

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO. 2012-1242

Appeal from the Court of Appeals
Ninth Appellate District
Summit County, Ohio
Case No. 25705

STATE OF OHIO

Appellee

v.

MATTHEW KARESKI

Appellant

MERIT BRIEF OF APPELLEE, CITY OF AKRON, OHIO

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STATEMENT OF THE FACTS

When evidence admitted at trial is sufficient to support a conviction, but on appeal, some of that evidence is determined to have been improperly admitted, the Double Jeopardy Clauses of the United States and Ohio Constitutions will not bar retrial. *State v. Brewer*, 121 Ohio St. 3d 202, at Syllabus. The question before this Court is whether a reviewing court should treat evidence introduced by judicial notice any differently.

This case involves the criminal conviction of Defendant, Matthew Kareski, for selling alcohol to an underage person in violation of R.C. 4301.69. During trial, the Court excluded the Chemical Analysis Affidavit (hereinafter referred to as the “Report”) that established that the liquid contents of the Bud Light sold was 3.35 percent ethanol. The Court excluded the Report, yet took judicial notice that Bud Light was beer.

The jury convicted Kareski of sale to an underage person (Tr. P. 225). On appeal, the Ninth District Court of Appeals held:

Consequently, although it was error for the trial court to take judicial notice that Bud Light 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.

State v. Kareski, 9th Dist. No. 25705, 2012-Ohio-2173, ¶ 13. In addition to the entire Record before this Court, Appellee submits this summary of the facts.

On August 19, 2010 an Ohio Department of Public Safety Investigative Unit set out to conduct compliance checks on establishments in Akron, Ohio. (Tr., p. 94) A compliance check consists of an underage person attempting to purchase alcohol from an establishment. (Tr., pp. 92; 112-113) The Investigative Unit consisted of Alcohol Enforcement Agent Keenan Reese,

Agent McBride and a Confidential Informant, who was nineteen years old at the time. (Tr., p. 93 and 113).

The Investigative Unit entered the Rubber City Grille, located in Akron, Ohio. (Tr., p. 113). The Informant walked up to the bar and ordered a Bud Light from the bartender, Defendant Kareski. (Tr., p. 98). Kareski retrieved a Bud Light and opened it. (Tr., p. 195). Kareski set it on the counter in front of the Informant. (Tr., p. 98; 116). The Informant paid Kareski for the beer and received his change. (Id.). Kareski did not ask the Informant for his identification. (Tr., p. 98). Agent Reese watched the entire transaction occur. (Tr. P. 116).

After the transaction, Agent Reese retrieved the purchased and opened Bud Light as evidence. (Tr., p. 116). Agent Reese sent a sample of the contents of the Bud Light bottle to be analyzed. (Tr., p. 117). The sample was analyzed, and the Report was generated. (Tr., 118; 120-121; 122-124). The tested sample was returned to Akron and stored in the Portage Lakes office. (Tr., p. 127). The Report was sent to the Ohio Investigative Unit. (Tr., p. 120).

At trial, the State introduced the bottle of Bud Light and the liquid sample that was used for testing. (Tr., p. 117). As the State attempted to introduce the Report, Defense counsel objected on the grounds of hearsay. (Tr., p. 117-118). A significant discussion occurred as to whether Agent Reese was qualified to testify as to the contents of the Report. (Tr., pp. 117-128). The trial court directed the State, "...Let's move on, I'll take this under advisement, and so move on to another area." (Tr., p. 128).

When the State concluded the direct examination of Agent Reese, the Court inquired, "Okay. Okay. You've got another agent, then, that's going to testify as well?" (Tr., p. 130). The State responded, "I can. I wasn't going to have her, but I probably can now." (Id.) After

cross examination, the Court took a brief recess so that it could, "Take a look at this issue." (Tr., p. 136).

The Court returned, and discussed the holding in *State v. Aiken*, 121 Ohio Misc. 2d 7, 2002-Ohio 6436 outside the presence of the jury. Based on that discussion, the Court determined, "I don't think the report comes in. I think I can take judicial notice that beer is an intoxicating liquor." (Tr., p. 137). After the jury was empanelled, the Court stated, "I will take judicial notice that Bud Light is in fact beer." (Tr., p. 140). Following the Court's exclusion of the report and decision to take judicial notice, the State rested. At the conclusion of the case, the jury found Defendant Kareski guilty of sale to an underage person. (Tr., p. 225).

Kareski filed a notice of appeal with the Ninth District Court of Appeals on November 29, 2010. On appeal, Kareski asserted that the Court erred in taking judicial notice that Bud Light is beer, and that there was insufficient evidence to sustain his conviction.

On May 16, 2012, the Ninth District Court of Appeals determined that the trial court erred by taking judicial notice that Bud Light is "beer" as defined by R.C. 4301.01, and also that the Court failed to properly instruct the jury as required by Evid. R. 201(G). However, the Ninth District took the judicially noticed fact into consideration when reviewing the sufficiency of the evidence pursuant to *State v. Brewer* 121 Ohio St. 3d 202, 2009-Ohio-593. Under a *Brewer* analysis, the Ninth District determined that there was sufficient evidence in the record to merit a new trial. As such, the case was remanded to the trial court for a new trial.

On May 24, 2012 Defendant filed a Motion for Reconsideration stating the Ninth District Court of Appeals improperly applied *Brewer* when it should have applied the standard set forth in *State v. Lovejoy*, 79 Ohio St. 3d 440 (1997). On June 25, 2012, the Ninth District issued a

Journal Entry that distinguished the facts underlying the instant case, and those in *Lovejoy*. The Ninth District denied Defendant's Motion for Reconsideration.

On July 24, 2012, Defendant Kareski filed a Notice of Appeal and Memorandum in Support of Jurisdiction with this Court. The State filed its Memorandum in Opposition of August 22, 2012. The Court accepted this appeal on October 24, 2012.

On December 18, 2012, Defendant Kareski filed his Appellant's Brief. In it, Defendant Kareski reduces his proposition of law to whether, "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 Clause of the State and Federal Constitutions." (Appellant's Brief, p. i)

LAW AND ARGUMENT

I. A TRIAL COURT'S IMPROPER TAKING OF JUDICIAL NOTICE IS A TRIAL ERROR AND MUST BE ANALYZED BY A REVIEWING COURT WHEN CONDUCTING A SUFFICIENCY OF THE EVIDENCE ANALYSIS FOR PURPOSES OF RETRIAL UNDER THE DOUBLE JEOPARDY CLAUSE.

The Ninth District Court of Appeals initially held that the trial court erred in taking judicial notice that Bud Light is beer under R.C. 4301.01(B)(2). However, the Ninth District Court of Appeals properly considered the judicially-noticed evidence when conducting its sufficiency of the evidence analysis and found that the State produced sufficient evidence to remand for retrial. Kareski seemingly argues that errors relating to a trial court's taking of judicial notice are not trial errors because judicial notice does not constitute evidence. This argument is not supported under Ohio or United States jurisprudence.

"[T]he United States Supreme Court has long recognized that Double Jeopardy will not bar retrial of a defendant who successfully overturns his conviction on the basis of trial error,

through either direct appeal or collateral attack.” *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, ¶ 16, citing *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988). This principle is a “well-established part of our constitutional jurisprudence” and is “necessary in order to ensure the ‘sound administration of justice.’” *Lockhart*, 488 U.S. at 38, quoting *United States v. Tateo*, 337 U.S. 463, 465-466, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964). “[I]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.” *Brewer* at ¶ 16, quoting *Tateo*, 337 U.S. at 466.

However, “when a defendant’s conviction is reversed by an appellate court on the sole ground that the evidence was insufficient to sustain the jury’s verdict, the Double Jeopardy Clause bars a retrial on the same charge.” *Lockhart*, 488 U.S. at 39, citing *Burks v. United States*, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). A reviewing court’s reversal for insufficiency of the evidence “is in effect a determination that the government’s case against the defendant was so lacking that the trial court should have entered a judgment of acquittal, rather than submitting the case to the jury.” *Lockhart*, 488 U.S. at 39, citing *Burks*, 437 U.S. at 16-17. Whether the judgment of acquittal is made by the reviewing court or the trial court does not affect its double jeopardy consequences; “to hold otherwise ‘would create a purely arbitrary distinction’ between defendants based on the hierarchical level at which the determination was made.” *Lockhart*, 488 U.S. at 39, quoting *Burks*, 437 U.S. at 11.

Critically, *Lockhart* held “a reversal based solely on evidentiary insufficiency has fundamentally different implications, for double jeopardy purposes, than a reversal based on such ordinary ‘trial errors’ as the ‘incorrect receipt or rejection of evidence.’” *Lockhart*, 488 U.S. at 40, quoting *Burks*, 437 U.S. at 14-16. An insufficiency finding “is in effect a finding

‘that the government has failed to prove its case’ against the defendant,” whereas a reversal for “trial error” is an improper admission of evidence finding that the defendant “has been convicted through a judicial *process* which is defective in some fundamental respect.” *Lockhart*, 488 U.S. at 40, quoting *Burks*, 437 U.S. at 15 (emphasis in *Lockhart*).

Notably in conducting a sufficiency review, the Court in *Lockhart* held that a reviewing court must consider *all* the evidence admitted at trial, including improperly admitted evidence. “[W]here the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial.” *Lockhart*, 488 U.S. at 34. “A trial court in passing on [a motion for acquittal] considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence which is considered by the reviewing court.” *Id.* at 41-42; see, also, *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 672, 175 L.Ed.2d. 582 (2010).

Consequently, “when evidence admitted at trial is sufficient to support a conviction, but on appeal, some of that evidence is determined to have been improperly admitted, the Double Jeopardy Clauses of the United States and Ohio Constitutions will not bar retrial.” *Brewer* at syllabus; see, also, *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126 at ¶80 (in accord with *Lockhart*). As *Brewer* concluded, *Lockhart’s* holding recognized that the state may rely upon the trial court’s evidentiary rulings in deciding how to present its case:

If the evidence offered by the State is received after challenge and is legally sufficient to establish the guilt of the accused, the State is not obligated to go further and adduce additional evidence that would be, for example, cumulative. Were it otherwise, the State, to be secure, would have to assume every ruling by the trial court on the evidence to be erroneous and marshal [sic] 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.

Brewer at ¶19, quoting *State v. Wood*, 596 S.W.2d 394 (Mo. 1980).

Kareski seemingly attempts to avoid the holdings in *Lockhart* and *Brewer* by arguing that “[a] judicially-noticed fact is not evidence, it is the absence of evidence, and therefore the Court should align itself with *State v. Lovejoy*, 79 Ohio St.3d 440 (1997).” (Appellants Brief, p. 10). This argument is misguided.

Initially, Rule 201 of the Ohio Rules of Evidence governs a court’s exercise of taking judicial notice of adjudicative facts. (Evid. R. 201). Rule 201(A) succinctly states:

This rule governs only judicial notice of adjudicative facts; i.e. the facts of the case.

As with all evidence produced during the course of a trial, judicial notice is one method to prove “adjudicative facts, i.e. the facts of the case.” Evid. R. 201(A). The trial court’s authority to take judicial notice of facts is recognized under Rule 27 of the Ohio Rules of Criminal Procedure. Thus, like all forms of evidence, the judicially-noticed fact must be submitted to the jury in a criminal case, but the jury “may, but is not required to, accept as conclusive any fact judicially-noticed.” Evid. R. 201(G). Judicial notice is simply a substitute for testimony to establish a fact and falls under the broad umbrella of evidence to be submitted to a fact finder for consideration. In fact, this Court in *State v. Lovejoy*, 79 Ohio St.3d at 449 recognized that a judicially-noticed fact in that case was “evidence”.

Consequently, this is not a “sufficiency of the evidence case” relating to the absence of evidence as characterized by Kareski. (Appellant’s Brief, p. 10). The improper taking of judicial notice of a fact is a trial error like any other error involving the admission of evidence. A reviewing court’s reversal based on a trial court’s improper taking of judicial notice “does not constitute a decision to the effect that the government has failed to prove its case” and “implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some

fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.” *Burks*, 437 U.S. at 15. The Ninth District’s reversal based on the trial court improperly taking judicial notice of an adjudicative fact centers around the *process* of producing evidence, not whether the State proved the defendant’s guilt.

As with any other trial error involving the improper admission of evidence, the reviewing court must consider the improper judicially-noticed fact in assessing whether the evidence is sufficient to permit retrial. *Lockhart*, 488 U.S. at 34; *Brewer* at syllabus. Such a finding is in accord with the underlying rationale in *Lockhart* and *Brewer*.

In *Lockhart*, 488 U.S. at 42, the Court reasoned:

The basis for the *Burks* exception to the general rules is that a reversal of insufficiency of the evidence should be treated no differently than a trial court’s granting a judgment of acquittal at the close of all evidence. A trial court in passing on such a motion considers all of the evidence it has admitted, and to make the analogy complete it must be this same quantum of evidence which is considered by the reviewing court.

The trial court in the instant case relied on a judicially-noticed fact when reviewing the Defendant’s Criminal Rule 29 motion. In accord with *Lockhart*, the reviewing court must consider a fact the trial court judicially-notices (even if the trial court erred in said ruling) when determining whether the evidence is sufficient to permit retrial. Such rationale would “make the analogy complete.”

Kareski asserts that he is unable to point to any cases in Ohio, or elsewhere, where a reviewing court considered judicially-noticed facts in assessing whether the State produced sufficient evidence as to an “element” of an offense to permit a retrial (Appellant’s Brief, p. 11). Although venue is not an element of an offense, the Ohio Supreme Court has held that “venue” is a fact which must be *proved* in criminal prosecution unless it is waived by the defendant. *State v. Headley*, 6 Ohio St.3d 475, 477, (1983) citing *State v. Draggo*, 65 Ohio St.2d 88, 90 (1981).

Accordingly, in criminal cases, the prosecution bears the burden to establish venue just like the essential elements of a criminal offense.

For example, in *State of Ohio v. Edwards*, 3rd Dist. No. 9-03-63, 2004-Ohio-4015, the State requested that the trial court take judicial notice of venue in response to defendant's motion for acquittal. After recessing, the trial court ruled that the offenses did occur in Marion County. On appeal, the Third District Court of Appeals, in conducting a sufficiency analysis, considered the judicially-noticed fact that the offenses occurred in Marion County. *Edwards*, ¶¶ 16, 17; see, also, *State v. Barr*, 158 Ohio App.3d 86, 2004-Ohio-3900, ¶¶ 13-25; *Village of Linndale v. Krill*, 8th Dist. No. 81881, 2003-Ohio-1535, A8.

Furthermore, the Colorado Court of Appeals in *People v. Cooper*, 104 P.3d 307 (Colo. App.2004), recognized that an improperly judicially-noticed fact must be considered in a reviewing court's sufficiency review. In *Cooper*, the defendant was convicted of three habitual-criminal counts. *Id.* at 310. The court held that the trial court committed reversible error by taking judicial notice of the defendant's presentence report that the state used to prove the defendant's identity for two prior convictions. *Id.* at 311. As to one of the habitual criminal counts, the court stated that "the evidence was sufficient with the presentence report, but insufficient without it." *Id.* The court, citing *Lockhart*, properly remanded the matter for a new sentencing hearing. *Id.* at 312. The Missouri Court of Appeals reached a similar result in *State v. Cullen*, 646 S.W.2d 850 (Mo. App.1982). In *Cullen*, the trial court improperly took judicial notice of a prior conviction. The court held that the error was a trial error and remanded for resentencing. *Id.* at 857-858, citing *Wood*, 596 S.W.2d at 389-399. The court found that "the prosecutor was justified in relying on the court's ruling that a basis for the sentence enhancement has been established. He should not have been expected to offer more evidence of defendant's

prior convictions, anticipating that the judicial notice may later prove defective and without it, the evidence would be insufficient.” *Cullen*, 646 S.W.2d at 858. Contrary to Kareski’s assertion, reviewing courts have relied on judicially-noticed facts to assess the sufficiency of evidence for retrial.

Kareski, additionally, asserts in conclusory terms that a trial court may not take judicial notice of an element of a criminal offense (Appellant’s Brief, p. 10). This assertion is immaterial as this issue has not been appealed. The issue before this Court is whether an improperly judicially-noticed fact must be reviewed by a court when making a sufficiency of the evidence determination for retrial. As argued above, the rationale in *Lockhart*, and adopted by *Brewer*, “answers the question in the affirmative. Nevertheless, a trial court’s taking of judicial notice of an adjudicative fact in a criminal case is well-established. See, e.g. *State v. Jamnicky*, 9th Dist. No. 03 CA 009, 2004-Ohio-324, ¶7-12 (judicial notice that a speed-detection device is reliable).

Finally, Kareski’s reliance on *Lovejoy*’s “remaining evidence” standard is contrary to *Lockhart* and *Brewer* “all evidence standard” and has no application to the issue before this court. In *Lovejoy*, the defendant’s weapon-under-disability charge was tried to the court. At the conclusion of closing arguments, the trial court *sua sponte* determined to “take judicial notice of prior proceedings in an earlier case to supply a crucial fact that the state failed to prove”. *Lovejoy*, 79 Ohio St.3d at 449. The Tenth District Court of Appeals reversed the trial court and remanded the case for a new trial, finding that the trial court erred by *sua sponte* reopening the state’s case after closing arguments and taking judicial notice of the defendant’s prior conviction. This Court, under those circumstances, 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.* Herein, in remanding the case for a retrial, the Ninth District Court correctly followed and applied this Court’s recent pronouncement in *Brewer*:

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.

(internal citations omitted) *Brewer*, supra, at ¶ 22.

The Ninth District correctly held that although this case involves judicially-noticed facts like *Lovejoy*, the distinction herein is that the trial court took judicial notice that Bud Light is “beer” during the State’s *presentation* of evidence. Thus, the State could rely upon this decision in determining how to proceed in its case-in-chief. Accordingly, *Lovejoy* does not apply to the case before this Court. The proper determination is that under *Lockhart* and *Brewer*, the judicially-noticed fact must be considered in evaluating the sufficiency of the evidence to stand retrial.

II. A BREWER ANALYSIS DOES NOT REQUIRE THE STATE TO AFFIRMATIVELY DEMONSTRATE THAT IT DETRIMENTALLY RELIED ON THE IMPROPERLY ADMITTED EVIDENCE TO MERIT A RETRIAL.

The holding in *Brewer* provides that “when evidence admitted at trial is sufficient to support a conviction, but on appeal, some of that evidence is determined to have been improperly admitted, the Double Jeopardy Clauses of the United States and Ohio Constitutions will not bar retrial.” *Brewer*, 121 Ohio St. 3d at syllabus. There is no threshold requirement that in order to qualify for a *Brewer* analysis the State must first demonstrate that it detrimentally relied on the improperly admitted evidence. Instead, the principle of reliance arose when the *Brewer* Court

analyzed whether the facts before it were more closely aligned with the United States Supreme Court's decision in *Lockhart*, or this Court's previous decision in *Lovejoy*.

In determining that the facts in *Brewer* were more closely aligned with *Lockhart*, this Court stated, "Thus this case and *Lockhart* involve a trial court's erroneous admission of evidence presented by the state during its case in chief and the state's reliance upon the erroneous evidentiary rulings." *Brewer*, 121 Ohio St. 3d at 207. Conversely, this Court distinguished *Lovejoy* because, "the state never relied on an erroneous evidentiary ruling in deciding what evidence to present at trial." *Id.* Just as in *Brewer* and *Lockhart*, there is sufficient evidence in the record that the State in *Kareski* relied on improperly admitted evidence during its case in chief.

In an attempt to align this case with *Lovejoy*, Defendant Kareski significantly misstates the record in the case, regarding whether the State relied on the trial court's decision to take judicial notice that Bud Light met the statutory definition of beer. (Kareski Merit Brief, pg. 9).

There is significant evidence that the State offered evidence that would establish the percentage of alcohol in Bud Light. Yet, the trial court's ruling obviated the need to put on cumulative and additional evidence when it took judicial notice that Bud Light was beer.

First, during the direct examination of Agent Reese, the admissibility of the Report was discussed at length. (Tr., pp. 116-128). As the State attempted to solicit additional testimony regarding the bottle of Bud Light and its contents, the trial court directed the State to discontinue this line of questioning. The trial court stated, "...Let's move on, I'll take this under advisement, and so move on to another area." (Tr., p. 128).

Second, after the direct examination of Agent Reese concluded, the trial court had not yet determined how it would rule on the admissibility of the Report, but asked, "Okay. Okay.

You've got another agent, then, that's going to testify as well?" (Tr., p. 130). The State indicated a willingness to bring in another witness, "I can. I wasn't going to have her, but I probably can now." (Tr., p. 130). The State was prepared to bring in an additional witness, if it were necessary.

Third, after cross examination, the State began its re-direct Agent Reese when the Court stated, "Let's do this. You may want to save that possible redirect. I'm going to take a brief recess. Take a look at that issue." (Tr., p. 136). After the break, the Court indicated that it had looked at applicable case law, and decided that it could take judicial notice that Bud Light is beer. The contents of the Bud Light had been judicially-noticed by the Court. Any further witnesses regarding whether Bud Light met the statutory definition of beer was unnecessary and cumulative. It was only after the Court took judicial notice that the State rested. The record unequivocally indicates the State relied on the Court's ruling. Based on the Court's decision, the State rested.

Defendant Kareski alleges that the State did not proffer any evidence. This is untrue. Prior to closing arguments, the State proffered Report at issue. The following proffer occurred:

The State would just like to report that State's Exhibit 2 would have been a report – an analysis of the beverage that was conducted under notary seal by criminalist Dienna Nielson. It does state that the liquid does contain 3.35 grams percent of ethanal (sic). That analysis for the beverage that was confiscated in relation to this particular case through the eight agents from the Ohio Department of Public Safety.

(Tr., p. 202). The State proffered the Report, identified the author, and established the contents of that Report. Despite Defendant's assertions to the contrary, the State correctly and timely proffered the percentage analysis of alcohol contained in the Bud Light.

The State may rely upon the trial court's evidentiary rulings in deciding how to present its case." *Id.* at 207. As this Court succinctly stated in *Brewer*, "Were it otherwise, the State, to

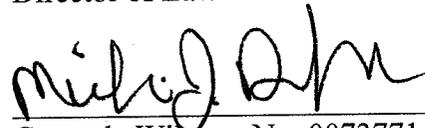
be secure, would have to assume every ruling by the trial court on the evidence to be erroneous and marshal and offer every bit of relevant and competent evidence.” *Id.* At trial, the State relied on the Court taking judicial notice that Bud Light was beer, and decided against marshalling and offering every bit of relevant and competent evidence.

CONCLUSION

The Ninth District correctly determined that the State met its burden of production by presenting sufficient evidence to sustain a conviction. Further the Ninth District’s application of *Brewer* and *Lockhart* to determine whether the judicially noticed fact could be considered when evaluates the sufficiency of the evidence for retrial. Accordingly, the Double Jeopardy Clauses of the United States and Ohio Constitutions do not bar retrial. For the aforementioned reasons, this Court should affirm the Ninth District Court of Appeals’ May 16, 2012 decision insofar that it remands this case for a retrial.

Respectfully submitted,

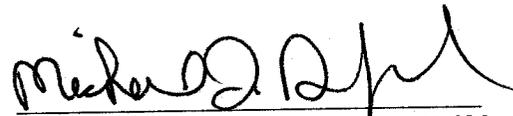
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CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of Appellee was sent by regular U.S. mail on this 30th day of January 2013, to Attorney Jack Morrison, Jr., Thomas R. Houlihan, and Scott E. Mullaney of Amer Cunningham, Co., LPA at 159 South Main Street, Suite 100, Akron, Ohio 44308-1322 and Seth L. Gilbert Assistant Prosecuting Attorney of Franklin County at 373 South High Street, 13th Floor, Columbus, Ohio 43215.



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ARTICLE II. JUDICIAL NOTICE

RULE 201. Judicial Notice of Adjudicative Facts

(A) **Scope of rule.** This rule governs only judicial notice of adjudicative facts; i.e., the facts of the case.

(B) **Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that 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.

(C) **When discretionary.** A court may take judicial notice, whether requested or not.

(D) **When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(E) **Opportunity to be heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(F) **Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.

(G) **Instructing jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

[Effective: July 1, 1980.]