[Cite as *State v. Rossiter*, 2023-Ohio-4809.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 21CA3762
v.	:	
DANIEL ROSSITER,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Peter Galyardt, Assistant State Public Defender, Columbus, Ohio, for appellant.[1]

Jeffrey C. Marks, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:12-20-23
ABELE, J.

{¶1} This is an appeal from a Ross County Common Pleas Court judgment of conviction and sentence. A jury found Daniel Rossiter, defendant below and appellee herein, guilty of three counts of gross sexual imposition in violation of R.C. 2907.05.

{¶2} Appellant assigns the following errors for review:

---

[1] Different counsel represented appellant during the trial court proceedings.

FIRST ASSIGNMENT OF ERROR:

"DANIEL ROSSITER RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT SENTENCED DANIEL ROSSITER TO A MULTIPLE-OFFENSE CONSECUTIVE SENTENCE THAT IS NOT CLEARLY AND CONVINCINGLY SUPPORTED BY THE RECORD AT EACH LEVEL OF ENHANCEMENT."

THIRD ASSIGNMENT OF ERROR:

"DANIEL ROSSITER'S SENTENCE IS UNCONSTITUTIONAL."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL [COURT] COMMITTED PLAIN ERROR WHEN IT IMPOSED THE WRONG SEX OFFENDER REGISTRATION TIER LEVEL UPON DANIEL ROSSITER."

{¶3} At the end of July 2020, Charity Johnson's five-year-old daughter, T.J., reported that appellant, T.J.'s grandfather, had molested her. After an investigation, a Ross County Grand Jury returned an indictment that charged appellant with three counts of gross sexual imposition, in violation of R.C. 2907.05.[2]

---

[2] The indictment does not recite the subdivision that applies. The language of the indictment, however, tracks R.C. 2907.05(A)(4):

> (A) No 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; or cause two or more other persons to have sexual contact when * * *
> * * * *
> (4) The other person, or one of the other persons,

{¶4} On October 26 and 27, 2021, the trial court held a jury trial. Charity testified that her aunt, who lived with Charity's mother and appellant, watched T.J. while Charity and her husband worked. At the end of July 2020, T.J. made statements that caused Charity concern. Charity learned that her father, appellant, had asked T.J. "to perform sexual things to him." Charity contacted the sheriff's office to report the allegations.

{¶5} T.J., age seven at the time of trial, testified that she saw appellant naked, but "only under the blankets." T.J. stated that appellant asked her to touch him in his "private part" or "pee pee." She elaborated that she touched appellant's "private part" with her hands and "rubbed it up and down." T.J. explained that she believes similar incidents had happened more than ten times. T.J. additionally stated that appellant touched her private part on "the outside but not on the inside." She testified that if appellant wanted to look inside, he "spread it apart." Appellant told her not to tell anyone about the incidents, but she later told her mother "because it was bad."

{¶6} Brian Putnam, a human resources operations manager at the company where appellant worked, stated that in early August 2020 appellant informed him that "he was about to lose everything and needed advice regarding his employment." When Putnam asked for

---

is less than thirteen years of age, whether or not the offender knows the age of that person.

additional information, appellant told him that he was about to be charged with gross sexual imposition. Appellant told Putnam "that he was guilty."

{¶7} Detective Tony Wheaton testified that on July 30, 2020, he received a telephone call from a patrol sergeant who had spoken with T.J.'s family about the allegations. The detective contacted Ross County Children Services and the Child Protection Center to schedule an interview with the child. He later observed the child's interview at the Child Protection Center. Immediately after the interview, Wheaton drove to appellant's residence to discuss the allegations. At first, appellant denied the allegations and claimed that any contact was inadvertent or for medical purposes. The next day, however, appellant called Wheaton and said he wanted to discuss the matter. Wheaton again drove to appellant's house and, this time, he recorded the conversation.

{¶8} During the conversation, appellant stated that he engaged in sexual contact with T.J. three or four times. He explained that the first time, the child asked if she could see his penis, but she did not touch it. The next time, T.J. wanted to see his penis and appellant asked if she wanted to touch it. She said yes. According to appellant, T.J. then asked if she could take off her shorts and stated that "it's only fair, I touched yours, you get to touch mine." At that point appellant "just kind of squeezed the outer lips together." The third time was about the same as the

second and according to appellant, when T.J. asked if she could see his penis, appellant showed it to her. T.J. "wanted to touch [it] so [appellant] let her." Appellant stated that T.J. liked to play and thought they were playing a game.

{¶9} On August 10, 2020, appellant called Detective Wheaton's cell phone. During this conversation, appellant

> basically wanted to reiterate that he was not blaming [the victim] for his actions. He also knew that at some point in time, he was going to be arrested and that he was willing to turn himself in. He had also indicated that at that point in time, he was not going to dispute this and traumatize [the victim] any further by having her have to testify in front of a bunch of strangers in a courthouse setting and that he would take full responsibility for his actions.

{¶10} After Detective Wheaton's testimony, the state rested. Appellant chose not to present any witnesses. After hearing the evidence, the jury found appellant guilty of all three counts.

{¶11} On November 9, 2021, the trial court held a sentencing hearing. At the start, the parties expressed confusion over whether appellant should be classified a Tier II or Tier III sex offender, but eventually settled on a Tier III sex-offender classification. The state also asked the court to impose a 14-year prison sentence.

{¶12} Appellant's counsel asked the trial court to consider that "aside from traffic tickets, this was [appellant]'s first real interaction with the criminal justice system." He requested the court impose a sentence "much less than 14 years." The court asked

appellant if he wished to make "any statement * * * in mitigation of punishment" before the court pronounced sentence, and appellant responded that he did. Appellant stated:

> I know what I did was wrong. I still maintain that this was not a sexual act. There was nothing sexual about it for me and I am very remorseful for my family and the things that I put them through and the trust that I destroyed. I pray everyday that God helps them through this and I wish I could take it back but I can't. There [were] things that T.J. confided in me during our few brief moments of alone time of sexual content between her and her brother and that's what led to this. Our family is very open sexually as far as they've always come to me and asked me questions. I raised both of my girls by myself. My wife worked. I was home alone all the time with them. * * * * I realize that this particular situation, I definitely overstepped my bounds but I – there was no sexual intent on my part whatsoever.

{¶13} Before it pronounced sentence, the trial court stated that it "listened to [appellant']s statements with great interest" and was "absolutely floored" that appellant tried "to represent to the court that this was not a sexual act and there was nothing sexual about it." The court explained that appellant's granddaughter, the victim, testified "and what she described was quite graphic and it was clearly a sexual act." The court found that appellant committed "the worst form of the offense" and poses "the greatest likelihood of committing future crimes." The court explained that appellant abused his five-year-old granddaughter when she had been entrusted to his care, used his "familial relationship and position of trust to manipulate and access that child for purposes of sexual gratification," and "engaged in

extremely predatory behavior." The court thus imposed the maximum sentence, five years in prison, on each count and ordered the sentences to be served consecutively to one another. The court found that (1) consecutive sentences are necessary to protect the public from future crime and to punish the offender; (2) consecutive sentences are not disproportionate to the seriousness of appellant's conduct and to the danger that he poses to the public; (3) at least two of the offenses were committed as part of one or more courses of conduct; and (4) the harm caused by two or more of the offenses was so great or unusual that no single prison term for any of the offenses committed as part of any course of conduct adequately reflects the seriousness of his conduct.

{¶14} On November 16, 2021, the trial court entered a sentencing decision that reflected its on-the-record findings and sentenced appellant to serve five years of imprisonment for each offense, to be served consecutively, and designated appellant a Tier III sexual offender. This appeal followed.

I

{¶15} In his first assignment of error, appellant asserts that for two reasons trial counsel failed to provide effective assistance of counsel. First, appellant contends that counsel failed to object to Detective Wheaton's testimony that appellant reported he "was not going to dispute this and traumatize [the victim] any further by having her testify in front of a bunch of

strangers in a courthouse setting and that he would take full responsibility for his actions." Second, appellant contends that counsel improperly advised the trial court that his offenses qualified him as a Tier III sex offender.

A

{¶16} The Sixth Amendment to the United States Constitution, and Article I, Section 10 of the Ohio Constitution, provides that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a criminal defendant is entitled to the "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Hinton v. Alabama*, 571 U.S. 263, 272, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) (the Sixth Amendment right to counsel means "that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence").

{¶17} To establish constitutionally ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *E.g., Strickland*, 466 U.S. at 687; *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 183; *State v.*

Powell, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 85. "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (a defendant's failure to satisfy one of the ineffective-assistance-of-counsel elements "negates a court's need to consider the other").

{¶18} The deficient performance part of an ineffectiveness claim "is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), quoting *Strickland*, 466 U.S. at 688; *accord Hinton*, 571 U.S. at 273. Prevailing professional norms dictate that "a lawyer must have 'full authority to manage the conduct of the trial.'" *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270, ¶ 24, quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).

{¶19} Furthermore, "'[i]n any case presenting an ineffectiveness claim, "the performance inquiry must be whether counsel's assistance was reasonable considering all the

circumstances."'" *Hinton*, 571 U.S. at 273, quoting *Strickland*, 466 U.S. at 688. Accordingly, "[i]n order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95 (citations omitted).

{¶20} Moreover, when considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* Additionally, "[a] properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were "so serious" that counsel failed to function "as the 'counsel' guaranteed * * * by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *e.g., State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin*, 37 Ohio St.3d 153,

156, 524 N.E.2d 476 (1988).

{¶21} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that "'but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome.'" *Hinton*, 571 U.S. at 275, quoting *Strickland*, 466 U.S. at 694; *e.g., State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus; *accord State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 91 (prejudice component requires a "but for" analysis). "'[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Hinton*, 571 U.S. at 275, quoting *Strickland*, 466 U.S. at 695. Furthermore, courts ordinarily may not simply presume the existence of prejudice but, instead, must require a defendant to affirmatively establish prejudice. *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, ¶ 22; *State v. Tucker*, 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002); *see generally Roe v. Flores-Ortega*, 528 U.S. 470, 483, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2008) (prejudice may be presumed in limited contexts, none

of which are relevant here).

B

{¶22} Appellant first asserts that trial counsel performed ineffectively by failing to object to Detective Wheaton's testimony that appellant informed the detective that appellant "was not going to dispute this and traumatize [the victim] any further by having her testify in front of a bunch of strangers in a courthouse setting and that he would take full responsibility for his actions." Appellant asserts that this statement is not relevant to prove "any point of contention at issue" and "had no relevance to any element of the offenses" at issue. He further argues that, even if that particular evidence could be deemed relevant, the danger of unfair prejudice substantially outweighed its probative value. Appellant claims that the statement "impugned [his] inviolate constitutional right to a public jury trial." He thus alleges that trial counsel performed deficiently by failing to object to the statement.

{¶23} Appellant further alleges that trial counsel's deficient performance prejudiced his defense because, he reasons, the statement "posed a grave risk and enticement to convict on an improper basis – namely the emotional one that

[appellant] yet again harmed his granddaughter by exercising his inviolate constitutional right to a public jury trial – which is plainly forbidden." Appellant argues that "the emotional pull from [the] statement colors the entirety of one's guilt determination on these facts, so it cannot be said that the statement did not reasonably contribute to the conviction."

{¶24} The state counters that the statement is relevant and, thus, trial counsel did not perform deficiently by failing to object to the statement. The state asserts that the entire context of the statement shows that appellant "is guilty" and "he knew what he did was wrong." The state points out that Detective Wheaton testified that appellant called the detective "to clarify some more about [the] investigation." Wheaton recounted the conversation with appellant:

> He basically wanted to reiterate that he was not blaming [the victim] for his actions. He also knew that at some point in time, he was going to be arrested and that he was willing to turn himself in. He had also indicated that at that point in time, he was not going to dispute this and traumatize [the victim] any further by having her testify in front of a bunch of strangers in a courthouse setting and that he would take full responsibility for his actions.

{¶25} The state argues that appellant's "statement that 'he would take full responsibility for his actions' is tantamount to him saying he is guilty and confessing to the crime," and his statement that "he did not want to traumatize the victim any

further is extremely probative of his guilt and that he knew exactly what he was doing." The state claims that the statement implies that appellant "acknowledged he already had traumatized" the victim and, thus, the "statement is clearly more probative than prejudicial, clearly relevant, and clearly admissible."

{¶26} The state also disputes appellant's assertion that the statement castigated appellant for exercising his right to a jury trial. The state argues that during the trial, it did not refer to appellant's decision to exercise his right to a jury trial and that "[i]t is pure speculation that the jury was overcome by emotion and used [the] statement in that way." The state further contends that, even if trial counsel performed deficiently by failing to object to the statement, any deficiency did not prejudice the defense because a reasonable probability does not exist that the outcome of the trial would have been different without the statement due to "a mountain of evidence" the record contained.

{¶27} We initially note that trial counsel's "failure to make objections is not alone enough to sustain a claim of ineffective assistance of counsel." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 103; *accord State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, 71 N.E.3d 1034, ¶ 144 (rejecting argument that failing to preserve error is

inherently prejudicial and stating, "[i]t is not enough that an alleged error resulted in a disadvantage for an accused"). Instead, a defendant still must "show that any particular failure to object substantially violated an[] essential duty [and] was prejudicial." *State v. Fears*, 86 Ohio St.3d 329, 347, 715 N.E.2d 136 (1999); *accord State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831 (1988) (failure to object insufficient on its own to establish ineffective assistance of counsel; instead, defendant must demonstrate that counsel substantially violated an essential duty and counsel's performance materially prejudiced defense).

{¶28} Additionally, trial counsel's decision to object, or not to object, may constitute a legitimate trial strategy or tactical decision for the reason that "'each potentially objectionable event could actually act to [the defendant]'s detriment.'" *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 140, quoting *Lundgren v. Mitchell*, 440 F.3d 754, 774 (C.A.6, 2006). Thus,

> "any single failure to object usually cannot be said to have been error unless the evidence sought is so prejudicial * * * that failure to object essentially defaults the case to the state. Otherwise, defense counsel must so consistently fail to use objections, despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice."

Johnson at ¶ 140, quoting *Lundgren*, 440 F.3d at 774; *cf. United States v. Cronic*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (describing right to effective assistance of counsel as "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing").

{¶29} In the case at bar, after our review we do not believe that trial counsel's single failure to object to the challenged statement essentially defaulted the case to the state. Appellant confessed to the crimes, not only in the challenged statement to Detective Wheaton, but also in conversation with his employer's human resources operations manager and in another conversation with the detective. Thus, we do not believe that trial counsel's failure to object to the challenged statement did, in effect, default the case to the state.

{¶30} Moreover, even if trial counsel had objected, the trial court would have had discretion to allow the statement into evidence. We do not believe that the statement is so inherently irrelevant or prejudicial that had counsel objected, the trial court obviously would have sustained the objection.

{¶31} Furthermore, even if we presume that trial counsel performed deficiently by failing to object to the statement (and the trial court would have excluded the statement), we do not believe that appellant established that a reasonable probability

exists that, absent the statement, the jury would have had a reasonable doubt respecting guilt. Instead, even without this one statement, we believe that the record contains ample, other evidence to establish appellant's guilt. Notably, appellant admitted, on more than one occasion, that he committed the offenses. Thus, the record supports appellant's convictions. Consequently, we believe that trial counsel's failure to object to the challenged statement did not constitute ineffective assistance of counsel. *See generally State v. Roig*, 8th Dist. Cuyahoga No. 102423, 2015-Ohio-3884, ¶ 12 (upholding conviction even though prosecutor commented, during closing argument, "to the effect that the victim had to suffer through the trial, improperly implying that [the defendant's] invocation of the right to a trial caused further harm to the victim"); *State v. Miller*, 1st Dist. Hamilton No. C-010543, 2002-Ohio-3296, ¶ 35-37 (prosecutor's improper comment on defendant's jury-trial right did not infect the trial with so much unfairness that conviction violated due-process rights).

Sex-offender Classification

{¶32} Appellant next argues that trial counsel failed to advocate for the correct sex-offender classification. Appellant asserts that: (1) trial counsel performed deficiently by failing to direct the trial court to the correct sex-offender-

classification level, Tier II, and (2) counsel's deficient performance prejudiced him in that it caused the trial court to impose an incorrect sex-offender classification. Here, the state concedes the error.

{¶33} We agree with the parties. R.C. 2950.01(F)(1)(c) states that a "Tier II sex offender/child-victim offender" includes a sex offender who has been convicted of violating R.C. 2907.05(A)(4). R.C. 2950.01(G)(1)(b) provides that a "Tier III sex offender/child-victim offender" includes a sex offender who has been convicted of violating R.C. 2907.05(B).[3] Appellant was convicted of violating R.C. 2907.05(A)(4), not R.C. 2907.05(B). Therefore, appellant's trial counsel (and the prosecution and trial court) should have proposed that the trial court classify appellant a Tier II, not a Tier III, sex offender. Trial counsel's failure to do so constituted deficient performance and this affected the outcome of the proceeding.

{¶34} Consequently, we agree with appellant that trial

---

[3] R.C. 2907.05(B) states as follows:

> No person shall knowingly touch the genitalia of another, when the touching is not through clothing, the other person is less than twelve years of age, whether or not the offender knows the age of that person, and the touching is done with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

counsel performed ineffectively for the failure to ask the court to impose a Tier II sex-offender classification. To this limited extent, we sustain appellant's first assignment of error, vacate the trial court's Tier III classification, and remand the matter so that the trial court may hold a new sex-offender classification hearing and notify appellant of the Tier II requirements. In all other respects, we overrule appellant's first assignment of error.

{¶35} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error to the extent that it relates to trial counsel's failure to object to the statement at issue, but sustain appellant's first assignment of error regarding trial counsel's failure to point the trial court to the correct sex-offender classification.

II

{¶36} In his second assignment of error, appellant asserts that the trial court erred by ordering him to serve consecutive sentences. Appellant contends that the record does not clearly and convincingly support consecutive sentences "at each level of enhancement." Although appellant does not challenge the trial court's decision to impose consecutive sentences for the first two offenses for a total prison term of ten years, he claims that clear and convincing evidence does not support the trial

court's decision that he consecutively serve all three offenses for a total of 15 years in prison. Appellant argues that before the trial court may impose any additional consecutive sentence, the court is first required to find that this additional consecutive sentence satisfied R.C. 2929.14(C)(4). Thus, appellant contends that the record does not clearly and convincingly support his additional consecutive sentence. In particular, appellant points out (1) he has no prior criminal history, except traffic violations, and (2) his criminal conduct occurred over a three-month period, which constitutes a tiny fraction of his life. Appellant thus alleges that he has led a "significant law-abiding life," and he faults the trial court for failing to appropriately weigh appellant's law-abiding life. Appellant surmises that had the trial court properly considered his law-abiding life, it would not have imposed the additional consecutive sentence. Thus, appellant requests that we modify the trial court's sentence so that the third offense be served concurrently with the first two offenses for a total prison term of ten years.

{¶37} We first observe that at the sentencing hearing appellant did not object to the imposition of consecutive sentences, nor did he argue that the trial court is required to articulate findings to support its consecutive sentence "at each

level of enhancement." A well-established principle is that appellate courts ordinarily will not consider any error that a complaining party "could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus. Moreover, it is well-settled that a party may not raise new issues or legal theories for the first time on appeal. *Stores Realty Co. v. Cleveland*, 41 Ohio St.2d 41, 43, 322 N.E.2d 629 (1975). Thus, a litigant who fails to raise an argument before the trial court forfeits the right to raise that issue on appeal. *Independence v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 30 ("an appellant generally may not raise an argument on appeal that the appellant has not raised in the lower courts"); *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 21 (defendant forfeited constitutional challenge by failing to raise it during trial court proceedings); *Gibson v. Meadow Gold Dairy*, 88 Ohio St.3d 201, 204, 724 N.E.2d 787 (2000) (party waived arguments for purposes of appeal when party failed to raise those arguments during trial court proceedings); *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992) (appellant cannot "present * * *

new arguments for the first time on appeal"); *accord State ex rel. Jeffers v. Athens Cty. Commrs.*, 4th Dist. Athens No. 15CA27, 2016-Ohio-8119, fn.3 ("[i]t is well-settled that failure to raise an argument in the trial court results in waiver of the argument for purposes of appeal"); *State v. Anderson*, 4th Dist. Washington No. 15CA28, 2016-Ohio-2704, ¶ 24 ("arguments not presented in the trial court are deemed to be waived and may not be raised for the first time on appeal").

{¶38} Appellate courts, nevertheless, have discretion to consider "[p]lain errors or defects affecting substantial rights." Crim.R. 52(B); *e.g., Risner v. Ohio Dept. of Natural Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 27. "To prevail under the plain-error standard, a defendant must show that an error occurred, that it was obvious, and that it affected his substantial rights," i.e., the trial court's error must have affected the outcome of the trial. *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 62, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). However, even when a defendant demonstrates that a plain error or defect may have affected his substantial rights, the Ohio Supreme Court has "admonish[ed] courts to notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest

miscarriage of justice.'" *Barnes*, 94 Ohio St.3d at 27, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶39} In the case sub judice, we do not believe that the trial court plainly erred by failing to articulate consecutive-sentence findings for each consecutive term of imprisonment. First, appellant does not cite authority to directly support the rule that he proposes – that a trial court must "separately find that consecutive sentences were statutorily necessary at each level of enhancement." Instead, appellant extrapolates that proposed rule from *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, 846 N.E.2d 824, and *State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-4761, 141 N.E.3d 169. Neither case, alone or together, clearly articulates the rule that appellant proposes. Therefore, we are unable to conclude that the trial court made an obvious error by failing to "separately find that consecutive sentences were statutorily necessary at each level of enhancement." *See Johnson v. United States*, 520 U.S. 461, 467, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (for an error to be "plain" or "obvious," the error must be plain "under current law" "at the time of appellate consideration"); *accord Barnes*, 94 Ohio St.3d at 27.

{¶40} Furthermore, we believe that a review of the record

reveals that the trial court complied with the statutory procedure to impose consecutive sentences. We observe that appellant agrees that the trial "court made the requisite consecutive-sentencing findings for the aggregate fifteen-year prison term." Additionally, the record does not clearly and convincingly show that the record fails to support the trial court's R.C. 2929.14(C)(4) findings.

{¶41} When reviewing felony sentences, appellate courts apply the standard set forth in R.C. 2953.08(G)(2). *E.g., State v. Nelson*, 4th Dist. Meigs No. 22CA10, 2023-Ohio-3566, ¶ 63. R.C. 2953.08(G)(2)(a) provides that "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." Instead, R.C. 2953.08(G)(2) authorizes appellate courts to "increase, reduce, or otherwise modify a sentence" "if it clearly and convincingly finds either of the following":

> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
> (b) That the sentence is otherwise contrary to law.

{¶42} Practically speaking, R.C. 2953.08(G)(2) means that appellate courts ordinarily "'defer to trial courts' broad discretion in making sentencing decisions.'" *State v. Gwynne*,

___ Ohio St.3d ___, 2023-Ohio-3851, ___ N.E.3d ___, ¶ 11 (*Gwynne II*), quoting *State v. Rahab*, 150 Ohio St.3d 152, 2017-Ohio-1401, 80 N.E.3d 431, ¶ 10 (lead opinion), and citing *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 23 (describing the appellate court's review of whether a sentence is clearly and convincingly contrary to law under R.C. 2953.08(G) as being deferential to the sentencing court); *accord State v. Creech*, 4th Dist. Scioto No. 16CA3730, 2017-Ohio-6951, ¶ 11, quoting *State v. Venes*, 8th Dist. Cuyahoga No. 98682, 2013-Ohio-1891, ¶ 21 ("[t]he language in R.C. 2953.08(G)(2) establishes an 'extremely deferential standard of review' for 'the restriction is on the appellate court, not the trial judge'").[4] In other words, appellate courts "may increase, reduce, or otherwise modify consecutive sentences only if the record does not 'clearly and convincingly' support the trial court's R.C. 2929.14(C)(4) consecutive-sentence findings." *Gwynne II* at ¶ 13.

> "[C]lear and convincing evidence" means "that measure or degree of proof which is more than a mere

[4] Interestingly, Justice Stewart, then a judge for the Eighth District Court of Appeals, authored the decision in *State v. Venes*. Justice Stewart took the opposite position when writing the majority decision in *Gwynne I*.

And the concurring opinion in *Venes* could not have been more prescient: "The doctrine of stare decisis now appears to be a mythical beast when it comes to criminal law." *Venes* at ¶ 31 (Rocco, J., concurring).

> 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established."

Gwynne II at ¶ 14, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

> Therefore, an appellate court is directed that it must have a firm belief or conviction that the record does not support the trial court's findings before it may increase, reduce, or otherwise modify consecutive sentences. The statutory language does not require that the appellate court have a firm belief or conviction that the record supports the findings. This language is plain and unambiguous and expresses the General Assembly's intent that appellate courts employ a deferential standard to the trial court's consecutive-sentence findings. R.C. 2953.08(G)(2) also ensures that an appellate court does not simply substitute its judgment for that of a trial court.

Gwynne II at ¶ 15.

{¶43} R.C. 2929.14(C)(4) outlines the requirements that trial courts must follow when imposing consecutive sentences. The statute provides:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to

> section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶44} In the case sub judice, we believe the record shows, and appellant agrees, that the trial court entered appropriate R.C. 2929.14(C)(4) findings. Additionally, the record does not clearly and convincingly show that the trial court's findings with respect to the R.C. 2929.14(C)(4) factors lack support. Consequently, we believe that we have no basis to disturb the trial court's sentencing determination.

{¶45} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

III

{¶46} In his third assignment of error, appellant asserts that his sentence is unconstitutional because the trial court had "a clear inability to render fair judgment" when it sentenced him. Appellant reiterates the arguments raised in his second assignment of error and additionally asserts that the trial court (1) "did not order and consider a pre-sentence

investigation report that would have provided it with a data-based recidivism score," and (2) "reacted immediately after hearing [appellant's] statement at sentencing without allowing for time and reflection." Appellant alleges that these factors illustrate that the trial court had "a clear inability to render [a] fair judgment" and "violated constitutional due process."

{¶47} "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *accord Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009). For purposes of the due-process guarantee, fairness "requires the absence of actual bias in the trial of cases" and "a system of law [that] endeavor[s] to prevent even the probability of unfairness." *Murchison*, 349 U.S. at 136. Thus, a "trial before a biased judge is fundamentally unfair and denies a defendant due process of law." *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, 34, citing *Rose v. Clark*, 478 U.S. 570, 577, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980) ("the Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases"). In fact, "[t]he presence of a biased judge on the bench is * * a paradigmatic example of structural

constitutional error, which if shown requires reversal without resort to harmless-error analysis." *State v. Sanders*, 92 Ohio St. 3d 245, 278, 750 N.E.2d 90 (2001), citing *Arizona v. Fulminante*, 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *see also State v. Stafford*, 158 Ohio App. 3d 509, 2004-Ohio-3893, 817 N.E.2d 411, ¶ 58 (1st Dist.) ("A biased trial court is a structural constitutional error and, if shown, requires reversal without resorting to a harmless-error analysis."). Structural error typically "is grounds for automatic reversal," so long as an objection has been raised in the trial court. *State v. West*, 168 Ohio St.3d 605, 2022-Ohio-1556, 200 N.E.3d 1048, ¶ 2.

{¶48} In the case at bar, appellant did not object during the sentencing hearing and assert that the judge displayed bias. Consequently, "our review is for plain error only." *Id.* at ¶ 28 ("assertions of structural error do not preclude an appellate court from applying the plain-error standard when the accused has failed to object") (citations omitted).

> Judicial bias has been described as "a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts."

State v. Dean, 127 Ohio St.3d 140, 2010-Ohio-5070, 937 N.E.2d

97, ¶ 47, quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph four of the syllabus; *accord State v. Weaver*, ___ Ohio St.3d ___, 2022-Ohio-4371, ___ N.E.3d ___, ¶ 59*; Culp v. Olukoga*, 2013-Ohio-5211, 3 N.E.3d 724, ¶ 55 (4th Dist.). "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings" and "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases" ordinarily do not demonstrate bias, unless those judicial opinions or remarks "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); *accord Weaver* at ¶ 59.

{¶49} Furthermore, judges are "presumed to follow the law and not to be biased, and the appearance of bias or prejudice must be compelling to overcome these presumptions." *In re Disqualification of George*, 100 Ohio St.3d 1241, 2003-Ohio-5489, 798 N.E.2d 23, ¶ 5.

{¶50} Consequently, "[a]llegations that are based solely on innuendo and speculation are insufficient to establish bias or prejudice." *In re Disqualification of Pokorny*, 135 Ohio St.3d 1268, 2013-Ohio-915, 986 N.E.2d 993, ¶ 6. We additionally

observe that "'[b]ias against a party is difficult to question unless the judge specifically verbalizes personal bias or prejudice toward a party.'" *Culp* at ¶ 55, quoting *Frank Novak & Sons, Inc. v. Brantley, Inc.*, 8th Dist. Cuyahoga No. 77823, 2001 WL 303716 (Mar. 29, 2001).

{¶51} In the case at bar, we perceive nothing in the sentencing hearing transcript to indicate that the trial judge exhibited any level of bias sufficient to call the fairness of the sentencing hearing into question. Consequently, we disagree with appellant's argument that the trial court could not render a fair judgment. We also disagree with appellant that the trial court's decision to forgo a presentence investigation report shows that the court was unable to render a fair judgment. As we noted in previous cases, "a presentence investigation report is only required if a trial court imposes community control." *State v. Smith*, 4th Dist. Scioto No. 20CA3934, 2022-Ohio-371, ¶ 133. In *Smith* at ¶ 133, we explained:

> Crim.R. 32.2 states: "Unless the defendant and the prosecutor in the case agree to waive the presentence investigation report, the court shall, in felony cases, order a presentence investigation and report before imposing community control sanctions or granting probation." R.C. 2951.03(A)(1) specifically states that "[n]o person who has been convicted of or pleaded guilty to a felony shall be placed under a community control sanction until a written presentence investigation report has been considered by the court." *Accord State v. Amos*, 140 Ohio St.3d 238, 2014-Ohio-3160, 17 N.E.3d

> 528, ¶ 15 ("the plain text of Crim.R. 32.2 and R.C. 2951.03(A)(1) also places an unavoidable duty on the trial court to obtain a presentence investigation report in every felony case in which a prison sentence is not imposed"); *State v. Dennis*, 2017-Ohio-4437, 93 N.E.3d 277, ¶ 25 (8th Dist.) ("a presentence investigation report is not required if the court imposes a prison term").

{¶52} Consequently, we do not agree with appellant that the trial court erred by sentencing appellant without ordering a presentence investigation report. *State v. Bowman*, 7th Dist. Belmont No. 03-BE-40, 2004-Ohio-6372, ¶ 24 (citation omitted) ("As the rule itself indicates, Crim.R. 32.2 requires a pre-sentence investigation only before granting probation or community control sanctions. If probation or community control sanctions are not at issue, the rule does not apply.").

{¶53} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error.

IV

{¶54} In his fourth assignment of error, appellant asserts that the trial court plainly erred by imposing the wrong sex offender classification.

{¶55} Based upon our disposition of appellant's first assignment of error, we find appellant's fourth assignment of error to be moot. We therefore do not address it. *See* App.R. 12(A)(1)(c).

{¶56} Accordingly, based upon the foregoing reasons, we overrule appellant's fourth assignment of error. We affirm the trial court's judgment of conviction for three counts of gross sexual imposition and the sentence to serve three consecutive five-year terms of imprisonment. We reverse, however, the portion of the trial court's judgment that classified appellant a Tier III sex offender and we remand this matter so that the trial court may conduct a new sex-offender hearing.

JUDGEMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part, reversed in part and cause remanded for further proceedings consistent with this opinion. Appellee shall recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of 60 days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the 60-day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the 45-day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said 60 days, the stay will terminate as of the date of such dismissal.

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

Hess, J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, 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.