[Cite as *State v. Nunez*, 2017-Ohio-5581.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104917

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VICTOR NUNEZ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-09-522573-A

BEFORE: E.T. Gallagher, J., Kilbane, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: June 29, 2017

FOR APPELLANT

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Victor Nunez ("Nunez"), appeals, pro se, from his convictions and the trial court's judgment denying his motion for a new trial. He raises the following assignments of error for review:

> 1. The trial court abused its discretion by failing to grant the motion for new trial, or at the very least, by failing to hold an evidentiary hearing on the motion.
>
> 2. The indictment is fatally defective because it alleges multiple, identical, and undifferentiated counts, in violation of the double jeopardy and due process clauses of the Ohio and United States Constitutions.
>
> 3. The trial court erred, and due process was denied, when the court deviated from the jury deadlock instruction approved by the Supreme Court of Ohio in *State v. Howard*, 42 Ohio St.3d 18, 537 N.E.2d 188 (1989).

{¶2} After careful review of the record and relevant case law, we affirm.

I. Procedural and Factual History

{¶3} In March 2009, Nunez was named in a 13-count indictment, charging him with five counts of rape in violation of R.C. 2907.02(A)(2), four counts of kidnapping in violation of R.C. 2905.01(A)(4), three counts of intimidation of a crime victim or witness in violation of R.C. 2921.04(B), and one count of aggravated burglary in violation of R.C. 2911.11(A)(1).

{¶4} The matter proceeded to a jury trial, where the following facts were adduced:

J.L. is Nunez's sister-in-law. She testified about an incident that occurred between June 1 and August 31, 2008. J.L. testified that she was asleep on her mother's couch when Nunez woke her and began touching her breasts. He then asked her to go to the basement, but she refused. Nunez took off his pants as well as J.L.'s and began engaging in sexual activity with her. J.L. testified that she told Nunez to stop, but he continued.

J.L. also testified about an incident that occurred between August 1 and September 30, 2008. According to J.L., she was again sleeping on her mother's couch when Nunez woke her. At this point, he asked J.L. to accompany him to the abandoned house next door to J.L.'s mother's house. J.L. first refused, but Nunez threatened to call her probation officer and hurt her children if she did not comply. After they entered the abandoned house, one of Nunez's acquaintances also entered the house without J.L.'s knowledge. Nunez grabbed J.L.'s ponytail and forced her to her knees. Nunez's acquaintance then forced his penis into J.L.'s mouth while Nunez engaged in vaginal intercourse with her. J.L. testified that Nunez and the acquaintance then switched places and continued to rape her.

Several witnesses testified to an event that occurred during the weekend of February 13 to February 15, 2009. N.J., who is J.L.'s cousin and was visiting from Kentucky, testified that on February 13, 2009, she decided to spend the night at J.L.'s apartment while her mother and father stayed with other family members. At some point during the evening, Nunez and his wife, who is J.L.'s sister, arrived at J.L.'s apartment with a bottle of alcohol. J.L. and Nunez were the only individuals who drank the alcohol. Nunez and his wife left later that evening.

J.L.'s mother, [L.L.] testified that, at around 3:00 or 3:30 a.m. on February 14, 2009, she and N.J.'s mother were playing cards when Nunez, who was supposed to be sleeping, came out and said he was going to the emergency room to have his eye examined. Once Nunez left, J.L.'s mother told N.J.'s mother that she felt Nunez was "up to no good," and was not going to the hospital. J.L.'s mother called MetroHealth Medical Center, where Nunez was allegedly going, several times throughout the night, but the hospital had no record of him ever being admitted as a patient.

J.L. and N.J. both testified that at around 3:30 a.m. on February 14, 2009, they were sitting in J.L.'s apartment talking when J.L. received a phone call from Nunez, who indicated that he and his wife were outside and needed J.L. to let them in. After opening the apartment door, J.L. saw Nunez, but his wife was not there. J.L. attempted to shut the door, but Nunez forced his way inside the apartment.

J.L. testified that she went to her bedroom to avoid Nunez, but he followed her. He came into her bedroom and began "ripping" her clothes off. She told him to stop, but he threw her on the bed and held her there. He pulled her hair and repeatedly asked whether she would like her cousin to watch what he was doing. J.L. testified that, at one point, Nunez used his knees to hold her down and repeatedly shoved his penis into her mouth. She was unable to escape because of the force Nunez was exerting against her. Nunez then changed positions and engaged in vaginal intercourse with her.

N.J. testified that after Nunez forced his way into J.L.'s apartment, she excused herself to go to the restroom. When she returned, J.L. and Nunez were in the bedroom with the door closed. N.J. heard J.L. screaming for Nunez to stop and leave her alone. N.J. did not call the police because she was afraid of Nunez, so she laid on J.L.'s couch and pretended to be asleep. Once Nunez emerged from J.L.'s bedroom, he walked over to the couch where she was lying. He then began to digitally penetrate her vagina, and she was so afraid that she put a blanket over her face. After the digital penetration, Nunez engaged in vaginal intercourse with her. Finally, he engaged in oral sex with her. N.J. testified that she did not scream, tell Nunez to stop, or attempt to push him away because she was petrified.

J.L. testified that she walked out of her bedroom and saw Nunez on top of N.J. She did not call the police or seek other assistance because Nunez had threatened to call her probation officer and had threatened her children.

Nunez called J.L. shortly after he left her apartment and told her that he had informed his mother and sisters of what happened and, should he be arrested, they would hurt J.L. and her children.

On February 15, 2009, N.J. and her family returned to Kentucky. N.J. then went to her best friend's house and told her what had happened. Her friend called N.J.'s mother and asked her to come over. N.J. then told her mother what had happened. Her mother then took her to the hospital for a physical examination. DNA samples collected during this examination matched DNA samples provided by Nunez.

N.J.'s father called J.L.'s mother to tell her that the two women had been raped. After learning who had raped the women, J.L.'s mother immediately called J.L.'s sister, who is Nunez's wife, to inform her of the perpetrator's identity. According to Nunez's wife, he admitted engaging in sexual intercourse with the women, but maintained that the activities were consensual.

Nunez's wife testified that although she had no idea Nunez was having a sexual relationship with her sister, she did know that Nunez and her sister had a congenial relationship. For example, Nunez and J.L. would buy drugs together, would go to the store together, and would go to the abandoned house next door to J.L.'s mother's house in order to smoke marijuana.

Nunez's sister also testified at trial. She testified that she was sexually molested as a child and that Nunez had been a constant source of comfort to her at the time. She also testified that, although she did not know that Nunez and J.L. were having a sexual relationship, J.L. and Nunez got along very well and spent time alone together.

State v. Nunez, 8th Dist. Cuyahoga No. 93971, 2010-Ohio-5589, ¶ 2-14 (“*Nunez I*”).

{¶5} At the conclusion of trial, Nunez was found guilty of aggravated burglary, three counts of rape, two counts of kidnapping with sexual motivation specifications, and one count of intimidation of a crime witness or victim. The counts on which Nunez was acquitted were those related to the incidents involving J.L. that occurred prior to February 2009. The trial court sentenced Nunez to 22 years in prison.

{¶6} In September 2009, Nunez appealed his convictions and sentence. This court affirmed Nunez’s convictions, but reversed and remanded for resentencing “because the trial court sentenced Nunez for multiple allied offenses.” *Nunez I* at ¶ 44. On remand, a resentencing hearing was held in January 2011. At the new sentencing hearing, the state elected to have the kidnapping under Count 10 merge into the rape under Count 9, and the kidnapping under Count 13 merge into the rape under Count 12. Following merger of the allied offenses, the trial court sentenced Nunez on the remaining counts. Nunez’s aggregate prison term remained 22 years.

{¶7} Prior to filing his appeal in *Nunez I*, Nunez filed a pro se motion for new trial based on allegedly newly discovered evidence that was not available at trial. In support of his motion, Nunez submitted an affidavit from his wife, Rachel Nunez, dated September 24, 2009. In her affidavit, Rachel implied that J.L. may have influenced the testimony of their mother, L.L., by purchasing her an expensive gift of furniture approximately one week before L.L. testified at trial. Nunez also submitted an affidavit from his friend, Antonio Mango, dated September 24, 2009, in an effort to introduce Mango’s “personal

knowledge of a preexisting, and consensual sexual relationship between [J.L.] and Nunez." Finally, Nunez alleged that he recently discovered discrepancies between the cellular phone records provided to the state and those provided to defense counsel during discovery. Nunez argued that the cellular phone records sent to defense counsel were "drastically different from those provided to the state," reflected that J.L. called Nunez "on a regular basis," and "strongly suggested that he and [J.L.] did have a romantic relationship."

{¶8} The trial court denied Nunez's motion for new trial, without a hearing. Nunez did not appeal from the trial court's judgment denying his motion for new trial.

{¶9} Following his resentencing, Nunez filed a delayed appeal with this court in April 2015.[1] After careful review, this court affirmed Nunez's sentence. *State v. Nunez*, 8th Dist. Cuyahoga No. 102946, 2016-Ohio-812 ("*Nunez II*").

{¶10} In April 2016, Nunez filed a pro se "motion for new trial." In the motion, Nunez argued that he is entitled to a new trial based on his discovery of "new evidence material to the defense which [he] could not with reasonable diligence have discovered and produced at the trial." In support of his motion, Nunez submitted affidavits from himself, Joseph Munley, Antonio Mango, Rachel Nunuz, L.L., and Shannon Cochran. Nunez also submitted a statement from his trial counsel and various exhibits and portions of the transcript from his criminal trial. Collectively, Nunez argued in his motion for new

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[1] Nunez was granted a writ of habeas corpus in federal court, which instructed that Nunez be granted leave to take a delayed appeal. *Nunez v. Kelly*, N.D. Ohio No. 1:12-CV-0903, 2014 U.S. Dist. LEXIS 178938 (Nov. 21, 2014).

trial that the "newly discovered material evidence" demonstrates that he was in a consensual romantic relationship with J.L. at all times relevant to the allegations levied against him in this case.

{¶11} In August 2016, the trial court denied Nunez's motion for new trial, without a hearing.

{¶12} Nunez now appeals from the trial court's judgment.

II. Law and Analysis

A. Motion for New Trial

{¶13} In his first assignment of error, Nunez argues the trial court abused its discretion by failing to grant the motion for new trial, or at the very least, by failing to hold an evidentiary hearing.

{¶14} Crim.R. 33 provides an avenue for a post-judgment attack on a valid criminal conviction. The rule provides for a number of situations where a criminal defendant may seek a new trial. Relevant to the arguments raised in this case, Crim.R. 33(A)(6) provides that a new trial may be granted:

> When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

{¶15} Under Crim.R. 33(B), however,

> [m]otions for a new trial based upon newly discovered evidence must be filed within one hundred twenty days after the verdict was rendered, unless it appears by clear and convincing proof that the movant was unavoidably prevented from discovering the new evidence[.]

{¶16} A party is unavoidably prevented from filing a motion for a new trial if the party establishes that he or she "had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence." *State v. Parker*, 178 Ohio App.3d 574, 2008-Ohio-5178, 899 N.E.2d 183, ¶ 16 (2d Dist.), citing *State v. Walden*, 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859 (10th Dist.1984).

{¶17} "Clear and convincing proof that the defendant was 'unavoidably prevented' from filing 'requires more than a mere allegation that a defendant has been unavoidably prevented from discovering the evidence he seeks to introduce as support for a new trial.'" *State v. Lee*, 10th Dist. Franklin No. 05AP-229, 2005-Ohio-6374, ¶ 9. The requirement of clear and convincing evidence puts the burden on the defendant to prove he was unavoidably prevented from discovering the evidence in a timely manner. *State v. Rodriguez-Baron*, 7th Dist. Mahoning No. 12-MA-44, 2012-Ohio-5360, ¶ 11.

> In addition to demonstrating that a petitioner was unavoidably prevented from discovering the evidence relied upon to support the motion for new trial, the petitioner also must show that he filed his motion for leave within a reasonable time after discovering the evidence relied upon to support the motion for new trial. If there has been a significant delay, the trial court must determine whether the delay was reasonable under the circumstances or whether the defendant has adequately explained the reason for the delay.

State v. Gray, 8th Dist. Cuyahoga No. 92646, 2010-Ohio-11, ¶ 18.

{¶18} A Crim.R. 33(A)(6) motion for new trial on the ground of newly discovered evidence may be granted only if that evidence

> (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.

State v. Petro, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

{¶19} By its terms, Crim.R. 33 does not require a hearing on a motion for a new trial. Thus, the decision to conduct a hearing is one that is entrusted to the discretion of the trial court. *State v. Smith*, 30 Ohio App.3d 138, 139, 506 N.E.2d 1205 (9th Dist.1986). The decision whether to grant a motion for a new trial also lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990).

{¶20} In this case, Nunez failed to file a motion seeking leave to file his motion for a new trial. A motion for leave is a necessary prerequisite for filing a delayed motion for a new trial. *State v. Smith*, 8th Dist. Cuyahoga No. 100588, 2014-Ohio-4799, ¶ 9. In his motion for new trial, Nunez stated that he "also filed in a separate motion (concurrently with this motion) which seeks leave of court to file this motion beyond the one hundred twenty day period prescribed by Crim.R. 33(B)." However, no such motion for leave is present in this record. Because Nunez filed his motion for a new trial without first seeking leave of court, he failed to comply with the necessary procedural steps set forth in

Crim.R. 33(B).[2] As a result, the trial court properly overruled his motion for a new trial. *See State v. Norman*, 10th Dist. Franklin No. 04AP-1312, 2005-Ohio-5087, ¶ 8 (defendant's failure to obtain leave of court was a sufficient basis for overruling motion); *State v. Mir*, 7th Dist. Mahoning No. 12 MA 210, 2013-Ohio-2880, ¶ 12 (defendant's failure to file a motion for leave is reason enough to sustain the trial court's decision); *State v. Tucker*, 8th Dist. Cuyahoga No. 95556, 2011-Ohio-4092, ¶ 29; *State v. Bates*, 10th Dist. Franklin No. 07AP-753, 2008-Ohio-1422.

{¶21} Nevertheless, even if we were to construe Nunez's pro se motion as an inartfully titled motion for leave, we find Nunez has failed to demonstrate that (1) he was unavoidably prevented from discovering the evidence relied on to support his motion for new trial, and (2) the delay between discovering the evidence and the filing of the motion was reasonable under the circumstances.

{¶22} In this case, Nunez's motion for a new trial was filed approximately seven years after the jury returned a guilty verdict against him. As stated, Nunez attached several exhibits and affidavits to his motion. For the purposes of judicial clarity, we address the evidentiary weight of each exhibit and affidavit separately.

1. December 2009 Letter by Nunez's Trial Counsel

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[2] Although a pro se litigant may be afforded reasonable latitude, there are limits to a court's leniency. *Henderson v. Henderson*, 11th Dist. Geauga No. 2012-G-3118, 2013-Ohio-2820, ¶ 22. Pro se litigants are presumed to have knowledge of the law and legal procedures, and are held to the same standard as litigants who are represented by counsel. *In re Application of Black Fork Wind Energy, L.L.C.*, 138 Ohio St.3d 43, 2013-Ohio-5478, 3 N.E.3d 173, ¶ 22.

{¶23} The first exhibit attached to Nunez's motion consists of a portion of a 2009 letter written by Nunez's trial counsel. The letter, referenced as Exhibit A, is addressed to the Cleveland Metropolitan Bar Association and was made in response to a bar complaint filed by Nunez against counsel following trial. In the letter, trial counsel maintained that he handled Nunez's case within the standards of professionalism and "complied with all Rules of Professional Responsibility." However, trial counsel stated that he believes Nunez is innocent and that he made two "inadvertent oversights during the trial," including (1) "missing an opportunity to persuade the trial judge to reconsider her decision to exclude evidence of other individuals' DNA on the underwear of Jane Doe 2," and (2) "stipulating to the admissibility of a computer disk containing a version of Jane Doe 1's cellular phone records that turned out to be materially different than the set that the phone company mailed directly to my office." Counsel explained in his letter that the phone records mailed to his office "suggested that Nunez and Jane Doe 1 had a consensual sexual/romantic relationship" given the number of calls Jane Doe 1 made to Nunez "during the two weeks leading up to the February 14 rape accusation."

{¶24} On appeal, Nunez contends that trial counsel's reference to the inconsistent phone records constitutes newly discovered evidence that discloses a strong probability of his innocence. We disagree.

{¶25} Initially, we note that defense counsel's letter, including the content therein, does not constitute newly discovered evidence. As referenced by trial counsel in the letter, the allegedly inconsistent phone records were delivered to defense counsel at his

office during discovery and were available at the time of Nunez's trial. Accordingly, Nunez has failed to demonstrate that he was unavoidably prevented from discovering the purported new evidence, which was in defense counsel's possession throughout his trial.

{¶26} In addition, we find Nunez's argument concerning the allegedly newly discovered phone records is barred by res judicata. *See State v. Shabazz*, 8th Dist. Cuyahoga No. 100623, 2014-Ohio-3142, ¶ 13, citing *Gray*, 8th Dist. Cuyahoga No. 92646, 2010-Ohio-11 ("[S]uccessive motions for new trial are barred by res judicata."). The doctrine of res judicata prevents repeated attacks on a final judgment and applies to all issues that were or might have been litigated. *State v. Taylor*, 8th Dist. Cuyahoga No. 88020, 2007-Ohio-825, ¶ 8, citing *Rogers v. Whitehall*, 25 Ohio St.3d 67, 494 N.E.2d 1387 (1986). "Principles of res judicata prevent relief on successive, similar motions raising issues which were or could have been raised originally." *Coulson v. Coulson*, 5 Ohio St.3d 12, 13, 448 N.E.2d 809 (1983). Further, where a new motion simply rephrases issues previously raised, the principles of res judicata bar the later motion. *Bahgat v. Bahgat*, 10th Dist. Franklin No. 83AP-469, 1984 Ohio App. LEXIS 11749 (Dec. 6, 1984). In this case, Nunez has known of the inconsistent phone records since 2009, and he relied extensively on those records in his first motion for new trial, which was denied by the trial court. Nunez did not appeal from the trial court's denial of his first motion for new trial, and the doctrine of res judicata bars reconsideration of the court's judgment on this issue.

2. Affidavits of Antonio Mango and Rachel Nunez

{¶27} In his affidavit, dated September 24, 2009, Antonio Mango averred that he is an acquaintance of Nunez. Mango stated that on a number of occasions, he observed Nunez and J.L. walking down the street together. Mango averred that J.L. did not appear to be in any fear or distress, and acted in a calm, ordinary manner. Mango further stated:

> At no time in my life did I engage in forced sexual intercourse or any other form of non-consensual sexual activity with [J.L.] in the company of Nunez nor otherwise. To the extent [J.L.] claims that she was sexually assaulted by me or Nunez at the same time, she is lying.

{¶28} In an affidavit dated September 24, 2009, Nunez's wife, Rachel Nunez, averred that in August 2009, she learned that her sister, J.L., had given their mother, L.L., an expensive gift just one week before Nunez's trial. Rachel's affidavit notes that L.L. testified on behalf of the state against Nunez and inferred that she may have been motivated to give false testimony.

{¶29} On appeal, Nunez argues that the affidavits of Mango and Rachel support his claims of innocence and challenge the credibility of key state witnesses. Here, the affidavits of Mango and Rachel are identical to the affidavits submitted on behalf of Nunez's first motion for new trial. For the reasons previously stated, Nunez's arguments concerning the allegedly newly discovered evidence set forth in Mango and Rachel's affidavits are barred by res judicata.

3. Affidavit of Joseph Munley

{¶30} Next, Nunez relies on an unnotarized affidavit of his friend, Joseph Munley, dated August 11, 2009. In the affidavit, Munley averred that he is friends with both Nunez and J.L. Munley stated that Nunez and J.L. often came over to his house together,

and "at no time did [he] see or sense any form of apprehension or fear from [J.L.] towards [Nunez]."

{¶31} Upon due consideration, we find Munley's statement is not newly discovered evidence that Nunez could not with reasonable diligence have discovered and produced at the trial. Moreover, Nunez cannot establish that he was unavoidably prevented from discovering the allegedly new evidence within the time prescribed for filing a motion for new trial based on newly discovered evidence. The statement was signed by Munley less than three weeks after Nunez's trial, well within the 120-day-time period under Crim.R. 33(B).

4. Affidavit of L.L.

{¶32} In an affidavit dated May 9, 2012, Nunez's mother-in-law, L.L., averred that the prosecutor "made me take the stand and changed my words around to help manipulate and persuade the jury to convict." L.L. stated in her affidavit that she believes the prosecutor manipulated her testimony in an effort to establish that Nunez had apologized to her for raping J.L. and N.S., when in fact, he had only apologized for cheating on Rachel and having an affair with J.L.

{¶33} Here, Nunez has not provided a reasonable explanation for the significant delay between the creation of L.L.'s affidavit and the filing of his motion for leave. Nor has he explained how he was unavoidably prevented from discovering the information set forth in L.L.'s affidavit within 120 days of his verdict. Accordingly, this court cannot say that the trial court abused its discretion in denying the motion for leave when Nunez has

not explained how he was unavoidably prevented from discovering the evidence, or why the evidence was not timely brought to the court's attention. *See State v. Sutton*, 8th Dist. Cuyahoga No. 103391, 2016-Ohio-7612, ¶ 19.

{¶34} Moreover, the transcript reveals that L.L. testified at trial and was questioned extensively regarding the same circumstances discussed in her affidavit. At no point during her testimony did L.L. state that her conversation with Nunez related to an apology for his infidelity. Rather, it is clear from the record that L.L.'s testimony concerning Nunez's apology related to the events that occurred after she had learned that Nunez had allegedly raped her daughter and niece.[3] *See* tr. 487-488. L.L. provided no testimony that Nunez claimed to have been involved in a consensual affair with J.L. Thus, it is evident that L.L.'s affidavit is an attempt to recant her trial testimony.

{¶35} Generally, newly discovered evidence that purportedly recants testimony given at trial is "looked upon with the utmost suspicion." *State v. Nash*, 8th Dist. Cuyahoga No. 87635, 2006-Ohio-5925, ¶ 10. "Recanting affidavits and witnesses are viewed with extreme suspicion because the witness, by making contradictory statements, either lied at trial, or in the current testimony, or both times." *Gray*, 8th Dist. Cuyahoga No. 92646, 2010-Ohio-11, ¶ 29. Consequently, "there must be some compelling reason

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[3] The following exchange took place on the record:

PROSECUTOR: Do you end up having communication with the Defendant?

L.L.: Yes. He called me about, maybe two hours later, and he says; [L.L.], I'm sorry, please forgive me. How can you — you want me to forgive you [sic] what you did to my daughter and my niece?

to accept a recantation over testimony given at trial." *State v. Fortson*, 8th Dist. Cuyahoga No. 82545, 2003-Ohio-5387, ¶ 13.

{¶36} Thus, a defendant is not necessarily entitled to a new trial when a witness submits an affidavit recanting trial testimony. *Gray* at ¶10. Instead, when a defendant seeks a new trial based upon a witness's recanted testimony, the trial court must evaluate the credibility of the recanting witness. *Toledo v. Easterling*, 26 Ohio App.3d 59, 60, 498 N.E.2d 198 (6th Dist.1985). The court must determine whether the recanting witness told the truth at trial or if the witness's recantation is true. *Id.* If the trial court determines the recantation is believable, the trial court must then determine whether the recanted testimony would have materially affected the outcome of trial. *State v. Brown*, 186 Ohio App.3d 309, 2010-Ohio-405, 927 N.E.2d 1133, ¶ 47 (7th Dist.). However, a trial court need not hold a hearing to ascertain the credibility of the recanted affidavit testimony. *State v. Washington*, 8th Dist. Cuyahoga No. 103875, 2016-Ohio-5329, ¶ 21.

{¶37} In light of L.L.'s trial testimony, we cannot say that L.L.'s apparent recantation would have materially affected the outcome of the trial or that it discloses a strong probability that it would change the result if a new trial were to be granted. Therefore, even if Nunez would have obtained leave based on the contents of L.L.'s affidavit, the evidence in the record is such that the trial court would have summarily denied Nunez's motion for a new trial. *See Smith*, 8th Dist. Cuyahoga No. 100588, 2014-Ohio-4799.

5. Affidavit of Shannon Cochran

{¶38} In an unnotarized statement, dated April 20, 2013, Shannon Cochran expressed her desire to testify on behalf of Nunez in order to demonstrate that Nunez and J.L. were in a consensual romantic relationship during the relevant time periods and "tried to hide it around certain people." Nunez contends that the affidavit is newly discovered evidence that supports his defense that he and J.L. were having a consensual affair.

{¶39} Here, clear and convincing evidence does not exist to establish that Nunez was unavoidably prevented from discovering the purported testimony of Cochran. As stated in Cochran's affidavit, Nunez and Cochran were friends and Nunez does not provide any reasonable basis for why he was unavoidably prevented from discovering Cochran's potential testimony prior to trial or within the 120-day period set forth in the rule. Moreover, Nunez has provided no reason for the three-year gap in time between the discovery of this witness and the filing of his motion for new trial. *Washington*, 8th Dist. Cuyahoga No. 103875, 2016-Ohio-5329. Accordingly, we find Cochran's affidavit does not satisfy the requirements of Crim.R. 33.

6. N.S.'s Medical Records and BCI Report

{¶40} In an effort to challenge the victim's credibility, Nunez further submitted copies of N.S.'s medical records from the St. Claire Regional Medical Center and a DNA lab report created by the Ohio Bureau of Criminal Investigation. After careful review, it is clear that these reports were created prior to Nunez's trial and, in fact, were discussed at length throughout the trial. Accordingly, the documents do not constitute newly discovered evidence.

7. Affidavit of Victor Nunez

{¶41} In his own affidavit, dated March 28, 2016, Nunez averred that the evidence and documents attached to his motion for new trial are true copies and have not been altered in any way. Nunez further averred that his family "has the missing compact disc of the phone records that defense counsel refers to in Exhibit A" and that he is "precluded from receiving or possessing it at the prison due to the prison rules." Nunez states that he "has acted with due diligence in pursuing the newly discovered evidence but has been unavoidably prevented from obtaining said evidence and filing the motion until now."

{¶42} Beyond his mere conclusory statements, Nunez has not explained why he was unavoidably prevented from submitting a timely Crim.R. 33(A)(6) motion, particularly where several of the relevant affidavits were created prior to the expiration of the time prescribed under Crim.R. 33(B). Moreover, Nunez has not explained the significant delay between the discovery of the new evidence and the filing of his motion for new trial.

{¶43} Based on the foregoing, we find that even if Nunez filed a proper motion for leave, the trial court did not abuse its discretion in denying the motion when the supporting evidence, on its face, demonstrates that (1) it was not newly discovered, (2) Nunez was not unavoidably prevented from discovering the evidence, or (3) the evidence was not timely brought to the court's attention. Moreover, res judicata bars consideration of the unsuccessful arguments previously raised in Nunez's first motion for new trial.

{¶44} Accordingly, Nunez's first assignment of error is overruled.

B. Res Judicata

{¶45} In his second assignment of error, Nunez argues his original indictment is fatally defective because it alleges multiple, identical, and undifferentiated counts, in violation of the double jeopardy and due process clauses of the Ohio and United States Constitutions. In his third assignment of error, Nunez argues the trial court erred, and due process was denied, when the court deviated from the jury deadlock instruction approved by the Supreme Court of Ohio in *State v. Howard*, 42 Ohio St.3d 18, 537 N.E.2d 188 (1989). For the purposes of judicial clarity, we consider the assignments of error together.

{¶46} After careful review, we decline to address the merits of the foregoing assignments of error. Res judicata bars the assertion of claims from a valid, final judgment of conviction that have been raised or could have been raised on direct appeal. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. Because Nunez's challenges to the sufficiency of the indictment and the validity of the trial court's jury instructions could have been, but were not, raised on direct appeal, they are now barred by res judicata. *See State v. Williams*, 8th Dist. Cuyahoga No. 101026, 2014-Ohio-5428, ¶ 20, citing *State v. Lowery*, 2d Dist. Montgomery No. 24198, 2011-Ohio-2827, ¶ 18-22 (even assuming there was a defect in defendant's indictment, he could not "raise the issue 'at any time' based on the trial court's alleged lack of subject matter jurisdiction"; res judicata barred defendant's argument that his indictment was defective in his petition for postconviction relief where defendant did not challenge the

sufficiency of his indictment at trial or on direct appeal). *See also State v. Cowan*, 8th Dist. Cuyahoga No. 99556, 2013-Ohio-4475, ¶ 22 ("[Defendant] had the opportunity to raise a jury instruction argument on direct appeal, but failed to do so. Consequently, this assigned error is also barred by res judicata.").

{¶47} Nunez's second and third assignments of error are overruled.

{¶48} Judgment affirmed.

It is ordered that appellee recover of appellant 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.

EILEEN T. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR