT HISTORY: Reargument granted by, Adhered to *State v. Brewer*, 2007 Ohio 4291, 2007 Ohio App. LEXIS 3842 (Ohio Ct. App., Cuyahoga County, Aug. 23, 2007) Discretionary appeal allowed by *State v. Brewer*, 2007 Ohio 6803, 2007 Ohio LEXIS 3429 (Ohio, Dec. 26, 2007)

PRIOR HISTORY: [1]**

Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-465703. *State v. Brewer*, 113 Ohio St. 3d 375, 2007 Ohio 2079, 865 N.E.2d 900, 2007 Ohio LEXIS 1145 (2007)

DISPOSITION: REVERSED AND REMANDED.

COUNSEL: FOR APPELLANT: Robert L. Tobik, Chief Public Defender, BY: Cullen Sweeney, Assistant Public Defender, Cleveland, Ohio.

FOR APPELLEE: William D. Mason, Cuyahoga County Prosecutor, BY: Edward J. Corrigan, Jon W. Oebker, Assistant Prosecuting Attorneys, Cleveland, Ohio.

JUDGES: BEFORE: Rocco, J., Celebrezze, A.J and Dyke, J. FRANK D. CELEBREZZE, JR., A.J. and ANN DYKE, J. CONCUR.

OPINION BY: KENNETH A. ROCCO**OPINION**

JOURNAL ENTRY AND OPINION

KENNETH A. ROCCO, J.:

[*P1] This case is before this court on remand from the Ohio Supreme Court. The Ohio Supreme Court reversed our determination that defendant-appellant Samuel Brewer's challenge to the sufficiency of the evidence was moot, and remanded for us to consider that assignment of error.

[*P2] In our previous decision, we concluded that appellant was prejudiced by the admission of hearsay evidence. In evaluating the sufficiency of the evidence, however, we must consider all of the evidence admitted by the trial court, whether erroneously or not. The evidence as a whole was sufficient to support the jury's verdict. Accordingly, we reverse and remand for a new trial.

Procedural [**2] History and Evidence

[*P3] Our previous 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.

[*P4] 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.

[*P5] 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.]."

[*P6] B.G. testified that she received a telephone call from [**3] 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.

[*P7] 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 that was "the same place that you just showed us." [**4] She said this touching occurred while appellant was kissing her. Appellant also told L.B. not to tell anyone.

[*P8] 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.]."

[*P9] 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

[*P10] In our previous 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.

[*P11] In evaluating [**5] the sufficiency of the evidence to support appellant's conviction, however, 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, P80, 767 N.E.2d 216; *Lockhart v. Nelson* (1988), 488 U.S. 33, 34, 109 S. Ct. 285, 102 L. Ed. 2d 265. 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 will nevertheless consider her testimony in determining whether the evidence before the trial court was sufficient to support the conviction. If the evidence was insufficient, then the double jeopardy cause precludes retrial. However, the *double jeopardy clause* does not preclude retrial if the court erred by admitting some of the evidence, but that evidence supported the jury's actions. *Lockhart*, 488 U.S. at 40-42.

[*P12] "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 [**6] 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, 574 N.E.2d 492, paragraph two of the syllabus.

[*P13] 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."

[*P14] 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. testified that appellant touched her (apparently pointing to her vagina) and kissed her; there was also testimony [**7] 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. Accordingly, we find the 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 must 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.

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., [**8]
A.J. and ANN DYKE, J. CONCUR

LEXSEE 2007 OHIO 4291

**STATE OF OHIO, PLAINTIFF-APPELLEE vs. SAMUEL
BREWER, DEFENDANT-APPELLANT**

No. 87701

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE
DISTRICT, CUYAHOGA COUNTY**

2007 Ohio 4291; 2007 Ohio App. LEXIS 3842

August 23, 2007, Released

SUBSEQUENT HISTORY: Discretionary appeal allowed by *State v. Brewer, 2007 Ohio 6803, 878 N.E.2d 33, 2007 Ohio LEXIS 3429 (Ohio, Dec. 26, 2007)*

PRIOR HISTORY: [1]**

Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-465703. *State v. Brewer, 2007 Ohio 3407, 2007 Ohio App. LEXIS 3164 (Ohio Ct. App., Cuyahoga County, July 5, 2007)*

DISPOSITION: RECONSIDERATION GRANTED; REVERSED AND REMANDED.

COUNSEL: FOR APPELLANT: Robert L. Tobik, Chief Public Defender, BY: Cullen Sweeney, Assistant Public Defender, Cleveland, Ohio.

FOR APPELLEE: William D. Mason, Cuyahoga County Prosecutor, BY: Edward J. Corrigan, Jon W. Oebker, Assistant Prosecuting Attorneys, Cleveland, Ohio.

JUDGES: BEFORE: Rocco, J., Celebrezze, A.J. and Dyke, J. FRANK D. CELEBREZZE, JR., A.J., and ANN DYKE, J., CONCUR.

OPINION BY: KENNETH A. ROCCO

OPINION

JOURNAL ENTRY AND OPINION

KENNETH A. ROCCO, J.:

[*P1] 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, [**2] so we reverse and remand for a new trial.

[*P2] 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 de-

terminated 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.

[*P3] 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

[*P4] 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 [**3] to two years' imprisonment and found him to be a sexually oriented offender.

[*P5] 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.

[*P6] 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.]."

[*P7] 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 [**4] 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.

[*P8] 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.

[*P9] 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.]."

[*P10] Detective Howard testified [**5] 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

[*P11] 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.

[*P12] 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.

[*P13] Appellant claims that this court may consider only properly admitted testimony in assessing [**6] the sufficiency of the evidence. In support of this proposition, he cites *State v. Lovejoy*, 79 Ohio St.3d 440, 1997 Ohio 371, 683 N.E.2d 1112. 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.

[*P14] 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, 716 N.E.2d 1126. 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.

[*P15] 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 [**7] 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, 109 S. Ct. 285, 102 L. Ed. 2d 265. 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, P100.

[*P16] 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, P80, 767 N.E.2d 216; *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.

[*P17] "An appellate court's function when reviewing the sufficiency [**8] 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, 574 N.E.2d 492, *paragraph two of the syllabus*.

[*P18] 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."

[*P19] Ms. Zanella's testimony that L.B. told her appellant touched L.B.'s genitals with his genitals and placed his genitals in [*9] 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 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.

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 [*10] this court to consider them as sub-

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

[*P20] 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, 853 N.E.2d 689*; *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, 767 N.E.2d 216*. 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.

Reversed and remanded.

It is ordered [*11] 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

LEXSTAT OHIO STAT S 2907.01

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2008 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JANUARY 25, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2907. SEX OFFENSES
IN GENERAL

Go to the Ohio Code Archive Directory

ORC Ann. 2907.01 (2008)

§ 2907.01. Definitions

As used in *sections 2907.01 to 2907.38 of the Revised Code*:

(A) "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means 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.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) "Harmful to juveniles" means that quality of any material or performance describing or representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of the following apply:

(1) The material or performance, when considered as a whole, appeals to the prurient interest of juveniles in sex.

(2) The material or performance is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles.

(3) The material or performance, when considered as a whole, lacks serious literary, artistic, political, and scientific value for juveniles.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if any of the following apply:

- (1) Its dominant appeal is to prurient interest;
- (2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;
- (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
- (4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;
- (5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch and includes an image or text appearing on a computer monitor, television screen, liquid crystal display, or similar display device or an image or text recorded on a computer hard disk, computer floppy disk, compact disk, magnetic tape, or similar data storage device.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

(L) "Spouse" means a person married to an offender at the time of an alleged offense, except that such person shall not be considered the spouse when any of the following apply:

(1) When the parties have entered into a written separation agreement authorized by *section 3103.06 of the Revised Code*;

(2) During the pendency of an action between the parties for annulment, divorce, dissolution of marriage, or legal separation;

(3) In the case of an action for legal separation, after the effective date of the judgment for legal separation.

(M) "Minor" means a person under the age of eighteen.

(N) "Mental health client or patient" has the same meaning as in *section 2305.51 of the Revised Code*.

(O) "Mental health professional" has the same meaning as in *section 2305.115 [2305.11.5] of the Revised Code*.

(P) "Sado-masochistic abuse" means flagellation or torture by or upon a person or the condition of being fettered, bound, or otherwise physically restrained.

HISTORY:

134 v H 511 (Eff 1-1-74); 136 v S 144 (Eff 8-27-75); 142 v H 51 (Eff 3-17-89); 143 v H 514 (Eff 1-1-91); 146 v H 445 (Eff 9-3-96); 147 v H 32 (Eff 3-10-98); 149 v S 9 (Eff 5-14-2002); 149 v H 8. Eff 8-5-2002; 149 v H 490, § 1, eff. 1-1-04; 151 v H 95, § 1, eff. 8-3-06; 151 v H 23, § 1, eff. 8-17-06; 152 v S 10, § 1, eff. 1-1-08.

LEXSTAT ORC ANN. 2907.05

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2008 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JANUARY 25, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2907. SEX OFFENSES
SEXUAL ASSAULTS

Go to the Ohio Code Archive Directory

ORC Ann. 2907.05 (2008)

§ 2907.05. Gross sexual imposition

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the judgment or control of the other person or of one of the other persons by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(3) The offender knows that the judgment or control of the other person or of one of the other persons is substantially impaired as a result of the influence of any drug or intoxicant administered to the other person with the other person's consent for the purpose of any kind of medical or dental examination, treatment, or surgery.

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

(5) The ability of the other person to resist or consent or the ability of one of the other persons to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age.

(B) No person shall knowingly touch the genitalia of another, when the touching is not through clothing, the other person is less than twelve years of age, whether or not the offender knows the age of that person, and the touching is done with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(C) Whoever violates this section is guilty of gross sexual imposition.

(1) Except as otherwise provided in this section, gross sexual imposition committed in violation of division (A)(1), (2), (3), or (5) of this section is a felony of the fourth degree. If the offender under division (A)(2) of this section substantially impairs the judgment or control of the other person or one of the other persons by administering any controlled substance described in *section 3719.41 of the Revised Code* to the person surreptitiously or by force, threat of force, or deception, gross sexual imposition committed in violation of division (A)(2) of this section is a felony of the third degree.

(2) Gross sexual imposition committed in violation of division (A)(4) or (B) of this section is a felony of the third degree. Except as otherwise provided in this division, for gross sexual imposition committed in violation of division (A)(4) or (B) of this section there is a presumption that a prison term shall be imposed for the offense. The court shall impose on an offender convicted of gross sexual imposition in violation of division (A)(4) or (B) of this section a mandatory prison term equal to one of the prison terms prescribed in *section 2929.14 of the Revised Code* for a felony of the third degree if either of the following applies:

(a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation;

(b) The offender previously was convicted of or pleaded guilty to a violation of this section, rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.

(D) A victim need not prove physical resistance to the offender in prosecutions under this section.

(E) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under *section 2945.59 of the Revised Code*, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(F) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(G) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

HISTORY:

134 v H 511 (Eff 1-1-74); 136 v S 144 (Eff 8-27-75); 137 v H 134 (Eff 8-8-77); 143 v H 208 (Eff 4-11-90); 145 v S 31 (Eff 9-27-93); 147 v H 32. Eff 3-10-98; 151 v H 95, § 1, eff. 8-3-06; 152 v S 10, § 1, eff. 1-1-08.

1 of 1 DOCUMENT

UNITED STATES CODE SERVICE
Copyright © 2007 Matthew Bender & Company, Inc.,
one of the LEXIS Publishing (TM) companies
All rights reserved

CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENTS
AMENDMENT 5

Go to the United States Code Service Archive Directory

USCS Const. Amend. 5

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 7 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1 of 1 DOCUMENT

UNITED STATES CODE SERVICE
Copyright © 2006 Matthew Bender & Company, Inc.,
one of the LEXIS Publishing (TM) companies
All rights reserved

CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENTS
AMENDMENT 6

USCS Const. Amend. 6

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 7 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

1 of 1 DOCUMENT

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2008 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JANUARY 25, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Go to the [Ohio Code Archive Directory](#)

Oh. Const. Art. I, § 5 (2008)

§ 5. Trial by jury; reform in civil jury system

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

HISTORY:

(As amended September 3, 1912.)

1 of 1 DOCUMENT

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2006 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY *
* AND FILED WITH THE SECRETARY OF STATE THROUGH MAY 1, 2006 *
* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2006 *

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

Oh. Const. Art. I, § 10 (2006)

§ 10. Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

HISTORY: (As amended September 3, 1912.)