

NO. 2007-1755

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 87701

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STATE OF OHIO,

Plaintiff-Appellee

-vs-

SAMUEL BREWER,

Defendant-Appellant

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**MERIT BRIEF OF APPELLEE**

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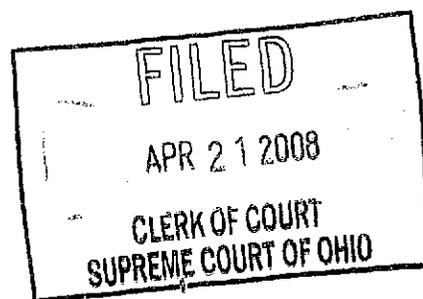
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**MERIT BRIEF OF APPELLEE**

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**STATEMENT OF THE CASE**

After a bench trial, defendant-appellant, Samuel Brewer (hereinafter referred to as “defendant”) was convicted of one count of gross sexual imposition. He appealed to the Eighth District. In *State v. Brewer*, Cuyahoga App. No.87701, 2006-Ohio-6029 (*Brewer I*) the Eighth District found merit to defendant’s argument that the trial court admitted improper hearsay evidence from social worker Lisa Zanella. (On appeal, the State conceded that the evidence was inadmissible but argued that it was harmless. The Eighth District disagreed and remanded for a new trial. )

On the hearsay issue, the Eighth District stated as follows:

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.

{¶ 13} 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.'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.

*Brewer I* at 12-13. As indicated in the preceding quote, in *Brewer I*, the Eighth District did not address defendant's sufficiency claim, holding it to be "moot."

Defendant appealed to this Court and argued that the Eighth District was obligated to rule on the sufficiency claim. This Court agreed and remanded the case back to the Eighth District.

On remand, the appellate court rejected defendant's sufficiency claim. *State v. Brewer*, Cuyahoga App. No.87701, 2007-Ohio-3407 (*Brewer II*). In evaluating whether sufficient evidence was presented at trial, the Eighth District considered all the evidence presented at trial, including the hearsay evidence that the *Brewer I* opinion determined was erroneously admitted.

In *Brewer II*, the court below stated as follows:

{¶ 11} In evaluating 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, ¶ 80; *Lockhart v. Nelson* (1988), 488 U.S. 33, 34. 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.

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

{¶ 13} 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.”

{¶ 14} 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 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.

*Brewer II* at ¶ 11 – 14.

Upon the release of *Brewer II*, defendant filed a motion for reconsideration claiming that the Eighth District erred in considered the hearsay evidence in its sufficiency analysis. In response to the motion for reconsideration, the appellate court issued yet a third *Brewer* opinion. *State v. Brewer*, Cuyahoga App. No. 87701, 2007-Ohio-4291. (*Brewer III*). In *Brewer III*, the

Eighth District denied defendant's motion for reconsideration and, thus, continued to consider the hearsay evidence in rejecting defendant's sufficiency argument. The *Brewer III* opinion stated as follows:

{¶ 11} 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.

{¶ 12} 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.

{¶ 13} Appellant claims that this court may consider only properly admitted testimony in assessing the sufficiency of the evidence. In support of this proposition, he cites *State v. Lovejoy*, 79 Ohio St.3d 440, 1997-Ohio-371. We agree that the Ohio Supreme Court in *Lovejoy* considered the sufficiency of the evidence *excluding* consideration of improperly admitted evidence. However, there was a critical distinction between the procedural posture of *Lovejoy* and this case: In *Lovejoy*, the case was tried to the bench; in this case, it was tried to a jury.

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

{¶ 15} Likewise, an appellate court assessing the sufficiency of the evidence must consider all of the evidence that was before the jury, even if it was improperly admitted. If the evidence as a whole was insufficient, then the double jeopardy clause precludes retrial. However, the double jeopardy clause does not preclude retrial if the court erred by admitting some of the evidence that supported the jury's actions. *Lockhart v. Nelson* (1988), 488 U.S. 33, 40-42. If some evidence was improperly admitted and prejudicial to the appellant but that evidence supported the verdict, the proper remedy is retrial, not outright reversal. See *Lockhart*, 488 U.S. at 34; *State v. Jeffries*, Lake App. No.2005-L-057, 2007-Ohio-3366, ¶ 100.

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

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

{¶ 18} 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.”

{¶ 19} Ms. Zanella's testimony that L.B. told her appellant touched L.B.'s genitals with his genitals and placed his genitals in L.B.'s mouth, if believed, provided ample evidence that appellant had sexual contact with L.B., a five-year-old child. Furthermore, L .B. herself testified that appellant touched her (apparently pointing to her vagina) and kissed her; there was also testimony that she told her mother that appellant had touched her “private area.” Finally, there was testimony that L.B. told Lam.B.'s girlfriend that appellant had used his tongue in kissing her. This testimony, if believed, also supports a determination that appellant had sexual contact with a five-year-old child.<sup>FN1</sup> 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.

FN1. In his motion for reconsideration, appellant urges that the state did not offer statements L.B. made to B.G. and Lam. B's girlfriend for the truth of the matter asserted, so that it is improper for this court to consider them as substantive

evidence. The jury was not instructed that its consideration of this testimony was limited, however. Cf. *State v. Kelly*, Cuyahoga App. No. 85662, 2006-Ohio-5902. In any event, we do not necessarily rely upon this additional testimony. The improperly admitted testimony of Ms. Zanella alone was sufficient to support the conviction.

{¶ 20} Appellant has requested that we rehear this case en banc. The cases he has cited as demonstrating a conflict within our district are largely distinguishable. Bench trials were conducted in all but one of these cases. *Newburgh Heights v. Cole*, 166 Ohio App.3d 826, 2006-Ohio-2463; *State v. Garrett*, Cuyahoga App. No. 87112-13, 2006-Ohio-6020; *State v. Webb*, Cuyahoga App. No. 87853, 2007-Ohio2222. As noted above, a different standard applies when a case is tried to the court. Furthermore, we feel obligated to follow the Ohio Supreme Court's pronouncements in *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126. Although not dispositive in that case, the court clearly expressed the standard it intended for the appeals courts to apply. Therefore, we decline to request a rehearing en banc.

*Brewer III* at ¶ 11 – 20.

### **STATEMENT OF FACTS**

The *Brewer I* opinion recounted the facts of this case as follows:

{¶ 2} 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.

{¶ 3} Appellant's jury trial began on October 31, 2005. At trial, the state presented the 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.

{¶ 4} 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 in [T.B.'s] house had hurt [L.B.]."

{¶ 5} 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.

{¶ 6} 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 L.B. not to tell anyone.

{¶ 7} 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.]."

{¶ 8} 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.

*State v. Brewer*, Cuyahoga App. No.87701, 2006-Ohio-6029 (*Brewer I*) at ¶ 2-8.

## LAW AND ARGUMENT

**Proposition 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. An indictment which fails to include an essential element is fatally defective, is voidable for lack of subject matter jurisdiction or for the failure to charge an offense, and may be challenged for the first time on appeal.**

This case presents a simple and straightforward issue: when an appellate court determines that evidence was erroneously admitted at trial, that evidence should be considered when that same appellate court reviews that defendant's sufficiency claim. The United States Supreme Court, in *Lockhart, infra*, determined that an appellate court should consider all the evidence that was before the trial court, even evidence that was later determined to be inadmissible.

On this issue, this Court has issued conflicting pronouncements. As explained below, in *Lovejoy, infra*, this Court, although not a part of the syllabus, stated that an appellate court should consider only admissible evidence during the sufficiency evaluation. Thus, *Lovejoy* is contrary to *Lockhart*. Later in *Yarbrough, infra*, this Court, also not a part of the syllabus, cited approvingly to *Lockhart's* holding that a reviewing Court should review *all* of the evidence that was before the trial court when it denied the sufficiency challenge. In the case at bar, the Eighth District specifically referenced *Yarbrough* in choosing the *Lockhart* approach.<sup>1</sup>

This case presents an opportunity to clarify the issue. As explained below, the State respectfully submits that the *Lockhart* approach is sound judicial policy. If this Court agrees, the State respectfully suggests the following syllabus:

---

<sup>1</sup> In choosing the *Lockhart* approach, the appellate court made a distinction between bench and jury trials. To be clear, the State believes that the *Lockhart* approach should be the law of this State. However, the State cannot find any support for the Eighth District's distinction between bench and jury trials on this issue.

When reviewing a challenge to the sufficiency of the evidence, the reviewing court must consider all the evidence admitted against the appellant at trial.

**A. The General Rule is that the State is permitted to retry a defendant after a successful appeal.**

The ultimate question in this case is whether the State will be able to retry this defendant after he, on direct appeal, successfully attacked evidence admitted at his trial. As a general rule, when a defendant is successful on appeal, the double jeopardy clause will not bar a retrial. *United States v. Tateo* (1964), 377 U.S. 463, 467-68, 84 S.Ct. 1587, 1589-90, 12 L.Ed.2d 448; *United States v. Ball* (1896), 163 U.S. 662, 672, 16 S.Ct. 1192, 1195, 41 L.Ed. 300; 3 W. LaFave & J. Israel, *Criminal Procedure* (1983) § 24.4, pp. 85-87. It only makes sense that a defendant cannot himself request that his conviction be set aside and then rely on that overturned conviction to bar a new trial. See 1 J. Bishop, *Criminal Law* (9th Ed.1923) § 1003, p. 743.

This rule is supported by two principles. First, the defendant, by successfully appealing his conviction, waives any double jeopardy objection to a retrial; *Trono v. United States* (1995), 199 U.S. 521, 530-31, 533, 26 S.Ct. 121, 123, 50 L.Ed. 292. Second, jeopardy continues through the appeal and into the subsequent retrial. See *Price v. Georgia* (1970), 398 U.S. 323, 326, 90 S.Ct. 1757, 1759, 26 L.Ed.2d 300; 3 W. LaFave & J. Israel, *supra*, § 24.4. These theories, known as “waiver” and “continuing jeopardy,” enable the state to retry a defendant who has successfully appealed.

It has been said that it is a “venerable principl[e] of double jeopardy jurisprudence” that “[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, *Burks v. United States* (1978), 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, poses no bar to further prosecution on the same charge.” *United States v. Scott*

(1978), 437 US 82, 90-91, 98 S Ct 2187, 57 L Ed 2d 65. Justice Harlan explained the basis for this rule:

Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest. *United States v. Tateo*, 377 US 463, 466, 12 L Ed 2d 448, 84 S Ct 1587 [1589] (1964).

*Montana v. Hall* (1987), 481 U.S. 400, 402-03, 107 S.Ct. 1825, 1826, 95 L.Ed.2d 354.

**B. The United States Supreme Court has reasoned that a reviewing court should consider all the admitted evidence in conducting a sufficiency review.**

In *Lockhart v. Nelson* (1988), 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265, the Supreme Court stated: "in cases such as this, where the evidence offered by the State and admitted by the trial court-whether erroneously or not-would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial." *Id.* 488 U.S. at 34, 109 S.Ct. 285. Relying on its opinion in *Burks v. United States*, *supra*, *Lockhart* distinguished reversals based solely on evidentiary insufficiency from reversals based on ordinary trial errors, such as the improper admission or rejection of evidence. It stated:

While the former is in effect a finding "that the government has failed to prove its case" against the defendant, the latter "implies nothing with respect to the guilt or innocence of the defendant," but is simply "a determination that [he] has been convicted through a judicial process which is defective in some fundamental respect."

*Lockhart*, 488 U.S. at 40, (quoting *Burks*, 437 U.S. at 15). The Court justified its holding in part on the basis that it “**merely recreates the situation that would have been obtained if the trial court had not erroneously admitted evidence.**” *Id.* at 42 [emphasis added].

The defendant in *Lockhart* pleaded guilty to burglary and theft after taking \$45 from a vending machine, and was sentenced by a jury to twenty years in prison under the Arkansas habitual criminal offender act. The enhanced sentence was based on the state's proof of four prior felony convictions. The state later conceded that long before the sentencing trial, Nelson had been pardoned for one of the four convictions upon which the sentence was based. When Nelson learned that the state planned to seek an enhanced sentence in a second sentencing trial using proof of other, valid convictions, he sought a federal writ of habeas corpus to bar the second trial on double jeopardy grounds. Nelson argued to the district court that his sentence was based on insufficient evidence because the state had failed to prove its case. The district court decided that the Double Jeopardy Clause foreclosed the state from attempting to resentence Nelson as an habitual offender. *Nelson v. Lockhart* (E.D.Ark.1986), 641 F.Supp. 174, and the Eighth Circuit affirmed. *Nelson v. Lockhart* (8th Cir.1987), 828 F.2d 446.

The Court in, “recreating the situation,” reasoned that “[h]ad 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.” *Lockhart* 488 U.S. at 42.

**C. The *Lockhart* approach allows the prosecution to rely on the trial court’s rulings and not “overtry” its case.**

The *Lockhart* approach is sound because, when a trial court erroneously admits evidence resulting in reversal, the State should not be precluded from retrial even though after-the-fact

inadmissibility of the evidence has rendered insufficient the State's proof at trial. The State, in proving its case at trial, is "entitled to rely upon the rulings of the court and proceed accordingly[.]" W. LaFare & J. Israel, *Criminal Procedure* § 24.4 at 917 (1985). If the evidence offered by the State is received after challenge and is legally sufficient to establish the guilt of the accused, the State is not obligated to go further and adduce additional evidence that would be, for example, cumulative. Were it otherwise, the State, to be secure, would have to assume every ruling by the trial court on the evidence to be erroneous and marshal and offer every bit of relevant and competent evidence. The practical consequences of this would adversely affect the administration of justice, if for no other reason, than the time that would be required for preparation and trial of every case. As Judge Posner stated, "A contrary conclusion would lead the government to "overtry" its cases-to introduce redundant evidence of the defendant's guilt-in order to insure itself against the risk of not being able to retry the defendant should some of its evidence be held on appeal to be inadmissible." *United States v. Tranowski* (7<sup>th</sup> Cir. 1983), 702 F.2d 668.

Indeed if the *Lockhart* rule is not followed, the State has not received "one fair opportunity" to make its proof. Where the State has not received "one fair opportunity" to present its case, former jeopardy considerations do not bar a retrial of the defendant. *Burks v. United States*, 437 U.S. at 15-16.

**D. This Court, in *Lovejoy*, departed from the United States Supreme Court's approach in *Lockhart*.**

Nine years after the United States Supreme Court issued *Lockhart*, this Court, although not a part of the syllabus, departed from the reasoning in *Lockhart*. In *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 1997-Ohio-371 (Pfeifer, dissenting), this Court stated that, in reviewing a sufficiency claim, an appellate court should not consider evidence that was determined to be inadmissible on appeal. This Court stated as follows:

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.

*Lovejoy* at 450. The *Lovejoy* majority opinion, rejecting the *Lockhart* approach, did not cite to the *Lockhart* opinion.

In *Lovejoy*, this Court was concerned about the State having a “second bite of the apple.” Herein, the State is not seeking a second bite of the apple. Rather, the State is merely attempting to “recreat[e] the situation that would have been obtained if the trial court had not erroneously admitted evidence.” *Lockhart*, 488 U.S. at 42.

**E. Subsequent to *Lovejoy*, this Court has shifted to the *Lockhart* approach.**

Four years after *Lovejoy*, this Court cited, approvingly to the *Lockhart* approach in *State v. Yarbrough*, 95 Ohio St.3d 227, 767 N.E.2d 216, 2002-Ohio-2126. In *Yarbrough*, this Court stated that “‘on a claim of insufficient evidence, the reviewing court considers **all** the evidence admitted against the appellant at trial.’ See *Lockhart v. Nelson* (1988), 488 U.S. 33, 40-42, 109 S.Ct. 285, 102 L.Ed.2d 265.” *Yarbrough* at ¶ 80 [emphasis added]. This citation to the *Lockhart* approach was relied upon by the appellate court below. Following the *Lockhart* approach, the Eighth District considered *Yarbrough* instructive as to the standard that should be applied in

Ohio. “Furthermore, we feel obligated to follow the Ohio Supreme Court's pronouncements in *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126. Although not dispositive in that case, the court clearly expressed the standard it intended for the appeals courts to apply.” *Brewer III* at ¶ 20.

**F. The greater weight of authority across the county has adopted the *Lockhart* approach.**

Virtually every state and federal jurisdiction has addressed this issue and espoused *Lockhart* as the preferred approach. As it is well-established federal law, all the federal circuits follow the United States Supreme Court opinion in *Lockhart*. However, it is worth noting that even before the Supreme Court's decision in *Lockhart*, the principle that a reviewing court must consider all the evidence admitted at trial in determining whether retrial is permissible under the Double Jeopardy Clause had been adopted by the majority of the federal courts of appeals that had decided this issue. *See e.g., United States v. Porter* (1<sup>st</sup> Cir. 1986), 807 F.2d 21, *cert. denied*, (1987), 481 U.S. 1048, 107 S.Ct. 2178, 95 L.Ed.2d 835; *United States v. Tranowski, supra*; *United States v. Sarmiento-Pere*, (5<sup>th</sup> Cir. 1981), 667 F.2d 1239 *cert. denied*, (1982) 459 U.S. 834, 103 S.Ct. 77, 74 L.Ed.2d 75; *United States v. Harmon* (9<sup>th</sup> Cir. 1980) 632 F.2d 812 ; *United States v. Mandel* (4<sup>th</sup> Cir. 1979) 591 F.2d 1347 (4th Cir.), *aff'd on rehearing*, 602 F.2d 653 (4th Cir.1979) (en banc), *cert. denied*, (1980) 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236).

Most state courts have followed *Lockhart*. *See, e.g., Arizona, State v. May* (2005), 210 Ariz. 452, 112 P.3d 39, 453 Ariz. Adv. Rep. 3; California *People v. Venegas* (1998) 18 Cal.4th 47, 94-95; Colorado, *State v. Williams* (2007 Colo. App.), --- P.3d ---, 2007 WL 17041641 Connecticut, *State v. Gray* (1986), 200 Conn. 523, 512 A.2d 217, 225-26; Florida, *Pacheco v. State* (Fla App. 1997), 698 So.2d 593, 596; *Evans v. State* (Ala.Crim.App. 1990), 568 So.2d 878, 880; Georgia, *Maxwell v. State* (1992), 262 Ga. 73, 74, 414 S.E.2d 470, overruled on other

grounds, *Wall v. State* (1998), 269 Ga. 506, 509(2), 500 S.E.2d 904; Illinois, *People v. Oliver* (1976), 38 Ill.App.3d 166, 347 N.E.2d 865, 868; Indiana, *Ritchie v. State* (1963), 243 Ind. 614, 189 N.E.2d 575, 576-79; Iowa, *State v. Lampman* (Iowa Ct.App.1982), 342 N.W.2d 77; Kansas, *State v. Moss* (1976), 221 Kan. 47, 557 P.2d 1292, 1295; Louisiana, *State v. Byrd* (La. 1980), 385 So.2d 248, 251-52; Maryland, *Brooks v. State* (1989), 314 Md. 585, 552 A.2d 872, 880; Michigan, *People v. Hoffmeister* (1975), 394 Mich. 155, 229 N.W.2d 305, 309, reh'g denied, 394 Mich. 944, 230 N.W.2d 270; Minnesota, *State v. Jackson* (1936), 198 Minn. 111, 268 N.W. 924, 926; Missouri, *State v. Wood* (1979), 596 S.W.2d 394, 398-99; Mississippi, *Hillard v. State* (2005), 950 So.2d 224; Montana, *State v. Gunn* (1931), 89 Mont. 453, 300 P. 212, 217; New Mexico, *State v. Haynie* (1994), 116 N.M. 746, 867 P.2d 416, 417-418; New York, *People v. Monaco* (1964). 14 N.Y.2d 43, 248 N.Y.S.2d 41, 197 N.E.2d 532, 535 (1964); Oklahoma, *Kilpatrick v. State* (1942), 75 Okla.Crim. 28, 128 P.2d 246, 249; Oregon, *State v. Jackson* (1979), 40 Or.App. 759, 596 P.2d 600, 602; Rhode Island, *State v. Eiseman* (R.I. 1983) 461 A.2d 369, 384; Tennessee, *State v. Brown* (Tenn. 1992), 836 S.W.2d 530, 544; Texas, *Bigley v. State* (Tex.Crim.App.1993); 865 S.W.2d 26, 27-28; Washington, *State v. Plakke* (1982), 31 Wash.App. 262, 639 P.2d 796, 799-800 (1982), overruled on other grounds by *State v. Davis* (1983), 35 Wash.App. 506, 667 P.2d 1117; Wyoming, *State v. Sorrentino*, 31 Wyo. 129, 224 P. 420, 426, reh'g denied, (Wyo. 1924), 31 Wyo. 499, 228 P. 283.

**G. Even under a *Lovejoy* approach, the appellate court found that sufficient evidence supported this conviction.**

To be clear, the State submits that the *Lockhart* approach, cited approvingly in this Court's *Yarbrough* opinion, is the better approach to this issue. However, even under an application of *Lovejoy* to this case, sufficient evidence supports this conviction and the State should be entitled to retry this defendant.

Defendant 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.” R.C. 2907.01(B).

The Court below was consistent in noting that, separate and apart from the hearsay evidence, there was other evidence of sexual contact. In *Brewer I*, the court noted that, although it was not enough evidence to overcome the harmless error analysis, there was “evidence of sexual conduct” other than the hearsay testimony of Ms. Zanella. *Brewer I* at ¶ 13.

Moreover, in ruling on the sufficiency claim in *Brewer II*, the appellate court noted that, in addition to the hearsay testimony from Ms. Zanella,

\* \* \* L.B. 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. \* \* \*

*Brewer II* ¶ 14. A review of all three *Brewer* opinions clarifies the appellate court’s judgment that, although this other evidence of sexual conduct was not enough to render the hearsay error harmless, the evidence, separate from the hearsay evidence, independently was sufficient to support the conviction.

### CONCLUSION

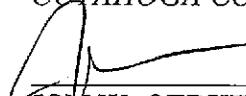
Thus, the State submits that this case presents this Court with the opportunity to both clarify Ohio law and follow the prevailing view from across the country by holding that when

reviewing a challenge to the sufficiency of the evidence, the reviewing court must consider all the evidence admitted against the appellant at trial.

Respectfully submitted,

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By:

  
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**SERVICE**

A copy of the foregoing Merit Brief of Appellee has been mailed this 21<sup>st</sup> day of April, 2008, to Cullen Sweeney, Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland, OH 44113.

  
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