[Cite as *State v. Amos*, 2026-Ohio-4417.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOHN E. AMOS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 26 BE 0023

Criminal Delayed Appeal from the
Common Pleas Court of Belmont County, Ohio
Case No. 07 CR 0056

BEFORE:
Carol Ann Robb, Cheryl L. Waite, Katelyn Dickey, Judges.

JUDGMENT:
Affirmed.

Atty. J. Kevin Flanagan, Belmont County Prosecutor*, Atty. Jacob A. Manning,* Assistant Prosecuting Attorney, for Plaintiff-Appellee and

John E. Amos, *pro se.*

Dated: November 6, 2026

Robb, J.

{¶1} Defendant-Appellant John E. Amos appeals the decision of the Belmont County Common Pleas Court denying his motion for leave to file a delayed motion for new trial 18 years after the jury verdicts. For the following reasons, the trial court's decision is affirmed.

STATEMENT OF THE CASE

{¶2} On April 5, 2007, a jury found Appellant guilty of raping his daughter (K.S.) on four occasions. The jury also found Appellant guilty of raping his daughter's friend (J.H.) during one of those occasions, in the fall of 2003, when J.H. was (or about to turn) 19 years old (count one) and K.S. was 14 years old (count two).

{¶3} According to the trial testimony on the first two counts, Appellant supplied the girls with alcohol, drove around, and parked in an isolated spot. During a game of truth-or-dare, Appellant instructed his friend to penetrate the vagina of K.S. five times with his penis, and the friend did so. Appellant then instructed K.S. to get on his lap during which Appellant penetrated her vagina while instructing her to provide oral sex to his friend. Next, he forced himself on a protesting J.H. and penetrated her vagina, then stopped and instructed K.S. to exit the vehicle. At the side of the vehicle, he bent K.S. over and penetrated her anally while she begged him to stop. (Tr. 254-271, 366-380, 446-455). After getting back in the car, he held up a gun while threatening to kill them if they spoke of the night. *Id*. at 309, 380, 456. All three passengers testified against Appellant at trial.

{¶4} The next two rape convictions were based on incidents at Appellant's residence where he forced K.S. to participate in threesomes with his girlfriend (with count three occurring in March 2005 when he penetrated K.S. with his penis and count four occurring before that when he penetrated her with a purple dildo). *Id*. at 280-295. The final charge (count seven) corresponded to Appellant leaning K.S. over a desk in a lumberyard office and penetrating her vagina from behind. *Id*. at 303-306.[1]

[1] The jury found him not guilty of two counts of rape of K.S. Count five was believed to have occurred on the same night as count two. (Tr. 275-276). Count six did not involve penetration as disclosed by the testimony of K.S. *Id.* at 299-300.

{¶5} On May 4, 2007, the court imposed the maximum sentence of ten years on each of the five counts to run consecutively and labeled Appellant a sexual predator. His conviction was affirmed on appeal, but the case was remanded for resentencing due to an issue with the application of a statute. *State v. Amos*, 2008-Ohio-7138 (7th Dist.). The same sentence was imposed on remand with no appeal. (9/2/08 J.E.).

{¶6} In the meantime, Appellant filed a petition for post-conviction relief under R.C. 2953.21. (1/8/08 Pet.); (2/1/08 Supp.). He argued the testimony of the victims lacked credibility and was the "product of State overreaching." In support, he submitted the affidavit of C.S., who was a defense witness at trial and was the mother of J.H. (1/14/08 Aff.). Her affidavit said if asked, she would have testified a children services worker called the house and told her to tell J.H. she would be arrested and have her children removed if she did not cooperate in the police investigation. C.S. additionally said J.H. told her the prosecutor asked a judge not to jail J.H. on a pending case because he needed her in a criminal case and the prosecutor told J.H. the case would be reinstated if she refused to testify in this case.

{¶7} Appellant also attached three letters he received in prison from K.S. stating she missed and loved him and asking why he did not write her back. The envelopes associated with two of the letters showed postmarks dated November 19 and November 30, 2007. Appellant's petition argued if her testimony against him constituted the truth, then she would not have written those letters. Yet, those letters also state: "I don't hate you. You['re] still my dad, Why me. I want to know that. I have a lot to say. (1) is do you hate me and why."

{¶8} On October 2, 2008, the trial court overruled the petition for post-conviction relief. The court pointed out it heard the testimony at trial where a great deal of evidence was presented and corroborated, concluding Appellant did not demonstrate the trial evidence was unreliable or secured through state overreaching. The court opined the letters from K.S. to her father in prison did not affect her credibility as a witness. As for the affidavit of C.S., the court noted it contained hearsay and was obtained from a defense witness who testified at trial, as did J.H. In addition, the court observed the purported prosecutorial coercion merely alleged the relay of accurate information, as J.H. had a pending case and she needed to be present as a witness at trial where she was expected to testify. Appellant did not appeal the denial of post-conviction relief.

{¶9} After nearly a decade, Appellant began filing additional motions, including in 2017, 2019, 2020, and 2023. *See, e.g., State v. Amos*, 2018-Ohio-3426 (7th Dist.) (raising indictment and post-release control issues in multiple motions); *State v. Amos*, 2019-Ohio-3651 (7th Dist.) (where he alleged ineffective assistance and merger issues); *State v. Amos*, No. 20 BE 0005 (7th Dist. Feb. 18, 2021) (dismissal for failure to file a brief after the trial court's denial of motion to vacate a void judgment on alleged verdict issue); *State v. Amos*, 2024-Ohio-2939 (7th Dist.) (as in a prior appeal after a similar post-conviction motion, we held the merger allegations would not render the sentence void and the issue was res judicata because it could have been raised in the direct appeal of the conviction).

{¶10} In 2025, Appellant filed a motion containing allegations of prosecutorial misconduct due to witness intimidation (the topic raised in his 2008 post-conviction petition). In addition to citing R.C. 2953.21 and discussing post-conviction relief for ineffective assistance of counsel, his motion also touched upon leave to file a motion for new trial. He reviewed a Supreme Court case on entitlement to leave to file an untimely new trial motion, emphasizing a trial court does not have discretion to deny leave based on failure to seek it within a reasonable time after discovering new evidence. *See State v. Bethel*, 2022-Ohio-783, ¶ 58 (announcing this new rule and rejecting the view of various appellate courts that evaluated whether the movant delayed seeking leave after learning of the cited evidence).

{¶11} Appellant attached the same affidavit of C.S. (this time without the signature page). He also filed an affidavit from K.S. (dated 4/9/25), which said: she went to the prosecutor's office with her mom the day before trial; she informed him she wanted to drop the charges and not testify; and the prosecutor told her mom to take her home and ensure she took her medication so she would be calm enough to testify. Appellant followed this motion with another based on the state's failure to file a response.

{¶12} The trial court denied the motions stating, "There is nothing new here." The court also said the claims were or could have been presented previously. In addition, the court observed, "Further, the various, purported affidavits Defendant submitted prove nothing . . . [but] stand for the proposition that the state's attorney informed the witnesses in advance of the consequences of not testifying truthfully. That is a sound practice rather than misconduct or intimidation." The court concluded Appellant failed to offer credible,

sufficient evidence and the items he cited were stale and tainted (with one lacking an acknowledgement and signature). (8/1/25 J.E.).

{¶13} On appeal, Appellant argued the affidavits contained newly discovered evidence he was unavoidably prevented from learning due to prosecutorial misconduct and the victims would not have testified if the state had not forced them to do so. He cited cases related to leave for new trial motions without discussing post-conviction relief petitions (or res judicata). The denial of his motion was affirmed on appeal, after addressing his arguments under a post-conviction relief petition framework. *State v. Amos*, 2026-Ohio-539 (7th Dist.) (holding there was no misconduct, the evidence was not outcome determinative, the untimely successive petitions demonstrated no exceptions to the post-conviction statute, and the claims were barred by res judicata).

{¶14} Just prior to the release of that opinion, on February 4, 2026, Appellant filed the motion at issue in the present appeal. This time, he specifically titled his filing a motion for leave to file a delayed motion for new trial, citing Crim.R. 33(B). He attached a different affidavit of K.S. (dated 1/13/26) and the same affidavit of C.S. (dated 1/14/08, which was filed with his 2008 initial petition for post-conviction relief and with his 2025 motion/petition).

{¶15} The 2026 affidavit of K.S. said: the day before trial, she told the prosecutor she wanted to drop the charges and was not going to testify against Appellant; the prosecutor told her mother to take her home and ensure she took her medication so she would be calm enough to testify; and she ended up testifying against Appellant because she feared the prosecutor would retaliate against her or her mother. Although she was 18 at the time of trial, the affidavit claimed she was 17 during the conversation.

{¶16} Although expressing a wish that she did not succumb to pressure to testify against her father, K.S. did not indicate she was recanting her testimony about her own rapes. Seemingly related to her testimony about the rape of J.H., she vaguely said, “If I knew what I know now, I would have never testified to something that I knew was wrong” and then noted J.H. and Appellant had a consensual relationship in the past and she never saw threat of force in the past. She concluded by stating the prosecutor “forced me to testify to something I didn’t want to do and I know it was wrong to do so.”

{¶17} On March 20, 2026, the trial court denied Appellant’s motion for leave to file a new trial motion in a decision stating he failed to meet his burden of showing by clear

and convincing evidence that his motion could not have been timely filed. In addition, it was observed his theory of prosecutorial misconduct has been repeatedly rejected. The court pointed out Appellant began using one of the affidavits in 2008 and his claims of prosecutorial misconduct related to it were rejected, constituting the law of the case, citing pages 1 and 2 of the October 2, 2008 judgment entry. The court said the other affidavit set forth the same type of prosecutorial misconduct claim rejected by the trial and appellate courts. The within appeal followed.

CRIM.R. 33(B) MOTION FOR LEAVE

{¶18} Appellant filed a motion for leave to file delayed motion for new trial based on prosecutorial misconduct, citing subdivision (2) in Crim.R. 33(A). This portion of the rule provides: "Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially the defendant's substantial rights . . . (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state . . ." Crim.R. 33(A)(2).

{¶19} The state's brief characterizes Appellant's motion as actually invoking subdivision (6), which provides: "When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial." Crim.R. 33(A)(6) (and requiring the defendant to produce affidavits of witnesses at the hearing on the new trial motion).

{¶20} Part of the reason for emphasizing the distinction is the rule's initial timeliness deadline and thus the period used for considering whether a defendant was unavoidably prevented from timely filing a motion for new trial. That is, division (B) provides:

> Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

> Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

Crim.R. 33(B).

{¶21} Although a newly discovered evidence motion has a longer initial deadline, Appellant cites the ground of prosecutorial misconduct despite the allegation being based on newly discovered evidence.

{¶22} Appellant's motion pointed out, "One way that a defendant may satisfy the 'unavoidably prevented' requirement contained in Crim.R. 33(B) is by establishing that the prosecution suppressed the evidence on which the defendant would rely when seeking a new trial." *State v. McNeal*, 2022-Ohio-2703, ¶ 3, 23 (he is not obligated to show he could not have discovered suppressed *Brady* evidence by exercising reasonable diligence), citing *State v. Bethel*, 2022-Ohio-783, ¶ 24-25, applying *Brady v. Maryland*, 373 U.S. 83, 87 (1963). However, in general, to satisfy the unavoidably prevented test, the defendant must show he had no knowledge of the existence of the ground, and he must also show he could not have learned of it in time to file a timely motion by exercising reasonable diligence. *State v. Trimble*, 2016-Ohio-1307, ¶ 19; *State v. Bishop*, 2025-Ohio-4948, ¶ 7 (7th Dist.). For a *Brady* violation, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 280-282 (1999) (the favorable evidence must be material so that there is a reasonable probability the result of the proceeding would have been different if disclosed).

{¶23} Although Appellant's motion for leave mentioned *Brady* material, his brief does not, and he did not demonstrate suppression of evidence by the state. He says he learned the state pressured the victims to testify after they became reluctant. As will be discussed further below, various facts he relies on were elicited at trial. In addition to

relying on the affidavit of his own trial witness, he also relies on a new version of an affidavit where one victim (his daughter) wishes she did not testify what she saw regarding the other victim (due to a prior consensual relationship and unknown information she learned after trial). Moreover, Appellant recognizes he is relying on newly discovered evidence.

{¶24} The doctrine of res judicata prohibits the defendant from raising defenses or due process claims that were raised in the prior proceeding below or on appeal. *State v. Hatton*, 2022-Ohio-3991, ¶ 22 (or that could have been raised). Res judicata applies to new trial motions and post-conviction relief petitions. *Id.* at ¶ 22-25 (however, if additional evidence is obtained that should have been disclosed by the state and such evidence expands a prior post-conviction petition argument, res judicata would not prohibit the motion for leave to file a new trial motion), citing, *e.g.*, *State v. Rodriguez*, 2019-Ohio-5117, ¶ 23 (8th Dist.). In the case cited by the Supreme Court, it was pointed out, "Res judicata bars all subsequent new trial motions that are based on claims that were brought or could have been brought on direct appeal or in prior motions filed under Crim.R. 33." *Rodriguez* at ¶ 23, quoting *State v. Williamson*, 2019-Ohio-1985, ¶ 14 (8th Dist.).

{¶25} Notably, the Supreme Court ruled on the res judicata issue prior to addressing the unavoidably prevented test on the motion for leave. *Hatton* at ¶ 22-25 (but found an undisclosed material and additional fact from the state's expert was not res judicata). In addition, even where the granting of leave to file a delayed new trial motion may have been warranted in a case, the Ohio Supreme Court has ruled a post-conviction petition analysis on a dispositive issue (e.g., no *Brady* violation) can *render the leave analysis futile*. *Bethel*, 2022-Ohio-783, at ¶ 20, 59. Accordingly, although the precise timing considerations differ between a motion for leave to file a delayed new trial motion and a post-conviction petition, legal questions already answered in a prior post-conviction relief petition can bind a movant.

{¶26} Under the law of the case doctrine cited by the trial court, a reviewing court's decision remains the law of the case on legal questions for subsequent proceedings in the case. *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (1984). "The law of the case doctrine is rooted in principles of res judicata and issue preclusion." *Amos*, 2024-Ohio-2939, at ¶ 28 (7th Dist.), quoting *State v. Norman*, 2021-Ohio-2389, ¶ 14 (10th Dist.).

{¶27} As the trial court in the present matter pointed out, the court rejected the importance of the C.S. affidavit in its October 2, 2008 judgment (from which no appeal was taken) and again in a subsequent ruling (that resulted in a prior appeal). In the latter ruling, the trial court opined the same affidavit of C.S. and a prior affidavit of K.S. do not establish misconduct. This court affirmed stating in part Appellant failed to show the result of trial would have been different. *Amos*, 2026-Ohio 539, at ¶ 8-9. Appellant then obtained a different affidavit from K.S. (with some similar allegations and some new statements) and filed the present motion for leave. We note government pressure is not inherently coercive. *See State v. Johnson*, 2024-Ohio-134, ¶ 32, fn. 5, citing *State v. Perez*, 2009-Ohio-6179, ¶ 71-76 (threats to arrest a family member are not coercive if such arrest could be lawfully performed); *Morgan v. Bennett*, 204 F.3d 360, 371 (2d Cir. 2000) ("pressure merely to testify does not indicate pressure to falsify").

{¶28} A trial court's ruling on a motion for leave to move for a new trial is reviewed for an abuse of discretion. *Hatton*, 2022-Ohio-3991, at ¶ 29. An abuse of discretion is more than an error of judgment but involves an unreasonable, arbitrary, or unconscionable attitude. *Id*. "[When applying this standard, an appellate court is not free to substitute its judgment for that of the trial judge." *Berk v. Matthews*, 53 Ohio St.3d 161, 169 (1990). Any questions of law are reviewed de novo. *Hatton* at ¶ 38.

ASSIGNMENT OF ERROR

{¶29} Appellant's sole assignment of error contends:

"THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION FOR LEAVE TO FILE A DELAYED MOTION FOR NEW TRIAL PURSUANT TO CRIM.R. 33(B)."

{¶30} First, Appellant says the court abused its discretion by relying on the October 2, 2008 judgment because the judgment was void for lack of jurisdiction. Specifically, he says the 2008 court lacked jurisdiction to rule on the merits of his petition because it was untimely with nothing showing he was unavoidably prevented from filing in a timely manner. *See* R.C. 2953.23(A)(1) (a court *may not entertain* a petition filed after the expiration of the period prescribed by R.C. 2953.21(A) unless the petitioner shows (1) he was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief or the United States Supreme Court recognized a new retroactive federal or state right and (2) shows by clear and convincing

evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty); *Johnson*, 2024-Ohio-134, at ¶ 10 (where the Supreme Court reiterated a trial court does not have subject matter jurisdiction to adjudicate an untimely postconviction petition absent the applicable deadline of one of the statutory exceptions to this jurisdictional bar), citing *State v. Apanovitch*, 2018-Ohio-4744, ¶ 36, 38 (reading the statutory language as meaning a court lacks subject matter jurisdiction to decide the merits of an untimely petition).

{¶31} Because Appellant now believes his first post-conviction relief petition was untimely, he says the trial court should have summarily dismissed it without considering the merits of it. From this, he contends the 2008 decision on the merits of his petition may not be utilized when reviewing the law of the case. However, Appellant's argument and untimeliness label is based upon his use of an *incorrect triggering event* to calculate the 180 days previously applicable to a timely petition.

{¶32} That is, he says his January 8, 2008 petition was untimely filed more than 180 days after the May 10, 2007 "the record on appeal" was filed in the direct appeal from his criminal conviction. *Yet, the statutory triggering event for starting the clock is the filing of the trial transcript, not the filing of the record*. Former R.C. 2953.21(A)(2) ("Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction"). The trial transcript was filed in his direct appeal on July 12, 2007, making his January 8, 2008 initial petition for post-conviction relief timely. Accordingly, his first argument is without merit.

{¶33} Second, Appellant says the court abused its discretion to the extent it addressed the merits of a projected new trial motion, which was not yet filed and thus not part of the record. He points out a court must grant leave to file a delayed new trial motion before addressing the merits of a new trial motion.

{¶34} "The sole question before the trial court when considering whether to grant leave is whether the defendant has established by clear and convincing proof that he was unavoidably prevented from discovering the evidence on which he seeks to base the motion for a new trial." *State v. Hatton*, 2022-Ohio-3991, ¶ 30; *McNeal,* 2022-Ohio-2703, at ¶ 21. "Unless and until a trial court grants a defendant leave to file a motion for a new

trial, the merits of the new-trial claim are not before the court." *Id*. at ¶ 33; *see also McNeal* at ¶ 21 (the trial court should not have "addressed the merits of a motion for a new trial that McNeal never had the opportunity to file"); *Bethel* at ¶ 41 (the trial court may not consider the merits of the proposed motion for a new trial until after it grants the motion for leave, which presented the sole issue of whether the movant was unavoidably prevented from timely moving for a new trial due to the state's suppression of evidence it had a duty to disclose).

{¶35} Contrary to the state's suggestion, the Supreme Court eliminated the element appellate courts had been imposing that required the *motion for leave* to be filed within a reasonable time after the new evidence was or could have been discovered. *McNeal* at ¶ 17 (confirming the test in the rule is only whether it should have been discovered by the deadline in the rule), citing *Bethel* at ¶ 53. As Appellant emphasizes, "Crim.R. 33(B) does not give a deadline by which a defendant must seek leave to file a motion for a new trial based on the discovery of new evidence." *Id*.

{¶36} However, we disagree with Appellant's contention that the trial court did not address whether the requirements for leave to file were satisfied or that the court addressed the merits of a predicted new trial motion (which was not filed yet). The court specifically said it was addressing his motion for leave to file a new trial motion. The court recited it was "his burden to prove by clear and convincing evidence that his motion could not have been timely filed." The court then held, "Defendant fails to do so, utterly." After making additional observations about earlier filings and prior rulings rejecting his theory, the court reiterated he failed to clearly and convincingly prove a motion for a new trial could be filed now on these claims. The court concluded by ruling, "the Court overrules Defendant's Motion for leave to file a motion for new trial pursuant to Criminal Rule 33."

{¶37} The court was not required to make specific findings or conclusions or use the word unavoidably prevented to show it was denying leave (rather than denying a not-yet-filed new trial motion). *State v. Johnson*, 2023-Ohio-918, ¶ 21 (7th Dist.) ("The plain language of Crim.R. 33 does not require the court to issue findings of fact and conclusions of law when denying a motion thereunder."). The term "unavoidably prevented" is more than "merely" prevented; rather, it equates to incapable of avoiding the non-discovery of the evidence within the applicable period. *State v. Johnson*, 2024-Ohio-134, ¶ 24. If a movant failed to show he was prevented from timely filing the motion, then necessarily he

did not clearly and convincingly show the greater test of being unavoidably prevented from timely filing it. In accordance, the judgment shows the court was ruling on the motion for leave (rather than overruling a predicted new trial motion).

{¶38} Alternatively, as set forth above, a res judicata or law of the case analysis can be addressed prior to the leave analysis and/or can render the motion for leave futile. *See, e.g., Hatton*, 2022-Ohio-3991, at ¶ 22-25; *Bethel*, 2022-Ohio-783, at ¶ 20, 59. This leads us to a review of the proof Appellant uses to argue he met his burden.

{¶39} As his final argument, Appellant says the court abused its discretion in stating facts that were not in the record without conducting an evidentiary hearing on the motion for leave. *See State v. Trimble*, 2016-Ohio-1307. However, the cited case merely calls for a hearing before denying leave *if the trial court determines the documents on their face support the claim that the defendant was unavoidably prevented from timely discovering the evidence*. *Id*. at ¶ 17, 29 (and then, applying the law of the case doctrine to a *Brady* violation issue).

{¶40} Appellant complains the trial court commented on his manipulation of his daughter. Yet, this was not a central part of the ruling or a credibility determination on a predicted new trial motion. It was more a criticism of his continual use of her writings (first her letters begging him for answers, then an affidavit, then a second affidavit) and was part of the alternative holding regarding the law of the case aspect of certain contentions. Notably, the prior proceedings and rulings in this case are part of the record. Contrary to any suggestion otherwise, the trial transcript filed in the direct appeal of the criminal conviction is part of the record in Crim.R. 33 proceedings. *See, e.g., State v. Lordi*, 2002-Ohio-5517, at ¶ 19 (7th Dist.).

{¶41} Again, Appellant had the burden to show "by clear and convincing proof that [he] was unavoidably prevented from the discovery of the evidence upon which he must rely . . ." Crim.R. 33(B). This burden of clear and convincing evidence is more than a mere preponderance of the evidence. *State v. Schiebel*, 55 Ohio St.3d 71, 74 (1990). To meet the clear and convincing standard, the defendant moving for leave to file a delayed motion for new trial must "produce in the mind of the trier of facts a firm belief or conviction" that he was unavoidably prevented from discovering the facts sought to be established. *State v. Barnette*, 2024-Ohio-2870, ¶ 18 (7th Dist.), quoting *Schiebel* at 74.

{¶42} A defendant is unavoidably prevented from filing a motion for a new trial if he lacked knowledge the ground for new trial existed *and* could not have learned of it by exercising reasonable diligence within the time for filing a timely motion for new trial. *Id*., citing *Lordi* at ¶ 26, 29 (7th Dist.); *Trimble*, 2016-Ohio-1307, at ¶ 19. As mentioned above, the defendant must show he was incapable of avoiding the non-discovery of the evidence within the applicable period, and "unavoidably prevented" is more than merely prevented. *Johnson*, 2024-Ohio-134, at ¶ 24. Notably, the Supreme Court has explained:

> The light that an affidavit's date sheds on that issue is dim, at best. A date merely reveals when the affidavit was executed or provided, not when the testimony it contains became available. Without an explanation of how the recantation was discovered, the information essential to the . . . inquiry remains cloaked in darkness. It is this type of information that bears on the [defendant's] ability to avoid delay in discovering recanted testimony.

Id. at ¶ 25 (a post-conviction relief case, which employs the same unavoidably prevented test but with different dates applying).

{¶43} The Supreme Court in *Johnson* rejected an argument "that questions concerning efforts to discover a recantation and the timing of a supporting affidavit should be explored at a hearing." *Id*. at ¶ 26. While relying on the petitioner's burden, it was observed, "Acceptance of an affidavit's date as prima facie evidence . . . would effectively eliminate the word 'unavoidably' from the [applicable law]." *Id*. at ¶ 27.

{¶44} The defendant must "submit evidence of specific facts beyond the supporting affidavit's date to explain why [he] was unable to timely obtain an affidavit from the recanting witness." *Id*. (where there was no affidavit of the defendant and the witness's affidavit did not specify when and how he notified the defendant of his uncertainty about his identification). A defendant cannot merely state "in a conclusory fashion that the information in [the witness's] affidavit 'was not available to [him] until this time' and 'was not discoverable by him until [the witness] voluntarily presented it' [to the defendant]." *Id*. at ¶ 29.

{¶45} Similarly, the plain text of Crim.R. 33(B) does not require a hearing on a motion for leave that lacks information bearing on the defendant's alleged inability to avoid the initial delay in discovering the evidence upon which the movant relies. "[C]lear and convincing proof 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." *Lordi* at ¶ 26; *see also State v. McFarland*, 2025-Ohio-5850, ¶ 29 (8th Dist.) (movant must present more than mere allegation that he was unavoidably prevented from obtaining evidence in time for a new trial deadline).

{¶46} In a case where the witnesses were subjected to "vigorous cross-examination" at trial where they explained contradictory reports and where the movant seeking leave failed to "plainly state when or why he first suspected [a witness's] testimony was the result of coercion by the state" or "when he initiated his efforts to contact [the witness]," we found he failed to show by clear and convincing proof that he was unavoidably prevented from the discovery of the alleged coercion. *Barne*tte, 2024-Ohio-2870, at ¶ 26-28 (7th Dist.) (concluding we were unable to determine whether the movant through reasonable diligence could have discovered the alleged coercion prior to the statutory deadline). And, in that case, the defendant submitted his own affidavit (although found conclusory and insufficient), whereas here Appellant did not submit his own affidavit. Rather, Appellant relies on the conclusory fact that the affidavits are dated after the new trial deadline.

{¶47} Contrary to Appellant's contention, the mere fact K.S. signed an affidavit in January 2026 did not demonstrate he could not have discovered the evidence and/or filed a new trial motion in a timely manner. He claims "it would defy logic" to find he could have obtained his daughter's affidavit by the deadline for a timely new trial motion because his daughter's "affidavit was notarized within the past year, well past the time to grant leave."

{¶48} As the state urges, a bald assertion in a motion for leave claiming he could not have learned what the affiants say does not require a trial court to exercise its discretion to find he met his burden by clear and convincing proof or to hold a hearing to elicit the allegations on the unavoidably prevented test. *Johnson*, 2024-Ohio-134, at ¶ 24-29; *Barnette* at ¶ 26-28.

{¶49} Appellant ignores the statement by C.S. that she would have told him if he asked her (before or at trial) and ignores the trial testimony related to the claims in both affidavits. C.S. was Appellant's own witness, who testified to disbelieving the rape claim against Appellant made by her daughter (J.H.) and who testified K.S. disliked Appellant's girlfriend. The affidavit of C.S. signed in January 2008 was submitted by Appellant over

the years in more than one prior motion, and courts have ruled it was not outcome determinative and did not show prosecutorial misconduct or coercion. On the topic of delay or Appellant being unavoidably prevented from learning the information she had, C.S.'s affidavit actually diminishes Appellant's position by merely saying she did not mention what she knew because the defense did not ask her precise questions when asking about her daughter's motivations.

{¶50} As to K.S., she was writing Appellant in prison in November 2007 to tell him she loved him and asking why he did not *previously* write her back. Her 2026 affidavit did not explain when, how, or why she told Appellant about the contents of the affidavit; nor did her 2025 affidavit. Appellant failed to provide evidence he was unavoidably prevented from discovering the information prior to the deadline for a timely new trial motion, let alone show this by clear and convincing proof.

{¶51} We stop to note neither affiant claimed the victims were coerced to testify to certain set of facts, just that they were instructed to testify. Both affidavits from K.S. talked about her telling the prosecutor she did not want to testify and wanted to drop the charges with the prosecutor telling her mom to have her take her medications when she got home so she could be calm enough to testify at trial the next day. K.S. did not recant her claims that Appellant raped her on multiple occasions. In her 2026 affidavit, it was unclear whether she was saying she lied about the testimony she provided as to J.H.'s struggle with Appellant on one occasion. She testified at trial that during the truth-or-dare game, she watched J.H. protest to Appellant pressing himself upon her in the backseat while J.H.'s head was on the lap of K.S. (with K.S trying to help J.H. push Appellant away at one point during the struggle). (Tr. 270-271).

{¶52} Rather than reaching an issue to be left for a new trial motion (relevant only after leave is granted), various observations we are making relate to the analysis of the unavoidably prevented test, res judicata, and law of the case. As reviewed above, the reliance on affidavits alleging the victims were reluctant to testify but strongly urged to do so by the prosecutor or a county children services worker involved theories previously ruled upon by the trial court on multiple occasions and affirmed by the appellate court on one of those occasions. Furthermore, the reluctance to testify and various other matters referenced in the affidavits or Appellant's motion *were addressed at the criminal trial*.

{¶53} At the April 4, 2007 trial, K.S. testified she takes prescription medications. (Tr. 235). This was during her testimony about being hospitalized after overdosing on one of her prescription medications in August 2006. This suicide attempt was prompted by her family's discovery of her journal talking about Appellant's act of sexual conduct against her. *Id*. at 235-244, 251. She testified, "I never wanted this to ever get out." *Id*. at 239. Then, it was elicited that if she had a preference or choice, she would not be at trial testifying. To confirm, the state reiterated, "You don't want to be here today, do you?" to which she responded in the negative. *Id*. at 252.

{¶54} After cross-examination, the prosecutor verified on redirect: "Have you told me you didn't want to testify against your father?" K.S. answered, "Yes, I have." The prosecutor further inquired, "Many times?" She answered, "Yes." *Id*. at 325 (also eliciting that, during her protests, she did not recant by saying the things she alleged did not happen or that she was lying). In closing, defense counsel argued, "[K.S.] recanted again and again." *Id*. at 687. Accordingly, the defense knew about K.S. being on medication and voicing to the prosecutor many times that she did not want to testify against Appellant. This was not suppressed evidence later discovered and found to be material to his defense.

{¶55} Moreover, defense counsel specifically emphasized to the trial court he had evidence both victims had a "quite friendly" relationship with Appellant after the 2003 truth-or-dare incident, and his closing argument raised this to the jury. *Id*. at 587, 685, 691. Also, the defense informed the court of a wish to present the testimony of a witness to prove J.H "had other sexual relations with John Amos." *Id*. at 590. Furthermore, in closing, the defense argued, "I would submit to you that [J.H.], if she was truly scared, would not be socializing thereafter. She would stay away . . . The real fact was [J.H.] socialized. The real fact was [J.H.] came back around again and again and again." *Id*. at 688, 691. Thus, the portion of the new K.S. affidavit on the topic of J.H. having consensual relations with Appellant in the past was a trial topic.

{¶56} Likewise, C.S.'s affidavit (based mostly on hearsay) said she possessed the information before trial while indicating it would have been freely available to Appellant upon inquiry. Again, C.S. was Appellant's own witness who informed the jury she disbelieved the claim of her own daughter (J.H.) that the encounter with Appellant constituted rape. C.S. also testified to believing she talked K.S. into recanting and "telling

the truth" while opining K.S. was out to get Appellant's girlfriend. *Id*. at 623-630. As to the content of C.S.'s affidavit suggesting J.H. was coerced to testify due to a prior case pending against her, this subject was addressed by J.H. when she testified at trial and was known to be an issue to the defense.

{¶57} For instance, the prosecutor specifically elicited the following from J.H.: she made two statements against Appellant before she even knew she had warrants out for her arrest for failing to pay court costs and restitution on misdemeanor charges; she learned about the warrants two days before trial when she met with the prosecutor about her testimony in this case; she appeared before the county court as directed by the prosecutor in one case and the judge recalled the warrant; she would appear on the other warrant soon; she did not receive any consideration for testifying against Appellant; and there were no promises about what the judge would do in her cases. *Id*. at 408-409, 419-422. J.H. also testified about a statement she made in between the two aforementioned statements, where she was pressured to clear Appellant's name by her own mother and by Appellant's girlfriend (who, along with two other people, approached J.H. twice and drove her to defense counsel's office to write a new statement that they provided, after telling her they would put her in the car if she did not exit her house). *Id*. at 397-400. Lastly, the defense asked the jury in closing to believe that J.H.'s warrants were handled for her and deals were made with her and other witnesses. *Id*. at 688-689.

{¶58} There is no indication the affidavit of C.S. contained information Appellant was unavoidably prevented from discovering prior to the deadline for seeking a new trial. Appellant easily could have obtained her information before or during trial.[2] The trial court did not abuse its discretion in concluding he failed to offer clear and convincing proof on this topic.

[2] We note two months before trial, Appellant married his girlfriend with whom K.S. said she was forced to participate in the threesomes in counts three and four. She testified to seeing K.S.'s missing journal, which Appellant ripped up; other journals K.S. kept at her mother's house were admitted as evidence. (Tr. 545, 562-563, 566-567). When Appellant's residence was searched, his girlfriend gave an oral and written statement incriminating Appellant and corroborating the threesome story and some other allegations. *Id*. at 541-545. The girlfriend later recanted her statement, claiming she merely regurgitated what K.S. said because the state threatened to take her children away from her unless she told the truth. *Id*. at 538-539. The defense emphasized her claim that she was told she would be free to leave the station if she testified against Appellant and the alternative was going to prison for the rest of her life. *Id*. at 547, 557. This was reiterated in closing argument, confirming witness coercion was a major part of Appellant's defense strategy at trial. *Id*. at 686.

{¶59} As reviewed above, the trial court twice already found this affidavit would not have been outcome-determinative, and this court affirmed on the time Appellant appealed. And Appellant's general legal theory of prosecutorial misconduct by instructing a witness they had to testify was rejected previously as well, including on a same affidavit of C.S. and on a prior affidavit of K.S. with similar allegations of being forced to testify. *Amos*, 2026-Ohio-539 (7th Dist.) (holding there was no misconduct, the evidence was not outcome determinative, the untimely successive petitions demonstrated no exceptions to the post-conviction statute, and the claims were barred by res judicata).

{¶60} In conclusion, the arguments under Appellant's sole assignment are without merit for various reasons. The trial court did not abuse its discretion in denying his motion for leave to file a delayed new trial motion. For the foregoing reasons, the trial court's judgment is affirmed.

Waite, P.J., concurs.

Dickey, J. concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.