**[Cite as *State v. Covender*, 2010-Ohio-2808.]**

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

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| STATE OF OHIO | C. A. No. 09CA009637 |
| Appellee | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| JOEL COVENDER | COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO |
| Appellant | CASE No. 94CR045253 |

DECISION AND JOURNAL ENTRY

Dated: June 21, 2010

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CARR, Judge.

**{¶1}** Appellant, Joel Covender, appeals the judgment of the Lorain County Court of Common Pleas denying his motion for a new trial. This Court affirms.

I.

**{¶2}** On April 20, 1994, Covender was indicted on one count of gross sexual imposition in violation of R.C. 2907.05, a felony of the third degree, and one count of felonious sexual penetration in violation of R.C. 2907.12, a felony of the first degree. On April 22, 1996, Covender was convicted of both counts. Covender was subsequently sentenced to twelve years of incarceration on the first count and eight to 25 years of incarceration on the second count. The sentences were to be served concurrently. On May 20, 1996, Covender appealed his conviction and this Court affirmed the conviction and sentence in *State v. Covender* (Dec. 24, 1997), 9th Dist. No. 09CA006457 ("*Covender I*"). The Supreme Court of Ohio declined further review. *State v. Covender* (2000), 87 Ohio St.3d 1490.

**{¶3}** On April 11, 2007, Covender moved for a new trial. The basis for his motion was that A.S., his former step-daughter and one of the complaining witnesses in his 1996 conviction, had recanted her trial testimony.[1] The trial court held a hearing on the motion on June 14, 2007. On July 18, 2007, the trial court granted Covender's motion for new trial. The State timely appealed from that judgment. On March 31, 2008, this Court concluded that A.S.'s testimony at the hearing did not constitute a recantation and reversed the trial court's judgment. See *State v. Covender*, 9th Dist. No. 07CA009228, 2008-Ohio-1453 ("*Covender II*").[2]

**{¶4}** On June 27, 2008, Covender filed a second motion for a new trial. The basis for the motion was an affidavit of David Slone, the biological father of A.S. The affidavit was dated June 26, 2008. Slone averred that he had witnessed his own mother, Debbie Slone, along with Nancy Kullman, the maternal step-mother of A.S., pressure and coerce A.S. to testify and give false statements against Covender. Slone averred that he "specifically witnessed Nancy Kullman and Debbie Slone repeatedly tell [A.S.] how to testify and how to answer questions from persons of authority." Slone further averred, "[r]epeatedly they would tell [A.S.] to say that Joel placed his finger into her vagina and all of the other circumstances which she eventually testified to at trial." Slone also averred that he regularly witnessed Nancy Kullman reading a book entitled, "No More Secrets From Me" to A.S. Slone averred this book dealt with child molestation and the final chapter dealt specifically with molestation being perpetrated by a step-father against a

[1] While the record indicates that A.S. has changed her last name, we refer to her by the same initials here in order to be consistent with our prior opinions.

[2] This Court noted in its 2008 opinion that Covender was also tried and convicted during the 1996 proceeding for similar conduct against his minor step-son, J.S. The sentence imposed was for both convictions. In 2007, J.S. recanted his trial testimony and Covender moved for and was granted a new trial on that conviction as well. The State did not appeal from that part of the trial court's order. *Covender II* at ¶3, FN1.

step-daughter. Slone indicated in his affidavit that he decided to come forward when the trial court's order granting a new trial was overturned on appeal.

**{¶5}** The trial court held a hearing on the motion on June 4, 2009. Slone did not appear to testify at the hearing. The trial court's subsequent journal entry, dated June, 29, 2009, indicated that Slone did not respond to a subpoena. At the hearing, counsel for Covender read Slone's affidavit into the record. Both parties called witnesses and presented exhibits. Subsequently, on June 29, 2009, the trial court ruled that the testimony of David Slone would not materially affect the outcome of trial and denied the motion. In reaching this conclusion, the trial court stated that it could not incorporate evidence from the first motion for new trial when determining the merits of the second motion for new trial.

**{¶6}** Covender filed his notice of appeal on July 24, 2009. On appeal, he raises two assignments of error.

II.

**ASSIGNMENT OF ERROR I**

"THE TRIAL COURT ERRED WHEN IT DETERMINED IT WAS NOT ALLOWED TO INCORPORATE THE EVIDENCE PRESENTED FROM APPELLANT'S FIRST MOTION FOR NEW TRIAL IN THIS MATTER[.]"

**{¶7}** In his first assignment of error, Covender argues that the trial court should have considered evidence presented in support of the first motion, specifically the testimony of A.S., when ruling on the second motion in light of the averments of David Slone. This Court disagrees.

**{¶8}** The Supreme Court of Ohio has held that the doctrine of the law of the case stands for the proposition that "[t]he decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the

trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3; see, also, *McDowell v. DeCarlo*, 9th Dist. No. 23376, 2007-Ohio-1262, at ¶11. "[T]he rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404, citing *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32.

**{¶9}** In deciding *Covender II*, this Court considered the evidence offered in support of Covender's first motion for new trial. Evid.R. 602 states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." This Court concluded that A.S.'s testimony at the first hearing "was not based on personal knowledge, as required by Evid.R. 602, but instead was based on 'feelings' and 'beliefs.'" *Covender II* at ¶16. This conclusion was based on the fact that "A.S. expressly testified that she had no memory of the years during which the abuse took place." Id. This Court noted that A.S. acknowledged in her testimony that her affidavit which served as the basis for the motion was not accurate to the extent it offered her memory of the days she lived with Covender. Id. at ¶15. This Court further concluded that "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." Id. at ¶16.

**{¶10}** This Court has concluded that the testimony of A.S. at the hearing on the first motion for new trial was not based on personal knowledge as required by Evid.R. 602. That conclusion is now the law of this case. This Court's determination that there was "no evidence properly before the trial court" in support of the first motion that would have given the trial court the reasonable belief that A.S.'s trial testimony was false is also the law of this case. In light of

these legal conclusions regarding the nature of the evidence offered in support of the first motion, the trial court did not err in ruling that it could not consider that evidence when ruling on the second motion. The first assignment of error is overruled.

**ASSIGNMENT OF ERROR II**

> "THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR A NEW TRIAL[.]"

**{¶11}** In his second assignment of error, Covender argues that the trial court erred in denying his motion for a new trial. This Court disagrees.

**{¶12}** The 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. A reviewing court will not disturb the trial court's decision absent an abuse of discretion. Id. The term "abuse of discretion" connotes more than an error of judgment; it implies that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

**{¶13}** Pursuant to Crim.R. 33(A)(6), "[a] new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

> "(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting

> attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses."

**{¶14}** The Supreme Court of Ohio has stated:

> "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro* (1947), 148 Ohio St. 505, syllabus.

**{¶15}** This Court has emphasized that "[t]o warrant the granting of a new trial, the new evidence must, at the very least, disclose a strong probability that it will change the result if a new trial is granted." *State v. Holmes*, 9th Dist. No. 05CA008711, 2006-Ohio-1310, at ¶15, quoting *State v. Starling*, 10th Dist. No. 01AP-1344, 2002-Ohio-3683, at ¶13.

**{¶16}** Covender argues there was a strong probability that the new evidence, indicating that David Slone witnessed the coercion and manipulation of A.S., would have affected the outcome of trial. The State contends that the new evidence would not have affected the outcome of trial. The State also argues that the claims raised in Covender's second motion for new trial are barred by the doctrine of res judicata as they amount to an attempt to re-litigate the issues raised in Covender's first motion for new trial.

**{¶17}** A copy of the transcript from the 1996 trial has not been included in the appellate record. "Crim.R. 33 clearly contemplates that before a trial court can consider a motion for a new trial in a criminal action, the defendant had to have been convicted after a trial to jury or the bench, at which evidence was presented." *State v. Rittner*, 6th Dist. No. F-05-003, 2005-Ohio-6526, at ¶65. The resolution of Covender's second assignment of error requires this Court to make determinations such as whether the new evidence presented in support of his motion was

cumulative to the former evidence, whether the new evidence merely contradicts or impeaches the former evidence, and, ultimately, whether the new evidence discloses a strong probability that it will change the result if a new trial is granted. Without a transcript from the trial, this Court cannot make these determinations. "This Court has repeatedly held that it is the duty of the appellant to ensure that the record on appeal is complete." *State v. Daniels*, 9th Dist. No. 08CA009488, 2009-Ohio-1712, at ¶22, quoting *Lunato v. Stevens Painton Corp.*, 9th Dist. No. 08CA009318, 2008-Ohio-3206, at ¶11. In the absence of a transcript from the original trial, Covender cannot prevail on his assignment of error.

**{¶18}** Covender's second assignment of error is overruled.

III.

**{¶19}** Covender's assignments of error are overruled. The Judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

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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 Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, J.
CONCURS

BELFANCE, P. J.
DISSENTS, SAYING:

**{¶20}** I respectfully dissent, as I would decline to apply the law of the case doctrine to overrule Mr. Covender's first assignment of error.

**{¶21}** In this case, the trial court stated that if it were permitted to consider the newly discovered evidence presented in the first motion for new trial and the evidence presented in the current motion for new trial, it would order a new trial. The court further stated that even acknowledging this Court's prior decision in *Covender II*, "the combination of [A.S.'s] failure to have any memory of any type of sexual misconduct perpetrated by the defendant (regardless as to whether this is characterized as something less than a complete recantation) and David Slone's testimony that he witnessed A.S.'s grandmothers coaching A.S. on what to say create a strong probability that the combination of this evidence would materially affect the outcome of the trial and would probably produce a different result." Thus, in light of this Court's prior decision, the trial court felt constrained to deny Mr. Covender's second motion for new trial notwithstanding its conclusion that a new trial was warranted.

**{¶22}** As noted by the majority, the law of the case doctrine "provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all

subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. Therefore, "absent extraordinary circumstances, such as an intervening decision by this court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." Id. at 5. The Supreme Court, however, also stated that "[t]he doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results." Id. at 3.

> "Thus, while a trial court cannot alter the law of the case as mandated by an appellate court, an appellate court may choose to reexamine the law of the case it has itself previously created, if that is the only means to avoid injustice. However, such reexaminations must not be undertaken lightly by an appellate court, nor encouraged as a common course of conduct for unsuccessful litigants." (Citation omitted.) *Weaver v. Motorists Mut. Ins. Co.* (1990), 68 Ohio App.3d 547, 549; see, also, *Layne v. Westfield Ins. Co.* (Feb. 13, 2002), 4th Dist. Nos. 01CA2596, 01CA2598, at *5; *Kingston v. Austin Dev. Co.* (Feb. 5, 1998), 8th Dist. No. 72034, at *6; (Porter, P.J., dissenting); *Pavlides v. Niles Gun Show, Inc.* (1996), 112 Ohio App.3d 609, 615.

**{¶23}** I would conclude that this Court should reconsider the legal conclusion in *Covender II* that A.S.'s testiomony could not qualify as evidence under Evid.R. 602. In *Covender II*, in reversing the trial court's decision to grant Mr. Covender a new trial, this Court concluded that A.S.'s testimony did not amount to a recantation because her testimony did not meet the standard under Evid.R. 602 as it was not based upon personal knowledge. *Covender II* at ¶16. Thus, this Court stated that the trial court had "no evidence properly before [it] that would have given the trial court the reasonable belief that A.S.'s trial testimony was false." Id. However, I disagree with the Court's initial premise that A.S.'s testimony was not even admissible under Evid.R. 602. To me it is clear that A.S.'s testimony met the basic evidentiary standard under Evid.R. 602 in that A.S.'s testimony was based upon her personal knowledge. A.S.'s testimony as to her memory or lack thereof is a fact that A.S. knows by virtue of her personal knowledge. Judge Dickinson observed in his dissent in *Covender II*:

> "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 acknowledgment 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." *Covender II* at ¶31.

Thus, regardless of the characterization of A.S's testimony as a recantation, A.S.'s testimony was based upon personal knowledge and was thus admissible as evidence for the trial court to consider. Likewise, in considering Mr. Covender's second motion for new trial, the trial court should be able to consider A.S.'s testimony along with the new evidence presented in evaluating whether it is appropriate to grant a new trial.

**{¶24}** Thus, I would hold that this Court is not barred under the law of the case doctrine from allowing the trial court to consider the new evidence set forth in Mr. Covender's second motion along with the evidence from *Covender II* in determining whether a new trial is warranted. Therefore, I would sustain Mr. Covender's first assignment of error. Further, as the disposition of the first assignment of error would render the second assignment of error moot, I would not address it.

APPEARANCES:

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

DENNIS WILL, Prosecuting Attorney, and MARY R. SLANCZKA, Assistant Prosecuting Attorney, for Appellee.