

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff/Appellee,

vs.

MATTHEW KARESKI

Defendant/Appellant.

CASE NO: 12-1242

APPEAL FROM THE SUMMIT  
COUNTY COURT OF APPEALS,  
NINTH APPELLATE DISTRICT

COURT OF APPEALS  
CASE NO. 25705

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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## I. WHY THIS CASE IS OF GREAT PUBLIC AND GENERAL INTEREST

The appellate jurisdiction of the Ohio Supreme Court is invoked when a controversy presents either a substantial constitutional question or a matter of great public or general interest. Ohio Constitution, Article IV, §2(B); See Also Franchise Developers, Inc. v. City of Cincinnati (1987), 30 Ohio St.3d 28, 31, 505 N.E.2d 966. This case should be accepted both as a matter of great public interest and as a substantial constitutional question.

In this case, the Ninth District Court of Appeals reversed a trial court conviction of Appellant, Matthew Kareski, after the trial court took judicial notice of an element of a criminal offense. The State appeared at trial with no evidence as to an element of the offense – no witnesses, no documentation, and no admissions. The trial court took judicial notice of the element, filling the gap left by the State. Thus, under *State v. Lovejoy* (1997), 79 Ohio St. 3d 440, 683 N.E.2d 1112, retrial of Kareski should have been barred by the Double Jeopardy Clauses of the State and Federal Constitutions. (Section 10, Article I of the Ohio Constitution, Fifth Amendment to the United States Constitution).

However, the Ninth District found that the taking of judicial notice of an element of an offense, even where the State had no evidence to submit on that point, was mere "trial error" which allowed a retrial under *State v. Brewer*, 121 Ohio St. 3d 202, 2009-Ohio-593, 903 N.E.2d 28. *State v. Kareski*, 9th Dist. No. 25705, 2012-Ohio-2173, at ¶13, Appendix p. 5-6. There was no indication in the record that the State declined to present cumulative evidence after the trial court erroneously took judicial notice of the

element, as in *Brewer*, but rather the transcript is clear that the State had no admissible evidence on the element and that gap was filled by the trial court, as in *Lovejoy*. Thus the State had one full and fair opportunity to try Kareski, and failed, and the Ninth District has provided the State with a second bite at the proverbial apple.

Pursuant to the foregoing, a substantial constitutional question is at issue, namely, can the State have a second opportunity to try a defendant under the State and Federal Double Jeopardy Clauses when the State comes to the first trial unable to prove its case?

Further, even if the Court finds that no substantial constitutional question is presented, this case provides the Court with an excellent opportunity, on discretionary appeal, to explain *Lovejoy's* continued vitality in light of *Brewer*. The *Brewer* Court took great pains to distinguish *Lovejoy*, instead of overruling it, suggesting that *Lovejoy* applies in cases of judicial notice. But if the Ninth District's application of *Brewer* in this case is correct, then *Lovejoy* is dead. This Court should accept this appeal to further explain when *Lovejoy* applies and when *Brewer* applies.

## II. STATEMENT OF CASE AND FACTS

Matthew Kareski is a bartender. On the evening of August 19, 2010, agents of the Ohio Department of Public Safety went to Kareski's place of employment with an underage person to test compliance with the liquor laws. The underage person approached the bar and asked Kareski for a Bud Light. Kareski told buyer the price of the beer and opened a bottle of Bud Light. At this point, Kareski noticed that the buyer's hand did not have any age-identifying mark that would have been placed by the doorman. Kareski placed the beer on the counter rail and told the buyer that he could not give him the beer until he showed proper age identification. The buyer told Kareski that he would pay for the beer and then come back with identification. The buyer paid for the beer and walked away from the bar. Kareski never allowed the buyer to touch the beer. ODPS agents then seized the beer from the rail and charged Kareski with underage sale of beer to a minor.

In order for the substance in question to be "beer" under R.C. §4301.01(B)(2), it must have been "brewed or fermented wholly or in part from malt products and containing one-half of one per cent or more, but not more than twelve per cent, of alcohol by volume." The label of the bottle of Bud Light did not disclose any alcohol content. The only evidence that the State offered on the issue of alcohol content was a bare laboratory report, with no foundational witness. (Tr. 117-118). Kareski objected, timely, and vociferously, that the report was hearsay and inauthentic. (Tr. 118, 122, 125). The report did not even identify the person who actually did the testing, indicating that the State was wholly unprepared to call that person as a witness. (Tr. 125-127).

The report was properly excluded by the Court. (Tr. 140). No other evidence of the alcohol content of the substance bottle was identified or offered by the State.

Despite the absence of any evidence that the liquid in the can was a malt product containing the requisite amount of alcohol, the trial court took judicial notice of the fact that the substance was "beer". (Tr. 140). The trial court then announced to the jury that "I will take judicial notice that Bud Light is in fact beer." (Tr. 140). While the court later gave jury instructions on the definition of "beer," (Tr. 216) the court had already obviated the need for the prosecution to prove the liquid was "beer."

Thereafter, the jury found Kareski guilty of the offense. (Tr. 225). On appeal, the Ninth District correctly held that the trial court erred in taking judicial notice of an element of the offense, namely, that "Bud Lite" was "beer" under the statutory definition of containing between one-half of one percent and twelve percent alcohol by volume pursuant to R.C. § 4301.01(B)(2). *Kareski*, 2012-Ohio-2173, at ¶7, Appendix p. 3. However, a majority of the Ninth District panel went on to find that this exercise of judicial notice was a "trial error" which allowed retrial of Kareski, after the State patches up the hole in its case. *Kareski*, 2012-Ohio-2173, at ¶13, Appendix p. 5-6.

On May 24, 2012, Kareski timely moved the Ninth District for reconsideration of the issue of whether Double Jeopardy prohibited a retrial. In response, a 2-1 majority of the Ninth District panel issued a Journal Entry on June 25, 2012, finding that *Lovejoy*, *supra*, was distinguishable, and the case was instead controlled by *Brewer*. (Appendix p. 9-11). One judge dissented from that determination. This request to accept jurisdiction was timely filed thereafter.

### III. ARGUMENT IN SUPPORT

**PROPOSITION OF LAW: A TRIAL COURT'S TAKING OF JUDICIAL NOTICE OF AN ELEMENT OF AN OFFENSE CANNOT BE CONSIDERED AS "EVIDENCE" IN DETERMINING WHETHER SUFFICIENT EVIDENCE EXISTS TO ALLOW A RETRIAL UNDER THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.**

The Ninth District correctly held that the trial court erred in taking judicial notice of an element of the offense, namely, that "Bud Lite" was "beer" under the statutory definition of containing between one-half of one percent and twelve percent alcohol by volume pursuant to R.C. § 4301.01(B)(2). *Kareski*, 2012-Ohio-2173, at ¶7, Appendix p. 3. However, the Ninth District went on to find that this exercise of judicial notice was a "trial error" which allowed retrial under *Brewer*. *Kareski*, 9th 2012-Ohio-2173, at ¶13, Appendix p. 5-6. Under *Brewer*, the courts are allowed to retry a criminal defendant, despite the Double Jeopardy clauses, if sufficient evidence exists to support the condition, including the consideration of inappropriately admitted evidence.

But in this case, there was no inappropriately admitted evidence. The taking of judicial notice is not evidence – it is the absence of evidence. There was no evidence in the record that the liquid in the bottle was between one-half of one percent and twelve percent alcohol by volume as required by statute. And the discussions at sidebar revealed that the State had no admissible evidence on the point to offer. The State should have been prepared to call the chemist who did any testing on the substance in order to meet Sixth Amendment requirements. *See Luis E. Melendez-Diaz v. Massachusetts*, (2009), 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314. Instead, the State tendered an unauthenticated hearsay lab report to prove alcohol

content, and when the trial court correctly excluded the report, the State had no witnesses available to prove that point. The only "evidence" that the liquid met the statutory definition of beer was judicial notice, and the *Lovejoy* case makes it clear that judicial notice is not evidence at all – it is the absence of evidence.

In *Lovejoy*, a defendant was convicted of having a weapon under disability. At his trial, the State did not offer any admissible evidence of the defendant's disability. But the judge took judicial notice of a fact in order to satisfy the disability element of the offense. 79 Ohio St. 3d 440 at 449. Thus *Lovejoy* is indistinguishable from the *Kareski* case, where the trial court took judicial notice of the character of the substance in the bottle to fill an evidentiary hole in the State's case.

The *Lovejoy* Court reversed the appellate court, which had held that the defendant should be retried on the weapon under disability charge, just as the Ninth District held that the State should have an opportunity to retry *Kareski* with different or additional evidence. *Id.* But this is clearly not permitted by *Lovejoy*. Just as in the *Kareski* case, the trial court in *Lovejoy* took "judicial notice \* \* \* to supply a crucial fact that the state had failed to prove," and this Court found that a retrial was inappropriate. *Id.* at 449-450. Just as in this case, this Court found that "a retrial would give the state a 'second bite at the apple' and a chance to present evidence it failed to offer at the first trial." *Id.* at 450. This Court went on to hold that the Double Jeopardy was intended to prevent just this sort of outcome. *Id.*

"If the state fails to present sufficient evidence to prove every element of the crime, it should not get a second opportunity to do that which it failed to do the first

time." *Id.* at 450. That is what is happening in *Kareski*. The State came to trial unable to prove that the liquid in the container met the standard required by R.C. § 4301.01(B)(2). The trial judge filled the gap in the evidence with judicial notice, over the specific and vociferous objection of Kareski's counsel. Therefore, the rule in *Lovejoy* is the appropriate rule that the Ninth District should have followed.

Instead of following *Lovejoy*, the Ninth District followed *Brewer*. Although *Brewer* is more recent authority, it was predicated upon an erroneous admission of hearsay evidence. As noted in *Brewer*, the State relied upon the trial court's mistaken ruling, and the State rested its case instead of admitting sufficient evidence to meet its burden of proof. 121 Ohio St. 3d 202 at ¶24. Because society has a strong interest "in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury," it was inappropriate to penalize the State for relying upon an erroneous evidentiary ruling, and appropriate to remand the matter for a trial free of error. *Id.* at ¶16.

That is in sharp contrast to the situation in *Lovejoy* and *Kareski*, where the State appeared for trial lacking any evidence on an essential element of the crime. The State in *Lovejoy* and *Kareski* did not rest its case once disputed evidence it provided was admitted into evidence – instead, the State in *Lovejoy* and *Kareski* could not prove its case at trial. The *Brewer* Court expressly recognized this distinction, noting that *Lovejoy* was distinguishable because in *Lovejoy*, "the state never relied on an erroneous evidentiary ruling in deciding what evidence to present at trial." *Brewer*, 121 Ohio St. 3d 202 at ¶22. Instead, the *Brewer* Court noted that "*Lovejoy* involved the prosecution's failure to meet the sufficiency-of-evidence standard" for failing to present

evidence on an element of the crime. *Id.*

In reaching its conclusion to remand the case for a new trial the Ninth District noted that when one included the judicially noticed element in the sufficiency analysis, the evidence was sufficient to support Kareski's conviction. *Id.* at ¶ 13, Appendix p. 6. *Lovejoy* makes plain that a judicially noticed fact cannot be bootstrapped into a sufficiency analysis. Instead, since it was necessary for the trial court to take judicial notice in the first place, it highlights the fact that the State did not meet its burden.

The majority of the Ninth District, in its reconsideration decision, found that this case was distinguishable from *Lovejoy*, because here, the trial court took judicial notice before the State rested its case, while in *Lovejoy*, the trial court re-opened the State's case to take judicial notice after the State had closed its case. (Appendix, p. 10). This is a distinction without a difference. Both in *Kareski* and *Lovejoy*, the State appeared at trial without any admissible evidence on an element of a criminal offense, and the trial court filled that gap with judicial notice.

The State cannot claim, in an effort to distinguish *Lovejoy*, that it relied upon the trial court's decision to take judicial notice, and then decided not to submit cumulative evidence on the same point. Even if such evidence was available, (which the record plainly demonstrates it was not), the State should not have relied upon the trial court's plainly erroneous decision to take judicial notice of an element of the offense. It is hornbook law that the trial court is not permitted to take judicial notice of an element of an offense. State v. Shaw, 7th Dist. No. 03 JE 14, 2004-Ohio-5121, at ¶55; State v. Langford, 8th Dist. No. 80753, 2003-Ohio-159, at ¶28; In the Matter of Howman (March

8, 1994), 5th Dist. No. CA-1059, \*3. Allowing the court to take judicial notice of an element of an offense turns the presumption of innocence on its head. Accordingly, the State cannot claim to have reasonably relied upon the error, even if it would have had the State's chemist waiting in the wings to testify, which it did not.

In light of the above, the Ninth District's decision to apply *Brewer* instead of *Lovejoy* is insupportable. It is perfectly appropriate, under *Brewer*, to afford the State a second opportunity to try a defendant when it makes the calculated decision not to offer cumulative evidence after an erroneous trial court admission of evidence. It is perfectly inappropriate, however, to allow the State a second trial when it comes to the first trial empty-handed.

Under the rationale adopted by the Ninth District, *Brewer* extends so far that the State could conceivably come to trial with no evidence whatsoever, ask for judicial notice of the entire offense, and if granted, get a preview of the defendant's evidence and trial strategy in advance of the eventual reversal and retrial. That is the very sort of conduct that the Double Jeopardy clauses of the State and Federal Constitutions was designed to prohibit.

When the State asks for judicial notice of an element of a criminal offense, the State is doing so because it has no evidence to satisfy that element. The fact that this event occurred after the State rested in *Lovejoy*, and in this case occurred in the middle of the trial when caught flat-footed by an appropriate objection, is immaterial. The taking of judicial notice on the element of an offense is, in effect, an admission of the State's lack of evidence on that element. As a result, it is entirely inappropriate for an

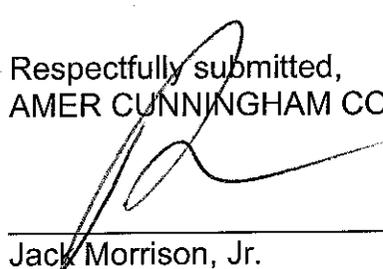
appellate court to look to that item of judicial notice to determine whether sufficient evidence of guilt exists to warrant a retrial. Therefore, this Court should accept this case and adopt the following proposition of law:

**A TRIAL COURT'S TAKING OF JUDICIAL NOTICE OF AN ELEMENT OF AN OFFENSE CANNOT BE CONSIDERED AS "EVIDENCE" IN DETERMINING WHETHER SUFFICIENT EVIDENCE EXISTS TO ALLOW A RETRIAL UNDER THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.**

**IV. CONCLUSION**

This Court should accept jurisdiction over the present appeal so that it can clarify and standardize the approach of the Ohio courts in the application of *Brewer* and *Lovejoy* in Double Jeopardy cases.

Respectfully submitted,  
AMER CUNNINGHAM CO., LPA



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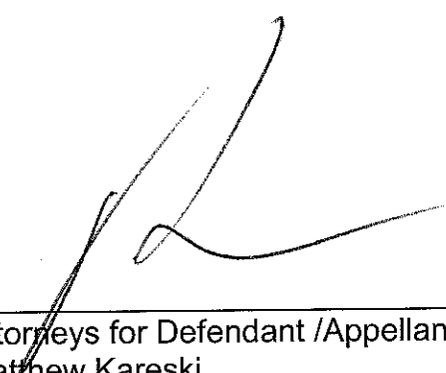
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**V. CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served via ordinary United States Mail this 24th day of July, 2012 upon:

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Attorneys for Defendant /Appellant  
Matthew Kareski



STATE OF OHIO )  
COUNTY OF SUMMIT )

COURT OF APPEALS  
DANIEL J. ...  
2012 MAY 16 AM 8:48

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

CLERK OF COURTS

C.A. No. 25705

Appellee

v.

MATTHEW KARESKI

Appellant

APPEAL FROM JUDGMENT  
ENTERED IN THE  
AKRON MUNICIPAL COURT  
COUNTY OF SUMMIT, OHIO  
CASE No. 10 CRB 09436

DECISION AND JOURNAL ENTRY

Dated: May 16, 2012

CARR, Judge.

{¶1} Appellant, Matthew Kareski, appeals his conviction in the Akron Municipal Court. This Court affirms in part and reverses in part.

I.

{¶2} Kareski tends bar at the Rubber City Grille in Akron. On August 19, 2010, an underage employee of the Ohio Department of Public Safety entered the bar and ordered a Bud Lite from Kareski. As a result of the transaction, Kareski was charged with selling beer to an underage person in violation of R.C. 4301.69(A). During the trial, the trial court excluded the State's chemical analysis of the contents of the Bud Lite bottle because the person who prepared the report was not available to testify. Over Kareski's objection, however, the trial court took judicial notice that Bud Lite is beer.

{¶3} Kareski moved for a judgment of acquittal under Crim.R. 29 at the close of the State's case and again after the jury returned a guilty verdict, arguing that the State failed to

prove that the substance in the bottle was “beer,” as defined by R.C. 4301.01(B)(2), and that even if it was, the State did not prove that a “sale” occurred under R.C. 4301.01(A)(2) and R.C. 4301.69(A). The trial court denied the motion, sentenced Kareski to a suspended jail term of sixty days, and fined him \$150. Kareski appealed, and his three assignments of error have been rearranged for purposes of discussion.

## II.

**ASSIGNMENT OF ERROR I**

THE TRIAL COURT ERRED IN ANNOUNCING TO THE JURY THAT AN ELEMENT OF THE OFFENSE HAD BEEN SATISFIED.

{¶4} Kareski’s first assignment of error is that the trial court incorrectly took judicial notice that Bud Lite is “beer,” as defined by R.C. 4301.01(B)(2). We agree.

{¶5} Under Evid.R. 201, a court may take judicial notice of an adjudicative fact when it is “either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Evid.R. 201(B). Judicial notice is improper when a fact is subject to reasonable dispute. *See Pieper v. Williams*, 6th Dist. No. L-05-1065, 2006-Ohio-1866, ¶ 40. A trial court cannot take judicial notice of the elements of an offense. *State v. Shaw*, 7th Dist. No. 03 JE 14, 2004-Ohio-5121, ¶ 55. When a court takes judicial notice in a criminal case, the jury must be instructed “that it may, but is not required to, accept as conclusive any fact judicially noticed.” Evid.R. 201(G).

{¶6} When a term is specifically defined by the Ohio Revised Code in conjunction with an offense, a trial court errs by taking judicial notice that the applicability of the definition has been proved. *See id.* at ¶ 41-55 (concluding that the trial court erred by taking judicial notice that a facility fell under the definition of a “school” for purposes of R.C. 2925.01, despite the fact

that the parties referred to it as such, when the State did not offer any evidence related to the definition.). R.C. 4301.01(B)(2) provides a technical definition of “beer” for purposes of R.C. 4301.69(A), defining the term as “all beverages brewed or fermented wholly or in part from malt products and containing one-half of one per cent or more, but not more than twelve per cent, of alcohol by volume.”

{¶7} In this case, the trial court erred with respect to judicial notice in two ways. First, regardless of the fact that the parties referred to beer in a general sense throughout the course of the trial, R.C. 4301.01(B)(2) defines the term with precision, and it was error for the trial court to take judicial notice that the definition – which is also an element of the offense – had been satisfied. Although we would agree that it is generally known throughout the trial court’s territorial jurisdiction that Bud Lite is beer, within the common, everyday understanding of that term, we cannot agree that it is generally known whether it contains between one-half of one percent and twelve percent alcohol by volume. R.C. 4301.01(B)(2) requires just such precision. The trial court compounded its error by failing to instruct the jury, as required by Evid.R. 201(G), that it could, but was not required to, accept the fact judicially noticed.

{¶8} Some courts have concluded that a trial court may take judicial knowledge of “beer or intoxicating liquor” under R.C. 4301.69(A). *See, e.g., Cleveland v. Husain*, 8th Dist. No. 49161, 1985 WL 9030, \*1 fn.3 (May 23, 1985) (concluding that the alcohol content in excess of the statutory minimum for beer was “judicially noticeable.”); *Mazzeo v. Bd. of Liquor Control*, 73 Ohio Law Abs. 94 (10th Dist.1955) (“[I]n this state wine has such a reputation by way of common knowledge of being an intoxicating beverage that the Court will take judicial notice of the same in addition to the legal definition defining it to be such a beverage.”); *State v. Aiken*, 121 Ohio Misc.2d 7, 2002-Ohio-6436, ¶ 19-24 (M.C.). *But see State v. Brophy*, 12th

Dist. Nos. 83-01-005, 83-01-006, 83-01-007, 1983 WL 4388, \*2 (June 8, 1983) (refusing to take judicial notice that whiskey is an intoxicating liquor). The focus in these cases, however, is primarily the sufficiency of the evidence, and the analysis of judicial notice is frequently contained within and dependent on that discussion. *See, e.g., Aiken* at ¶ 16-23 (concluding that judicial notice could be taken that rum is an “intoxicating liquor,” but comingling that analysis with discussion of circumstantial evidence of the effects of the beverage on the person who consumed it.). Whether judicial notice can be taken in the first instance and whether a conviction is based on insufficient evidence, however, are separate questions.

{¶9} The trial court erred by taking judicial notice that Bud Lite is “beer” as defined by R.C. 4301.01(B)(2) and by failing to instruct the jury as required by Evid.R. 201(G). Kareski’s first assignment of error is sustained.

#### **ASSIGNMENT OF ERROR II**

THE TRIAL COURT ERRED IN DENYING APPELLANT’S MOTION FOR JUDGMENT OF ACQUITTAL, PURSUANT TO CRIM.R. 29.

#### **ASSIGNMENT OF ERROR III**

THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT TO CONVICT APPELLANT BEYOND A REASONABLE DOUBT FOR THE SALE OF BEER TO AN UNDERAGE PERSON, DENYING HIM HIS LIBERTY WITHOUT DUE PROCESS OF LAW.

{¶10} Kareski’s second and third assignments of error argue that his conviction for selling beer to an underage person is based on insufficient evidence. Specifically, Kareski has argued that the State produced insufficient evidence that there was a sale of beer within the meaning of R.C. 4301.01(A)(2) and R.C. 4301.69(A). We disagree.

{¶11} “Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo.” *State v. Williams*, 9th Dist. No. 24731, 2009–Ohio–6955, ¶ 18,

citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompkins* at 390 (Cook, J., concurring). In reviewing the evidence, we do not evaluate credibility, and we make all reasonable inferences in favor of the State. *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991). The State's evidence is sufficient if it allows the trier of fact to reasonably conclude that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

{¶12} Consequently, when the State relies on an erroneous trial court ruling in the presentation of evidence and rests, having presented sufficient evidence to support a conviction, double jeopardy does not bar retrial. See *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, ¶ 24-25. In that instance,

[i]f 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, by the time which would be required for preparation and trial of every case.

*Id.* at ¶ 19, quoting *State v. Wood*, 596 S.W.2d 394, 398-399 (Mo.1980). The converse is also true: "the State is not entitled to retry a criminal defendant after reversal for trial court error if the State failed in the first instance to present sufficient evidence." *State v. Denny*, 9th Dist. No. 08CA0051, 2009-Ohio-3925, ¶ 12, citing *Brewer* at ¶ 18. Thus, even if the only evidence with respect to an element of the offense was improperly admitted by the trial court, it should be considered when evaluating the sufficiency of the evidence on appeal. See *Brewer* at ¶ 7, 24.

{¶13} In this case, the trial court erred by taking judicial notice that "beer," as defined by R.C. 4301.01(B)(2), was involved in the transaction at issue. That decision constituted trial

error, and this Court's reversal on that point reflects "a determination that [the] defendant has been convicted through a judicial process which is defective in some fundamental respect[.]" *Burks v. U.S.*, 437 U.S. 1, 15. "When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." *Id.* As long as there was sufficient evidence supporting Kareski's conviction with consideration of the judicial notice given by the trial court, we will not reverse his conviction for insufficient evidence, and our reversal for trial error does not bar retrial. See *Lockhart v. Nelson*, 488 U.S. 33, 41-42 (1988); *Brewer*, 121 Ohio St.3d at syllabus. Consequently, although it was error for the trial court to take judicial notice that Bud Lite is beer within the meaning of the statute, we nonetheless consider the judicially noticed element in our sufficiency analysis and conclude that, as in *Brewer*, the evidence underlying Kareski's conviction was sufficient to establish that the substance at issue was beer.

{¶14} Kareski has also argued that his conviction should be reversed because there was insufficient evidence of a sale. A "sale" of beer includes "exchange, barter, gift, offer for sale, sale, distribution and delivery of any kind, and the transfer of title or possession of beer[.]" R.C. 4301.01(A)(2). In this case, the confidential informant testified that he ordered a bottle of Bud Lite from Kareski and paid for the purchase. He recalled that Kareski gave him an open bottle of Bud Lite, placing it "in front of me as if I was going to drink it," within easy reach. Although the confidential informant could not recall whether he touched the bottle or not, he testified that he "may have." Viewing this evidence in the light most favorable to the State, as this Court must in considering the sufficiency of the evidence, the jury could reasonably conclude that a sale occurred.

{¶15} Kareski's second and third assignments of error are overruled.

III.

{¶16} Kareski's second and third assignments of error are overruled. His first assignment of error is sustained. The judgment of the Akron Municipal Court is, therefore, reversed. This case is remanded to the trial court for a new trial in light of our disposition.

Judgment affirmed in part,  
reversed in part,  
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

  
\_\_\_\_\_  
DONNA J. CARR  
FOR THE COURT

DICKINSON, J.  
CONCURS.

BELFANCE, P. J.  
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

JACK MORRISON, JR., THOMAS R. HOULIHAN, and SCOTT E. MULLANEY, Attorneys at Law, for Appellant.

CHERRI CUNNINGHAM, Director of Law, DOUGLAS J. POWLEY, Chief City Prosecutor, and CARA C. KENNERLY-FORD, Assistant City Prosecutor, for Appellee.

STATE OF OHIO  
COUNTY OF SUMMIT

COURT OF APPEALS  
DANIEL J. ...  
SS.  
2012 JUN 25 PM 2: 21

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

SUMMIT COUNTY  
CLERK OF COURTS

C.A. No. 25705

Appellee

v.

MATTHEW KARESKI

Appellant

JOURNAL ENTRY

Mr. Kareski has moved this Court to reconsider our May 16, 2012, decision and order that reversed his conviction for selling beer to an underage person and remanded the matter for further proceedings. The State of Ohio has not responded.

In determining whether to grant a motion for reconsideration, a court of appeals must review the motion to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. *Garfield Hts. City School Dist. v. State Bd. of Edn.*, 85 Ohio App.3d 117 (1992). Upon review of Kareski's motion, we find no obvious error or issue that we did not properly consider.

Mr. Kareski does not take issue with this Court's decision to the extent that it reversed his conviction, but argues that it should be reconsidered because we concluded that the State presented sufficient evidence to support the conviction in the first place and, therefore, that double jeopardy does not prevent retrial. Specifically, Mr. Kareski has argued that this Court incorrectly relied on *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, for the proposition that the judicial noticed fact that Bud Lite is beer, although trial error, could be considered with respect to the sufficiency of the evidence. Mr. Kareski maintains that *State v. Lovejoy*, 79 Ohio St.3d 440 (1997) controls instead.

This case distinguishable from *Lovejoy* and, for that reason, we disagree. In *Lovejoy*, the trial court sua sponte reopened the evidence after closing arguments. *Id.* at 449. Despite the fact that the State had failed to present sufficient evidence on an element of the offense, the trial court took judicial notice of an additional fact at that point. *Id.* Under those circumstances, the Ohio Supreme Court concluded that “[t]o simply remand the \* \* \* charge for a retrial would give the state a ‘second bite at the apple’ and a chance to present evidence it failed to offer at the first trial.” *Id.* As the Court noted in *Brewer*, however, the timing of the trial court’s judicial notice in *Lovejoy* was critical:

In *Lovejoy*, the state did not rely on an erroneous trial court evidentiary ruling, but rather failed to meet its burden of proof to present sufficient evidence to prove the defendant's guilt beyond a reasonable doubt. Recognizing the state’s failure, the trial court sua sponte reopened the case to take judicial notice of prior proceedings in a different case to establish a missing element. \* \* \* [I]n *Lovejoy*, the state never relied on an erroneous evidentiary ruling in deciding what evidence to present at trial. Instead, *Lovejoy* involved the prosecution’s failure to meet the sufficiency-of-evidence standard.

\* \* \* By barring retrial on double jeopardy grounds in *Lovejoy*, we “recreate[d] the situation that would have been obtained” if the trial court had not erroneously reopened the case to take judicial notice of a necessary element of the crime after closing arguments.

(Internal citations omitted.) *Brewer*, 2009-Ohio-593, at ¶ 24-25.

Like *Lovejoy*, this case involves judicial notice. Unlike *Lovejoy*, however, the trial court concluded that it could take sua sponte judicial notice that Bud Lite is “beer” during the State’s presentation of evidence. This was a trial error upon which the State could rely in deciding what evidence to present at trial. Accordingly, under *Brewer*, the judicially noticed fact could be considered in evaluating the sufficiency of the evidence, and double jeopardy does not prevent Mr. Kareski from being retried.

The motion for reconsideration is denied.



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Judge

Concurs:  
Dickinson, J.

Dissents:  
Belfance, J.