[Cite as *State v. Meeks*, 2016-Ohio-7517.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 2016CA00050
	:	
STEVEN M. MEEKS	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2013CR1142
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 24, 2016

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
MATTHEW A. RAZAVI SPECIAL PROSECUTOR MEDINA CO. PROS. OFFICE 72 Public Square Medina, OH 44256	ANTHONY KOUKOUTAS 116 Cleveland Ave. North Canton, OH 44702

Delaney, J.

{¶1} Defendant-appellant Steven M. Meeks appeals from the February 16, 2016 Judgment Entry of the Stark County Court of Common Pleas overruling his motion for new trial. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} A comprehensive statement of the facts underlying appellant's convictions may be found in our opinion at *State v. Meeks*, 5th Dist. Stark No. 2014CA00017, 2015-Ohio-1527, 34 N.E.3d 382, appeal not allowed, 143 Ohio St.3d 1543, 2015-Ohio-4633, 40 N.E.3d 1180 [*Meeks I*].

{¶3} This case arose when appellant was investigated for sexual assaults of two different victims on two different occasions. K.M. was age 14 at the time of the sexual assault and the second victim, P.K., was an adult at the time of the offense. Appellant was charged by indictment as follows: Count I, rape pursuant to R.C. 2907.02(A)(1)(c), a felony of the first degree; Count II, sexual battery pursuant to R.C. 2907.03(A)(2), a felony of the third degree; Count III, rape pursuant to R.C. 2907.02(A)(1)(c), a felony of the first degree; Count IV, sexual battery pursuant to R.C. 2907.03(A)(2), a felony of the third degree; Count V, unlawful sexual conduct with a minor pursuant to R.C. 2907.04(A), a felony of the fourth degree; and Count VI, gross sexual imposition pursuant to R.C. 2907.05(A)(5), a felony of the fourth degree.

{¶4} Counts IV through VI arose from the sexual assault of K.M.

{¶5} Following trial by jury, appellant was found guilty as charged on January 17, 2014. Counts I and II merged for purposes of sentencing and appellant received a prison term of six years, consecutive to a prison term of eight years on Count III, for a total

aggregate prison term of 14 years. Counts IV, V, and VI merged with Count III. Appellant was determined to be a Tier III sex offender.

{¶6} The instant appeal implicates counts IV through VI and arises from affidavits submitted by a witness to the events involving K.M. and that witness' father. We have thoroughly reviewed the entire record as we are required to do when reviewing a trial court's decision upon a motion for new trial. The facts related here focus more specifically on those relevant to appellant's motion for new trial.

{¶7} Counts IV through VI arose during a party attended by appellant at the home of Mike Schuller after a school dance on March 5, 2011. K.M. attended the dance with her friend A.F.

K.M.'s Account

{¶8} The following evidence is adduced from K.M.'s testimony at trial.

{¶9} K.M. went to the dance with her friend A.F., also a 14–year–old freshman. After the dance they returned to K.M.'s house and A.F. was texted by Mike Schuller, a senior and friend of appellant, who wanted to "hang out." K.M. and A.F. snuck out of the house around 11:00 p.m. and were picked up by appellant and Schuller a few houses away. The girls were brought to a party already in progress in the basement of Schuller's house.

{¶10} Present at the party were appellant, Schuller, R.J. Holliday, Holliday's then-girlfriend Breanne Newcomb, and Ian Cameron. K.M. had never consumed alcohol before but started drinking vodka upon her arrival at the party, as did A.F. Everyone at the party was drinking except for appellant and Cameron in particular was already very drunk.

{¶11} K.M. continued to drink liquor from red Solo cups. She began to “black out” and woke up in a dark room, very sick, with appellant beside her on a bed. She didn't know how she got into the room. She was naked and did not remember taking her clothes off. She knew she had sex with appellant and she did not agree to it. She said appellant ran from the room when Newcomb and Holliday broke in.

{¶12} K.M. was throwing up when the door opened and Holliday came in; she told him to get out. Newcomb came in and K.M. told her she “lost her virginity.” Newcomb helped her get dressed and took her to a bathroom to clean up. She had thrown up on herself so she took a shower, as did A.F. K.M. felt very sick and continued to throw up.

{¶13} Appellant and Schuller drove K.M. and A.F. home in appellant's parents' car.

{¶14} K.M. did not tell her mother or anyone about sexual intercourse with appellant because she was scared and didn't want to get in trouble for sneaking out of the house and drinking. She felt she was responsible for what happened. She unequivocally testified she was drunk that night, appellant was sober, he took advantage of her, and she did not consent to sexual intercourse.

{¶15} At trial K.M. said she had been reluctant to tell Collins what happened when he appeared at her home to investigate. She told him she was drinking at the party and woke up naked and vomiting; if sexual intercourse happened, she did not agree to it but she did not have a different feeling or pain in her genitals afterward, although at trial she admitted this was not true. At trial, K.M. said was physically aware she had sexual intercourse. Under cross-examination she said she felt pain but knew it was not a medical condition that required the attention of a doctor and would go away.

{¶16} K.M. said she was not trying to blame anyone. She called appellant after the incident and said people were saying things he should know about, meaning the rumor he had raped her. Appellant went to Dairy Queen once with K.M. and A.F. after the incident. She did not feel hostility toward appellant but the fact remained he took advantage of her when she was 14 and drunk.

The Witnesses' Testimony Relevant to Counts IV through VI

Ian Cameron

{¶17} During the 2011 party at Schuller's house, Ian Cameron was extremely intoxicated before K.M. and A.F. arrived and testified he was getting sick in the bathroom while most of the events took place. He was aware of rumors around school afterward about what happened but did not ask appellant about it.

Breanne Newcomb

{¶18} Breanne Newcomb was dating R.J. Holliday in March 2011. On March 5, 2011, Newcomb and Holliday attended the winter dance with appellant, Schuller, and Cameron, each of whom had dates that night. After the dance the group went to Schuller's house and all of the dates except Newcomb left. K.M. and A.F. appeared at the party but Newcomb did not know how they got there. She knew they were freshmen.

{¶19} Everyone at the party was drinking heavily, except appellant. Newcomb told appellant not to kiss K.M. or “do anything” with her because she was so young. Holliday told Newcomb appellant carried K.M. into the bedroom; Newcomb was angry at appellant and Holliday because she specifically warned them not to let anything happen. Appellant came out of the bedroom and said K.M. was throwing up. Newcomb thought Holliday went into the bedroom first and came out to get her because K.M. didn't want him in there.

{¶20} Newcomb entered the bedroom and found K.M. naked, sitting on the side of the bed, throwing up. Newcomb observed she seemed even more intoxicated than she had been before. Newcomb helped her get dressed because she was unable to. Newcomb asked K.M. if she had sex with appellant and K.M. replied, “I think so.”

R.J. Holliday

{¶21} Robert “R.J.” Holliday was Newcomb's boyfriend at the time and also friends with appellant. He was present at the party at Schuller's house and was drinking and playing “liquor pong.” He testified K.M. became “obviously intoxicated;” she was unable to walk on her own. Holliday witnessed appellant pick her up and carry her into the basement bedroom. He described her condition at the time as “lifeless.”

{¶22} The lights in the bedroom were off and the door was locked. The doors of the bedroom were glass French doors but witnesses were unable to see into the room because it was dark. Holliday confirmed Newcomb was angry and told him to get K.M. and appellant out of the bedroom. He banged on the locked door but there was no response. When he was unable to get the door open he gave up and “everyone went their separate ways.” Newcomb went to bed, Cameron passed out on the sofa, and Schuller and A.F. were together on a futon. Holliday fell asleep and was awakened by Cameron throwing up. He put Cameron in the shower and banged on the bedroom door again to ask appellant for help cleaning up because he knew appellant hadn't been drinking. A.F. started throwing up.

{¶23} Suddenly appellant came out of the bedroom “with throw up on him,” saying that K.M. was getting sick. Holliday went into the bedroom and saw her sitting on the side

of the bed, naked and throwing up; she did not seem to know where she was. Newcomb then came into the bedroom to help K.M. and Holliday left the bedroom.

{¶24} Holliday testified he discussed the events with appellant. He asked appellant if he had sex with K.M. and appellant said yes; he asked appellant what protection he used and appellant told him he “pinched it off,” which Holliday understood to mean he held his penis in his hand and “pinched” his urethra to prevent himself from ejaculating. Holliday never saw appellant with his clothes off.

{¶25} Holliday and appellant later had a falling-out because Holliday wanted appellant to take his sister to the prom and appellant took someone else. Appellant also told someone Holliday was dating he was interested in someone else. Holliday denied that his testimony was intended to “get even” with appellant over these issues. Holliday did not go to the police; they came to him after the second victim gave police his name as a witness to the incident after the Winter Formal. Holliday provided K.M’s name to the second victim.

Appellant's Testimony Relevant to Counts IV through VI

{¶26} The following is adduced from appellant's testimony at trial. Appellant became aware of the rumor he raped K.M. while he was working at Panera. He said R.J. Holliday started the rumor because he was mad appellant didn't take his sister to the prom and also because he told Holliday's girlfriend he was cheating on her.

{¶27} Appellant said he was at the party at Schuller's house after the Winter Formal. His date left the party early and he was sitting in the basement when K.M. and A.F. appeared. He didn't know how they got there and had no part in picking them up. Holliday poured the girls several drinks and appellant told him to stop. Holliday

purportedly said the girls needed to have fun and keep playing the liquor pong game. Appellant noticed K.M. looked “flushed of color” and he thought she needed to lie down. He led K.M. into the bedroom so she could lie down and it was Holliday who slammed the door shut because he was mad appellant prevented him from giving K.M. more to drink. Appellant denied locking the bedroom door.

{¶28} Appellant said K.M. sat down on the bed and put her arms around him. He heard Holliday pounding on the bedroom door, saying Cameron was throwing up and asking for appellant's help. He got up to leave the room and K.M. started throwing up on her own clothes and on his shirt. He told her to take off whatever had vomit on it, then opened the door, left the room, and asked Newcomb to take care of K.M. while he went to get a trash can. He helped clean up the basement while Newcomb put K.M. in the shower.

{¶29} Appellant stated while Cameron, K.M., and A.F. were in the shower, he washed and dried their clothing. He and Holliday then drove K.M. and A.F. home to K.M.'s house where they dropped the girls off at the end of her driveway.

{¶30} Appellant said he didn't have sex with K.M. and didn't tell anyone he did. He took his shirt off to change into a spare shirt because K.M. had thrown up on it. He was in the bedroom with K.M. for less than a minute, not enough time to have had sex. He never saw her naked; she was beginning to take her hoodie off but was fully clothed when he left the room. He continued to have contact with K.M. after the party; he said they spoke and texted each other and went out to eat at Dairy Queen once. Appellant went to her house but, according to him, her stepfather thought it was inappropriate for a senior to be hanging around a freshman so they didn't talk much after that.

{¶31} During cross examination, appellant spontaneously stated he was familiar with a phenomenon known as “drunken recall” from watching a History Channel documentary on the topic. In his understanding, a person does not remember things they did when they were drunk once they become sober; however, once they are drunk again, the memory of those drunken activities comes back.

{¶32} Appellant concluded K.M. fabricated the allegations because Holliday put her up to it.

Testimony of Mike Schuller Relevant to Counts IV through VI

{¶33} Mike Schuller testified on appellant's behalf and said the group was at his house for parties “hundreds of times” but he did not recall a party after the Winter Formal specifically and knew nothing of these events until he was contacted by Jackson police. He acknowledged he told the prosecutor he didn't want to be involved. Despite his claim he was no longer friends with appellant and hadn't spoken to him in a long time, he admitted he solicited appellant's help in obtaining an internship at appellant's workplace a little over a year before trial.

Motions for New Trial

{¶34} Appellant filed his first motion for new trial pursuant to Crim.R. 33(A)(6) on February 7, 2014, the same date he also filed notice of appeal from the convictions and sentences. The trial court ruled it did not have jurisdiction over the motion for new trial until the appeal was final and held it in abeyance until the direct appeal was complete upon the decision of the Ohio Supreme Court declining review. See, *Meeks I*, supra, 2015-Ohio-1527, appeal not allowed, 143 Ohio St.3d 1543, 2015-Ohio-4633, 40 N.E.3d 1180.

{¶35} On May 12, 2015, appellant filed a second motion for new trial pursuant to Crim.R. 33(A)(2). The motion contains an affidavit of A.F., the minor who accompanied K.M. to the party on March 5, 2011, and an affidavit of A.F.'s father. The motion alleges appellee knew A.F.'s address but did not disclose it to the defense, and further alleges A.F. had exculpatory information that would have changed the outcome of the trial.

{¶36} Specifically, A.F.'s affidavit states she was never contacted by any investigator on the case; she spoke to the prosecutor by phone about a week before the trial; she was with K.M. the night of the party; she and K.M. were picked up that evening by appellant and Mike Schuller; they drank alcoholic beverages including vodka at the party; K.M. "made out" with appellant at the party; K.M. threw up in a basement bathroom; K.M. was not upset when they left the party and she told A.F. she had sex with appellant; A.F., K.M., and appellant met at Dairy Queen the next day; A.F. saw K.M. "making out with" appellant during this encounter; and K.M. was not upset and never told A.F. she was raped by appellant. In A.F.'s description of the party, the affidavit contains the following statements:

> * * * *.
>
> 9. I would have testified that at some point [K.M.] and [appellant] were on a couch in the basement making out.
>
> 10. I would have testified that [K.M.] exited a room located in the basement with [appellant].
>
> 11. I would have testified that [K.M.] was fully clothed when she exited the room with [appellant].
>
> * * * *.

{¶37} Relevant to appellant's motions for new trial, Paragraph 19 of A.F.'s affidavit states that on the day after the rape, after A.F. accompanied appellant and K.M. to Dairy Queen, appellant drove A.F. to her house.

{¶38} In his affidavit, A.F.'s father states he spoke to the prosecutor by phone prior to the jury trial; the prosecutor came to the father's home looking for A.F.; and A.F. was not home but the father called her on her cell phone and the prosecutor spoke to her about the case.

{¶39} The trial court overruled the motion for new trial by judgment entry dated February 16, 2016.

{¶40} Appellant now appeals from the trial court's judgment entry overruling his motion for new trial.

{¶41} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶42} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL."

ANALYSIS

{¶43} In his sole assignment of error, appellant argues the trial court should have granted his motion for new trial. We disagree.

{¶44} Crim.R. 33 governs new trials. A motion for a new trial made pursuant to Crim.R. 33 is addressed to the sound discretion of the trial court, and may not be reversed unless we find an abuse of discretion. *State v. Schiebel,* 55 Ohio St.3d 71, 75, 564 N.E.2d 54 (1990). An abuse of discretion implies that the trial court's judgment is arbitrary,

unreasonable, or unconscionable. *State v. Sage,* 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987).

{¶45} Before the trial court, appellant moved for a new trial pursuant to Crim.R. 33(A)(2) and (A)(6). Those sections state:

> A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
>
> * * * *.
>
> (6) 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.

Misconduct of the Prosecuting Attorney

{¶46} In his second motion for new trial, appellant alleged he is entitled to a new trial based upon misconduct of the prosecuting attorney. Appellee provided the name of A.F., the freshman minor who accompanied K.M. to the party, as a potential witness with her address listed as unknown. The affidavits of A.F. and her father indicate the trial prosecutor spoke to them both prior to trial and came to the family's residence. Appellee did not update the information provided in discovery with A.F.'s address, which appellant argues is prosecutorial misconduct.

{¶47} As appellee points out, A.F. states in her affidavit that appellant drove her to her house after the Dairy Queen outing the day after the rape. Appellant's argument does not explain how he is now ignorant of A.F.'s address. We further note A.F.'s affidavit does not state she told the prosecutor the information she includes in the affidavit and A.F. was not called as a trial witness by either party.

{¶48} Appellant argues, though, he is entitled to a new trial pursuant to Crim. R. 33(A)(2) because his substantial rights have been materially affected by misconduct of the prosecuting attorney. In general terms, the conduct of a prosecuting attorney during trial cannot be made a ground of error unless that conduct deprives the defendant of a fair trial. *State v. Maurer*, 15 Ohio St.3d 239, 266, 473 N.E.2d 768 (1984). It must be clear beyond a reasonable doubt that absent the prosecutor's conduct, the jury would have found the defendant not guilty. Id. The test for prosecutorial misconduct is whether the prosecutor's conduct at trial was improper and prejudicially affected the substantial rights of the defendant. *State v. Sampson*, 5th Dist. Stark No. 2001CA00206, 2003-Ohio-1692, ¶ 25, citing *State v. Lott*, 51 Ohio St.3d 160, 165, 55 N.E.2d 293 (1990); *State v. Smith*, 14 Ohio St.3d 13, 14-15, 470 N.E.2d 883 (1984).

{¶49} Appellant contends appellee essentially suppressed A.F.'s address and her purportedly favorable testimony. The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 88, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In order to establish a *Brady* violation, a defendant must establish three elements: (1) that the prosecution withheld evidence, (2) that the defense was not aware of the evidence, and (3) that the evidence withheld was material. *State v. Johnston*, 39 Ohio St.3d 48, 529 N.E.2d 898 (1988), paragraph four of the syllabus; *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Appellant has not presented evidence demonstrating substantive grounds for relief under *Brady*.

{¶50} Appellant has not demonstrated A.F.'s address, assuming it was withheld, is material. The withholding of exculpatory or impeachment evidence constitutes a *Brady* violation only if it is "material." *United States v. Bagley*, 473 U.S. 667, 677, 105 S.Ct. 3375 (1985). The United States Supreme Court has noted that the "touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *State v. Holloman*, 10th Dist. Franklin No. 06AP-608, 2006-Ohio-6789, ¶ 15, citing *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566 (1995), quoting *Bagley,* supra, at 678.

{¶51} A.F.'s role in the case was disclosed in the complete police reports given to appellant in discovery. Appellee disclosed A.F.'s name as a potential witness, and the witnesses who attended the party, including appellant and his friends, identified A.F. as the friend who accompanied K.M. to the party. We are not persuaded appellant was ignorant of A.F.'s address because the affidavit states he drove her home. Having reviewed the entire record of this case, we find it is highly unlikely the outcome of appellant's trial would have been any different if he had A.F.'s address and if she testified to the statements in her affidavit. Appellant does not make any specific argument stating how having A.F.'s address could possibly have resulted in the jury finding him not guilty of the charge. *State v. Matthews*, 5th Dist. Holmes No. 10-CA-009, 2011-Ohio-1321, ¶ 28. Appellant asserts A.F.'s statements "would have directly established a contrary timeline," but we find that A.F.'s statements regarding the timing of events in fact confirm the testimony of appellee's trial witnesses.

{¶52} Moreover, A.F.'s affidavit corroborates the victim's testimony on a point appellant contested at trial: appellant and Mike Schuller picked the two freshmen up and brought them to the party. Appellant claimed at trial K.M. and A.F. simply appeared in the basement and he played no role in getting them there. A.F.'s affidavit further confirms the victim's intoxication and her testimony that she met appellant at Dairy Queen the next day. We find nothing in A.F.'s affidavit to be compelling evidence in support of appellant's version of events.

Newly-Discovered Evidence

{¶53} Before the trial court, appellant also moved for a new trial on the basis of newly-discovered evidence pursuant to Crim.R. 33(A)(6). We also find appellant's

proffered evidence does not warrant the granting of a new trial. To warrant the granting of a motion for a new trial on the ground of newly discovered evidence, it must be shown that "the new evidence (1) discloses a strong probability that it will change the result of a new trial if 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. Petrone*, 5th Dist. Stark No. 2012CA00096, 2013-Ohio-1138, ¶ 45, citing *State v. Petro,* 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus. " [* * *] *Petro* does not establish a per se rule excluding newly discovered evidence as a basis for a new trial simply because that evidence is in the nature of impeaching or contradicting evidence. The test is whether the newly discovered evidence would create a strong probability of a different result at trial." *State v. Arnold*, 189 Ohio App.3d 507, 2010-Ohio-5379, 939 N.E.2d 218, ¶ 14 (2nd Dist.), citing *Dayton v. Martin*, 43 Ohio App.3d 87, 539 N.E.2d 646 (2nd Dist.1987).

{¶54} We remain unconvinced appellant did not know where A.F. lived or could not have easily found out. The reasonable diligence requirement of Crim.R. 33(A)(6) infers that an attorney will use reasonable efforts and reasonable foresight to procure evidence. *State v. Shepard*, 13 Ohio App.3d 117, 118, 468 N.E.2d 380 (2nd Dist.1983), citing *State v. Kiraly*, 56 Ohio App.2d 37, 51-54, 381 N.E.2d 649 (8th Dist.1977). An attorney must use reasonable diligence to secure newly discovered evidence within a reasonable time after the trial. Id. By A.F.'s own account, she was acquainted with appellant and Mike Schuller. The knowledge of her address, even her testimony if she had testified to the statements in her affidavit, would not change the result if a new trial

was granted. See, *State v. Imani*, 5th Dist. Tuscarawas No. 2013 AP 01 0008, 2013-Ohio-2082, ¶ 23.

{¶55} Even if we were to assume the information contained in the affidavits could not have been secured by reasonable diligence, we are not persuaded the evidence would create a strong probability of a different result at trial. We are required to review the issue of newly-discovered evidence from the record as a whole, and having done that, we disagree with appellant that the proffered affidavits of A.F. and her father constitute newly-discovered evidence within the meaning of Crim.R. 33. The purpose of the affidavits, as argued by appellant, is merely to impeach or contradict appellee's evidence, and as we noted infra, A.F.'s affidavit corroborates appellee's theory at trial. A.F.'s statements that K.M. didn't say anything about the rape and went to Dairy Queen with appellant the next day are consistent with K.M.'s trial testimony as well.

{¶56} Based upon the entire record of this case, we find it is clear beyond a reasonable doubt that appellant would not have been acquitted had he been provided with A.F.'s address or potential testimony. See*, State v. Essad*, 5th Dist. Richland No. CA-2882, 1992 WL 127120, *3. We agree with appellee's argument that "[i]t is reasonable to conclude that [appellant] did not want to contact [A.F.] or call her to testify as the majority of her proffered testimony from the affidavit contradicts the defense theory of the case, contradicts [appellant's] actual testimony, and inculpates [appellant] in these offenses." (Brief, 13). The statements in A.F.'s affidavit are not inconsistent with appellee's evidence at trial. Nor do the statements provide any basis upon which appellant would have been found not guilty of Counts IV through VI.

{¶57} Considering the totality of the circumstances and the record, the trial court did not abuse its discretion by denying defendant's motions for new trial under Crim.R. 33(A)(2) and (6). Accordingly, the trial court's decision is neither unreasonable, arbitrary, nor unconscionable, and the trial court did not abuse its discretion in overruling appellant's motions for new trial.

CONCLUSION

{¶58} Appellant's sole assignment of error is overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J. and

Hoffman, P.J.

Baldwin, J., concur.