[Cite as *State v. Covender*, 2008-Ohio-1453.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellant v. JOEL COVENDER Appellee	C. A. No. 07CA009228 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 94CR045253 94CR045912

DECISION AND JOURNAL ENTRY

Dated: March 31, 2008

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, J.

{¶1} Plaintiff/Appellant, State of Ohio, appeals the order granting a new trial to Defendant/Appellee, Joel Covender entered by the Lorain County Court of Common Pleas. We reverse.

{¶2} Defendant was indicted on April 20, 1994, on one count of gross sexual imposition in violation of R.C. 2907.05, a third-degree felony and one count of felonious sexual penetration in violation of R.C. 2907.12, a first-degree felony for conduct against his minor stepdaughter. Defendant was tried and convicted on both counts on April 22, 1996. Defendant was sentenced to twelve

years of incarceration on the first conviction and eight to 25 years of incarceration on the second count. The sentences were to be served concurrently. On May 20, 1996, Defendant appealed his conviction and this Court affirmed the conviction and sentence on December 24, 1997, in *State v. Covender* (Dec. 24, 1997), 9th Dist. No. 09CA006457 ("*Covender I*").

{¶3} On April 11, 2007, after serving more than ten years of his sentence, Defendant moved for a new trial. The basis for his motion was that his former step-daughter, one of the complaining witnesses in his 1996 conviction, had recanted her trial testimony.[1] A hearing was held on June 14, 2007, and on July 18, 2007, the trial court granted Defendant's motion for new trial ("Judgment Entry"). The State timely appealed the judgment entry and has raised two assignments of error.

First Assignment of Error

> "The trial court erred when it determined that [Defendant] presented newly discovered evidence in support of his motion for new trial."

{¶4} The State asserts that the trial court erred when it determined that A.S.'s affidavit and testimony were newly discovered evidence. The State asserts that A.S.'s mother (Ms. Goode) was aware of A.S.'s doubts about the incident in

[1] Defendant was also tried and convicted during the same 1996 proceeding for similar conduct against his minor step-son, J.S. and the sentence imposed was for both convictions. J.S. also recanted his testimony in 2007, and Defendant moved for and was granted a new trial on that conviction as well. The State has not appealed from that part of the trial court's order.

2002 or 2003, and that this information was provided to Project Innocence and Defendant at approximately the same time.

{¶5} Defendant asserts that he did not learn of A.S.'s alleged recantation until his parole hearing in January of 2007, during which he learned that A.S. had asked the parole board to release him. Defendant maintains that, after he was released from prison in February 2007, his lawyer contacted A.S. and learned that she was willing to recant her trial testimony. Defendant asserts that he had no contact with A.S. while in prison and was not aware of her change of position until January 2007. Defendant does not address Ms. Goode's testimony that she advised him of A.S.'s change of position in 2002 or 2003. Defendant asserts that his motion for leave to file a motion for new trial was timely filed and his motion for new trial was filed within seven days after leave was granted by the trial court as required by Crim.R. 33(B).

{¶6} A motion for new trial must be made within one hundred twenty days of the end of the proceedings if the basis for the motion is the discovery of new evidence. Crim.R. 33(B). "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." Id. "Clear 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." *State v. Mathis* (1999), 134 Ohio App.3d 77, 79, overruled on other grounds, 157 Ohio App.3d 26, 31.

{¶7} To be considered newly discovered evidence, a "defendant must demonstrate that the evidence 1) is of such weight that it creates a strong probability that a different result would be reached if a new trial is granted; 2) was discovered after trial; 3) could not, in the exercise of due diligence, have been discovered before trial; 4) is material to the issues; 5) is not merely cumulative to the former evidence; and 6) does not merely impeach or contradict the former evidence." *State v. Gilcreast*, 9th Dist. No. 21533, 2003-Ohio-7177, at ¶55, citing *State v. Petro* (1947), 148 Ohio St. 505, syllabus.

{¶8} In his May 4, 2007 motion for leave to file a motion for new trial based on newly discovered evidence, Defendant asserted that he discovered that A.S. would allegedly recant her testimony in March of 2007. Defendant did not assert that he was unavoidably prevented from discovering the recantation and/or present clear and convincing evidence as to why he was so prevented. Neither does the trial court's May 8, 2007 order granting Defendant leave to file his motion for new trial based on newly discovered evidence contain a "finding that [Defendant] was unavoidably prevented from discovering the evidence within the

one hundred twenty day period," as required by Crim.R. 33(B).[2] The State, however, did not file a brief in opposition to Defendant's motion for leave and/or file any objections to the trial court's May 8, 2007 order granting leave. The State merely followed the trial court's briefing schedule and opposed the motion for new trial on May 29, 2007. Accordingly, the State has forfeited any argument as to the propriety of the trial court's determination that Defendant was entitled to move for a new trial based on newly discovered evidence. See *Isquick v. Dale Adams Enterprises, Inc.*, 9th Dist. No. 20839, 2002-Ohio-3988, at ¶11-12; *Sekora v. General Motors Corp.* (1989), 61 Ohio App.3d 105, 112.

{¶9} The State's first assignment of error is overruled.

Second Assignment of Error

> "The trial court erred when it granted [Defendant's] motion for new trial."

{¶10} The State asserts that the trial court erred when it granted Defendant's motion for new trial based on the alleged new evidence. The State asserts that Defendant had been aware that A.S. had no recollection of parts of her childhood in 2002-2003, and thus, this revelation was not newly discovered. The State further argues that, even if A.S.'s memory lapse could be construed as newly discovered evidence, it did not warrant a new trial because A.S.'s testimony and

[2] We note that the Judgment Entry does analyze this issue and make a finding that A.S.'s recantation is newly discovered evidence.

affidavit did not recant her trial testimony. The State further maintains that the trial court erred in determining that A.S.'s testimony in her affidavit and at the new trial hearing, more than ten years after the incidents, was more reliable and credible than her testimony at trial. The State finally argues that, even if the trial court correctly determined that A.S.'s testimony in support of Defendant's new trial was a credible recantation of her trial testimony, there was still insufficient evidence that the alleged recantation would have been material to the outcome of the case. We resolved the issue of whether A.S.'s recantation was properly deemed to be newly discovered evidence in our discussion of the State's first assignment of error.

{¶11} A decision to grant a motion for a new trial is within the sound discretion of the trial court. *State v. Schiebel* (1990), 55 Ohio St.3d 71, paragraph one of the syllabus. We will not disturb the trial court's decision absent an abuse of discretion. Id. A trial court may grant a motion for a new trial on the grounds that a witness has recanted her testimony when the trial court determines that the statements of the recanting witness are credible and true. *State v. Perez* (Sept. 27, 2000), 9th Dist. No. 3045-M, at *3. See, also, *State v. Pirman* (1994), 94 Ohio App.3d 203, 209. Newly discovered evidence that recants testimony given at trial is "looked upon with the utmost suspicion." *State v. Elkins*, 9th Dist. No. 21380, 2003-Ohio-4522, at ¶15, quoting *State v. Saban* (Mar. 18, 1999), 8th Dist. No. 73647, and *State v. Germany* (Sept. 30, 1993), 8th Dist. No. 63568. As it is the

trial court's duty to ascertain the credibility of the witness, "a motion for a new trial that is based on recanted testimony is to be granted only when the court is reasonably satisfied that the trial testimony given by a material witness was false." *Elkins* at ¶15, citing *Saban* and *Germany*, supra. See also, *State v. Curnutt* (1948), 84 Ohio App. 101, 110-111.

{¶12} Once a court determines that the recantation is to be believed, i.e., is more credible than the witness's trial testimony, the trial court must determine "whether [the statements] would materially affect the outcome of the trial." *Perez* at *3. See, also, *Pirman*, 94 Ohio App.3d at 209. "Recantation by a significant witness does not, as a matter of law, entitle the defendant to a new trial." *State v. Walker* (1995), 101 Ohio App.3d 433, 435. Such decision is left to the sound discretion of the trial court. An abuse of discretion is more than an error of law or judgment and implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶13} The State asserts that A.S.'s "recantation" does not recant her testimony at trial. We agree. A.S.'s affidavit filed in support of Defendant's motion for new trial states:

> "[Defendant] never hurt me or attempted to touch me in an inappropriate manner. He never touched me in my genital area or my anal area."
>
> ***
>
> "Today as an adult I can confidently say that [Defendant] never molested me. *** I felt pressure from the grownups involved to say what they wanted me to say."

A.S.'s affidavit states as she was only six at the time the abuse occurred, she does "not recall ever saying any of the statements supposedly made by me at that time."

{¶14} At the new trial hearing on June 14, 2007, A.S. testified that she went to the Ohio State Parole Board of her own accord because she "believe[d] in [Defendant's] innocence[.]" A.S. testified:

> "Q. And your testimony is that what you stated in 1996 was not true?
>
> "A. Yes.
>
> "Q. Did Daddy, did Joel Covender ever touch you inappropriately?
>
> "A. No.
>
> "Q. Did he ever put his finger on your vagina?
>
> "A. No.
>
> ***
>
> "Q. Had [Defendant] taken his finger and placed it and done what he allegedly or what was proven I guess back in 1996 up to today, had he done that, would you remember that?
>
> "A. Yes.
>
> "Q. And you know for a fact that did not happen, correct?
>
> "A. Yes."

{¶15} While the above testimony does appear to contradict A.S.'s testimony at trial, on cross-examination, A.S. acknowledged that she did not remember most of her childhood and that she "just felt and knew it in her heart" that "these things didn't happen." A.S. also stated, that she "had no independent recollection of whether it happened, it was just [her] feelings." A.S. testified:

> "Q. Okay. So you're not testifying from any memory at this point, right?
>
> "A. No. But it is my belief that if these things had happened, I would remember them."
>
> ***
>
> "Q. You don't know that for certain, do you?
>
> "A. For certain, no, I honestly cannot, you know, recall anything, but I know that this didn't happen."

A.S. further acknowledged that her affidavit was not accurate to the extent it offered her memory of the days she lived with Defendant. A.S. further stated that although "I may not remember a lot, *** I know what kind of person I am, I would not block something like that out. I wouldn't. It's not who I am and it's not, it wouldn't be that way."

{¶16} In its Judgment Entry, the trial court acknowledged this Court's admonishment in *Elkins*, supra, that trial courts are to view recanted testimony with "utmost suspicion." *Elkins* at ¶15. In light of this strict standard and the foregoing testimony, we hold that the trial court abused its discretion in ordering a new trial. A.S.'s testimony at the June 14, 2007 hearing did not recant her trial

testimony. A.S.'s testimony was not based on personal knowledge, as required by Evid. R. 602, but instead was based on "feelings" and "beliefs." A.S. expressly testified that she had no memory of the years during which the abuse took place. Accordingly, there is no evidence properly before the trial court that would have given the trial court the reasonable belief that A.S.'s trial testimony was false. Defendant's motion for new trial was improperly granted.

{¶17} The State's second assignment of error is sustained.

{¶18} The State's first assignment of error is overruled and the State's second assignment of error is sustained. The judgment of the trial court is reversed.

Judgment Reversed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

LYNN C. SLABY
FOR THE COURT

CARR, P. J.
CONCURS

DICKINSON, J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶19} I agree with the majority's reasoning and conclusion overruling the State's first assignment of error. I disagree, however, with its reasoning and conclusion sustaining the State's second assignment of error.

{¶20} A motion for new trial based on recanted testimony requires a trial court to engage in a three-step analysis. The first step in that analysis is to determine whether a witness has recanted.

{¶21} The definition of recant is "[t]o withdraw or renounce prior statements or testimony formally or publicly." *Black's Law Dictionary* 1274 (7th ed. 1999). A witness recants, therefore, by formally or publicly withdrawing or repudiating earlier testimony. In reviewing the first step of the trial court's analysis, this Court must determine whether Mr. Covender presented evidence, in the form of A.S.'s own formal or public statements, that, if believed, would

convince the trial court that she testified falsely at his trial. This determination is, in effect, a determination of whether Mr. Covender submitted sufficient evidence and, therefore, this Court's review of this step is de novo. See *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33.

{¶22} At Mr. Covender's trial during April 1996, A.S., who at that time was eight years old, testified that Mr. Covender had molested her. She testified that he had given her "a bad touch"; that he had touched her "[i]n both of [her] privates"; that, when he touched her, she had felt "something inside" her; and that it had hurt. In her affidavit that was filed in support of Mr. Covender's motion for new trial, she said that Mr. Covender had never hurt her or attempted to touch her in an inappropriate manner and that he had never molested her. At the evidentiary hearing held by the trial court, she testified that her trial testimony had not been true and that Mr. Covender had never touched her inappropriately or put his finger in her vagina. Accordingly, A.S. made formal and public statements that, if believed, would convince the trial court that she testified falsely at Mr. Covender's trial. The trial court correctly determined that she had recanted.

{¶23} The second step in a trial court's analysis is determining whether to believe the recanted testimony. In this case, the trial court had to determine whether A.S.'s testimony recanting her trial testimony outweighed that trial testimony. In reviewing this step of the analysis, this Court, in effect, must

determine whether the trial court's conclusion that A.S. testified falsely at Mr. Covender's trial was against the manifest weight of the evidence.

{¶24} If the applicable standard is the civil manifest-weight-of-the-evidence standard adopted by the Ohio Supreme Court in *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, review of the first step disposes of this step as well. The same evidence that constitutes sufficient evidence also amounts to "some competent, credible evidence going to all the essential elements of the case." *Id*. at ¶ 26 (quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St. 2d 279, syllabus (1978)). If the applicable standard is the criminal standard, this Court must review all the evidence that was before the trial court, both at the hearing on Mr. Covender's motion for a new trial and at the trial, and determine whether the trial court lost its way and created a manifest miscarriage of justice by concluding that A.S. testified falsely at Mr. Covender's trial:

> [A]n appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

State v. Otten, 33 Ohio App. 3d 339, 340 (1986).

{¶25} The evidence presented at Mr. Covender's trial showed that A.S. had been interviewed repeatedly, including a number of times by her mother's step-mother and, separately, by her natural father's step-mother. Some of the interviews conducted by these women were recorded, and others were not. The

ones that were recorded included questionable interview techniques, including asking A.S. to repeat things she had said in earlier, unrecorded interviews and asking her leading questions. The repeated interviews using questionable techniques not only call into question what A.S. said during those interviews, but also what she said during interviews with others and during her trial testimony.

{¶26} Among the evidence presented by the State at trial, was the testimony of a pediatric nurse practitioner who purported to have found physical evidence that both A.S. and her brother, J.S., were sexually abused. This testimony was potentially significant because, if there was physical evidence that A.S. was abused by someone, it is less likely that her trial testimony that she was abused by Mr. Covender was false. On cross-examination, however, the nurse practitioner had to acknowledge that, although a physician had signed off on the report of her purported physical findings, that physician had neither examined the children nor reviewed photographs the nurse practitioner had taken during her own examination. Those photographs, which were taken with equipment that magnifies an image 15 times, failed to show much of the physical evidence she claimed to have found. Further, during her direct testimony, she relied on a 1989 book co-authored by Dr. David Chadwick. On cross-examination, after acknowledging that she considered Dr. Chadwick an authority on child sexual abuse, she had to concede that the physical findings she claimed to have seen on A.S. and J.S. and that she had described as anatomical changes almost always

caused by trauma and that indicates a high probability of sexual abuse, were not included on either a list of "Findings consistent with sexual abuse" or a list of "Findings sometimes seen in sexual abuse, but also with other causes" in a 1992 article co-authored by Dr. Chadwick. Further, a pediatrician who testified at trial on behalf of Mr. Covender said that none of the physical evidence purportedly found by the nurse practitioner tended to prove that either A.S. or J.S. had been sexually abused:

> The physical findings, all of them, are either one hundred percent pristine normal, or they are mild abnormalities, and variants which you would find in 10, 20, 30, even 50 percent of children walking the street who are not abused.

{¶27} It is significant that the nurse practitioner not only purported to find physical evidence that A.S. was sexually abused, but also that J.S. was sexually abused. J.S. too has recanted his trial testimony, explaining that he fabricated the story about Mr. Covender molesting him because he did not want to be separated from A.S. The State has not appealed that part of the trial court's order in which it granted Mr. Covender a new trial on the charge based upon his alleged abuse of J.S. The nurse practitioner's trial testimony is so lacking in credibility that it adds no support to the credibility of A.S.'s trial testimony.

{¶28} As mentioned previously, at the hearing on Mr. Covender's motion for new trial, A. S. testified that her trial testimony had not been true and that Mr. Covender had never touched her inappropriately or put his finger in her vagina. She provided that testimony, even though the prosecutor warned her that she could

be prosecuted for perjury, presumably based on the testimony she had given when she was eight years old, and even though, at the prosecutor's urging, the trial court told her that she had a right to remain silent, that anything she said could be used against her in a court of law, that she had a right to an attorney, and that, if she could not afford an attorney, one would be appointed for her.

{¶29} On cross-examination, the prosecutor asked A.S. about her memory of her childhood:

> Q. And isn't it true you told me that you don't remember most of your childhood?
>
> A. Yes, it is.
>
> Q. And I asked you how you knew these things didn't happen and you said you just felt and knew it in your heart; do you remember that?
>
> A. Yes.
>
> Q. And you told me that you had no independent recollection of whether it happened, it was just your feelings, correct?
>
> A. Yes.
>
> Q. Okay. So you're not testifying from any memory at this point, right?
>
> A. No. But it is my belief that if these things had happened, I would remember them.
>
> Q. It's your belief, correct?
>
> A. Uh-huh.
>
> Q. You don't know that for certain?
>
> . . . .

A. For certain, no, I honestly cannot, you know, recall anything, but I know that this didn't happen.

On redirect, A.S. repeated her testimony that she knew Mr. Covender had not molested her:

Q. Had Mr. Covender taken his finger and placed it and done what he allegedly or what was proven I guess back in 1996 up to today, had he done that, would you remember that?

A. Yes.

Q. And you know for a fact that did not happen, correct?

A. Yes.

On recross, the prosecutor again challenged her:

Q.. So you can't say what things happened during that time then, you're just, you're solely just guessing at that point, correct?

. . . .

A. The thing is is that I may not remember a lot, but I know that the kind of person I am, I would not block something like that out. I wouldn't. It's not who I am and it's not, it wouldn't be that way.

Q. Again, you have no independent recollection of when you were younger, correct?

A. Correct.

Q. And you'll concede that that's somewhat abnormal, correct?

A. Yes.

{¶30} In its Journal Entry, the trial court wrote that A.S.'s testimony "withstood and was tested by a well crafted and forceful cross examination." The

majority, however, has concluded, based upon the prosecutor's cross-examination, that A.S.'s testimony was not based on "personal knowledge." I cannot agree.

{¶31} When I was five years old, I broke my left arm. I remember where I was, what I was doing, and who I was with when I broke my arm. I do not remember anything that happened the day before, the week before, or even the year before the day on which I broke my arm. Similarly, I do not remember anything that happened the day after, the week after, or even the year after I broke my arm. If I were asked whether I ever broke my leg while I was a child, I could definitively answer that I did not, even though I have no distinct recollection of much of my childhood. I am admittedly further removed from my childhood than is A.S. Further, I acknowledge that breaking a bone is far different from being sexually abused. A.S.'s answers on cross-examination, however, are not evidence that she was not testifying from personal knowledge when she said Mr. Covender never molested her; rather, her answers are an acknowledgement of the nature of memory. When a person says that something never happened to her, it is not because she remembers everything that happened to her every minute of every day of her life. It is because, based upon the nature of the event she has been asked to recall, she "believe[s]" or "feel[s]" that, if that event had happened to her, she would remember.

{¶32} Having reviewed all the evidence presented at Mr. Covender's trial and at the hearing on his motion for new trial, I cannot say that the trial court lost

its way and created a manifest miscarriage of justice by concluding that A.S. testified truthfully at the hearing on Mr. Covender's motion for a new trial that the testimony she gave at trial was false. The trial court's resolution of the second step of its necessary analysis is not against the manifest weight of the evidence.

{¶33} The final step of a trial court's analysis is to "discern whether the statements would materially affect the outcome of the trial." *State v. Elkins*, 9th Dist. No. 21380, 2003-Ohio-4522, 2003 WL 22015409, at ¶16. The fact that a significant witness has recanted does not necessarily entitle a defendant to a new trial. *Id.* Rather, the trial court has discretion to determine whether a new trial is warranted. *Id.*

{¶34} In this case, other than the nurse practitioner's testimony regarding physical evidence of abuse, testimony that was severely impeached on cross-examination, A.S.'s trial testimony and her answers given during repeated interviews were the only direct evidence supporting Mr. Covender's convictions for gross sexual imposition and felonious sexual penetration in connection with her. In order for this Court to conclude that the trial court abused its discretion by granting Mr. Covender a new trial once it concluded that A.S. had testified falsely at his trial, it would have to believe that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219 (1983). In his Judgment Entry, the trial judge noted that he had read the entire trial transcript and reviewed the exhibits admitted at trial. Based on that review,

he concluded that the absence of A.S.'s false testimony would have materially affected the outcome of that trial. The trial court's handling of Mr. Covender's motion for a new trial is not an example of unreasonable, arbitrary, or unconscionable conduct. Rather, it is an example of what a good judge does when called upon to exercise his discretion. The trial court's judgment should be affirmed.

APPEARANCES:

DENNIS P. WILL, Prosecuting Attorney, ANTHONY D. CILLO, and BILLLIE JO BELCHER, Assistant Prosecuting Attorneys, for Appellant.

W. SCOTT RAMSEY, Attorney at Law, for Appellee.