

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
	:	
Plaintiff-Appellee,	:	
	:	CASE NO. 2011-L-057
- VS -	:	
	:	
JAMES E. PESCI,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 98 CR 000578.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

James E. Pesci, pro se, PID: 385-424, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, James E. Pesci, pro se, appeals the judgment of the Lake County Court of Common Pleas denying his “Motion to Vacate Void Judgment Based on Jury Verdict Forms.” In his motion, appellant argued that his jury verdict forms did not comply with R.C. 2945.75 and *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, a decision of the Supreme Court of Ohio, as the forms failed to include the degree of offense for which he was convicted or a statement that an aggravating element was

found to justify convicting him of a greater degree of the criminal offense. For the following reasons, we affirm the decision of the trial court.

{¶2} Appellant was convicted of three counts of burglary in a jury trial, felonies of the second degree. Appellant was sentenced on January 16, 2001, to a total of seven years in prison, to be served consecutively to a sentence appellant was serving out of Cuyahoga County.

{¶3} Appellant filed a direct appeal on February 21, 2001. This court, in *State v. Pesci*, 11th Dist. No. 2001-L-026, 2002-Ohio-7131, found appellant's assignments of error to be without merit and affirmed the judgment of the trial court. In that appeal, appellant claimed the following:

{¶4} "[1.] The trial court erred to the prejudice of the defendant-appellant when it denied his motion to dismiss for a violation of his statutory and constitutional rights to a speedy trial.

{¶5} "[2.] The trial court erred to the prejudice of the defendant-appellant when it denied his motion to suppress.

{¶6} "[3.] The trial court erred to the prejudice of the defendant-appellant when it allowed two of the state's witnesses to testify to inadmissible hearsay.

{¶7} "[4.] The trial court erred to the prejudice of the defendant-appellant when it denied his motion for acquittal made pursuant to Crim.R. 29.

{¶8} "[5.] The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶9} Appellant appealed this court's decision to the Supreme Court of Ohio, which declined to review his case. *State v. Pesci*, 98 Ohio St.3d 1566, 2003-Ohio-2242.

{¶10} Appellant then filed a writ of prohibition in this court, *State ex rel. Pesci v. Lucci*, 115 Ohio St.3d 218, 2007-Ohio-4795, which was denied. The Supreme Court of Ohio affirmed the decision of this court. Id. at ¶5.

{¶11} Appellant subsequently filed a pro se “Motion to Vacate a Void, Ab Initio, Judgment” on November 2, 2007, in the trial court. Appellant raised the same issue that was raised in his first assignment of error on appeal in *State v. Pesci*, 2002-Ohio-7131. Treating this motion as a petition for postconviction relief, the trial court denied appellant’s motion on December 14, 2007, as untimely. Appellant appealed this decision in *State v. Pesci*, 11th Dist. No. 2008-L-012, 2008-Ohio-1660. This court dismissed the appeal for failure to file a timely notice of appeal, pursuant to App.R. 4(A) and Loc.R. 3(D)(2). Id. at ¶9.

{¶12} Appellant again appealed the trial court’s judgment entry of December 14, 2007, denying his pro se “Motion to Vacate A Void, Ab Initio, Judgment.” In *State v. Pesci*, 11th Dist. No. 2009-L-032, 2009-Ohio-6385, appellant asserted the following assignment of error: “The trial court has no valid indictment for personal or for subject matter jurisdiction.” This court affirmed the judgment of the trial court, finding that appellant’s appeal was untimely and that his claims were barred by the doctrine of res judicata. Id. at ¶22.

{¶13} In March 2011, appellant filed numerous motions with the trial court. In his “Motion to Vacate Void Judgment Based on Improper *** Jury Verdict Forms,” appellant argued that his jury verdict forms were improper. The trial court denied appellant’s motion on April 22, 2011, relying on the doctrine of res judicata.

{¶14} Appellant filed a timely notice of appeal and asserts the following assignment of error:

{¶15} “The trial court abused its discretion and/or committed plain error in violation of the Ohio and United States Constitutions by denying the appellant’s motion to vacate the void judgment based on the jury verdict forms as res judicata as the sufficiency of a jury verdict form to justify convicting a defendant of a greater degree of a criminal offense presents a question of law, which the court reviews de novo. A structural error of law is a constitutional defect that effects [sic] the framework within which the trial proceeds rather than simply being an error in the trial itself. A structural error gives rise to a constitutional presumption of prejudice as a matter of automatic reversal, of which res judicata does not apply.”

{¶16} Appellant argues that under the Supreme Court of Ohio’s decision in *State v. Pelfrey*, 2007-Ohio-256, and R.C. 2945.75, his jury verdict form was improper as it failed to include the degree of the offense of which he was convicted or a statement that an aggravating element was found. Appellant maintains that the trial court erred in its dismissal of his motion to vacate because res judicata is not applicable.

{¶17} R.C. 2945.75(A)(2) states:

{¶18} “When the presence of one or more additional elements makes an offense one of more serious degree *** [a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.”

{¶19} In *Pelfrey*, the Supreme Court held that “a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.” *State v. Pelfrey*, 2007-Ohio-256, at ¶14.

{¶20} In its judgment entry, the trial court noted that “[w]hile Defendant is correct that the verdict forms did not include the degree of the offense of which he was convicted, the Court finds that Defendant’s argument is barred by *res judicata*.” We agree.

{¶21} As stated by the Supreme Court of Ohio in *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus:

{¶22} “Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment of conviction, *or on an appeal* from that judgment.” (Emphasis sic.)

{¶23} Recently, this court addressed whether *res judicata* precludes a defendant from raising errors regarding the validity of jury verdict forms subsequent to his direct appeal. In *State v. Garner*, 11th Dist. No. 2010-L-111, 2011-Ohio-3426, at ¶1, the appellant claimed that his jury verdict form under *Pelfrey* was defective and, further, that the trial court erred in dismissing his motion to vacate because *res judicata* was not applicable. In *Garner*, we stated:

{¶24} “Garner asserts that *Pelfrey* allows parties to raise the issue of jury verdict form defects even if the issue has been waived at the trial court level. While this is true, *Pelfrey* does not hold that *res judicata* is inapplicable in situations where the appellant has not only waived the issue at the trial court level but also failed to raise the issue in his direct appeal. Appellate courts that have addressed this issue have found that, where the appellant filed and argued a direct appeal but did not raise any arguments

under *Pelfrey* or related to the inadequacy of the jury verdict form, res judicata applies to subsequent appeals. See *State v. Evans*, 9th Dist. No. 10CA0027, 2011-Ohio-1449, at ¶9 (holding that ‘because Evans could have raised issues related to the jury verdict forms in his direct appeal, he is foreclosed from raising the issue at this time’); *State v. Foy*, 5th Dist. No. 2009-CA-00239, 2010-Ohio-2445, at ¶8 (where appellant failed to raise the issue of jury verdict form defects under *Pelfrey* during his direct appeal, res judicata barred him from raising the issue in a subsequent appeal).” Id. at ¶23.

{¶25} Further, we note that although *Pelfrey* was released after appellant’s conviction and direct appeal, the doctrine of res judicata is still applicable. “[T]he Supreme Court of Ohio made it clear that its decision in *Pelfrey* did not make ‘new’ law, but simply applied R.C. 2945.75 as the Ohio General Assembly had expressly written it.” *State v. Hines*, 193 Ohio App.3d 660, 2011-Ohio-3125, at ¶16. See, also, 134 v H 511 (Eff 1-1-74). Accordingly, as appellant could have raised issues related to the jury verdict forms in his direct appeal, he is foreclosed from raising this issue.

{¶26} Based on the foregoing, appellant’s assignment of error is without merit. The judgment of the Lake County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.