[Cite as *State v. Denny*, 2009-Ohio-3925.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

STATE OF OHIO	C.A. No. 08CA0051
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RAYMOND E. DENNY	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellant	CASE No. 08-CR-0092

DECISION AND JOURNAL ENTRY

Dated: August 10, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Raymond Denny, appeals from the decision of the Wayne County Court of Common Pleas. This Court reverses.

I

{¶2} In 2008, Appellant, Raymond Denny, was indicted on one count of unlawful sexual conduct with a minor, in violation of R.C. 2907.04, a felony of the fourth degree. The charges arose out of a sexual relationship between Denny and a thirteen-year old female. The matter proceeded to a bench trial on September 4, 2008. At trial, the State presented the testimony of Wooster Police Department Deputy Anthony Lemmon, who testified as to Denny's age at the time of the alleged sexual conduct. Lemmon's testimony was based solely on his review of computerized records including records from the Ohio Law Enforcement Gateway and the Bureau of Motor Vehicles. The trial court convicted Denny on this sole count. On September 24, 2008, Denny was sentenced to 36 months of probation and labeled a Tier 1 Sex

Offender. Denny timely appealed his conviction. He has raised two assignments of error for our review.

II

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO PROVE THE ELEMENT OF AGE SOLELY THROUGH THE USE OF INADMISSIBLE HEARSAY EVIDENCE."

{¶3} In his first assignment of error, Denny asserts that the trial court erred when it allowed the State to prove the elements of age solely through inadmissible hearsay evidence. We agree.

{¶4} Generally, this Court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Roberts*, 156 Ohio App.3d 352, 2004-Ohio-962, at ¶14. However, the Ohio Supreme Court has held that "[w]hen a court's judgment is based on an [arguably] erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." *Med. Mut. of Ohio v. Schlotterer*, ___ Ohio St. 3d ____, 2009-Ohio-2496, at ¶13. Here the argument on appeal raises a question of law, i.e. whether the trial court erred in admitting Deputy Lemmon's testimony that was based on inadmissible hearsay. Id. We review such questions of law de novo. Id.

{¶5} Denny was convicted of unlawful sexual conduct with a minor, in violation of R.C. 2907.04, which provides, in relevant part, that

> "(A) No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard."

{¶6} Specifically, Denny takes issue with the testimony of Deputy Anthony Lemmon which the State offered to prove that Denny was "eighteen years of age or older". Id. The record reflects that Deputy Lemmon testified over defense objection as follows:

> Q: "And during your investigation did you --- were you able to determine Mr. Denny's date of birth?
>
> A: "According to previous reports his date of birth was March 23[], 1986.
>
> "***
>
> Q: "Detective Lemmon, as part of your investigation did you have the opportunity to review any records involving Mr. Denny?
>
> A: "Yes, criminal records.
>
> Q: "And what records did you look at?
>
> A: "Just local records that we have on him.
>
> Q: "And where are those records kept, how are they stored?
>
> A: "Computer database.
>
> Q: "So you have a computer database at the police department. So what did you do when you were investigating this case to determine Mr. Denny's address, any other information about him. What did you do?
>
> A: "Yes, we run him through the National Crime Information Center as well as local records and any driving record checks.
>
> Q: "And did you have the opportunity to determine Mr. Denny's date of birth based on your investigation?
>
> A: "Yes.
>
> Q: "And what is his date of birth?
>
> A: "March ---
>
> Defense counsel: "Again, I'd renew my objection. That's hearsay. Those records are hearsay.
>
> The court: "Are the records kept in the ordinary course of business?
>
> A: "Yes.

The court: "And who's the custodian of the records?

A: "BMV would be a custodian of one.

The court: "These aren't records kept exclusively by the Wooster Police Department?

A: "Local records would be kept by the Clerk of Courts.

The court: "Are those records you reviewed?

A: "Yes, we always do a local check.

The court: "I'm going to allow the answer.

"***

A: "March 23[], 1986."

{¶7} The record further reflects that on cross-examination Deputy Lemmon testified:

Q: "Couple question [sic], Deputy Lemmon. Did you ever examine Raymond Denny's birth certificate?

A: "No, I did not.

Q: "So what you're testifying in court today is something that you saw on a BMV record?

A: "Yes.

Q: "Was that record certified from the Bureau of Motor Vehicles?

A: "No.

Q: "How do you know it's accurate?

A: "Just based on what they say.

Q: "So you're relying totally upon what you saw in some computer print out from the Bureau of Motor Vehicles?

A: "That's correct.

Q: "So in answer to my question, you have no way of knowing it's accurate.

A: "Just based on what they tell me."

{¶8} Evid.R. 602 states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Here, Deputy Lemmon's testimony about what the Bureau of Motor Vehicle records supposedly showed regarding Denny's age was not based on his personal knowledge. Rather, he based his testimony on his review of uncertified records from the BMV. The only possible hearsay exception through which this testimony could be admitted is contained in Evid.R. 803(6), which governs the admissibility of records of regularly conducted business activity. Evid.R. 803(6) states in relevant part that the following are admissible:

> "A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

{¶9} Here, no records were submitted to the court or offered into evidence to show Deputy Lemmon's personal knowledge of Denny's age. He merely testified regarding his review of the BMV records. Further, no record custodian testified as to the accuracy of the computer database and/or printout. Consequently, the trial court erred in admitting the officer's testimony regarding Denny's age. Denny's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN FAILING TO GRANT [DENNY'S] MOTION FOR JUDGMENT OF ACQUITTAL PRIOR TO THE CASE BEING SUBMITTED TO THE JURY BECAUSE [THE STATE] FAILED TO PROVE THE ESSENTIAL ELEMENTS OF THE OFFENSE OF UNLAWFUL SEXUAL CONDUCT WITH A MINOR."

{¶10} In his second assignment of error, Denny argues that the trial court erred in failing to grant his motion for judgment of acquittal prior to the case being submitted to the jury because

the State failed to prove the essential elements of the offense of unlawful sexual conduct with a minor.

{¶11} As an initial matter, we conclude that our resolution of the first assignment of error does not render moot Denny's challenges to the sufficiency of the evidence introduced at trial. The Ohio Supreme Court recently "distinguish[ed] between appellate court reversals based solely upon insufficiency of the evidence and those based on ordinary 'trial errors.'" *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, at ¶18. The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution protect a criminal defendant from multiple prosecutions for a single offense. Accordingly, notwithstanding some procedural defect by the trial court warranting reversal, the State remains entitled to "one, and only one, full and fair opportunity" to prosecute the defendant in regard to a single offense. *Richardson v. United States* (1984), 468 U.S. 317, 330 (Brennan, J., concurring in part and dissenting in part). When a case is reversed on the basis of trial error, such as the improper receipt or rejection of evidence, the Double Jeopardy Clause does not prohibit retrial "'where the evidence offered by the State and admitted by the trial court-whether erroneously or not-would have been sufficient to sustain a guilty verdict[.]'" *Brewer* at ¶17, quoting *Lockhart v. Nelson* (1988), 488 U.S. 33, 34.

{¶12} The *Brewer* court recognized the corollary, however, that 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. Id. at ¶18. Accordingly, a defendant's assigned error that the conviction is based on insufficient evidence is not moot under these circumstances. The Ohio Supreme Court emphasized, however, that the interest in the administration of justice dictates that the appellate court review the issue of sufficiency in consideration of all evidence

presented by the State in its case in chief, whether such evidence was properly admitted or not. Id. at ¶19. Regarding any prior decisions of this Court which reached a contrary conclusion, *Brewer* clarifies that a sufficiency argument cannot be rendered moot under these circumstances. See, e.g., *State v. Myers*, 9th Dist. No. 23508, 2007-Ohio-4134.

{¶13} Crim.R. 29 provides, in relevant part:

> "(A) The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."
>
> "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 the 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. Galloway* (Jan. 31, 2001), 9th Dist. No. 19752.

{¶14} The test for sufficiency requires a determination of whether the State has met its burden of production at trial. *State v. Walker* (Dec. 12, 2001), 9th Dist. No. 20559; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390.

{¶15} In his brief, Denny has only challenged the element of proof under R.C. 2907.04 regarding his age. He has raised no arguments regarding the evidence presented by the State to prove the other elements of unlawful sexual conduct with a minor. Pursuant to *Brewer* and *Lockhart*, we must review the sufficiency challenge in consideration of all evidence presented by the State – whether it was properly admitted or not. *Brewer* at ¶19; *Lockhart*, 488 U.S. at 34. Accordingly, we conclude that Denny's conviction was supported by sufficient evidence. Denny's second assignment of error is overruled.

III

{¶16} Denny's first assignment of error is sustained. His second assignment of error is overruled. The judgment of the Wayne County Court of Common Pleas is reversed.

Judgment reversed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, 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(E). 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 to Appellee.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
DICKINSON, J.
CONCUR

APPEARANCES:

JEFFREY D. HAUPT, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.