[Cite as *State v. Velez*, 2010-Ohio-312.]

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

STATE OF OHIO	C.A. No. 09CA009564
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JOSE VELEZ	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 05CR069496

DECISION AND JOURNAL ENTRY

Dated: February 1, 2010

CARR, Judge.

{¶1} Appellant, Jose Velez, appeals the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} In June of 2003, Jose Velez met Heather Whitman, who is now known as Heather Velez ("Heather"). She had two children at that time, including the child victim in this case, A.W. Both Velez and Heather were HIV positive. Velez and Heather moved in together in July of 2003, and Heather became pregnant in August of 2003. They married on February 28, 2004. During this time, the family moved from an apartment to a house in Lorain, Ohio. From February to April of 2004, Heather worked during the night. While she was gone, Velez often had the responsibility of caring for A.W. and her sister.

{¶3} When Heather was at work on a night in March of 2004, A.W. slipped on the edge of the bathtub after bathing and suffered an injury to her vaginal area. This occurred while

she was in the care of Velez. Heather learned of this incident the next day and she took A.W. to visit a family practice physician, Dr. Onyeneke. A.W. was diagnosed with a sprained perineum. In April of 2004, Heather had A.W. tested for HIV. Heather informed social worker Teresa Yuzon that A.W. had cut herself while playing with one of Heather's razors. However, A.W. informed Yuzon that Velez had put his finger "in there." In light of these statements, Yuzon referred Heather to a pediatrician, Dr. Coster. In June of 2004, the Lorain Police Department and the Lorain County Children Services investigated the allegations made by A.W. The investigation was closed when A.W. refused to speak to officers and the allegations were left unsubstantiated.

{¶4} In November of 2005, A.W. informed her mother that Velez had sexually molested her. In December of 2005, Heather took A.W. to the Applewood Center to enroll in counseling. The records from Applewood showed that both A.W. and Heather made allegations against Velez. She took A.W. to Dr. Essel, who confirmed that A.W. had been vaginally penetrated. A.W. informed Dr. Essel that there was contact between her vagina and Velez's penis. Heather took A.W. to a nurse practitioner to get a second opinion. The nurse practitioner confirmed Dr. Essel's findings. In February of 2006, a sexual assault nurse from the Nord Center in Lorain, Ohio examined A.W. The nurse diagnosed a blunted posterior hymenal margin as a result of sexual assault by blunt force.

{¶5} On December 6, 2005, Velez was indicted on one count of rape in violation of R.C. 2907.02; one count of kidnapping, with a sexual motivation specification, in violation of R.C. 2905.01; and one count of gross sexual imposition in violation of R.C. 2907.05. These three charges involved A.W. On January 10, 2006, after a second victim, M.S., came forward, the indictment was supplemented. Velez was charged with another count of rape of A.W. and

one count of rape of M.S.; one count for each victim of gross sexual imposition; one count for each victim of kidnapping with a sexual motivation specification; and one count for each victim for felonious assault, in violation of R.C. 2903.11.

{¶6} On May 22, 2006, a hearing was held to determine if A.W. was competent to testify. The trial court deemed her competent. At the time of trial, A.W. was seven years old and M.S. was seventeen years old.

{¶7} Velez waived his right to a jury trial, and the matter proceeded to a bench trial on July 10, 2006. On July 19, 2006, the trial court found Velez guilty of two counts of rape in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree; two counts of kidnapping with sexual motivation specifications in violation of R.C. 2905.01(A)(4) and R.C. 2941.147, felonies of the first degree; two counts of felonious assault in violation of R.C. 2903.11(B)(3), felonies of the second degree; and two counts of gross sexual imposition in violation of R.C. 2907.05(A)(4), felonies of the third degree. Mr. Velez was sentenced to life in prison. This Court affirmed his conviction in *State v. Velez*, 9th Dist. No. 06CA008997, 2007-Ohio-5122.

{¶8} On November 9, 2006, Velez filed several pro se motions with the trial court. One of the motions was a motion for new trial which involved only the convictions involving A.W. The trial court then appointed an attorney for the purposes of assisting him with his post-trial motions. On October 29, 2007, a hearing was held and the trial court heard testimony. After several continuances, on January 14, 2008, the trial court heard additional evidence and closing arguments on the motion and the parties submitted supporting affidavits. On March 13, 2009, the trial court denied the motion for a new trial. The trial court also denied Velez's remaining motions. On April 10, 2009, Velez filed a notice of appeal from the trial court's judgment entry denying his motion for new trial.

{¶9} On appeal, Velez raises one assignment of error.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION FOR NEW TRIAL."

{¶10} In his sole assignment of error, Velez argues that the trial court erred in denying his motion for new trial. This Court disagrees.

{¶11} An appellate court reviews a trial court's ruling on a motion for new trial under an abuse of discretion standard of review. *State v. Schiebel* (1990), 55 Ohio St.3d 71, paragraph one of the syllabus. An abuse of discretion is more than an error of judgment; it means 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.

{¶12} In *State v. Petro* (1947), 148 Ohio St. 505, at syllabus, 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. Lopa* (1917), 96 Ohio St. 410, approved and followed.)"

{¶13} "A trial court may grant a motion for 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. Covender*, 9th Dist. No. 07CA009228, 2008-Ohio-1453, at ¶11, citing *State v. Perez* (Sept. 27, 2000), 9th Dist. No. 3045-M. However, this Court has stated that "[n]ewly discovered evidence that recants testimony given at trial is 'looked upon with the utmost suspicion.'" *Covender* at ¶11; quoting *State v. Elkins*, 9th Dist. No. 21380, 2003-Ohio-4522, at ¶15. "Recantation by a significant witness does not, as a matter of law, entitle the defendant to a new trial." *Covender* at ¶12, quoting *State v. Walker* (1995), 101 Ohio App.3d 433, 435.

{¶14} The trial court found that the evidence presented by Velez failed to satisfy three of the six requirements which must be met in order to grant a motion for a new trial. Specifically, the trial court found that the new evidence was merely cumulative to the evidence presented at trial; the new evidence served merely to contradict the former evidence; and the evidence did not disclose a strong probability that the result would be different if a new trial were to be granted. After a review of the record, this Court agrees.

{¶15} The trial court held a hearing on Velez's motion for a new trial on October 29, 2007. The judge who presided over the hearing on the motion also presided over Velez's bench trial. Ms. Barbara Maher, a therapist and supervisor at the Berea Children's Home, testified on behalf of Velez. Ms. Maher is a licensed independent social worker and holds a master's degree in social work. She specializes in the area of sexually abused or traumatized children. In August, 2006, Ms. Maher was employed as a counselor at the Nord Center in Lorain, Ohio, where she treated A.W. as a patient. On August 23, 2006, Ms. Maher learned that Heather Velez, A.W.'s mother, had contacted the Children's Advocacy Center and reported that A.W. had lied about Velez molesting her. On that same day, Ms. Maher spoke to A.W. During their conversation, A.W. was "very upset" and she indicated that she had lied about the incident.

Instead of having a session that day, Ms. Maher decided to bring A.W. back on the next day. During the course of those conversations, A.W. indicated that Roy Whiteman, her grandfather, had molested her and that Nina D'Abato, her grandmother, had told her to say that it was Velez who molested her. Ms. Maher also testified that D'Abato told A.W. that she would buy her things if she indicated that Velez had molested her. Ms. Maher testified that during subsequent sessions, A.W. was "very negative towards herself" and that she "kept calling herself a liar." Ms. Maher also testified that she believed A.W.'s recantation to be truthful. In support of her position, Ms. Maher testified that she had been working with A.W. to develop a "trauma narrative" in which she described the specific things that happened to her. It was during the development of this "trauma narrative" that A.W. indicated she had lied about Velez molesting her.

{¶16} After the hearing, Velez also submitted an affidavit from Jeanette Ellis who is a professional counselor at the Nord Center in Lorain. Ms. Ellis had conducted therapy sessions with A.W. involving issues of responsibility. Ms. Ellis averred that during these sessions, A.W. indicated that it was her grandfather who was responsible for the sexual assault. Velez also submitted the affidavit of Heather, who similarly averred that A.W. told her that it was Roy Whiteman who molested her.

{¶17} Prior to analyzing whether A.W.'s purported recantation merited the granting of a motion for a new trial, it is important to briefly summarize relevant testimony from trial. After a pre-trial hearing which was held on May 22, 2006, the trial judge found A.W. competent to testify on behalf of the State. During direct examination at trial, A.W. answered a series of questions which demonstrated she was able to distinguish a truthful statement from a statement which constituted a lie. She also indicated that she understood the importance of telling the

truth. A.W. testified about a specific incident where she had fallen while getting out of the bathtub after bathing. As a result of the fall, she hurt her vaginal area. Because her mother was at work, her stepfather, Velez, checked to see if she suffered an injury. After Velez had checked A.W. for an injury, A.W. went to bed. A.W. testified that later that night, Velez removed her from her bed and took her into her Heather's bedroom. A.W. testified that Velez proceeded to "put his private in mine." A.W. testified that this happened on subsequent occasions when Heather was at work.

{¶18} On the day following the initial incident, A.W. informed Heather that she had fallen while getting out of the bathtub. A.W. did not immediately tell her mother what had happened because she feared that her mother would either yell at her or not believe her. On cross examination, A.W. was asked a series of questions on the issue of recantation. Specifically, counsel for Velez asked A.W. why her testimony differed from the account she had given doctors on the day following her fall. On numerous occasions during the cross-examination, A.W. insisted that her testimony in which she indicated Velez molested her was the truth.

{¶19} Detective Ralph Gonzalez also testified on behalf of the State at trial. Detective Gonzales testified that the initial investigation into the allegations of sexual abuse in 2004 was closed unsubstantiated because A.W. denied any wrongdoing on the part of Velez. During that first investigation, A.W. displayed an unwillingness to discuss the case with authorities. Detective Gonzalez testified that the reason for A.W.'s unwillingness to discuss the case was a fear of Velez. Subsequently, during a second investigation, A.W. told authorities that Velez had molested her.

{¶20} It should also be noted that the trier of fact was confronted with the issue of whether Nina D'Abato had improperly influenced A.W. Heather testified that A.W.'s grandmother, D'Abato, had given A.W. a gift on the night she had finished testifying at trial. Specifically, D'Abato bought A.W. a "Bratz Doll" DVD. Significantly, Heather also testified that A.W.'s grandfather, Roy Whiteman, was frequently at the house with Jose and A.W. on nights when Heather went to work. It is also noteworthy that the defense never disputed that A.W. had been molested. Rather, the defense's theory of the case was that Velez was not the perpetrator.

{¶21} The statements A.W. purportedly made to Ms. Maher, Ms. Ellis, and her mother clearly contradict her testimony at trial regarding who was responsible for molesting her. A.W. testified at trial that Velez had molested her on multiple occasions. According to Ms. Maher and Ms. Ellis, A.W. has since stated that she lied during her trial testimony and it was actually her grandfather who molested her. As noted above, new evidence that recants testimony given at trial is looked upon with the utmost suspicion. *Covender* at ¶11; *Elkins* at ¶15. This is because the witness, by making contradictory statements, either lied at trial, in the current testimony, or in both instances. *State v. Jones*, 10th Dist. No. 06AP-62, 2006-Ohio-5953, at ¶25, citing *United States v. Earles* (N.D.Iowa 1997), 983 F.Supp. 1236, 1248. The trial court may grant a motion for a new trial when it makes the determination that the source of the new evidence is credible and true. *Covender* at ¶11.

{¶22} "Because it is the trial court's obligation to measure the credibility of witnesses, in order to grant a motion for new trial based on recanted testimony, the trial court must be reasonably well satisfied that the trial testimony initially given by the witness was false (and, by implication, that the recanted testimony is credible and true)." *State v. Woodward*, 10th Dist.

No. 08AP-1015, 2009-Ohio-4213, at ¶22; see, also, *Jones* at ¶25. When a trial court does not make this determination regarding the credibility of recanted testimony, it is improper for a trial court to grant a new trial.

{¶23} In this case, the trial court's conclusion that the new evidence is cumulative and merely contradictory to A.W.'s testimony at trial necessarily rests on a determination regarding the credibility of the statements which A.W. made to Ms. Maher, Ms. Ellis, and her mother. The trial judge who presided over Velez's motion for a new trial also presided over Velez's bench trial. Therefore, the trial judge had the best vantage point from which to evaluate the credibility of witnesses and make factual determinations. It is apparent that the trial court did not determine that the statements A.W. purportedly made to Ms. Maher and Ms. Ellis were credible and true. Especially critical to the analysis here is the fact that A.W. did not testify at the hearing despite testifying at trial. Because A.W. did not testify at the hearing, the judge could only evaluate the credibility of her statements as they were presented through the testimony and averments of others. In light of the determination regarding the credibility of A.W.'s statements, the new evidence did not disclose a strong probability that a new trial would yield a different result. The trial court also noted that at the original trial, the trier of fact was confronted with the issue A.W.'s credibility. A review of the trial transcript also reveals that the trier of fact was confronted with the fact that Nina D'Abato had given A.W. a gift at the conclusion of her testimony. Nevertheless, the trier of fact proceeded to conclude that Velez had molested A.W. It follows that absent a determination that A.W.'s recantation was credible and true, the trial court did not abuse its discretion in denying Velez's motion for a new trial.

{¶24} Velez's assignment of error is overruled.

III.

{¶25} Velez's assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

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

DICKINSON, P. J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶26} The lead opinion, at Paragraph 11, states that an appellate court reviews a trial court's ruling on a motion for new trial under an abuse of discretion standard. That, however, is

only true in part. As I explained in my concurring and dissenting opinion in *State v. Covender*, 9th Dist. No. 07CA009228, 2008-Ohio-1453, at ¶20, when a trial court is faced with a motion for new trial based on recanted testimony, it must engage in a three-step analysis. This Court reviews the first step of that analysis, whether the defendant presented sufficient evidence to show a recantation, de novo. *Id.* at ¶21. It reviews the second step, the trial court's determination whether to believe or disbelieve the recanted testimony, under a manifest weight of the evidence standard. *Id.* at 23. And it reviews only the third step, the ultimate decision of whether to grant a new trial, for an abuse of discretion. *Id.* at ¶ 33. Application of the proper standards of review in this case results in the same conclusion: the trial court did not err by denying Mr. Velez's motion for a new trial. Accordingly, I concur in judgment only.

BELFANCE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶27} I concur in the judgment, however, I write separately to emphasize that the evidence presented by Mr. Velez was compelling. Unlike many recantation cases, the recantation in this case was not the product of the minor child herself coming forward asserting that her prior testimony as to the identity of the perpetrator was false so that a new trial could be granted. Had that been the case, the recantation would have been heavily suspect as it could have been the product of undue influence by certain family members or others with a close relationship to the child and to this case. Instead, the recantation occurred in the context of confidential therapy sessions where the child would have naturally felt the freedom to be honest and frank. One of the child's therapists also testified that she believed that the recantation was true. In one session, the recantation occurred during therapy sessions involving the issue of responsibility. The therapeutic environment was a natural setting for the child to freely disclose her guilt for having previously been untruthful. Further, although the trial court indicated that

the trier of fact had already been confronted with the child's prior recantation, that is not exactly so. The trier of fact was never confronted with the child's recantation of her prior assertion as to the *identity* of the perpetrator. Instead, the child was questioned concerning her conflicting accounts as to whether any sexual molestation had occurred. In addition, there was conflicting testimony at trial as to when the child's grandfather was at the home. Although at the hearing on the motion for a new trial the State presented evidence that the grandfather was not in Ohio when the alleged molestation occurred; at trial there was evidence that established that the grandfather had resided at the child's home.

{¶28} Judge Dickinson has presented a logical analysis when considering a motion for new trial in the context of an alleged recantation. In keeping with that analysis in the instant matter, there was sufficient evidence to demonstrate a recantation. Further, in light of the evidence presented, had the trial court concluded that a new trial was appropriate, in my view, that conclusion would not have been erroneous as it would not have been against the manifest weight of the evidence nor an abuse of the court's discretion. Notwithstanding, it is evident that despite the sufficiency of the evidence as to the existence of a recantation, the trial court considered evidence that countered Mr. Velez's assertions and challenged the credibility of the recantation. Ultimately, the trial court's denial of the motion cannot be said to be either against the manifest weight of the evidence nor an abuse of discretion. Thus, I also conclude that the trial court did not commit reversible error by denying Mr. Velez's motion for new trial.

APPEARANCES:

PAUL A. GRIFFIN, Attorney at Law, for Appellant.

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