ORIGINAL

IN THE SUPREME COURT OF OHIO

11-1696

STATE OF OHIO,	:	Case No. _____
Plaintiff-Appellee,	:	On Appeal from the Union County Court of Appeals Third Appellate District
v.	:	
EDWARD B. AVERY, SR.,	:	Court of Appeals Case No. 14-10-35
Defendant-Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, EDWARD B. AVERY, SR.

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SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents the same issue currently before this Court in *State v. Lester*, Case No. 2010-1372: whether an appeal from an entry that does not comply with *State v. Baker*, 119 Ohio St. 3d 197, 2008-Ohio-3330, has any preclusive effect with respect to a subsequent appeal that is timely initiated after a defendant receives his first final appealable order. The Court should grant jurisdiction and hold this case for the decision in *Lester*.

In addition to this procedural question, this case presents three substantive issues. The first is whether Mr. Avery's motion for a mistrial should have been granted, which motion objected to the presence of a dismissed alternate juror for approximately two-thirds of the total duration of the jury's deliberations. The second is whether a trial court commits plain error when it instructs a jury with language intended for use only with a child victim, when a child is not involved, which substantially lowers the prosecution's burden of proof. And the third is whether a trial court should merge rape and kidnapping for sentencing, when both offenses involved the same victim in a single location.

This case involves substantial constitutional questions, as well as questions of public or great general interest. For the reasons set forth herein, Mr. Avery respectfully requests the Court to accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

A four-count indictment was issued against Edward B. Avery, Sr., by the Union County Grand Jury in March 1997. The charges against Mr. Avery were rape, aggravated robbery, aggravated burglary, and kidnapping. Mr. Avery pleaded not guilty to all counts, and the case proceeded to a jury trial on July 31, 1997.

Mr. Avery had been staying with a friend, Gavin Hill, at the Village Square apartment complex for approximately two weeks before March 14, 1997, the date of the events giving rise to this case. On the evening of March 13, 1997, Mr. Hill was drinking with Mr. Avery at a friend's house, and last saw him that evening being dropped off at a Marysville bar. Mr. Avery testified that he left the bar at closing time with a friend named Jackie, and she drove them to her home. Jackie later drove Mr. Avery back to the apartment complex, where he found himself locked out. He went to his ex-girlfriend's apartment, in the same complex, but could not stay there.

As it was raining that morning, and as Mr. Avery knew that Mr. Hill would not return from work for some time yet, he continued to walk around the apartment complex. He went to the patio of Vicky Johnson's apartment, and saw her leave with her boyfriend. Mr. Avery entered the empty apartment, and Ms. Johnson returned shortly before 6:00 a.m. Ms. Johnson, who was 41 years of age when she testified, stated that when she entered the bedroom, someone threw a "shirt or something" over her head, and threw her on the bed. She testified that she

screamed for help. No witness from the apartment complex corroborated this testimony.

Ms. Johnson testified that the intruder performed oral sex on her, then had vaginal intercourse with her. She could not see his face, but saw that he was black when she saw the fingers that were holding the blanket over her head. She testified that he walked her to the bathroom, and told her to shower. When he left, Ms. Johnson drove to Bob Evans, where her boyfriend worked. A 911 call was made, and a rape kit was collected that morning. DNA testing from the rape kit established a profile consistent with Mr. Avery's, and that one in five million African-American males possesses a similar profile.

Mr. Avery testified that the encounter was consensual, and that he had met Ms. Johnson in the laundry facility at the apartment complex approximately two weeks earlier, and had seen her once again in the interim. He testified that she had told him she would leave the door open for him. He also testified that Ms. Johnson indicated concern about whether someone had seen him enter or leaving her apartment, and that she told him to take the two dollars that she later claimed he stole from the apartment.

The jury returned guilty verdicts on rape, kidnapping, and aggravated burglary, and on robbery as a lesser included offense to aggravated robbery. The trial court imposed maximum, consecutive terms for rape, aggravated burglary, and kidnapping, and imposed an eight-year concurrent term for robbery. Mr. Avery was determined to be a sexual predator. Mr. Avery appealed, raising four assignments

of error, in Case No. 14-97-30, and his convictions and sentence were affirmed on April 14, 1998.

But because post-release control was not properly imposed in the sentencing entry, and because there had never been a single sentencing entry that complied with *State v. Baker*, 119 Ohio St. 3d 197, 2008-Ohio-3330, and Crim. R. 32(c), a resentencing hearing was held November 23, 2010. The trial court imposed the same overall term of imprisonment, and reduced the concurrent term for robbery from eight years to seven years. Journal Entry of Re-Sentence, November 24, 2010. Mr. Avery appealed that ruling to the Third District Court of Appeals, which affirmed his convictions and sentence. *State v. Avery*, Union App. No. 14-10-35, 2011-Ohio-4182.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

First Proposition of Law:

Appellate proceedings premised on a trial court entry that does not constitute a final appealable order have no preclusive effect on an appeal timely initiated after a defendant receives his or her first final appealable order from the trial court.

The August 7, 1997, entry by which the trial court committed Mr. Avery to the Department of Rehabilitation and Correction did not contain "the means of conviction, whether by plea, verdict, or finding by the court." *State v. Baker*, 119 Ohio St. 3d 197, 2008-Ohio-3330, ¶ 19. The 1997 sentencing entry was not a final appealable order under *Baker*, and Mr. Avery did not have a final appealable order until November 24, 2010.

The jurisdiction of an appellate court is wholly dependent on the issuance of a final appealable order: "[i]t is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction." *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St. 3d 540, 2006-Ohio-1713, ¶ 8. Appellate courts often dismiss criminal appeals for lack of jurisdiction, due to defective judgment entries. See, e.g., *State v. Kimmell*, Wyandot App. No. 16-10-06, 2011-Ohio-660, fn. 2; *State v. Christie*, Defiance App. No. 4-10-04, 2011-Ohio-520, ¶ 14.

"If a court acts without jurisdiction, then any proclamation by that court is void." *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St. 3d 70, 75, 1998-Ohio-275. See also *Hubbard v. Canton City School Board of Educ.*, 88 Ohio St. 3d 14, 2000-Ohio-260 (appellate decision vacated because it was issued in the absence of jurisdiction as a result of a lack of a final appealable order.) The 1998 opinion issued by the Third District Court of Appeals, concerning Mr. Avery's direct appeal from a defective sentencing entry, is void because that court lacked jurisdiction to hear Mr. Avery's appeal. Thus, the 1998 appellate-court decision cannot serve as a valid, preclusive judgment under the doctrine of *res judicata*, and the appellate court's conclusion that "[Mr.] Avery is not entitled to 'another bite at the apple'" fails to give proper effect to this Court's decisions regarding the proper exercise of jurisdiction by intermediate courts of appeals.

Second Proposition of Law:

A trial court errs by not declaring a mistrial when a dismissed alternate juror was present for two hours during jury deliberations.

This Court recently held that when a dismissed alternate juror is present during jury deliberations, prejudice to the defendant is presumed, and reversal is required unless the prosecution makes an affirmative showing that no prejudice occurred. *State v. Downour*, 126 Ohio St. 3d 508, 2010-Ohio-4503. Here, the jurors began deliberating at approximately 1:00 p.m. on August 1, 1997, and just before 3:00 p.m. it became apparent that a dismissed alternate juror had been in the jury room for almost two hours. Defense counsel objected and moved for a mistrial. The prosecution made no response to the motion. The trial court denied the motion, and instructed the jurors to "begin their deliberations all over again." One hour later, the jury arrived at its verdict.

This scenario falls squarely under the rule set forth in *Downour*, as Mr. Avery immediately objected to the presence of a dismissed alternate juror during deliberations, and moved for a mistrial. The prosecution made no showing at all after the objection and the motion for a mistrial. Because a dismissed alternate juror—a "mere stranger," in the view of this Court—was in the jury room for approximately two-thirds of the total time that the jury deliberated, Mr Avery's convictions must be reversed. *Downour*, 126 Ohio St. 3d at ¶¶ 9-11.

Third Proposition of Law:

A criminal defendant's due process rights are violated when the trial court issues improper jury instructions for the offense of kidnapping.

The trial court's jury instruction regarding kidnapping improperly informed the jurors that Mr. Avery committed kidnapping if "by any means" he removed Ms. Johnson from where she was found, or restrained her liberty. This instruction would have been appropriate, pursuant to R.C. 2905.01(A), if Ms. Johnson were "under the age of thirteen." But because Ms. Johnson was 41 years old, this instruction constituted reversible error.

Because trial counsel did not object to this instruction, Mr. Avery must now demonstrate that the instruction constituted plain error. *State v. Underwood* (1983), 3 Ohio St. 3d 12, 13. Further, as more than one appellate court has observed, the failure of the trial court to "properly instruct the jury on a material element of an offense is not, per se, grounds for reversal." *State v. Wolford*, Union App. No. 14-07-10, 2007-Ohio-6428, ¶ 20 (quoting *State v. Hover*, 12th Dist. No. CA2004-12-150, 2005-Ohio-5897, ¶ 42).

But a reviewing court must recognize plain error if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Barnes* (2002), 94 Ohio St. 3d 21, 27 (quoting *United States v. Olano* (1993), 507 U.S. 725, 736). Plain error occurred here because it is impossible to know whether the jury concluded that Mr. Avery used a threat or force to compel Ms. Johnson to go from the bedroom to the bathroom, or whether that movement was obtained "by

any means." The latter method—much more easily met by the prosecution than establishing threat or force—of committing a kidnapping would have been a permissible finding under the court's jury instruction, but would not have been a proper finding under the kidnapping statute. The erroneous instruction improperly allowed the jury to convict Mr. Avery of kidnapping an *adult* on a factual basis which would only suffice to constitute kidnapping of a *child.* Thus, Mr. Avery's kidnapping conviction must be reversed, and his case must be remanded for a new trial.

Fourth Proposition of Law:

A trial court errs when it does not merge rape and kidnapping as allied offenses, and both offenses involve the same victim in a single location.

At the resentencing hearing, Mr. Avery moved for merger of the rape and kidnapping offenses. The testimony of Ms. Johnson established that if a kidnapping occurred, it was incidental to the offense or rape, and thus the two offenses should have been merged for purposes of sentencing. This conclusion is mandated by two prior decisions from this Court: *State v. Logan* (1979), 60 Ohio St. 2d 126, and *State v. Johnson*, 128 Ohio St. 3d 153, 2010-Ohio-6314.

In *Logan*, the defendant held a knife to the victim's throat, forced her "down [an] alley, around a corner, and down a flight of stairs," before raping her at knifepoint. *Logan*, 126 Ohio St. 2d at 126. Because there was not a "substantial increase in the risk of harm separate from that involved in the rape," this Court concluded that Logan's "detention and asportation of the victim was incidental to

the crime of rape, and therefore demonstrate[d] but a single animus." Here, the offense of kidnapping began when Ms. Johnson was accosted in her bedroom, and continued until she was sent to the bathroom and instructed to take a shower. Here—far more so than in *Logan*—any movement of Ms. Johnson did not result in a "substantial increase in the risk of harm separate from that involved in the rape." Thus, there was "but a single animus" in the commission of the two offenses.

Because there was a single animus, the offenses of rape and kidnapping should have merged for purposes of sentencing. This conclusion is derived from the holding in *State v. Johnson*, 128 Ohio St. 3d 153, 2010-Ohio-6314. There, this Court noted that R.C. 2941.25 requires offenses to be merged when they "were committed by the same conduct," because "the statute's purpose is to prevent shotgun convictions." Id. at ¶¶ 46-47. Merger is inappropriate only "if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense." Id. at ¶ 51. Here, as demonstrated by the foregoing application of *Logan*, none of those determinations is appropriate here. Thus, the trial court should have merged the convictions for rape and kidnapping for purposes of sentencing.

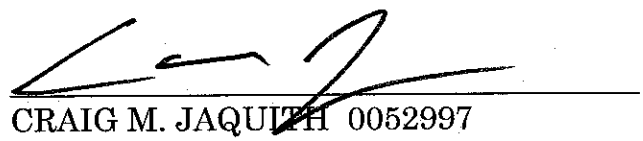
CONCLUSION

This case involves substantial constitutional questions, as well as questions of public or great general interest. For all the above reasons, Mr. Avery respectfully

requests the Court to accept jurisdiction and reverse the decision of the court of appeals.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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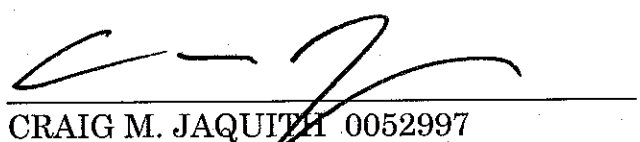
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Edward B. Avery, Sr., was sent by regular U.S. mail, postage prepaid to the office of David W. Phillips, Union County Prosecutor, 221 West Fifth Street, Room 333, Marysville, Ohio 43040, on this 6th day of October, 2011.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. _____
	:	
Plaintiff-Appellee,	:	On Appeal from the Union
	:	County Court of Appeals
v.	:	Third Appellate District
	:	
EDWARD B. AVERY, SR.,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 14-10-35

APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, EDWARD B. AVERY, SR.

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
UNION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

EDWARD AVERY, SR.,

DEFENDANT-APPELLANT.

CASE NO. 14-10-35

JUDGMENT ENTRY

COURT OF APPEALS
UNION COUNTY
2011 AUG 22 PM 1:03
Teresa L. Nichols
CLERK

For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

John R. Willamowski

JUDGES

DATED: August 22, 2011

A 101 P 00222

COURT OF APPEALS
UNION COUNTY
2011 AUG 22 PM 1:03
Teresa A. Nichols
CLERK

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
UNION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

EDWARD AVERY, SR.,

DEFENDANT-APPELLANT.

CASE NO. 14-10-35

OPINION

Appeal from Union County Common Pleas Court
Trial Court No. 1997 CR 0020

Judgment Affirmed

Date of Decision: August 22, 2011

APPEARANCES:

Craig M. Jaquith for Appellant

David W. Phillips and Terry L. Hord for Appellee

WILLAMOWSKI, J.

{¶1} Defendant-Appellant, Edward B. Avery, Sr. ("Avery"), appeals the judgment entry of the Union County Court of Common Pleas, resentencing Avery to correct an error in the imposition of postrelease control. On appeal, Avery raises several issues pertaining to his original 1997 convictions for rape, kidnapping, aggravated burglary, and robbery. For the reasons set forth below, the judgment is affirmed.

{¶2} On August 1, 1997, a jury found Avery guilty of first degree rape, second degree robbery, first degree aggravated burglary, and first degree kidnapping. Avery was sentenced to maximum sentences of ten years imprisonment for the counts of rape, aggravated burglary and kidnapping, to be served consecutively to each other, and eight years imprisonment for the count of robbery, to be served concurrently to the sentences for the other counts, for a total of thirty years of imprisonment. In addition, the trial court adjudicated Avery a sexual predator.

{¶3} Avery appealed his conviction to this Court, asserting four assignments of error. This Court affirmed the conviction and sentence in a decision dated April 14, 1998. See *State v. Avery* (1998), 126 Ohio App.3d 36, 709 N.E.2d 875 (or, "*Avery I*"). Avery's motion for leave to file a delayed appeal to the Ohio Supreme Court was denied at 91 Ohio St.3d 1462, 743 N.E.2d 401.

{¶4} On January 12, 2004, Avery filed a request for review and modification of his sentence. The trial court overruled Avery's motion without holding an evidentiary hearing and he appealed that decision. On August 9, 2004, we affirmed the trial court's decision, finding that the trial court's refusal to hold an evidentiary hearing on the motion was appropriate as the motion was untimely and barred by res judicata. See *State v. Avery*, 3d Dist. No. 14-04-06, 2004-Ohio-4165 (or, "*Avery II*").

{¶5} Subsequently, Avery filed a motion to correct inaccuracies in his sentencing entry and a motion for resentencing because of the trial court's failure to properly inform him of postrelease control ("PRC"). Counsel was appointed for Avery and on September 22, 2010, a hearing was held on all of his pending motions, along with additional issues that were raised at the hearing. On November 23, 2010, a de novo sentencing hearing was held. On November 24, 2010, the trial court resentenced Avery to an aggregate sentence of thirty years in prison (with credit for time served) and correctly informed him as to PRC. The resentencing entry also included the method of conviction, which was lacking in the previous judgment entry. See Crim.R. 32(C); *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163.

{¶6} It is from this judgment that Avery now brings his third appeal before this Court, raising the following three assignments of error.

First Assignment of Error

The trial court erred by not declaring a mistrial when a dismissed alternate juror was present for two hours during jury deliberations.

Second Assignment of Error

The trial court erred in its instructions to the jury on kidnapping, and thereby deprived Mr. Avery of his right to a fair trial before a properly instructed jury, and of his right to due process of law, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.

Third Assignment of Error

The trial court erred when it did not merge rape and kidnapping as allied offenses.

{¶7} Although the issues that Avery raises in this appeal have either previously been addressed on appeal, or could have been raised at the time of his previous appeals, he again seeks to revisit these issues after his new sentencing hearing. However, a recent decision by the Supreme Court of Ohio has clarified the extent of review that is applicable after a new sentencing hearing is held due to a trial court's failure to properly impose PRC. See *State v. Fischer*, 128 Ohio St.3d 92, 2010–Ohio–6238, 942 N.E.2d 332.

{¶8} The Ohio Supreme Court abrogated portions of *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, and held that "the new sentencing hearing to which an offender is entitled under *Bezak* is limited to

proper imposition of postrelease control." *Fischer* at ¶29, 942 N.E.2d 332. When postrelease control is not properly included in a sentence for a particular offense, the sentence for that offense is void, but "only the offending portion of the sentence is subject to review and correction." Id. at ¶27, 942 N.E.2d 332. The new sentencing hearing is limited to the proper imposition of postrelease control. Id. at ¶29, 942 N.E.2d 332.

{¶9} The scope of relief is limited and does not permit a reexamination of all the perceived errors at trial or in other proceedings. Id. at ¶25, 942 N.E.2d 332, citing *Hill v. United States* (1962), 368 U.S. 424, 430, 82 S.Ct. 468, 7 L.Ed.2d 417. The doctrine of "res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence." Id. at paragraph three of the syllabus, 942 N.E.2d 332; *State v. Hall*, 3d Dist. No. 12-10-11, 2011-Ohio-659, ¶12.

{¶10} The three assignments of error raised by Avery do not pertain to the imposition of PRC. Therefore, they are barred by the doctrine of res judicata and are not subject to another appellate review.

{¶11} However, Avery also argues that res judicata is not applicable because he contends that the 1997 sentencing entry was not a proper final appealable order pursuant to *State v. Baker*. See 119 Ohio St.3d 197, supra. Therefore, Avery asserts that the opinion issued by this court in his 1998 direct

appeal is void because this Court did not have jurisdiction. He maintains that *Avery I* and *Avery II* cannot serve as preclusive judgments under the doctrine of res judicata.

{¶12} Crim.R. 32(C) provides that a "judgment of conviction shall set forth the plea, the verdict, or findings upon which each conviction is based, and the sentence." In *Baker*, the Ohio Supreme Court explained this requirement by holding that a "judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court." 119 Ohio St.3d 197, at the syllabus.

{¶13} Although Avery's original sentencing entry may not have technically complied with *Baker* and Crim.R. 32(C), that does not mean that it was necessary to conduct a resentencing hearing on this matter nor does it mean that the original sentence was a nullity. The Ohio Supreme Court has stated that "the technical failure to comply with Crim. R. 32(C) by not including the manner of conviction in [a defendant's] sentence is not a violation of a *statutorily* mandated term, so it does not render the judgment a nullity." (Emphasis sic.) *State ex rel. DeWine v. Burge*, 128 Ohio St.3d 236, 2011-Ohio-235, 943 N.E.2d 535, ¶19. The Ohio Supreme Court observed that the appropriate remedy for a violation of Crim.R.

32(C) is "resentencing," however, it "did not suggest that this term encompassed anything more than issuing a corrected sentencing entry that complies with Crim.R. 32(C)." Id at ¶20. The Supreme Court distinguished an error in failing to state the method of conviction "from egregious defects, such as an entry that is not journalized, that permit a court to vacate its previous orders." Id. at ¶19. It explained its reasoning as follows:

> **Pursuant to Crim.R. 36, "[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time." "[C]ourts possess inherent authority to correct clerical errors in judgment entries so that the record speaks the truth." *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19. "[N]unc pro tunc entries 'are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided.'" *State ex rel. Mayer v. Henson*, 97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223, ¶ 14, quoting *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 164, 656 N.E.2d 1288. A nunc pro tunc entry is often used to correct a sentencing entry that, because of a mere oversight or omission, does not comply with Crim.R. 32(C). [Citations omitted.]**
>
> **Consistent with the treatment of Crim.R. 32(C) errors as clerical mistakes that can be remedied by a nunc pro tunc entry, we have expressly held that "the remedy for a failure to comply with Crim.R. 32(C) is a revised sentencing entry rather than a new hearing." *State ex rel. Alicea v. Krichbaum*, 126 Ohio St.3d 194, 2010-Ohio-3234, 931 N.E.2d 1079, ¶ 2; see also *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805, ¶ 10–11 (a defendant is entitled to a sentencing entry that complies with Crim.R. 32(C)); *Dunn v. Smith*, 119 Ohio St.3d 364, 2008-Ohio-4565, 894 N.E.2d**

> **312, ¶ 10 (when a trial court fails to comply with Crim.R. 32(C), "the appropriate remedy is correcting the journal entry").**

Id. at ¶¶17-18.

{¶14} In this case, as in *Burge*, the trial court and all the parties proceeded under the presumption that the sentencing entry for Avery was a final appealable order. "Any failure to comply with Crim.R. 32(C) was a mere oversight that vested the trial court with *specific, limited jurisdiction* to issue a new sentencing entry to reflect what the court had previously ruled * * *." (Emphasis sic) Id. at ¶19. The trial court's November 24, 2010 sentencing entry corrected the "mere oversight" of the previous failure to state the method of conviction. All of the parties were aware of the fact that Avery was found guilty after a jury trial and the record reflected this fact in numerous places. The trial court's correction of the sentencing entry to reflect what had actually occurred was merely a nunc pro tunc correction that did not render the previous judgment a nullity. Avery, having already had the benefit of a direct appeal, cannot raise any and all claims of error in successive appeals. See *Fischer* at ¶33; *State v. Harris*, 5th Dist. No. 10-CA-49, 2011-Ohio-1626, ¶30. Avery is not entitled to "another bite at the apple" as a result of this corrected judgment entry.

{¶15} Avery's new judgment entry of sentencing, which corrected the portion of the sentence pertaining to PRC and specified the method of conviction,

cannot be used as a vehicle to reopen all of the other aspects of his case. Avery's appeal from that judgment is limited to the subject of postrelease control. Res judicata is still applicable to the issues Avery has raised today. Based on the above, Avery's three assignments are overruled.

{¶16} Having found no error prejudicial to the Appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

ROGERS, P.J. and SHAW, J., concur.

/jlr