

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 87701**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**SAMUEL BREWER**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
RECONSIDERATION GRANTED;  
REVERSED AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-465703

**BEFORE:** Rocco, J., Celebrezze, A.J. and Dyke, J.

**RELEASED:** August 23, 2007

**JOURNALIZED:**

[Cite as *State v. Brewer*, 2007-Ohio-4291.]

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[Cite as *State v. Brewer*, 2007-Ohio-4291.]  
KENNETH A. ROCCO, J.:

{¶ 1} Appellant has asked this court to reconsider its July 5, 2007 decision finding that the evidence was sufficient to support his conviction for gross sexual imposition. We grant appellant's motion for reconsideration. Upon reconsideration, we conclude that the evidence was sufficient to support appellant's conviction. We stand by our determination that, in assessing the sufficiency of the evidence, we must consider all of the evidence before the jury, whether or not it was properly admitted. The evidence as a whole was sufficient to support the jury's verdict. Nevertheless, appellant was prejudiced by the admission of hearsay evidence, so we reverse and remand for a new trial.

{¶ 2} In a decision entered November 16, 2006, this court concluded that appellant was prejudiced by the admission of hearsay evidence at his jury trial. Accordingly, we reversed and remanded for a new trial, and determined that appellant's other assignments of error were moot. The Ohio Supreme Court reversed our determination that appellant's challenge to the sufficiency of the evidence was moot, and remanded for us to consider that assignment of error.

{¶ 3} In our decision of July 5, 2007, this court held that the evidence as a whole was sufficient to support the jury's verdict. Appellant's reconsideration motion challenges the standard this court applied to assess the sufficiency of the evidence, as well as the evidence this court relied upon in reaching its decision.

#### Procedural History and Evidence

{¶ 4} Our November 2006 opinion set forth in some detail the procedural history of this case; we review it again here only insofar as it is relevant to our consideration of the sufficiency of the evidence. Following a jury trial, appellant was found guilty of one count of gross sexual imposition involving a child victim, L.B. The court subsequently sentenced appellant to two years' imprisonment and found him to be a sexually oriented offender.

{¶ 5} As relevant to the gross sexual imposition charge, at trial, the state presented the testimony of the victim's aunt, T.B.; the victim, L.B.; the victim's mother, B.G.; the victim's father, Lam.B.; Detective Sherilyn Howard; and social worker Lisa Zanella. The defense presented the testimony of pastor Shirley Miller.

{¶ 6} T.B. testified that appellant lived with her and her family when they moved to Warner Road in Cleveland, Ohio, in February 2005. L.B., her niece, visited her house and played with her children. L.B.'s mother, B.G. (who is T.B.'s sister), called T.B. and told her that L.B. "was hurting and she was concerned about that. She said someone in [T.B.'s] house had hurt [L.B]."

{¶ 7} B.G. testified that she received a telephone call from L.B.'s father, Lam.B. on April 30, 2005. He told her that L.B. had done something to "Ro," and said something to Ro. B.G. testified that she then went to L.B., age five, and asked her if she had anything she wanted to tell B.G. about "Sam," i.e., appellant. B.G. testified that L.B. "really just shut me out," put her head down, and said very little. This was unusual behavior for L.B. L.B. told B.G. that appellant had touched her

“private area.” B.G. did not seek a medical examination of L.B. Through conversations with Roshawn Sample (Lam.B.’s girlfriend) and others, B.G. learned that appellant had touched her daughter’s vagina and chest and kissed her.

{¶ 8} L.B. testified that appellant kissed her “on the lips,” but she denied that he used his tongue when he did so and denied that he touched her. She indicated where her “privacy” was for the jury. At first, she denied that anyone had touched her “privacy,” but when asked whether “Sam” had touched her somewhere, she said yes, pointed to the place where he touched her, and agreed that was “the same place that you just showed us.” She said this touching occurred while appellant was kissing her. Appellant also told L.B. not to tell anyone.

{¶ 9} L.B.’s father, Lam.B., testified that his girlfriend, Roshawn, told him that when L.B. kissed Roshawn, L.B. “tried to stick her tongue in her mouth.” Roshawn told Lam.B. that she asked L.B. where she had learned that, and L.B. told her that appellant kissed her like that. Lam.B. then called B.G. and told her “that someone named Sam had kissed [L.B.]”

{¶ 10} Detective Howard testified that she interviewed the appellant, who denied any sexual contact with the victim. There was no evidence of any physical trauma. Social worker Lisa Zanella testified, over objection, that she interviewed L.B., and L.B. told Zanella that “Sam had touched her with his balls in her private area” and “put his balls in her mouth” once.

### Law and Analysis

{¶ 11} In our November 2006 opinion, we concluded that the trial court had abused its discretion by admitting the hearsay testimony of Lisa Zanella about what L.B. told her during her interviews. The state conceded that this testimony was improperly admitted, and we determined that the admission of Zanella's testimony was not harmless beyond a reasonable doubt. Consequently, we remanded the case for a new trial.

{¶ 12} On appellant's appeal of our decision to the Ohio Supreme Court, the court remanded this case to us to consider whether the evidence was sufficient to support appellant's conviction. In our July 5, 2007 decision, we concluded that all of the evidence presented to the jury, including improperly submitted evidence, was sufficient to support the verdict.

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

{¶ 14} In a bench trial, it is presumed that the trial court will consider only relevant, material and competent evidence. *State v. Bays*, 87 Ohio St.3d 15, 27,

1999-Ohio-216. Thus, in assessing the sufficiency of the evidence in a bench trial, the appellate court properly considers only the admissible evidence. *Lovejoy*, supra. In a jury trial, however, the trial court determines what evidence the jury should consider. Thus, when the trial court rules on the sufficiency of the evidence on a Crim.R. 29 motion, the court considers all evidence that was admitted.

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

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



consider her testimony in determining whether the evidence before the trial court was sufficient to support the conviction.

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

{¶ 18} Appellant was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(4), which is defined as "sexual contact with another, not the spouse of the offender," when "[t]he other person \*\*\* is less than thirteen years of age, whether or not the offender knows the age of that person." Sexual contact is statutorily defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶ 19} Ms. Zanella's testimony that L.B. told her appellant touched L.B.'s genitals with his genitals and placed his genitals in L.B.'s mouth, if believed, provided ample evidence that appellant had sexual contact with L.B., a five-year-old child. Furthermore, L.B. herself testified that appellant touched her (apparently

pointing to her vagina) and kissed her; there was also testimony that she told her mother that appellant had touched her “private area.” Finally, there was testimony that L.B. told Lam.B.’s girlfriend that appellant had used his tongue in kissing her. This testimony, if believed, also supports a determination that appellant had sexual contact with a five-year-old child.<sup>1</sup> Accordingly, we find the evidence presented to the trial court – including improperly admitted hearsay evidence – was sufficient to support appellant’s conviction. Nevertheless, for the reasons stated in our previous opinion, we reverse appellant’s conviction and remand for a new trial because we cannot say that the admission of Ms. Zanella’s hearsay testimony about her interviews with L.B. was harmless beyond a reasonable doubt.

{¶ 20} Appellant has requested that we rehear this case en banc. The cases he has cited as demonstrating a conflict within our district are largely distinguishable. Bench trials were conducted in all but one of these cases. *Newburgh Heights v. Cole*, 166 Ohio App.3d 826, 2006-Ohio-2463; *State v. Garrett*, Cuyahoga App. No. 87112-13, 2006-Ohio-6020; *State v. Webb*, Cuyahoga App. No. 87853, 2007-Ohio-2222. As noted above, a different standard applies when a case is tried to the court.

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<sup>1</sup>In his motion for reconsideration, appellant urges that the state did not offer statements L.B. made to B.G. and Lam.B.’s girlfriend for the truth of the matter asserted, so that it is improper for this court to consider them as substantive evidence. The jury was not instructed that its consideration of this testimony was limited, however. Cf. *State v. Kelly*, Cuyahoga App. No. 85662, 2006-Ohio-5902. In any event, we do not necessarily rely upon this additional testimony. The improperly admitted testimony of Ms. Zanella alone was sufficient to support the conviction.

Furthermore, we feel obligated to follow the Ohio Supreme Court's pronouncements in *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126. Although not dispositive in that case, the court clearly expressed the standard it intended for the appeals courts to apply. Therefore, we decline to request a rehearing en banc.

Reversed and remanded.

It is ordered that appellant recover from appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

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