

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee,

vs.

MATTHEW KARESKI

Defendant-Appellant.

) CASE NO: 2012-1242
)
) APPEAL FROM THE SUMMIT
) COUNTY COURT OF APPEALS,
) NINTH APPELLATE DISTRICT
)
)
) COURT OF APPEALS
) CASE NO. 25705
)

DEFENDANT-APPELLANT'S MERIT BRIEF

Counsel for Defendant/Appellant:

Jack Morrison, Jr. #0014939
 Thomas R. Houlihan #0070067*
 Scott E. Mullaney #0079804
 AMER CUNNINGHAM CO., L.P.A.
 159 S. Main Street, Suite 1100
 Akron, Ohio 44308-1322
 (PH) 330-762-2411
 (FAX) 330-762-9918
 Houlihan@Amer-law.com

* denotes counsel of record

Counsel for Plaintiff/Appellee:

Cara C. Kennerly-Ford #0081297
 ASSISTANT CITY PROSECUTOR
 203 H.K. Stubbs Justice Center
 217 South High Street
 Akron, Ohio 44308
 (PH) 330-375-2730

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III. STATEMENT OF FACTS

This case presents the question of whether a Court of Appeals may remand a case for retrial despite the Double Jeopardy clause when the State fails to produce admissible evidence on an element of a criminal offense, and the trial court fills the hole in the evidence with judicial notice.

Matthew Kareski is an employee of the Rubber City Grille where he works as a bartender (October 20th, 2010 Akron Municipal Court Transcript ["Tr."], p. 169, Appellant's Supplement ["Supp."] p. 38). Mychael Kimbel is a 19 year old employee of the Ohio Department of Public Safety (ODPS), where he works as a confidential informant (Tr. pp. 91-93, Supp. pp. 2-4). In the evening of August 19, 2010, Kimbel and two ODPS agents went to the Rubber City Grille (Tr. pp. 94-95, Supp. p. 5-6). Kimbel and the ODPS agents entered the Rubber City Grille through a back entrance, as opposed to the lobby, where a doorman checks identification prior to an individual's entrance into the establishment (Tr. pp. 157-158, Supp. pp. 36-37).

After entering Rubber City Grille, Kimbel approached the bar and asked the bartender, Kareski, for a Bud Light (Tr. p. 98, Supp. p. 7). Kareski told Kimbel the price of the beer and opened a bottle of Bud Light (Tr. p. 176-177, Supp. pp. 39-40). At this point, Kareski noticed that Kimbel's hand did not have any age identifying mark that would have been placed by the doorman. (Tr. pp. 176-177, Supp. pp. 39-40). Kareski testified that he placed the beer on the counter rail and told Kimbel that he could not give him the beer until he showed proper age identification (Tr. pp. 176-178, Supp. pp. 39-41). Kimbel told Kareski that he would pay for the beer and then come back with

identification (Tr. pp. 176-177, pp. 39-40). Kimbel paid for the beer and walked away from the bar (Tr. pp. 177, Supp. p. 39).

Kareski never allowed Kimbel to touch the beer. (Tr. pp. 177-178, Supp. pp. 40-41). While Kimbel never returned to the bar, an ODPS agent later approached the bar, outside the view of Kareski, and took the Bud Light bottle that Kimbel ordered (Tr. pp. 116, 198, Supp. pp. 8, 42). The ODPS agent that took the Bud Light bottle from the bar was 29 years old. (Tr. p. 131, Supp. p. 21). At all times relevant, multiple video surveillance cameras were operating at the Rubber City Grille (Tr. pp. 153-154, Supp. pp. 34-35; Defendant's Trial Exhibit 1). The surveillance cameras confirm that Kimbel never touched or even reached for the bottle of beer (Defendant's Trial Exhibit 1).

The City did not come to trial prepared to prove that the bottle of Bud Light contained "beer" according to the statutory definition found in R.C. § 4301.01(B)(2) (Appendix p. 15), which defines "beer" 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." The bottle itself does not disclose an alcohol content. (City's Trial Exhibit 1). The City offered a bare laboratory report, with no foundational witness, in an attempt to prove the contents. (Tr. pp. 117-118, Supp. pp. 9-10). Kareski objected, timely, and vociferously, that the report was hearsay and inauthentic. (Tr. pp. 118, 122, 125, Supp. pp. 10, 14, 17). The report was properly excluded by the trial court. (Tr. p. 140, Supp. p. 30). No other evidence of the contents of the Bud Light bottle was offered, proffered, or identified by the State.

Despite the absence of any evidence that the liquid in the can was a malt product, or if a malt product, that it contained the requisite amount of alcohol, the trial

court took judicial notice of the fact that the substance was "beer" under the statutory definition. (Tr. p. 140, Supp. p. 30). The trial court then *announced to the jury* that "I will take judicial notice that Bud Light is in fact beer." (Tr. p. 140, Supp. p. 30). While the court later gave jury instructions on the definition of "beer," (Tr. p. 216, Supp. p. 43) 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. p. 225, Supp. p. 44).

Kareski appealed to the Ninth District, arguing that the trial court's decision to accept judicial notice that a bottle labeled "Bud Light" was a malt product "containing one-half of one per cent or more, but not more than twelve per cent, of alcohol by volume" under the statutory definition was error. The Ninth District agreed, and reversed the conviction. *State v. Kareski*, 9th Dist. No. 25705, 2012-Ohio-2173, at ¶9, Appendix p. 7. 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. *Kareski*, 2012-Ohio-2173, at ¶13, Appendix pp 8-9.

Kareski filed an Application for Reconsideration in the Ninth District, citing *State v. Lovejoy*, 79 Ohio St. 3d 440, 683 N.E.2d 1112 (1997), and arguing that because the trial court took judicial notice of an element of the offense, in the absence of any evidence on that element, a retrial of Kareski should have been barred by the Double Jeopardy Clauses of the State and Federal Constitutions. In response, a 2-1 majority of the Ninth District panel issued a Journal Entry on June 25, 2012, finding that *Lovejoy*

was distinguishable, and the case was instead controlled by *Brewer*. (Appendix p. 13).
One judge dissented from that determination. (Appendix p. 14).

On July 25, 2012, Kareski timely filed a discretionary appeal with this Court.
(Appendix p. 1). This Court granted the discretionary appeal on October 24, 2012.

IV. LAW AND ARGUMENT

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.

A. A retrial may only be granted under the "trial error" doctrine when the State relies upon an erroneous evidentiary ruling and declines to submit cumulative evidence.

In 2009, this Court decided the *Brewer* case, and in so doing, adopted a line of authority from the Federal Courts which holds that there is no Double Jeopardy violation when a prosecutor relies upon erroneously admitted evidence, declines to submit cumulative evidence on the same point, and the conviction is later reversed based upon the erroneously admitted evidence. *Brewer*, 121 Ohio St. 3d 202 at ¶17, *citing Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265. In so doing, this Court carefully examined when a retrial of a criminal case does, and does not, offend the Double Jeopardy provisions of the U.S. and State Constitutions. (Section 10, Article I of the Ohio Constitution, Fifth Amendment to the United States Constitution, Appendix pp. 19-20).

In its analysis, the *Brewer* Court, relying on *Lockhart*, made clear that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for the 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." *Brewer*, 121 Ohio St. 3d 202 at ¶17, *citing State v. Roberts*, 119 Ohio St.3d 294, 2008-Ohio-3835, 893 N.E.2d 818, ¶11, *quoting Green v. United States*, 355

U.S. 184, 187–188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Based upon the policy underlying the Double Jeopardy clause, the *Brewer* court repeated that the 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." *Id.*, quoting *State v. Calhoun*, 18 Ohio St.3d 373, 376, 18 OBR 429, 481 N.E.2d 624 (1985), quoting *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

After setting forth the policy underlying the Double Jeopardy clause, the *Brewer* Court considered the relationship between the U.S. Supreme Court *Burks* and *Lockhart* cases, *supra*. In the *Burks* case, the Supreme Court determined that a retrial was barred by Double Jeopardy when a defendant wins an appeal solely based upon insufficient evidence. 437 U.S. at 10–11. But in *Lockhart*, the Supreme Court found that Double Jeopardy did not bar a retrial when the reversal was based upon a trial error, as opposed to the sufficiency of the evidence. 488 U.S. at 40.

In harmonizing *Lockhart* and *Burks*, the *Brewer* Court found that "*Lockhart's* holding recognizes that the state may rely upon the trial court's evidentiary rulings in deciding how to present its case." *Brewer* at ¶19. If not permitted to rely upon the trial court's rulings on evidence, then the effect would be to place a burden upon the State to present cumulative evidence on every point, in order to protect against the possibility of a later reversal of any of the evidentiary rulings. *Id.*

As a result of this reasoning, the *Brewer* court determined that a retrial was warranted under the facts of that case. In *Brewer*, hearsay evidence was erroneously admitted against a defendant, and this Court repeatedly noted that the State relied upon the admission of this hearsay evidence in deciding not to offer other, cumulative

evidence on the same point. *Id.* at ¶¶21, 22. Thus under Ohio law, the touchstone question in allowing a retrial after a reversal of conviction under the "trial error" doctrine is whether the State relied upon an erroneous trial court evidentiary ruling in order and declined to present erroneous evidence.

B. The "trial error" doctrine does not extend to cases where the State lacks evidence on an element of the offense and the gap in the evidence is filled by judicial notice.

In sharp contrast to *Brewer* is this Court's earlier decision in *Lovejoy*, 79 Ohio St. 3d 440. In *Lovejoy*, no evidentiary determination was at issue. Rather, the trial court accepted judicial notice of an element of an offense that the State was not prepared to prove at trial. In that context, this Court found that Double Jeopardy precluded a retrial, because the State had one full and fair opportunity to convict the defendant and failed to adduce sufficient evidence in support of the conviction. 79 Ohio St. at 449-450.

The *Lovejoy* Court reversed the appellate court, which had held that the defendant should be retried on a weapon under disability charge. 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. 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. The Court went on to note that "[i]f 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.

The *Brewer* Court took great pains to distinguish *Lovejoy*, suggesting that it survived *Brewer* and should be applied when the facts of the case warrant it. The

Brewer Court noted 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.*

C. *Kareski* did not involve the State's reliance upon an erroneous evidentiary ruling, but rather involved the State's inability to present sufficient evidence to support a conviction.

The State accused Mr. Kareski of committing a criminal offense. Accordingly, the State was required to prove each element of the offense beyond a reasonable doubt to support a guilty verdict. R.C. § 2901.05. (Appendix p. 22) Particularly, the State was required to prove that the liquid in the bottle was beer as defined by R.C. § 4301.01(B)(2) – both a malt beverage **and** containing the specified alcohol content. (Appendix p. 15)

The State came to trial without any admissible evidence on this point. The State brought to trial an unauthenticated report which purported to describe the liquid in the bottle. 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 Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314, (2009). 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 other evidence available.

The State offered a bare laboratory report with no foundational witnesses. (Tr. pp. 117-118, Supp. pp. 9-10). The trial court made inquiry as to the State's plan for

authenticating the document. (Tr. pp. 118-121, Supp. pp. 10-12). It was clear that no authenticating witness was available. (Tr. p. 120, Supp. p. 11). Kareski further objected to the hearsay nature of the document. (Tr. pp. 122, 125, 126, 138, Supp. pp. 14, 17, 18, 28). The State did not squarely address the hearsay question, but instead argued that (1) the report was self-authenticating, (Tr. pp. 122-123, Supp. pp. 14-15), (2) that the alcohol content and ingredients could be read from the label of the bottle (which was not accurate) (Tr. pp. 123, 127, 128, 138, Supp. pp. 15, 19, 20, 28), and (3) that Kareski could have requested pre-trial testing of the liquid in the bottle and supplied his own witness (Tr. pp. 123, 139, Supp. pp. 15, 29). As noted by Kareski, none of those arguments satisfied the fundamental Confrontation Clause problem of failing to produce a witness to prove an element of the case. (Tr. pp. 126, 138, Supp. pp. 18, 28).

The argument revealed that the testing was done by a person named Deana Nielson from Columbus. (Tr. pp. 122, 123, Supp. pp. 14-15). The State gave no indication that Ms. Nielson made the trip from Columbus to Akron for the trial. The State did not request a continuance to procure Ms. Nielson. Instead, the State requested judicial notice. (Tr. pp. 119, 140, Supp. pp. 11, 30). The trial court decided to exclude the report from evidence, but granted the State's request for judicial notice that the liquid in the bottle was beer. (Tr. p. 140, Supp. p. 30). Immediately after the trial court decided to take judicial notice that the bottle contained beer, the State rested. (Tr. p. 141, Supp. p. 31). There was no offer, proffer, or other indication that the State had available any admissible evidence to demonstrate that the liquid in the bottle was "beer" according to the statutory definition. There was no offer, proffer, or other indication that the State declined to put on cumulative evidence on that point in reliance

upon the trial court's ruling. Instead, the record is clear that the State was simply unprepared to prove the contents of the bottle at trial.

Thus the *Kareski* case is not a case founded upon trial error, where the State relied to its detriment on an erroneous trial court evidentiary ruling, and declined to put on cumulative evidence. Instead, the State was unprepared to submit sufficient evidence to prove the elements of the case, and the gap in the evidence was filled by the trial court's erroneous decision to take judicial notice of an element of an offense. Thus *Kareski* is a *Lovejoy* case, not a *Brewer* case.

D. Judicial notice of an element of an offense is not evidence that can be relied upon by the Appellate Court in making a sufficiency determination - rather, it is the absence of evidence.

Plainly, *Kareski* is a sufficiency of the evidence case, and the State having failed to submit sufficient evidence to support a conviction, is precluded from retrying *Kareski* by Double Jeopardy. But the Ninth District held otherwise. When challenged by *Kareski's* Application for Reconsideration, the majority of the Ninth District panel explained that it was permitted to include the judicially noticed element in the sufficiency analysis, in order to allow a retrial under *Brewer*. (June 25, 2012 Judgment Entry, Appendix 22). This is bad logic, bad law, and bad policy. A judicially noticed fact is not evidence, it is the absence of evidence. The fact that judicial notice was necessary highlights the fact that the prosecutor was unprepared for trial. 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. Doing so turns the presumption of innocence on its ear.

Counsel for Kareski cannot find another instance, in this state or any other, where a court of appeals included judicial notice of an element of an offense as "evidence" in a sufficiency-of-the-evidence analysis. In fact, the only case counsel could find even touching on these issues cited *Burks* in reversing and remanding a conviction with instructions for acquittal when a trial court took judicial notice of an element of an offense. *McDaniels v. Florida*, 388 So. 2d 259, 260–61 (Fla. Dist. Ct. App. 1980). Taken to its logical (although admittedly unlikely) extreme, under the Ninth District's reasoning, a court of appeals could reverse and remand for retrial a case where the State offered no evidence, and the trial court took judicial notice of all of the elements of the case. This result plainly would not stand under Double Jeopardy or Due Process analysis.

While it may be appropriate under *Lockhart* for the Court of Appeals to consider wrongly admitted evidence to determine whether the sufficiency-of-the-evidence standard is met, thus permitting a retrial, it is a much different proposition to allow an absence of evidence to be considered in the analysis. At least wrongly admitted evidence could be considered as representative of other, cumulative evidence the State could have put into evidence if not for a trial error. But here, in *Kareski*, there is no wrongly admitted evidence to evaluate, or any indication that there was cumulative evidence waiting in the wings that never made it into the record due to a trial court error. There is nothing but the trial court's naked decision to remove an element of the offense from the consideration of the jury.

And in contrast to *Brewer* and *Lockhart*, the State in *Kareski* did not appear at trial with admissible evidence on an element of the case, then decline to present

cumulative evidence after a trial court error. The State in *Kareski* appeared at trial with no admissible evidence at all on an element of the offense, and the trial court error was a result of that absence of evidence. The State had its full and fair opportunity to present sufficient evidence to secure a conviction, and flat-out failed to do so.

E. The timing of the trial court's decision to take judicial notice is immaterial.

The only other ground recited by the Ninth District for applying *Brewer* instead of *Lovejoy* is the timing of the trial court's decision to take judicial notice of an element of the offense. In *Lovejoy*, the trial court reopened a closed case to take judicial notice, and in *Kareski*, the trial court accepted judicial notice in the middle of trial. 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.

It is clear from *Brewer* that, in order for the "trial error" doctrine to apply and permit a retrial, the State must appear at trial with evidence, be the beneficiary of an erroneous evidentiary ruling, and suffer prejudice by failing to submit cumulative evidence on the same point. The timing of that event is irrelevant when there is no indication that the State was capable of producing any admissible evidence on that point, whether at the beginning, middle, or end of trial.

In *Lovejoy*, the trial court reopened the case after the State rested in order to take judicial notice of an element of the offense. In *Kareski*, the State rested immediately after the trial court took judicial notice of an element of the offense, with no further evidence, proffer, or indication that the State was declining to present cumulative evidence on that point. (Tr. pp. 140-141, Supp. pp. 30-31). This is a distinction without

a difference. The State was not prejudiced in its presentation of evidence by a trial error, as in *Brewer* – instead, the trial court's decision to take judicial notice was the only thing that allowed the State to get the case to the jury, as in *Lovejoy*.

As a result, the Ninth District's decision that the timing of events distinguished *Kareski* from *Lovejoy* is unavailing.

V. CONCLUSION

The Ninth District's decision to remand this case for a new trial gives the State a second opportunity to prepare its case and try again after failing to produce sufficient evidence at trial to support a conviction of Matthew Kareski. For the reasons set forth in this Brief, this Honorable Court should REVERSE the Ninth District Court of Appeals' May 16, 2012 Decision insofar as it remands the case for a retrial.

Respectfully submitted,
AMER CUNNINGHAM CO., LPA

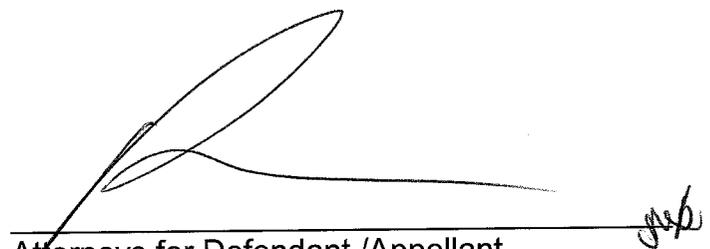
Jack Morrison, Jr. (#0014939)
Thomas R. Houlihan (#0070067)
Scott E. Mullaney (#0079804)
159 South Main Street, Suite 1100
Akron, OH 44308
Phone: (330) 762-2411
Fax: (330) 762-9918
Houlihan@amer-law.com

Attorneys for Defendant/Appellant

VI. CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via ordinary United States Mail this 17th day of December, 2012 upon:

Cara C. Kennerly-Ford
Assistant City Prosecutor
203 H.K. Stubbs Justice Center
217 South High Street
Akron, OH 44308
Counsel for Plaintiff/Appellee



Attorneys for Defendant /Appellant
Matthew Kareski

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 NOTICE OF APPEAL

Counsel for Defendant/Appellant:

Jack Morrison, Jr. #0014939
Thomas R. Houlihan #0070067*
Scott E. Mullaney #0079804
AMER CUNNINGHAM CO., L.P.A.
159 S. Main Street, Suite 1100
Akron, Ohio 44308-1322
(PH) 330-762-2411
(FAX) 330-762-9918
Houlihan@Amer-law.com
* denotes counsel of record

Counsel for Plaintiff/Appellee:

Cara C. Kennerly-Ford #0081297
ASSISTANT CITY PROSECUTOR
203 H.K. Stubbs Justice Center
217 South High Street
Akron, Ohio 44308
(PH) 330-375-2730

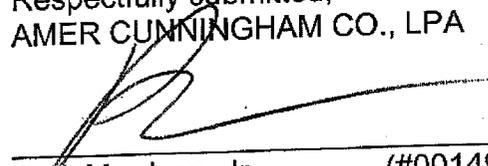
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Appellant, Matthew Kareski, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered in the case on May 16, 2012. Kareski applied for reconsideration on May 24, 2012, and the Ninth District entered a Judgment Entry denying the request on June 25, 2012.

This case is one of great public or general interest and involves a substantial Constitutional question.

Respectfully submitted,
AMER CUNNINGHAM CO., LPA



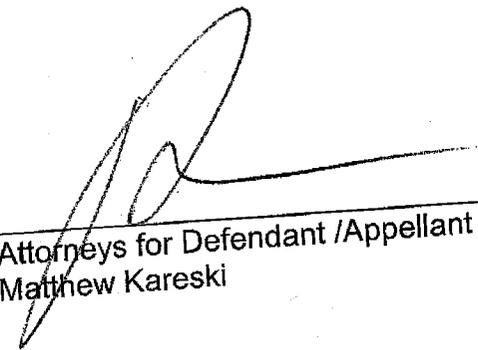
Jack Morrison, Jr. (#0014939)
Thomas R. Houlihan (#0070067)
Scott E. Mullaney (#0079804)
159 South Main Street, Suite 1100
Akron, OH 44308
Phone: (330) 762-2411
Fax: (330) 762-9918
Houlihan@amer-law.com

Attorneys for Defendant/Appellant

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:

Cara C. Kennerly-Ford
Assistant City Prosecutor
203 H.K. Stubbs Justice Center
217 South High Street
Akron, OH 44308
Counsel for Plaintiff/Appellee


Attorneys for Defendant /Appellant
Matthew Kareski OK

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STATE OF OHIO)
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL J. BOYER
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IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

MATTHEW KARESKI

Appellant

C.A. No. 25705

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.

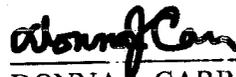
Judgment affirmed in part,
reversed in part,
and cause remanded.

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 P. ...
JSS:
2012 JUN 25 PM 2: 21

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25705

Appellee

SUMMIT COUNTY
CLERK OF COURTS

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.



Judge

Concurs:
Dickinson, J.

Dissents:
Belfance, J.

R.C. § 4301.01

Baldwin's Ohio Revised Code Annotated
Title XLIII. Liquor
Liquor Control Law
4301.01 Definitions

(A) As used in the Revised Code:

(1) "Intoxicating liquor" and "liquor" include all liquids and compounds, other than beer, containing one-half of one per cent or more of alcohol by volume which are fit to use for beverage purposes, from whatever source and by whatever process produced, by whatever name called, and whether they are medicated, proprietary, or patented. "Intoxicating liquor" and "liquor" include wine even if it contains less than four per cent of alcohol by volume, mixed beverages even if they contain less than four per cent of alcohol by volume, cider, alcohol, and all solids and confections which contain any alcohol.

(2) Except as used in sections 4301.01 to 4301.20, 4301.22 to 4301.52, 4301.56, 4301.70, 4301.72, and 4303.01 to 4303.36 of the Revised Code, "sale" and "sell" include exchange, barter, gift, offer for sale, sale, distribution and delivery of any kind, and the transfer of title or possession of beer and intoxicating liquor either by constructive or actual delivery by any means or devices whatever, including the sale of beer or intoxicating liquor by means of a controlled access alcohol and beverage cabinet pursuant to section 4301.21 of the Revised Code. "Sale" and "sell" do not include the mere solicitation of orders for beer or intoxicating liquor from the holders of permits issued by the division of liquor control authorizing the sale of the beer or intoxicating liquor, but no solicitor shall solicit any such orders until the solicitor has been registered with the division pursuant to section 4303.25 of the Revised Code.

(3) "Vehicle" includes all means of transportation by land, by water, or by air, and everything made use of in any way for such transportation.

(B) As used in this chapter:

(1) "Alcohol" means ethyl alcohol, whether rectified or diluted with water or not, whatever its origin may be, and includes synthetic ethyl alcohol. "Alcohol" does not include denatured alcohol and wood alcohol.

(2) "Beer" includes 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.

(3) "Wine" includes all liquids fit to use for beverage purposes containing not less than one-half of one per cent of alcohol by volume and not more than twenty-one per cent of alcohol by volume, which is made from the fermented juices of grapes, fruits, or other agricultural products, except that as used in sections 4301.13, 4301.421, 4301.422, 4301.432, and 4301.44 of the Revised Code, and, for purposes of determining the rate of the tax that applies, division (B) of section 4301.43 of the Revised Code, "wine" does not include cider.

(4) "Mixed beverages," such as bottled and prepared cordials, cocktails, and highballs, are products obtained by mixing any type of whiskey, neutral spirits, brandy, gin, or other distilled spirits with, or over, carbonated or plain water, pure juices from flowers and plants, and other flavoring materials. The completed product shall contain not less than one-half of one per cent of alcohol by volume and not more than twenty-one per cent of alcohol by volume.

(5) "Spirituous liquor" includes all intoxicating liquors containing more than twenty-one per cent of alcohol by volume.

(6) "Sealed container" means any container having a capacity of not more than one hundred twenty-eight fluid ounces, the opening of which is closed to prevent the entrance of air.

(7) "Person" includes firms and corporations.

(8) "Manufacture" includes all processes by which beer or intoxicating liquor is produced, whether by distillation, rectifying, fortifying, blending, fermentation, or brewing, or in any other manner.

(9) "Manufacturer" means any person engaged in the business of manufacturing beer or intoxicating liquor.

(10) "Wholesale distributor" and "distributor" means a person engaged in the business of selling to retail dealers for purposes of resale.

(11) "Hotel" has the same meaning as in section 3731.01 of the Revised Code, subject to the exceptions mentioned in section 3731.03 of the Revised Code.

(12) "Restaurant" means a place located in a permanent building provided with space and accommodations wherein, in consideration of the payment of money, hot meals are habitually prepared, sold, and served at noon and evening, as the principal business of the place. "Restaurant" does not include pharmacies, confectionery stores, lunch stands, night clubs, and filling stations.

(13) "Club" means a corporation or association of individuals organized in good faith for social, recreational, benevolent, charitable, fraternal, political, patriotic, or athletic purposes, which is the owner, lessor, or occupant of a permanent

building or part of a permanent building operated solely for those purposes, membership in which entails the prepayment of regular dues, and includes the place so operated.

(14) "Night club" means a place operated for profit, where food is served for consumption on the premises and one or more forms of amusement are provided or permitted for a consideration that may be in the form of a cover charge or may be included in the price of the food and beverages, or both, purchased by patrons.

(15) "At retail" means for use or consumption by the purchaser and not for resale.

(16) "Pharmacy" means an establishment, as defined in section 4729.01 of the Revised Code, that is under the management or control of a licensed pharmacist in accordance with section 4729.27 of the Revised Code.

(17) "Enclosed shopping center" means a group of retail sales and service business establishments that face into an enclosed mall, share common ingress, egress, and parking facilities, and are situated on a tract of land that contains an area of not less than five hundred thousand square feet. "Enclosed shopping center" also includes not more than one business establishment that is located within a free-standing building on such a tract of land, so long as the sale of beer and intoxicating liquor on the tract of land was approved in an election held under former section 4301.353 of the Revised Code.

(18) "Controlled access alcohol and beverage cabinet" means a closed container, either refrigerated, in whole or in part, or nonrefrigerated, access to the interior of which is restricted by means of a device that requires the use of a key, magnetic card, or similar device and from which beer, intoxicating liquor, other beverages, or food may be sold.

(19) "Community facility" means either of the following:

(a) Any convention, sports, or entertainment facility or complex, or any combination of these, that is used by or accessible to the general public and that is owned or operated in whole or in part by the state, a state agency, or a political subdivision of the state or that is leased from, or located on property owned by or leased from, the state, a state agency, a political subdivision of the state, or a convention facilities authority created pursuant to section 351.02 of the Revised Code;

(b) An area designated as a community entertainment district pursuant to section 4301.80 of the Revised Code.

(20) "Low-alcohol beverage" means any brewed or fermented malt product, or any product made from the fermented juices of grapes, fruits, or other agricultural

products, that contains either no alcohol or less than one-half of one per cent of alcohol by volume. The beverages described in division (B)(20) of this section do not include a soft drink such as root beer, birch beer, or ginger beer.

(21) "Cider" means all liquids fit to use for beverage purposes that contain one-half of one per cent of alcohol by volume, but not more than six per cent of alcohol by weight, and that are made through the normal alcoholic fermentation of the juice of sound, ripe apples, including, without limitation, flavored, sparkling, or carbonated cider and cider made from pure condensed apple must.

(22) "Sales area or territory" means an exclusive geographic area or territory that is assigned to a particular A or B permit holder and that either has one or more political subdivisions as its boundaries or consists of an area of land with readily identifiable geographic boundaries. "Sales area or territory" does not include, however, any particular retail location in an exclusive geographic area or territory that had been assigned to another A or B permit holder before April 9, 2001.

CREDIT(S)

(2006 H 530, eff. 6-30-06; 2002 H 371, eff. 10-11-02; 2000 S 262, eff. 4-9-01; 1998 H 402, eff. 3-30-99; 1998 S 66, eff. 7-22-98; 1997 H 390, eff. 7-19-97; 1995 S 162, eff. 7-1-97; 1995 H 239, eff. 11-24-95; 1995 S 149, eff. 11-21-95; 1994 S 167, eff. 11-1-94; 1994 S 209, eff. 11-9-94; 1992 H 340, eff. 4-24-92; 1990 H 405, S 131; 1989 H 481; 1988 H 562; 1987 H 419; 1986 H 39, H 428)

OH Const. Art. I, § 10

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
O Const I Sec. 10 Rights of criminal defendants

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 the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

CREDIT(S)

(1912 constitutional convention, am. eff. 1-1-13; 1851 constitutional convention, adopted eff. 9-1-1851)

United States Code Annotated
Constitution of the United States

V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

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.

Baldwin's Ohio Revised Code Annotated

Title XXIX. Crimes--Procedure

Chapter 2901. General Provisions

2901.05 Presumption of innocence; proof of offense; of affirmative defense; as to each; reasonable doubt

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B)(1) Subject to division (B)(2) of this section, a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.

(2)(a) The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.

(b) The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses it while in a residence or vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

(3) The presumption set forth in division (B)(1) of this section is a rebuttable presumption and may be rebutted by a preponderance of the evidence.

(C) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(D) As used in this section:

(1) An "affirmative defense" is either of the following:

(a) A defense expressly designated as affirmative;

(b) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence.

(2) "Dwelling" means a building or conveyance of any kind that has a roof over it and that is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is temporary or permanent or is mobile or immobile. As used in this division, a building or conveyance includes, but is not limited to, an attached porch, and a building or conveyance with a roof over it includes, but is not limited to, a tent.

(3) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest.

(4) "Vehicle" means a conveyance of any kind, whether or not motorized, that is designed to transport people or property.

(E) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs.

CREDIT(S)

(2008 S 184, eff. 9-9-08; 1978 H 1168, eff. 11-1-78; 1972 H 511)