[Cite as *State v. Owens*, 2016-Ohio-176.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,	:	Case No. 14CA9
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
ANTHONY E. OWENS,	:	
Defendant-Appellant.	:	RELEASED 01/11/2016

APPEARANCES:

Harry R. Reinhart, Reinhart Law Office, Columbus, Ohio, for appellant.

Mike Dewine, Ohio Attorney General, and Jocelyn S. Kelly Lowe, Special Prosecutor, Ohio Associate Assistant Attorney General, Columbus, Ohio, for appellee.

Hoover, P.J.

{¶1} Following a trial, a jury returned a verdict finding Anthony E. Owens guilty of gross sexual imposition in violation of R.C. 2907.05(A)(4), a felony of the third degree. The Gallia County Court of Common Pleas determined that prison was mandatory because evidence corroborated the victim's testimony. The court imposed a mandatory prison term of 48 months, classified Owens as a Tier II sexually oriented offender, and sentenced him to a mandatory five-year term of postrelease control.

{¶2} On appeal, Owens asserts in his first assignment of error that his substantial rights were prejudiced by the presence of an unauthorized person before the grand jury who influenced the grand jury to return a true bill of indictment. Because Owens failed to timely object to the presence of an Ohio Assistant Attorney General as a special prosecutor before the grand jury when it returned an indictment against him, he forfeited all but plain error. Although we agree

with Owens that the assistant attorney general should not have conducted the grand jury without a trial court entry authorizing her appointment as a special prosecutor, the absence of the entry here did not constitute plain error. It is clear that the prosecuting attorney requested that the attorney general conduct the grand jury based on a conflict of interest. The assistant attorney general was otherwise qualified to do so. Lastly, the fact that a jury found Owens guilty of gross sexual imposition beyond a reasonable doubt supports that the grand jurors in this case were not subject to undue influence by an unauthorized person. Therefore, we reject his first assignment of error.

{¶3} In his second assignment of error, Owens contends that the trial court erred to the prejudice of his substantial rights by allowing several assistant attorneys general to appear as Gallia County prosecutors in a criminal prosecution where the attorneys appearing in that capacity had no independent statutory authority to do so. Again, Owens forfeited all but plain error by failing to timely object to the appearance of several assistant attorneys general without appointment as special prosecutors in his case. We find that any error did not constitute plain error because it did not affect the outcome of the proceeding. Consequently, we overrule his second assignment of error.

{¶4} In his third and fourth assignments of error, Owens argues that the jury verdict finding him guilty of gross sexual imposition of his daughter is not supported by sufficient evidence and is against the manifest weight of the evidence. School Nurse Kimberly Skidmore testified that in March 2010, Owens's biological daughter, S.J., stated that a few weeks earlier, Owens climbed into her bed, pulled down her panties, and rubbed his private parts against her back, but left when S.J.'s stepsister began waking up. Child Protection Center Forensic Interviewer Elizabeth Sandman Juszczyk testified that she interviewed S.J. in April 2010; and a

videotape of that interview was introduced into evidence at trial. In the interview, S.J claimed that the assault occurred after her stepsister's birthday party when she was lying on the bunk bed with her stepsister. S.J. told the forensic interviewer that Owens laid down behind her and pulled her towards him, pulled her pants down and pushed her towards his penis, and that when she tried to pull her pants up, she accidentally touched his penis. Owens then told S.J. to spread her legs so that he could put his penis inside her legs; but he left when she refused to do so; and everyone in the room woke up when balloons got caught in a fan. At trial, S.J. testified that Owens got onto her bed behind her, pulled her pants down while she tried to pull them back up, and left when she refused to let him put his penis between her legs. Based on this evidence, the jury did not clearly lose its way or create a manifest miscarriage of justice in finding the state had proved the essential elements of gross sexual imposition beyond a reasonable doubt. Owens's third and fourth assignments of error are meritless.

{¶5} In his fifth assignment of error, Owens asserts that the trial court's imposition of a mandatory prison term pursuant to R.C. 2907.05(C)(2)(a) violated his rights to due process of law and trial by jury under the United States and Ohio Constitutions. As the state concedes, based on *State v. Bevly*, 142 Ohio St.3d 41, 2015-Ohio-475, 27 N.E.3d 516, the trial court erred in applying this unconstitutional provision to impose a mandatory prison term on him. We sustain Owens's fifth assignment of error.

{¶6} Therefore, we reverse the judgment of the trial court and remand the cause for the limited purpose of conducting a new sentencing hearing in accordance with *Bevly*. In all other respects, we affirm the judgment of the trial court, including his conviction for gross sexual imposition.

I. Facts and Procedural Posture

{¶7} In May 2011, Ohio Assistant Attorney General Elizabeth Matune appeared before the Gallia County Grand Jury and represented to the grand jury that she was a special prosecutor who was presenting a criminal case against Owens because the Gallia County Prosecuting Attorney had a conflict of interest. More specifically, Matune stated the following:

> Okay. Um, I'm from a unit called special prosecutions with the Attorney General's office and what we do is we just kind of when somebody has like a conflict or has some sort of um, actually that's what it was in this case, we also like when somebody needs help with something we'll step in, but we come in as a Special Prosecutor and take the case. This particular case there was a concern because somebody involved in the background used to work for the Sheriff's office and so just so there was no question that everything's being done correctly they handed it off to us. So um, I'm just here for one case. All right. Okay, and um, we can go ahead and get started.

{¶8} No evidence exists in the record that the Gallia County Prosecuting Attorney filed a motion or request that Matune be appointed a special prosecuting attorney or a special assistant prosecuting attorney to conduct the grand jury or that the common pleas court or any other court appointed Matune to do so.

{¶9} In the grand jury proceedings, Matune questioned Gallia County Deputy Sheriff Chad Wallace, who had already been sworn; and he detailed that Owens's biological daughter, S.J., had reported that Owens had sexually abused her. One of the grand jurors asked Wallace several questions. At the conclusion of his testimony, Matune summarized that there were three separate incidents: (1) one occurring in a van in which Owens put two fingers in S.J.'s vagina; (2) another in a van in which Owens forced S.J. to put his penis in her mouth; (3) and the final

one occurring in Owens's home when he asked to put his penis between her legs; and she tried to pull her pants back up and she accidentally touched his penis. Matune referred to the first two incidents as rapes and the last incident as gross sexual imposition.

{¶10} The grand jury then deliberated and returned an indictment charging Owens with two counts of rape and one count of gross sexual imposition. Matune signed the indictment as a "Special Prosecuting Attorney," and the indictment included a statement that "[t]his Bill of Indictment found upon testimony sworn and sent before the Grand Jury at the request of the Prosecuting Attorney."

{¶11} A few weeks later in June 2011, the trial court arraigned Owens. The trial court noted that "it came to the Court's attention this morning for the first time that actually this case was presented to the Grand Jury by a representative of the Ohio Attorney General's office," but that because the attorney general's office was unavailable to appear at the arraignment, the office agreed that there was no conflict for the Gallia County Prosecuting Attorney to represent the state at the arraignment. Nobody objected to the trial court proceeding, and Owens entered a plea of not guilty to the charges.

{¶12} In July 2011, 49 days after the indictment and under a separate trial court case number, Gallia County Prosecuting Attorney Jeff Adkins filed an application "to appoint a special assistant prosecutor to prosecute a matter involving an alleged rape" pursuant to R.C. 309.10 and the inherent powers of the court. The trial court granted the prosecutor's application and appointed Matune as "special assistant prosecutor, to handle a matter involving an alleged rape which the Prosecuting Attorney has a conflict."

{¶13} In December 2011, the state submitted an amended bill of particulars in which the third count of the indictment was summarized as follows:

> On or about December 1, 2009 to April 30, 2010 in Gallia County, Ohio, Anthony Owens, did purposefully engage in sexual contact with Jane Doe, who was not the spouse of Anthony Owens, when Jane Doe was less than 13 years of age, whether o[r] not Anthony Owens knew of Jane Doe's age, to wit: forcing Jane Doe, date of birth April 2, 2001, to touch erogenous zone of offender, contrary to Section 2907.05(A)(4) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

{¶14} In February 2013, the state, through the Gallia County Prosecuting Attorney, requested that the trial court appoint Ohio Attorney General Michael DeWine and any of his assistant attorneys general, "but specifically Assistant Attorney General Marianne T. Hemmeter * * * and Assistant Attorney General Amanda Bunner * * * of the Ohio Attorney General's Special Prosecutions Unit, as Special Assistant Prosecutors for Gallia County to assist in the preparation and trial of this case." About a week later, the trial court appointed Assistant Attorneys General Hemmeter and Bunner as assistant prosecutors to assist in the preparation and trial of the case. Hemmeter and Bunner had appeared previously in the case before being appointed; and several other assistant attorneys general appeared in the case without any trial court entry appointing them to serve as prosecutors or assistant prosecutors in the case.

{¶15} The first jury trial in November 2013 ended in a mistrial upon the joint motion of the State and the defense when it became apparent that Owens's counsel's continued representation of him presented a conflict of interest.

{¶16} Owens obtained new counsel and a second jury trial was held in June 2014. Assistant Attorneys General Hemmeter and Brad Turner represented the state, even though

Turner had not been appointed by the trial court as a special prosecuting attorney or assistant prosecuting attorney in the case.

{¶17} At trial, the following evidence was adduced. Owens is the biological father of S.J., who was born in April 2001. C.B., S.J.'s mother, never married Owens; and they ended their relationship before S.J. turned two years old. They arranged for Owens to have visitation with S.J. every other weekend.

{¶18} Kimberly Skidmore, a school nurse for Gallia County Local Schools, testified that in March 2010, she received a telephone call from a grandparent of a student in the same grade as S.J. who had been told by S.J. that she had been raped. Skidmore interviewed S.J. the next morning; and S.J. detailed incidents in which her father, Owens, had sexually abused her. S.J. specified that in the first incident, Owens grabbed her in her crotch when he was driving her. In the second incident, which was a few weeks later, Owens got into her bed, pulled down her panties, and started touching her. When she pulled her panties back up and told him to stop, he kept rubbing his private parts against her back. S.J. told Skidmore that her stepsister then started to wake up, so Owens left. Skidmore then contacted S.J.'s mother, and S.J. told her the same thing she had told the nurse. S.J.'s mother took her to a hospital emergency room, where she received a medical examination and talked to a nurse and a sheriff's deputy.

{¶19} A few weeks later, in late April 2010, S.J.'s mother took her to the Child Protection Center in Chillicothe, which is a child advocacy center that specializes in working with children who have potentially been abused or neglected. Elizabeth Sandman Juszczyk, a forensic interviewer and child-abuse specialist employed at the center, conducted a videotape interview of S.J. regarding the allegations concerning Owens; and the videotape of the interview was introduced into evidence. In the interview, S.J. said that when she was seven years old,

Owens was taking her to his house in his van when he told her to unzip her pants and spread her legs. Owens took his two fingers and put them in S.J.'s vagina and asked her if she liked that. She told him she didn't like it; and he warned her not to tell anybody because it would get him in big trouble.

{¶20} S.J. next told the forensic interviewer that Owens got into the shower with her and hugged her when she was naked for about five minutes a few weeks after the first van incident. This incident was not part of the criminal case.

{¶21} S.J. then detailed an incident that occurred while they were watching the Winter Olympics in February 2010 at Owens's house when she had arrived right after her stepsister's birthday party. She was in the same bed with her stepsister when Owens got in the bed behind her, pulled down her pants, and pushed her towards his penis. When S.J. tried to pull up her pants, she accidentally touched his penis. She said it felt squishy when she touched it. He then told her to spread her legs so he could put his penis between her legs, but she refused. Everybody was asleep, but they woke up when balloons got caught in a fan in the room and Owens got out of her bed. S.J later clarified that her stepsister was the only person in the room with them.

{¶22} She later told the forensic interviewer that during the van incident, Owens forced her to put his penis in her mouth a couple times. He also made her touch and tickle it. S.J. noted to the forensic interviewer that she remembered more about the incidents than when she was last interviewed.

{¶23} Dr. Scott McCallum watched the forensic interview of S.J. and then conducted a medical examination of her that same day. He did not find anything significant in his examination of the child. Dr. McCallum testified that the lack of physical findings was not surprising because (1) most of the time, penetration does not go beyond the hymen, (2) the

passage of time heals any injury, and (3) less than five percent of sexually abused children have that abuse confirmed by a medical examination. S.J.'s description of the incidents to Dr. McCallum was consistent with her forensic interview that same day.

{¶24} At trial, S.J. testified that during the first incident in the van, Owens unzipped her pants; and he put his fingers on top of her vagina, but not inside of it. She then noted that Owens hugged her from behind when she was in the shower. She also noted that Owens made her put his penis in her mouth a couple times when they were in the van.

{¶25} For the last incident, S.J. testified that while they were watching the Winter Olympics, Owens turned off the television and got behind her in her bed, with her stepsister sleeping in the same bed. Owens started pulling down her pants, and she tried to pull them back up multiple times. He asked her if he could put his penis between her legs and when she said no, he got up and walked away. S.J. did not remember anyone else in the room besides her and her stepsister.

{¶26} S.J. also identified four pictures she had drawn during the same period when her father had touched her inappropriately. The drawings were sexually explicit and depicted a man touching a woman's vaginal area as well as a couple engaging in sexual intercourse. Dr. Robin Tener, a licensed clinical psychologist, testified that S.J.'s drawings indicated that she had sexual knowledge that was not developmentally typical for her age. Dr. Tener explained that a child's disclosure of sexual abuse could be delayed and that children lose details of the incidents over time in a different manner than adults do.

{¶27} Deputy Sheriff Wallace testified that he and another deputy sheriff interviewed Owens about the allegations; and he denied that he did anything wrong. Owens and his wife testified at trial and denied that he ever sexually abused S.J.

{¶28} The jury deliberated and returned verdicts of not guilty for the two rape charges in the first two counts of the indictment and the lesser included offense of gross sexual imposition for the first rape charge. The jury returned a verdict of guilty on the charge of gross sexual imposition in the third count of the indictment. At the sentencing hearing, the trial court determined that S.J.'s three statements about the incident—to the school nurse, the forensic interviewer, and at trial—corroborated each other and concluded that a mandatory prison sentence was thus required by R.C. 2907.05(C)(2)(a). In August 2014, the trial court sentenced Owens to a mandatory prison term of 48 months and a five-year period of postrelease control and classified him as a Tier II sexually oriented offender. This appeal followed; and we granted Owens's motion to supplement the record with the motion and entry relating to the trial court's appointment of Matune as a special assistant prosecuting attorney and a complete transcript of the grand jury proceedings.

II. Assignments of Error

{¶29} Owens assigns the following errors for our review:

1. The defendant's substantial rights were prejudiced by the presence of an unauthorized person before the grand jury who influenced the grand jury to return a true bill of indictment.
2. The trial court errs to the prejudice of the defendant's substantial rights by allowing several attorneys to appear as Gallia County Prosecutors in a criminal prosecution where the attorneys appearing in that capacity had not been appointed by the court as special prosecutors or special assistant prosecutors and the attorneys so appearing had no independent statutory authority to prosecute criminal offenses.

3. The jury verdict is supported by evidence insufficient as a matter of law to sustain the conviction.
4. The jury verdict is against the manifest weight of the evidence.
5. Imposition of a mandatory prison term pursuant to R.C.§ 2907.05(C)(2)(a) violates the defendant's rights to due process of law and trial by jury under the state and federal constitutions.

III. Law and Analysis

A. Unauthorized Person before Grand Jury

{¶30} In his first assignment of error, Owens asserts that his substantial rights were prejudiced by the presence of an unauthorized person before the grand jury who influenced the grand jury to return an indictment against him. Owens claims that because no entry authorized Assistant Attorney General Matune to conduct the grand jury, she was an unauthorized person before the grand jury. Owens claims that Matune examined the sole witness before the grand jury and sought a return of the indictment on the three specified charges against Owens when she was not authorized to do so. Owens's claim challenges the validity of the indictment.

{¶31} Crim.R. 12(C)(2) mandates that "[d]efenses and objections based on defects in the indictment" "must be raised before trial." The failure to timely object to a defect in the indictment constitutes a forfeiture of the error. *See State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, ¶ 46, and Crim.R. 12(H) (both describing the failure to timely raise this objection as a waiver); *See also State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 21 (clarifying that the failure to timely assert a right or object to an error is more properly characterized as forfeiture rather than waiver). Owens's trial counsel did not raise any

objections to the indictment at any time after it was returned in May 2011 until after he was convicted and sentenced in August 2014.

{¶32} Owens contends that he did not forfeit his claim that the indictment was defective because the Gallia County Prosecuting Attorney applied for the appointment of a special assistant prosecutor to prosecute the case and the trial court granted the application and appointed Matune to handle the matter because the prosecuting attorney had a conflict under a case number separate from Owens's criminal case. He argues that these facts were consequently "not discovered by the defense before trial and could not reasonably have been discovered until after trial when new counsel was employed to prosecute the appeal."

{¶33} Owens's contention is meritless. As the state counters, Owens's trial counsel could have asked the state for appointment paperwork or checked the court's general docket at any point during the lengthy period between the return of the indictment and the second jury trial. Owens and his attorneys were aware of the involvement of Matune and other members of the Attorney General's office from the date of the arraignment, when the trial court expressly noted that a representative of the Attorney General's office had presented the matter to the grand jury. If anything, the lack of any application or entry appointing Matune in the criminal case would have bolstered his claim that the indictment was defective and given him more reason to raise this objection during the proceedings. By not doing so, he forfeited this claim.

{¶34} Owens next claims that the error was not forfeited because it constituted structural error, which is not subject to forfeiture or waiver and is presumptively prejudicial. Structural errors are constitutional defects that may be raised for the first time on appeal and are cause for automatic reversal because the errors permeate the entire conduct of the trial from beginning to end so that the trial cannot reliably serve its function as a vehicle for the determination of guilt or

innocence. *See State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 17; *State v. Hess*, 2014-Ohio-3193, 17 N.E.3d 15, ¶ 23 (4th Dist.). Any error here was, however, a statutory or rule violation and not a constitutional error. Indeed, the manner by which an accused is charged with a crime is procedural rather than jurisdictional, and after a conviction for crimes charged in the indictment, the judgment binds the defendant for the crime for which he was convicted. *See, e.g., Monroe v. Jackson*, 119 Ohio St.3d 344, 2008-Ohio-4480, 894 N.E.2d 43, ¶ 4.

{¶35} Therefore, Owens's assertion of structural error is meritless. *See State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 55, quoting *State v. Esparza*, 74 Ohio St.3d 660, 662, 660 N.E.2d 1194 (1996) (the " 'trial-error/structural-error distinction is irrelevant unless it is first established that *constitutional* error occurred' " [emphasis sic.]); *State v. Gotel*, 11th Dist. Lake No. 2009-L-051, 2009-Ohio-6516, ¶ 40 (where a defective indictment did not result in multiple violations of constitutional rights, a plain-error rather than a structural-error analysis was appropriate).

{¶36} Former Supreme Court of Ohio Chief Justice Thomas Moyer emphasized in denying a motion to dismiss an affidavit of disqualification that "[a] prompt objection to the appointment" of a special prosecutor is "essential if that appointment [is] to be undone." *See In re Disqualification of Cirigliano*, 105 Ohio St.3d 1223, 826 N.E.2d 287 (2004).

{¶37} Because Owens forfeited his challenge to his indictment by failing to timely raise it during the proceedings in his criminal case, "[a]ny claim of error in the indictment in such a case is limited to a plain-error review on appeal." *Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, at ¶ 46; *Gotel*, 2009-Ohio-6516, at ¶ 40. To constitute plain error under Crim.R. 52(B), the defendant must demonstrate (1) an error, *i.e.*, a deviation from a legal rule, (2) that the

error constitutes an obvious defect in the trial proceedings, and (3) that the error must have affected substantial rights—*i.e.*, the error must have affected the outcome of the trial. *Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, at ¶ 22, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). Moreover, "even if an accused shows that the trial court committed plain error affecting the outcome of the proceeding, an appellate court is not required to correct it." *Rogers* at ¶ 23. Instead, courts take notice of plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Rogers* at ¶ 23, citing *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus; *see also State v. Lewis*, 4th Dist. Ross No. 14CA3467, 2015-Ohio-4303, ¶ 9. With these standards in mind, we consider Owen's claim.

{¶38} The General Assembly requires that in general, the prosecuting attorney "may inquire into the commission of crimes within the county" and "shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, except for those required to be prosecuted by a special prosecutor pursuant to section 177.03 of the Revised Code or by the attorney general pursuant to section 109.83 of the Revised Code * * *." R.C. 309.08(A). R.C. 309.08 does not prevent the appointment and employment of assistants to assist the prosecuting attorney. R.C. 309.10. Under R.C. 309.06(A), the prosecuting attorney "may appoint any assistants * * * who are necessary for the proper performance of the duties of his office."

{¶39} By contrast, the attorney general is "the chief law officer for the state and all its departments." R.C. 109.02. "When required by the governor or the general assembly, the attorney general shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested." *Id.*

{¶40} Unlike a prosecuting attorney or a duly appointed assistant prosecuting attorney, the Ohio Attorney General and any Assistant Attorneys General do not have any inherent authority to try general criminal cases in state trial courts absent an appointment to do so in a specific case. Here, notwithstanding the terminology used in the trial court's entries appointing Assistant Attorneys General Matune, Hemmeter, and Bunner, they were not appointed as "assistant" prosecuting attorneys in the criminal case because the Gallia County Prosecuting Attorney and his office had a conflict of interest and did not direct the assistant attorneys general in the criminal case. *See State ex rel. Williams v. Zaleski*, 12 Ohio St.3d 109, 112-113, 465 N.E.2d 861 (1984) (terminology of motion to appoint special prosecutor and assistant or entry is not controlling and R.C. 2941.63 and 309.10 are by their language limited to court authority to appoint an attorney to assist the prosecuting attorney in a pending criminal cause).

{¶41} Instead, the assistant attorneys general acted independently and as special prosecutors in the criminal case. A common pleas court has inherent authority to appoint counsel to assist the grand jury in criminal matters where neither the prosecuting attorney nor his duly appointed assistant can perform these duties. *Id.* at 111, citing *State ex rel. Thomas v. Henderson*, 123 Ohio St. 474, 478, 175 N.E. 865 (1931); *see also State v. Miller*, 4th Dist. Meigs No. 92 CA 496, 1993 WL 413506, *5 (Oct. 14, 1993) ("Regardless of the absence of any statutory authority, courts possess inherent power to appoint special prosecutors where regular prosecutors assert conflicts"); *State v. Crisp*, 4th Dist. Meigs No. CA 481, 1993 WL 379518, *6 (Sept. 24, 1993) ("A court of common pleas, however, possesses the inherent power to appoint counsel to assist the grand jury in criminal matters"). But these cases require that the common pleas court appoint a special prosecutor before the special prosecutor can present a criminal case to the grand jury. *See Miller* at *1 and *Crisp* at *1.

{¶42} By contrast, in this case, the common pleas court did not appoint Assistant Attorney General Matune to act as special prosecutor because of the Gallia County Prosecuting Attorney's conflict of interest before she presented the case against Owens to the grand jury, which returned an indictment against him. Although the state cites two cases in support of its contention that no entry reflecting Matune's assignment or appointment was required, we find these cases to be inapposite. In *State v. Robertson*, 5th Dist. Richland No. 11CA0046, 2012-Ohio-2955, ¶ 49-59, the issue was whether a municipal court had authority to order special prosecutor fees to be paid in the absence of a specific statute authorizing the assessment of these fees to the defendant as court costs. Conversely, this case involves a common pleas court matter and does not involve the issue of court costs. In *State v. Hooks*, 2nd Dist. Montgomery Nos. CA 16978 and 17007, 1998 WL 754574, *7-8 (Oct. 30, 1998), the court rejected a postconviction-relief claim that one of the state's prosecutors at trial was not authorized pursuant to R.C. 2941.63 to act as an assistant prosecuting attorney. By contrast, this case does not involve R.C. 2941.63 because notwithstanding the terminology used in the trial court's subsequent entry appointing her for the criminal case, Matune acted as a special prosecuting attorney rather than as an assistant directed by the Gallia County Prosecuting Attorney. Nor is this case before us as a claim for postconviction relief. Therefore, neither of the cases cited by the state supports its proposition that Matune was properly appointed to present the matter to the grand jury.

{¶43} Consequently, Matune's presentation of the case to the grand jury before she was duly appointed to act as a special prosecutor in the matter because of the conflict of interest for the Gallia County Prosecuting Attorney and his office constituted error; and this error constituted an obvious defect in the trial proceedings.

{¶44} Nevertheless, in determining whether this error affected Owens's substantial rights, "[u]nder R.C. 2939.10, only the prosecuting attorney, assistant prosecuting attorney, and, in certain cases, the Attorney General or special prosecutor appointed by the Attorney General have access to the grand jury." *Walton v. Judge Wyandot Cty. Common Pleas Court*, 64 Ohio St.3d 564, 565, 597 N.E.2d 162 (1992). Similarly, under Crim.R. 6(D), "[t]he prosecuting attorney, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting," and Crim.R. 2(G) defines "[p]rosecuting attorney" to include "the attorney general of this state * * * and the assistant or assistants." Neither of these provisions permits an assistant attorney general to appear before the grand jury absent an appointment or statutory authorization to do so, but once that presence is duly authorized, the assistant attorney general may proceed.

{¶45} "The language of R.C. 2939.10 and [Crim.R.] 6(D) is clear and unambiguous and therefore should be applied as written rather than interpreted and expanded to authorize the presence of a person not included in the explicit language of those provisions." *See generally* 2011 Ohio Atty.Gen.Ops. No. 2011-004, *2. "Violations of Crim.R. 6(D), while not requiring the 'automatic reversal of a subsequent conviction regardless of the lack of prejudice,' nevertheless are subject to review to determine if it affected a substantial right under Crim.R. 52(A)." *State v. Owens*, 4th Dist. Gallia No. 14CA9, 2015-Ohio-3017, ¶ 12, quoting *United States v. Mechanik*, 475 U.S. 66, 71, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986).

{¶46} In interpreting the similarly worded Fed.R.Crim.P. 6(d), the United States Supreme Court held that the rule "protects against the danger that a defendant will be required to

defend against a charge for which there is no probable cause to believe him guilty." *Mechanik* at 70. The Supreme Court held that any error in the simultaneous presence and testimony of two government witnesses before the grand jury was rendered harmless by the jury's subsequent guilty verdict because that verdict meant "not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." *Id.* at 69-70; *see also Bank of Nova Scotia v. United States*, 484 U.S. 1003, 108 S.Ct. 693, 98 L.Ed.2d 645 (1988) (violation of Fed.R.Crim.P. 6(d) by the joint appearances of IRS agents before the grand jury to read transcripts to the jurors was subject to harmless-error rule).

{¶47} Similarly, in *State v. Jewell*, 4th Dist. Vinton No. CA448, 1990 WL 127049, *8 (Aug. 22, 1990), we affirmed a trial court's denial of a motion to quash indictments based on a violation of Crim.R. 6(D) because of a caseworker's unauthorized presence during grand jury proceedings because in accordance with *Mechanik*, "[a] conviction of a criminal defendant by a jury renders harmless any conceivable error regarding the presence of unauthorized persons during grand jury proceedings." In addition, we held that because the caseworker was present during only the grand jury proceedings that resulted in an indictment upon which the defendant was ultimately acquitted, the error was also harmless for that reason. *Id.*

{¶48} These holdings are consistent with the holdings of the majority of other courts that have addressed this issue, which require the showing of prejudice for a successful challenge to an indictment on this basis. *See, e.g., State v. Korecky*, 10th Dist. Franklin Nos. 94APA10-1505 and 94APA10-1506, 1995 WL 360303, *2; *see also* Annotation, *Presence of Unauthorized Persons during Grand Jury Proceedings as affecting Indictment*, 23 A.L.R.4th 397, Section 3 (1983).

{¶49} Based on this authority, the jury's verdicts of guilty on the charge of gross sexual imposition and not guilty on the remaining charges rendered harmless any error in the trial court not formally appointing Matune as special prosecutor before she presented the case to the grand jury. We observe that Matune was otherwise qualified to present the matter to the grand jury. In this regard, we reject Owens's argument in his reply brief that not crediting his argument is tantamount to permitting the Attorney General to effect "an audacious jurisdictional 'power-grab' " by deciding to prosecute cases "that the County Prosecutor has decided not to prosecute." Owens similarly contends that "Prosecutor Adkins *did not* ask Assistant Attorney General Matune to present the matter to the Grand Jury" and "[s]omeone from the Attorney General's Office took it upon himself or herself to do this without authority from Prosecutor Adkins." (Emphasis sic.) The transcript of the grand jury proceeding establishes that Matune and the Attorney General's office was requested by the Gallia County Prosecuting Attorney's office to handle the matter because of a conflict of interest. Because the error was forfeited by Owens when he failed to timely object to the indictment; and he failed to prove that this error constituted plain error where his substantial rights were not violated, we overrule his first assignment of error.

B. Appearance of Attorneys without Proper Appointment

{¶50} In his second assignment of error, Owens contends that the trial court erred to the prejudice of his substantial rights by allowing several assistant attorneys general to appear as Gallia County prosecutors in his criminal case before they were appointed to do so. "It is a well-established rule that ' "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time such error could have been avoided or corrected by the trial court." ' " *State v.*

Quarterman, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15, quoting *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 277 (1968), paragraph three of the syllabus. By failing to object to the appearance of these assistant attorneys general during the trial court proceedings, Owens forfeited all but plain error. *See, e.g., DeRolph v. State*, 94 Ohio St.3d 40, 42, 760 N.E.2d 351 (2001) ("The time has now passed for the Attorney General to object, and we find that the state has waived its right to challenge the separate appearance of the officials * * * or their representation by separate counsel").

{¶51} Moreover, Owens failed to establish that any error constituted plain error—that it affected his substantial rights, *i.e.*, that the outcome of his trial would have clearly been otherwise without the participation of the contested assistant attorneys general. Therefore, we overrule his second assignment of error.

C. Sufficiency and Manifest Weight of the Evidence

{¶52} In his third assignment of error, Owens argues that his conviction for gross sexual imposition is not supported by sufficient evidence. In his fourth assignment of error, Owens claims that his conviction for gross sexual imposition is against the manifest weight of the evidence.

{¶53} "When a court reviews a record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Maxwell*, 139 Ohio St.3d 12, 2014–Ohio–1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The court must defer to the trier of fact on

questions of credibility and the weight assigned to the evidence. *Kirkland*, 140 Ohio St.3d 73, 2014–Ohio–1966, 15 N.E.3d 818, at ¶ 132.

{¶54} In determining whether a criminal conviction is against the manifest weight of the evidence, an 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011–Ohio–6254, 960 N.E.2d 955, ¶ 119. "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387. But the weight and credibility of evidence are to be determined by the trier of fact. *Kirkland* at ¶ 132. "A jury, sitting as the trier of fact, is free to believe all, part or none of the testimony of any witness who appears before it." *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014–Ohio–1941, ¶ 23. We defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Id*.

{¶55} The jury convicted Owens of gross sexual imposition in violation of R.C. 2907.05(A)(4) as charged in the third count of the indictment. The statute specifies that "[n]o person shall have sexual contact with another, not the spouse of the offender, cause another, not the spouse of the offender, to have sexual contact with the offender * * * when * * * [t]he other person * * * is less than thirteen years of age, whether or not the offender knows the age of that person." R.C. 2907.01(B) defines "[s]exual contact" as "any touching of an erogenous zone of

another, including without limitation the thigh, genitals, buttock, public region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶56} The state presented evidence that included two prior statements of S.J. regarding the charge of gross sexual imposition as well as her trial testimony. In her statement to the school nurse, S.J. noted that Owens climbed into her bed, pulled down her panties, and rubbed his private parts against her back, but left when her stepsister woke up. In her videotaped interview with the child-abuse specialist at the Child Protection Center, S.J. detailed that during the time of the Winter Olympics in February 2010, Owens got into bed with her, pulled down her pants, and pushed her towards his penis. When she tried to pull up her pants, she accidentally touched his penis. Dr. McCallum testified that S.J. recounted the same incidents to him that same visit. At trial, S.J. testified that while they were watching the Winter Olympics, Owens turned off the television, got behind her in her bed, and pulled down her pants multiple times, with S.J. attempting to pull them back up. S.J. denied Owens's request to put his penis between her legs. Finally, around the time that Owens was inappropriately touching S.J., she drew sexually explicit pictures that indicated a knowledge that was not developmentally typical for someone of her young age.

{¶57} Although Owens points to various inconsistencies between her statements and her trial testimony, the jury was free to believe all, part, or none of S.J.'s testimony. *West* at ¶ 23; *see also State v. Gavin*, 4th Dist. Scioto No. 13CA3592, 2015-Ohio-2996, ¶ 29. The state's evidence established that Owens had sexual contact with his then-nine-year-old daughter by pulling down her pants, rubbing his private parts against her, and/or having her touch his penis.

{¶58} Nor does Owens's acquittal of the other charges he faced require an acquittal on the charge of gross sexual imposition. Consistency in the jury verdict is not required because

each separate count is treated as if it were a separate indictment. *See State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 81, citing *United States v. Powell*, 469 U.S. 57, 62, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984).

{¶59} Finally, insofar as Owens asserts that S.J.'s trial testimony did not establish that she touched Owens's penis during the incident, which he claims the state's amended bill of particulars specified as the sexual contact in the charge, he did not assign this variance from the amended bill as error and we need not address it. *See State v. Nguyen*, 4th Dist. Athens No. 14CA42, 2015-Ohio-4414, ¶ 41 ("we need not address this contention because we review assignments of error and not mere arguments").

{¶60} Based on the evidence before it, the jury neither clearly lost its way nor created a manifest miscarriage of justice in finding that the state had proved the essential elements of gross sexual imposition beyond a reasonable doubt. We overrule Owens's third and fourth assignments of error.

D. Mandatory Prison Term under R.C. 2907.05(C)(2)(a)

{¶61} In his fifth assignment of error, Owens asserts that the trial court's imposition of a mandatory prison term pursuant to R.C. 2907.05(C)(2)(a) violated his rights to due process of law and trial by jury under the United States and Ohio Constitutions.

{¶62} In *State v. Bevly*, 142 Ohio St.3d 41, 2015-Ohio-475, 27 N.E.3d 516, at paragraphs one and two of the syllabus, the Supreme Court of Ohio resolved this issue by holding that this provision of R.C. 2907.05(C)(2)(a) is unconstitutional:

> 1. Because there is no rational basis for the provision in R.C. 2907.05(C)(2)(a) that requires a mandatory prison term for a defendant convicted of gross sexual imposition when the state has produced evidence corroborating the crime, the

> statute violates the due-process protections of the Fifth and Fourteenth Amendments to the United States Constitution.
>
> 2. In cases in which a defendant has pled guilty, imposing a mandatory prison term pursuant to R.C. 2907.05(C)(2)(a) when corroborating evidence of the charge of gross sexual imposition is produced violates the defendant's right to a jury trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

{¶63} The state agrees that based on *Bevly*, a remand is required for the limited purpose of conducting a new sentencing hearing consistent with that case. *See also State v. Shifflet*, 2015-Ohio-4250, __ N.E.3d __, ¶ 48 (4th Dist.). We sustain Owens's fifth assignment of error.

V. Conclusion

{¶64} Having sustained Owens's fifth assignment of error, we reverse the judgment of the trial court and remand the cause for the purpose of conducting a new sentencing hearing consistent with *Bevly*. Having overruled Owens's remaining assignments of error, we affirm his conviction for gross sexual imposition.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and Piper, J.*: Concur in Judgment and Opinion.

For the Court

BY: _____
Marie Hoover, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

*Judge Robert N. Piper III from the Twelfth Appellate District, sitting by assignment of the Supreme Court of Ohio in the Fourth Appellate District.