No.

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 100736

STATE OF OHIO,

Plaintiff-Appellee,

v.

G. TIMOTHY MARSHALL,

Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT G. TIMOTHY MARSHALL

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TABLE OF CONTENTS

I. EXPLANATION OF WHY THIS FELONY APPEAL IS ONE OF PUBLIC OR GREAT GENERAL INTEREST

This case calls upon this Court to construe, for the first time in history, the witness-bribery statute. Rarely does an appellate court create a new criminal liability. But that is what the court below did here, fundamentally altering bribery law by creating a "form" of bribery requiring only a general purpose to "corrupt," instead of a specific purpose to influence official action – i.e., *the witness' testimony*. It then compounded this error by applying an equally novel and flawed rule of law that allows lay witness opinions or "impressions" on what is "wrong," "illegal" or a "bribe" under the guise that these opinions and "impressions" are "helpful" to a jury. The upshot is an amorphous "corruption" liability that fails to provide individuals fair warning of what a bribe is, and a conviction based on lay opinions that the challenged conduct was "wrong," "illegal," or a "bribe."

The Court should accept jurisdiction and offer guidance on two issues of first impression:

- Bribery has always required proof of a purpose to influence official action. Does witness-bribery require proof of a purpose to corrupt or influence a witness with respect to their testimony?
- The foundational requirements of Evid.R. 701 protect against lay opinions that merely tell the jury what result to reach. Is a lay witness opinion that the defendant's conduct is wrong or illegal helpful to a jury and therefore admissible under Evid.R. 701?

Here, a jury found Defendant-Appellant G. Timothy Marshall, an Ohio attorney, guilty of bribery stemming from conversations concerning civil settlements in a pending criminal matter in which Marshall represented the accused. Testimony about these conversations was, according to the trial court, "all over the place," but the one thing that

was clear is that Marshall never asked anyone to tell the witness to change her testimony in any way. The trial court nevertheless denied Marshall's motion to acquit and over his objection charged the jury on two "forms" of bribery: (1) corrupting a witness; or (2) improperly influencing the witness with respect to her testimony in an official proceeding. The definition of "corrupt" allowed the jury to convict without finding Marshall intended to improperly influence witness testimony. The jury returned a verdict of guilty on both bribery counts, aided significantly by lay opinions that what Marshall was doing was "wrong," "illegal" or a "bribe."

The court of appeals affirmed the creation of two "forms" of bribery, holding witness-corruption bribery does not require a purpose to influence testimony. (*See* App. Op., ¶¶ 46-48, 61, Appx. 21-22, 27.) Accordingly, the appellate panel found no error in the trial court's denial of the motion for acquittal or the jury charge. (*Id.*) The panel also affirmed admission of the lay opinions on illegality, claiming they "assisted the jury in understanding Marshall's conduct and his intentions." (*Id.*, ¶ 26, Appx. 13.)

The creation of two "forms" of bribery conflicts with this Court's precedents. While this Court has not addressed witness bribery, it has addressed the elements of public-servant bribery. *See State v. Davis*, 90 Ohio St. 100 (1914); *State v. Italiano*, 18 Ohio St.3d 38 (1985), overruled in part on other grounds by *State v. Jenks*, 61 Ohio St.3d 259 (1991). In that context, this Court recognizes *one* form of bribery requiring proof of a *specific purpose* to corrupt the servant "[w]ith respect to his official duty[.]" *Davis*, 90 Ohio St. at 105; *accord Dottore v. Vorys, Sater, Seymour & Pease, L.L.P.*, 8th Dist. No. 98861, 2014-Ohio-25, ¶ 114 (bribery requires proof of a "purpose to 'corrupt' or 'improperly influence' the

public servant * * * *in the performance of that individual's 'duty'*") (emphasis added); *cf. Italiano*, 18 Ohio St.3d at 41 (the "official duty" improperly influenced may be established by custom).

The witness-corruption "form" of bribery also makes an entire statutory clause superfluous. *Burkhart v. H.J. Heinz Co.*, 140 Ohio St.3d 429, 2014-Ohio-3766, ¶ 31. The court below created this new "form" of bribery based on its conclusion that: (a) "corrupt a witness" and "improperly influence a witness" had the same meaning; and (b) applying the clause "with respect to the witness's testimony" to *both* of these phrases would make the prohibition against corrupting a witness superfluous. (App. Op., ¶ 47, Appx. 21-22.) But giving independent meaning to the phrase "corrupt a witness" is unnecessary — redundant "couplets" are common. *See Kohlbrand v. Ranieri*, 159 Ohio App.3d 140, 2005-Ohio-295, ¶ 16 (1st Dist.) (noting they "invite just what has happened here—an assertion that they somehow have different meanings"). And this new "form" of bribery created a bigger problem than it purported to solve: if corrupting and improperly influencing are the same, then there is no act that would "improperly influence a witness with respect to the witness's testimony," but *not* "corrupt a witness." Ironically, the appellate court's attempt to avoid superfluity actually made an *entire clause* meaningless.

Finally, the witness-corruption form of bribery violates the rule of lenity and cannon of constitutional avoidance. Even assuming the appellate panel's interpretation is reasonable, it surely is not the only interpretation. Resolving ambiguity by creating a "form" of bribery requiring only a general purpose to corrupt does not supply fair warning of the conduct criminalized, violating the rule of lenity and the cannon of constitutional

avoidance — which teaches that statutes should be construed in a manner that saves them from being unconstitutionally vague. *United States v. Lanier*, 520 U.S. 259, 266 (1997); *see also* R.C. 2901.04(A); *State v. Swidas*, 133 Ohio St.3d 460, 2012-Ohio-4638, ¶ 24; p. 12, *infra*.

This case is a stark illustration of the problem. Other jurisdictions deem offers of civil settlement in exchange for dropping criminal charges insufficient to support a bribery conviction. *See, e.g., People v. Harper*, 552 N.E.2d 148, 150-51 (N.Y.1990); *Lichens v. Superior Court*, 5 Cal. Rptr. 539, 542 (3d Dist.1960). These rulings rest in part on the "common sense" notion that "agreeing to 'drop' charges certainly is not the same as agreeing to alter testimony." *Harper*, 552 N.E.2d at 150. A general ban on corrupting a witness does not give fair warning that civil settlement offers permitted elsewhere are prohibited by Ohio law.

This Court should accept review and confirm R.C. 2921.02(C) requires proof of a specific purpose to corrupt or influence "a witness with respect to the witness's testimony in an official proceeding."

Equally important and deserving of review is the Eighth District's erroneous conclusion that lay witnesses may offer opinions and "impressions" on whether a defendant's conduct is "wrong" or "illegal." Rule 701 permits lay witnesses to offer opinions only if they are based on personal knowledge and helpful to the determination of a fact in issue. Evid.R. 701. Federal authority construing identical standards recognizes that lay opinions on topics such as whether conduct is "legal" are "meaningless assertions which amount to little more than choosing up sides[.]" *U.S. v. Wantuch*, 525 F.3d 505, 514 (7th Cir. 2008). Such piling on is not helpful to the jury, and these opinions are therefore

properly excluded under federal law. *U.S. v. Garcia*, 413 F.3d 201, 214 (2d Cir. 2005) (Rule 701's foundational requirements "protect against" lay opinions that "merely tell the jury what result to reach").

The opinion below conflicts with these federal authorities, based solely on the conclusory statement that such opinions "assist[] the jury in understanding [the witness'] conduct and his intentions." (App. Op., ¶ 26, Appx. 13.) This statement "fundamentally misunderstands" Rule 701: "[w]ere it to be accepted, there would be no need for the trial jury to review personally any evidence at all" — "jurors could be 'helped' by a summary witness * * * who could not only tell them what was in the evidence but tell them what inferences to draw from it." *U.S. v. Grinage,* 390 F.3d 746, 750 (2d Cir. 2004). This Court also should accept review to offer guidance on the circumstances under which lay opinions are admissible and conform Ohio law to federal precedent construing identical standards.

II. STATEMENT OF THE CASE AND FACTS

This case stems from Marshall's representation of Thomas Castro in a sexual assault case, *State v. Castro*, Case No. CR557475, and alleged overtures to settle potential civil claims against Castro. As background, Castro was indicted in January 2012 for sex offenses against M.T. and L.A.; he pleaded guilty on October 17, 2012; and he was scheduled to be sentenced on November 16, 2012.

Castro, Marshall and two other attorneys who represented Castro were indicted for bribery-related offenses. By the time of trial, only Marshall and Castro's other attorney, Marc Doumbas, remained as defendants. The State's case against Marshall focused on two counts of bribery, alleging: (1) he offered money to a victim-witnesses, M.T., if she agreed to

"drop" charges against Castro; and (2) after Castro pled guilty to sexual battery, Marshall offered money to M.T., if she agreed to say "something nice" at Castro's sentencing hearing. The bribery counts related to two events: a lunch with a co-worker of M.T. and others at the Blue Point Grille in Cleveland, and a phone conversation with another lawyer, Harvey Bruner, six months later.

A lunch involving no discussion of witness testimony. On April 19, 2012, Marshall and four friends, Doumbas, Trina Fenn, Mary Jo O'Toole and Jim Davidson, had lunch at the Blue Point Grille. Fenn and O'Toole knew Marshall from working for him as secretaries in the 1980s. Davidson, a retired Cleveland police commander, had known Marshall for over 30 years; Marshall previously represented the Cleveland Police Patrolmen's Association.

Everyone agreed most of the lunch was devoted to reminiscing. Beyond that, their accounts diverged. Davidson heard no business conversation or statements resembling a bribe; Doumbas denied that compensation for M.T. ever came up.

The State built its case around the two secretaries' testimony, one of whom was employed by the County Prosecutor's Office. They claimed that, late in the lunch, Marshall asked Fenn if she knew M.T. — explaining Doumbas represented someone M.T. had made date-rape allegations against. Fenn said she knew M.T.; they were co-workers, friendly and saw each other on smoking breaks. Fenn claimed: (1) Marshall discussed the possibility of a "third-party" representing M.T. in a civil settlement; (2) mentioned hypothetical figures of $54,000 for pain and suffering and $6,000 for the "third-party"; and (3) based upon this discussion, Fenn "thought" that, if M.T. settled, the criminal case would "go away."

O'Toole did not hear any discussion of money, but "felt" Marshall wanted Fenn to encourage M.T. to "drop the charges." Both claimed the discussion was not "right," and Fenn "felt" any payment to a rape victim was a "bribe." But no one testified that Marshall *discussed* M.T.'s potential testimony against Castro, much less *suggested* M.T. lie or alter her testimony in any official proceeding. And Fenn never testified that Marshall said the criminal case would "drop" as part of the hypothetical settlement.

There was no further discussion, at any time, between Marshall and Fenn of this alleged hypothetical "offer." A couple months later, Fenn saw M.T. during a smoking break. M.T. could tell Fenn "knew" about the rape allegations and asked how she knew. Fenn told her about the lunch. M.T. recalled Fenn telling her she could get $50,000, if she dropped the charges against Castro. M.T. claimed she "knew" the offer was "wrong" and "illegal."

A discussion about restitution for the witness-victim. Following Castro's October 2012 guilty plea, Doumbas and Marshall began formulating a mitigation strategy for Castro. This strategy contemplated presenting a "package" to the court including counseling, psychological and drug/alcohol assessments, acknowledging addiction issues, attending AA meetings, making restitution to his victims, reestablishing his faith and assembling letters from friends, relatives and others.

To explore the possibility of restitution, Marshall called attorney Harvey Bruner, whom he knew represented a close friend of M.T.'s in a pending criminal matter. The purpose of the call was to see if Bruner might learn, through his client, if M.T. had a civil attorney and, if not, whether Bruner might represent her. According to Bruner, Marshall mentioned $50,000 was available to compensate M.T. in a civil settlement, but never asked

for anything specific in return from M.T. except to state he would like M.T. to "say something nice to the judge" about Castro at sentencing. Bruner admitted Marshall never asked that M.T. change her testimony or lie about anything, and never asked for a victim impact statement. And he acknowledged a truthful statement about restitution is a "nice thing" a victim could say at sentencing. Nevertheless, over objection, Bruner was permitted to tell the jury his opinion that the offer constituted "an attempt to facilitate a bribe." Although Bruner reached out to his client to contact M.T., M.T. was never contacted.

The trial court sent the case to the jury on the theory that a bribe does not require proof of a specific purpose to influence testimony. At trial, there was no evidence that Marshall (or anyone else on his behalf) ever asked M.T. to lie or alter her testimony in any way. Accordingly, Marshall made and renewed a motion for acquittal under Crim.R. 29. The trial court denied the motion, believing the sole issue was whether the civil settlement offer was "made through other parties to influence or corrupt a witness in this case," and that an offer of a civil settlement in exchange for a request to drop charges could establish a bribe since a purpose to alter testimony was not required.

The trial court then charged the jury, over Marshall's objection, that they did not need to find Marshall intended to improperly influence testimony to convict:

> Before you can find the *** defendant G. Timothy Marshall guilty of bribery you must find beyond a reasonable doubt that on or about the 19th day of April 2012, in Cuyahoga County, Ohio, the defendants did promise, offer or give [M.T.], a witness, or another person, any valuable thing or valuable benefit, to wit: money, *with purpose to corrupt* [M.T.] *or* to improperly influence her with respect to her testimony in an official

> proceeding either before or after she was subpoenaed or sworn.[1]

(Emphasis added.) During deliberations, the jury asked whether they could avoid reaching a verdict on one count, indicating they were unanimous on the others. The trial court gave a "*Howard*" charge, telling the jury to "exert every possible effort to reach an agreement." The jury then found Marshall guilty on both counts of bribery.

The appeal. Marshall appealed and a panel of the Tenth District, sitting by assignment in the Eighth District, affirmed. The panel found no error in the jury instructions and affirmed the denial of Marshall's motion to acquit, concluding the "last antecedent rule" dictates that R.C. 2921.02(C) creates two "forms" of witness-bribery, only one of which requires proof of a specific purpose to influence testimony. (*See* App. Op., ¶¶ 46-48, 61, Appx. 21-22, 27.) The panel also affirmed admission of lay witness opinion testimony on legality and wrongdoing, based on its (erroneous) conclusion that the opinions "assisted the jury in understanding Marshall's conduct and his intentions." (*Id.*, ¶ 26, Appx. 13.)

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

> **A bribery conviction under R.C. 2921.02(C) requires proof beyond a reasonable doubt that the defendant had the intent to corrupt or improperly influence a witness with respect to his or her testimony in an official proceeding.**

Common law bribery required proof of a "corrupt purpose of *influencing official action* by a public officer or by a person performing an official function." 4 Torcia,

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[1] The judge issued a similar charge on the count relating to the Bruner phone call.

Wharton's Criminal Law, Section 645 (15th Ed.) (emphasis added). Ohio's bribery statute followed suit and requires a specific purpose to influence official action: the crime of bribing a public servant, for example, requires proof of a purpose to corrupt or influence "with respect to the discharge of the public servant's * * * duty," R.C. 2921.02(A). Indeed, this Court has long understood the bribery statute to require proof of a specific purpose to influence official action. *E.g., State v. Davis*, 90 Ohio St. 100 (1914).

Witness-bribery is no different. R.C. 2921.02(C) says: "[n]o person, with purpose to corrupt a witness or improperly to influence a witness *with respect to the witness's testimony in an official proceeding*, either before or after the witness is subpoenaed or sworn, shall promise, offer, or give the witness or another person any valuable thing or valuable benefit." (Emphasis added.) Thus, the briber must intend to corrupt or influence the official act of testifying in a proceeding. *See State v. Susany*, 7th Dist. Mahoning No. 07 MA 7, 2008-Ohio-1543, ¶ 33.

The court below wrongly concluded that R.C. 2921.02(C) created "two forms" of witness bribery, only one of which required a specific purpose to influence official action. It did so by latching on to the word "or" in R.C. 2921.02(C), and applying the "last antecedent rule" to limit the specific purpose required by statute to the improper influence "form" of bribery. (*Id.* at ¶ 47.) The "or" in R.C. 2921.02(C), however, is far too thin a reed on which to create two "forms" of bribery.

For one thing, a similar "or" appears in the public-servant bribery provision, R.C. 2921.02(A), and courts consistently hold that this provision — which criminalizes an offer made with a "purpose to corrupt a public servant or party official, *or* improperly to

influence a public servant or party official with respect to the discharge of the public servant's or party official's duty" — creates one "form" of bribery that requires proof of a specific purpose to influence official action. *E.g., Dottore v. Vorys, Sater, Seymour & Pease, L.L.P.*, 8th Dist. No. 98861, 2014-Ohio-25, ¶ 114 (requiring proof of a "purpose to 'corrupt' or 'improperly influence' the public servant * * * *in the performance of that individual's 'duty'*") (emphasis added); *Susany,* 2008-Ohio-1543, ¶ 33 (explaining that "[s]ubsection A involves the intent to corrupt a public servant with regard to his or her discharge of duty").

For another, creating two forms of bribery under R.C. 2921.02(C) would criminalize only one-half of many transactions. The provision barring a witness from *soliciting* a bribe requires proof of a specific purpose "to corrupt or improperly influence self or another person with respect to testimony given in an official proceeding." R.C. 2921.02(D). This language, of course, cannot be splintered into two offenses, and it is unreasonable to conclude the General Assembly intended to create a dichotomy where the person giving the bribe is a criminal (because they acted with a general intent to corrupt), but the person receiving the bribe acted legally (because they did not have a specific intent to corrupt or improperly influence their own testimony).

In any event, the "last antecedent rule" does not support confining the specific purpose element to only one "form" of bribery. As discussed, such an interpretation renders the *entire second clause* superfluous, because there is no act that would improperly influence a witness with respect to their testimony, but *not* corrupt a witness. *See* p. 3, *supra.*

In short, the only reasonable interpretation of R.C. 2921.02(C) is that it requires proof in every case of a purpose to corrupt or improperly influence a witness *with respect to the witness' testimony in an official proceeding.* At a minimum, this interpretation is reasonable and required by the rule of lenity (*see* pp. 3-4, *supra*) and cannon of constitutional avoidance: a statute that only requires proof of a general intent to "corrupt a witness" fails to give fair notice of the prohibited conduct and would be unconstitutionally vague. *See Mahoning Edn. Assn. of Dev. Disabilities v. State Emp. Relations Bd.*, 137 Ohio St.3d 257, 2013-Ohio-4654, ¶ 19 (courts construe statutes to avoid finding of unconstitutionality); *Skilling v. United States,* 561 U.S. 358, 412 (2010) (adopting narrowing construction of honest-services statute to avoid invalidity under void-for-vagueness doctrine). The trial court erred in denying Marshall's motion for acquittal and charging the jury in a manner that permitted a guilty verdict based solely on a purpose to corrupt a witness without regard to their testimony. The judgment should be reversed.

Proposition of Law No. 2:

> **Lay opinions regarding the legal implications of a defendant's conduct are beyond the lay witness' personal knowledge and experience, unhelpful to the jury, and inadmissible under Evid.R. 701.**

Evid.R. 701 limits lay witness opinion testimony "to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." This Court looks to analogous federal law to interpret these requirements, observing that the first requires the opinion to be "rationally based upon personal knowledge" and the second

requires the opinion to be "helpful to the trier of fact." *State v. McKee,* 91 Ohio St.3d 292, 296, 2001-Ohio-41.

Lay witness opinions and impressions addressing the legal implications of a defendant's conduct — i.e., whether it is "wrong," "illegal," or a "bribe" — do not satisfy the first requirement. A lay witness (who by definition is not a legal expert) cannot have "a reasonable basis — grounded either in experience or specialized knowledge — for arriving at the opinion expressed." *McKee,* 91 Ohio St.3d at 296. Since a lay witness does not have a reasonable basis for forming a legal conclusion, such an opinion is not "rationally based" upon his or her perception and therefore is not admissible under Evid.R. 701.

Such opinions also do not satisfy the second requirement. Courts have recognized that "[o]pinion testimony is not helpful to the factfinder if it is couched as a legal conclusion." *Hogan v. American Telephone & Telegraph Co.,* 812 F.2d 409, 412 (8th Cir.1987) (citing *Torres v. County of Oakland,* 758 F.2d 147, 150 (6th Cir.1985). Part of the reason is that opinions couched as legal conclusions convey "the witness' unexpressed, and perhaps erroneous, legal standards to the jury." *Torres,* 758 F.2d at 150. Additionally, lay opinions on topics such as whether certain conduct is "legal" are unhelpful because they are "meaningless assertions which amount to little more than choosing up sides[.]" *U.S. v. Wantuch,* 525 F.3d 505, 514 (7th Cir. 2008).

Here, over objections, the trial court permitted opinion testimony from several lay witnesses as to whether certain conduct was "wrong," "illegal," or a "bribe." No foundation was laid that any of these witnesses had specialized knowledge permitting them to opine on the legality of Marshall's conduct; one witness candidly admitted she did not know the

basis of her opinion. In any event, these opinions were not helpful to the jury. *Torres*, 758 F.2d at 150; *Wantuch*, 525 F.3d at 514. For both reasons, the ruling finding no error in the admission of this testimony should be reversed.

IV. CONCLUSION

For all of the above reasons, this Court should accept jurisdiction, confirm that R.C. 2921.02(C) requires proof of a specific purpose to corrupt or influence witness testimony and that lay witness opinions that merely tell the jury what result to reach are inadmissible, and reverse the judgment of the court of appeals.

Respectfully submitted,

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A copy of the foregoing was served on August 5, 2015 per S.Ct.Prac.R. 3.11(B) by mailing it by United States mail to:

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APPENDIX

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100736

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

G. TIMOTHY MARSHALL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-571014-D

BEFORE: Klatt, J., Sadler, P.J. and Dorrian, J.*
(*Sitting by assignment: Judges of the Tenth District Court of Appeals)

RELEASED AND JOURNALIZED: June 25, 2015

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WILLIAM A. KLATT, J.:

{¶1} Defendant-appellant, G. Timothy Marshall, appeals from a judgment of conviction entered by the Cuyahoga County Court of Common Pleas. For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶2} On January 28, 2013, a grand jury indicted Marshall and three others: Thomas Castro, Marc Doumbas, and Anthony Calabrese, for a variety of charges arising from bribery allegations. Specifically, Marshall, Doumbas and Calabrese were lawyers who represented Castro in connection with criminal charges filed against him for the alleged rape of two women, M.T. and L.A. With respect to Marshall, the bribery charges alleged: (1) that he offered money to M.T. if she agreed to drop her charges against Castro; and (2) after Castro entered guilty pleas to sexual battery in his criminal case, Marshall offered money to M.T. if she agreed to say something nice about Castro at the sentencing hearing.

{¶3} Calabrese and Castro entered guilty pleas to a number of charges including bribery before trial, leaving Marshall and Doumbas as the only remaining defendants at trial. Doumbas was convicted of two counts of bribery and those convictions are the subject of a separate appeal in this court. *State v. Doumbas*, 8th Dist. Cuyahoga No. 100777. By the time of trial, the only remaining charges against Marshall were two counts of bribery in violation of R.C. 2921.02(C). There are two separate communications that form the basis for the charges.

A. The Blue Point Lunch

{¶4} Castro was indicted for the alleged rapes in January 2012. After the indictment, he asked his corporate attorney, Calabrese, for advice on how to proceed. Calabrese recommended that he call Marshall and Doumbas, who were both experienced criminal lawyers. Additionally, Doumbas had previously represented Castro in a previous dispute involving L.A.

{¶5} After Castro met with Marshall and Doumbas to discuss the indictment, Marshall contacted a former employee of his, Trina Fenn, who worked with M.T. in the Cuyahoga County Prosecutor's Office. Marshall asked Fenn and another former employee, Mary Jo O'Toole, to meet for lunch at the Blue Point restaurant in downtown Cleveland. Marshall, Fenn and O'Toole, along with Doumbas and a friend of Marshall's, met at the restaurant on April 19, 2012. Doumbas arrived late to the lunch. Marshall sought to learn what he could about M.T. from Fenn.

{¶6} During the lunch, Marshall asked Fenn if she knew M.T. and explained that Doumbas was representing someone against criminal accusations made by M.T. Marshall then told Fenn what happened between M.T. and Castro and asked her to talk to M.T. and find out if M.T. would settle the matter. Fenn recalls Marshall using the term "civil settlement." Marshall offered $54,000 for M.T.'s pain and suffering as well as $6,000 for whoever represented her. Based upon what Marshall stated, Fenn believed that if M.T. entered into the settlement, the criminal case would "go away." (Tr. 639.) Although O'Toole did not hear the entire

conversation, from what she did hear, she believed that Marshall was asking Fenn to talk to M.T. in an attempt to get her to drop the charges. (Tr. 593.)

{¶7} Fenn told M.T. about Marshall's offer a couple months later. M.T. recalled the conversation she had with Fenn. M.T. testified that Fenn told her that she (M.T.) would get $50,000 to drop the charges against Castro. The offer devastated M.T. because she felt that it was wrong and illegal. (Tr. 702.) M.T. then told the prosecutor handling the case against Castro about the offer. This alleged offer is the basis for one of Marshall's bribery convictions.[1]

B. Marshall's Discussion with Harvey Bruner

{¶8} Marshall's second bribery conviction is based upon a telephone conversation Marshall had with attorney Harvey Bruner. On October 17, 2012, Castro entered a guilty plea to two counts of sexual battery in his criminal case. At that point, Doumbas and Marshall started to think about what they could do to mitigate Castro's possible prison sentence. (Tr. 1403.) Marshall and Doumbas discussed that Marshall would contact Bruner, a criminal defense attorney whom Marshall had known for a long time. Marshall decided to contact Bruner because he represented M.T.'s boyfriend, John Brown, in an unrelated criminal matter. The idea was that Bruner, through Brown, could contact M.T. and that Bruner could potentially represent her in reaching a civil settlement. (Tr. 1111.)

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[1]Doumbas was acquitted of the bribery charge that was based on the offer allegedly made during the Blue Point lunch.

{¶9} Marshall called Bruner and discussed whether Bruner might represent M.T. for purposes of a civil settlement. Bruner testified that Marshall mentioned that $50,000 was available to compensate M.T. Bruner stated that the only thing Marshall asked for in return was for M.T. to "say something nice to the Judge" about Castro at sentencing. (Tr. 738.) Bruner had concerns about the conversation because he believed Marshall was offering money in exchange for favorable comments from the victim. Nevertheless, Bruner conveyed the message to Brown and told him that he would be willing to represent M.T. in the matter if it was done legally. Bruner never discussed the offer with M.T. Nor was there evidence that Brown communicated the offer to M.T. However, Brown informed the police about the offer. Thereafter, Brown permitted the police to arrange and record a phone call he made to Marshall to discuss the offer. During that phone call, Marshall told Brown several times that he wanted M.T. to be represented by a lawyer so that they could compensate her for what she had gone through and that it would be best to reach a settlement after Castro had been sentenced. Marshall did not request anything in exchange for the compensation during the phone call.

C. The Trial

{¶10} The lay witnesses at trial testified to the version of events described above. Both sides also called an expert witness to discuss the legal and ethical aspects of the case. Marshall called Robert Glickman, an experienced attorney. Glickman testified that in his legal opinion, it is not a crime for a defense attorney

to initiate settlement discussions with a crime victim or a representative of the victim. (Tr. 1294.) He analogized the concept to a theft case wherein a victim who has received restitution might request that the charges be dropped by the prosecuting authority. The victim might also inform the trial judge at sentencing that the defendant made restitution in support of mitigation.

{¶11} The state presented expert testimony from George Jonson, another experienced attorney, albeit one more focused on attorney disciplinary matters. Jonson agreed that it was legally permissible for a criminal defense attorney to negotiate a civil settlement with a crime victim on behalf of the defendant. (Tr. 861.) He opined, however, that the defense attorney could not condition a settlement payment on: (1) the victim's agreement to request that the criminal charges be dropped; or (2) the victim's agreement to request that the defendant not be sent to prison. Jonson concluded that such conduct would be akin to paying someone for testimony, which is not permissible. Jonson testified that his conclusion was limited to a consideration of Ohio's Rules of Professional Conduct for attorneys. He did not opine whether Marshall's actions violated any criminal law of the state, including the bribery statute. (Tr. 887.)

{¶12} Ultimately, a jury found Marshall guilty of both counts of bribery and the trial court sentenced him accordingly.

II. Marshall's Appeal

{¶13} On appeal, Marshall presents nine assignments of error:

1. Marshall was denied due process and a fair trial when the trial court failed to properly instruct the jury on the essential element of bribery that the defendant's unlawful purpose to corrupt or improperly influence a witness must be, in all events, "with respect to [the witness's] testimony in an official proceeding."

2. Marshall was denied due process, trial by an impartial jury, and a fair trial, and there was plain error, when the trial court: (a) permitted the State to present "expert" testimony of George Jonson on irrelevant and prejudicial matters and on purely legal issues, and (b) failed to bar all testimony from Jonson after the State elicited testimony from him that he represents "all the judges in Ohio."

3. Marshall was denied due process, trial by an impartial jury, and a fair trial, and there was plain error, because the court failed to provide essential jury instructions that the law generally permits the negotiation and/or consummation of a civil settlement between a criminal defendant and crime victim of money damage claims arising from the underlying alleged criminal acts that includes: (a) the victim's truthful request to the prosecutor that criminal charges be dismissed, "dropped," or reduced; and/or (b) a requirement that the victim accurately report any such settlement at sentencing.

4. Marshall was denied due process, trial by an impartial jury, and a fair trial when the trial court repeatedly allowed lay witnesses to offer their inadmissible and prejudicial "opinions" or "impressions" including about ultimate issues in the case, and to testify in the form of legal conclusions.

5. Marshall's convictions are based on evidence that is insufficient as a matter of law, in violation of Marshall's rights to due process and a fair trial as guaranteed by the U.S. and Ohio Constitutions.

6. Marshall was denied due process and a fair trial, and the trial court abused its discretion, when the court failed to allow Marshall to conduct a full and effective cross-examination of Harvey Bruner and refused to allow Marshall to introduce extrinsic evidence of Bruner's prior inconsistent statements to the defense investigator (and others).

7. Prosecutorial misconduct in numerous respects denied Marshall a fair trial and violated his right to due process in violation of the U.S. and Ohio Constitutions.

8. Marshall's trial counsel provided ineffective assistance of counsel in numerous respects, thereby denying Marshall his rights under the U.S. and Ohio Constitutions.

9. Marshall's convictions are against the manifest weight of the evidence.

{¶14} We will address Marshall's assignments of error out of order for analytical clarity.

A. Marshall's Second and Fourth Assignments of Error

{¶15} We address Marshall's second and fourth assignments of error together because they both involve the trial court's decision to admit testimony.

{¶16} The decision whether to admit or to exclude evidence rests within the sound discretion of the trial court. *State v.* Brown, 8th Dist. Cuyahoga No. 99024, 2013-Ohio-3134, ¶ 50, citing *State v. Jacks*, 63 Ohio App.3d 200, 207 (8th Dist.1989). Therefore, an appellate court that reviews the trial court's decision with respect to the admission or exclusion of evidence must limit its review to a determination of whether the trial court committed an abuse of discretion. *Id.*, citing *State v. Finnerty*, 45 Ohio St.3d 104, 107 (1989). An abuse of discretion requires a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Minifee*, 8th Dist. Cuyahoga No. 99202, 2013-Ohio-3146, ¶ 23, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

1. Admission of Expert Testimony

{¶17} Marshall contends in his second assignment of error that the trial court erred by allowing George Jonson to testify as an expert on legal ethics because his testimony addressed purely legal issues, some of which were irrelevant in the case. Marshall also argues that Jonson's testimony should have been stricken after Jonson stated that he represented "all the judges in Ohio." (Tr. 854.) Marshall did not object to Jonson's testimony based upon these grounds and has, therefore, forfeited all but plain error. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 121; *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, ¶ 121. An error does not rise to the level of plain error unless, but for the error, the outcome of the trial would have been different. *State v. Long*, 53 Ohio St.2d 91 (1978). Under Crim.R. 52(B), plain error requires an obvious defect in the trial court proceedings that affected "substantial rights." *State v. Posa*, 8th Dist. Cuyahoga No. 94255, 2010-Ohio-5355, ¶ 6. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002); *Long* at paragraph three of syllabus.

{¶18} Marshall first argues that Jonson should not have been permitted to give expert testimony regarding what constitutes bribery because an expert witness cannot opine about what the law prohibits or permits. We note that Jonson did not

offer an opinion regarding the requirements of the bribery statute or any other criminal law. His testimony focused on what was impermissible under Ohio's Rules of Professional Conduct for attorneys. Therefore, Marshall's first argument is meritless.

{¶19} Marshall also argues that Jonson should not have been permitted to testify about the ethics of Marshall's conduct under Ohio's Rules of Professional Conduct because that issue was not relevant in Marshall's criminal case. We disagree. An expert may provide testimony even if it embraces an ultimate issue to be decided by the trier of fact if it is helpful to the trier of fact in the determination of a factual issue. *State v. Baker*, 92 Ohio App.3d 516, 533 (8th Dist.1993); *Schaffter v. Ward*, 17 Ohio St.3d 79, 81 (1985). Marshall's defense in this case was that his conduct was ethical and permitted under the law because he was simply attempting to settle a potential claim against his client, albeit in the context of a pending criminal case. The state presented Jonson's testimony to refute this claim and to demonstrate that Marshall's conduct was unethical. Thus, Jonson's expert testimony was relevant and helpful for the jury to understand and determine a relevant factual issue in the case.

{¶20} Marshall also argues that the trial court should have excluded Jonson's testimony because he testified that he represented "all the judges in Ohio." Apparently, the liability insurer for Ohio's judges has retained Jonson to represent judges when they are sued in their official capacities. Marshall surmises that this

comment might have led the jury to believe Jonson was the trial judge's lawyer and thereby enhance Jonson's credibility. Because this argument is pure speculation, it carries little weight, particularly in a plain error context. Therefore, we reject it.

{¶21} Lastly, Marshall contends that Jonson's testimony should have been excluded under Evid.R. 403 because any probative value of the testimony was outweighed by the overwhelming prejudice. However, Marshall makes little attempt to explain why the probative value of Jonson's testimony is substantially outweighed by the danger of unfair prejudice. Therefore, this contention is not a basis for finding plain error.

{¶22} For these reasons, the trial court did not commit plain error by admitting Jonson's testimony. Therefore, we overrule Marshall's second assignment of error.

2. Admission of Lay Witness Opinion Testimony

{¶23} Marshall argues in his fourth assignment of error that the trial court erred by allowing lay witnesses to offer their opinions and impressions about ultimate issues in the case, including legal conclusions. Marshall points to testimony from M.T., Fenn, Bruner, O'Toole, and Brown in which they gave their impressions or opinions, mostly over Marshall's objections, about events that they observed. In most of these instances, the witnesses testified that they believed Marshall was doing something wrong or illegal or that they thought he was trying

to bribe M.T. Marshall argues that the admission of this opinion testimony violated Evid.R. 701. We disagree.

{¶24} Evid.R. 701 governs the admissibility of lay opinion testimony:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue.

{¶25} Lay opinions, inferences, impressions, or conclusions are admissible if they are those that a rational person would form on the basis of the observed facts and if they assist the jury in understanding the testimony or delineating a fact in issue. *State v. Miller*, 5th Dist. Richland No. 2009-CA-0113, 2010-Ohio-3488, ¶ 50, citing *State v. Kehoe*, 133 Ohio App.3d 591 (12th Dist.1999). The decision to admit lay opinion testimony is reviewed under the abuse of discretion standard. *State v. Strothers*, 8th Dist. Cuyahoga No. 97687, 2012-Ohio-5062, ¶ 25.

{¶26} The complained of testimony from these witnesses satisfies the requirements of Evid.R. 701. The testimony is rationally based on the witnesses' impressions of what occurred during their interactions with Marshall. Additionally, the testimony assisted the jury in understanding Marshall's conduct and his intentions. Simply because the witnesses' testimony directly addressed the ultimate issue in the case (i.e., whether Marshall bribed M.T.) does not demonstrate an abuse of discretion by the trial court. Evid.R. 704 provides that opinion testimony, lay or expert, is admissible, even if it embraces an ultimate issue to

be decided by the trier of fact, if it is helpful to the trier of fact in determining a factual issue. *State v. Warmus*, 197 Ohio App.3d 383, 2011-Ohio-5827, ¶ 11 (8th Dist.). The trial court did not abuse its discretion by admitting the lay opinion testimony.[2]

{¶27} For the foregoing reasons, we find no error in the trial court's decisions to admit the testimony discussed above. Accordingly, we overrule Marshall's fourth assignment of error.

B. Marshall's Sixth Assignment of Error

{¶28} In Marshall's sixth assignment of error, he contends that the trial court abused its discretion by limiting his cross-examination of Harvey Bruner and by prohibiting the introduction of extrinsic evidence of an alleged prior inconsistent statement by Bruner. We disagree.

{¶29} The scope of cross-examination is governed by Evid.R. 611(A), which provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Trial judges may impose reasonable limits on cross-examination based on a variety of concerns, such as harassment, prejudice,

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[2]To the extent that Marshall also contends that the admission of the lay opinion testimony violated Evid.R. 403, he failed to present any argument in support of that contention. Therefore, we reject it.

confusion of the issues, the witness's safety, repetitive testimony, or marginally relevant interrogation. *Cleveland v. Garcia*, 8th Dist. Cuyahoga No. 100017, 2014-Ohio-1425, ¶ 7.

{¶30} Although a defendant must be given the opportunity to cross-examine all witnesses against him as a matter of right, the scope of that cross-examination is within the discretion of the trial court. *State v. Watson*, 8th Dist. Cuyahoga No. 90962, 2009-Ohio-2120, ¶ 62, citing *State v. Faulkner*, 56 Ohio St.2d 42, 46 (1978). Accordingly, we review the trial court's limitation of cross-examination under an abuse of discretion standard. *Watson* at ¶ 60, citing *State v. Gresham*, 8th Dist. Cuyahoga No. 81250, 2003-Ohio-744.

1. Marshall's Arguments

{¶31} Marshall challenges the trial court's limitations on his cross-examination of Bruner. At some point in time, Bruner filed for personal bankruptcy. Apparently, there were allegations in the bankruptcy case that Bruner's bankruptcy petition contained false statements. Marshall sought to question Bruner about those allegations. Marshall claims that the allegations were probative of Bruner's credibility. The trial court refused to allow the questioning because there was no judicial finding that Bruner made any false statements in his bankruptcy filings, and without such a finding, the allegations had "zero probative value" and would confuse the jury. (Tr. 731.) We agree. Without a judicial finding that Bruner made false statements in the bankruptcy filings, mere allegations of

such conduct would only serve to confuse the issues. The trial court did not abuse its discretion by refusing to allow cross-examination on this topic.

{¶32} Marshall also argues that the trial court abused its discretion by not allowing him to present extrinsic evidence of alleged prior inconsistent statements made by Bruner to an investigator. Again, we disagree.

{¶33} Evid.R. 613(B) governs the admissibility of extrinsic evidence of a prior inconsistent statement to impeach a witness. It states, in relevant part:

> Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:
>
> (1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;
>
> (2) The subject matter of the statement is one of the following:
>
> (a) A fact that is of consequence to the determination of the action other than the credibility of a witness.

{¶34} The decision whether to admit extrinsic evidence of a prior inconsistent statement which is collateral to the issue being tried and pertinent to the credibility of a witness is a matter within the sound discretion of the trial judge. *State v. Soke*, 105 Ohio App.3d 226, 239 (8th Dist.1995), citing *State v. Cornett*, 82 Ohio App.3d 624, 635 (12th Dist.1992); *State v. McKinney*, 8th Dist. Cuyahoga No. 99270, 2013-Ohio-5730, ¶ 13.

{¶35} For extrinsic evidence to be admissible under Evid.R. 613(B), a proper foundation for its admission must be established. *State v. Martinez*, 8th Dist. Cuyahoga No. 97233, 2013-Ohio-1025, ¶ 15. A foundation must be established through direct or cross-examination in which: (1) the witness is presented with the former statement; (2) the witness is asked whether he or she made the statement; (3) the witness is given an opportunity to admit, deny, or explain the statement; and (4) the opposing party is given an opportunity to interrogate the witness regarding the inconsistent statement. *State v. Morgan*, 8th Dist. Cuyahoga No. 97934, 2012-Ohio-4937, ¶ 14-15, citing *State v. Theuring*, 46 Ohio App.3d 152, 155 (1st Dist.1988).

{¶36} If a witness denies making the statement, extrinsic evidence of the statement is generally admissible if it relates to "[a] fact that is of consequence to the determination of the action." Evid.R. 613(B)(2)(a); *McKinney* at ¶ 14, citing *Martinez* at ¶ 16. If, however, the witness admits making the prior statement, the trial court does not abuse its discretion by refusing to admit extrinsic evidence of that statement. *Id.* Additionally, when a witness claims a lack of memory regarding the events described in a prior statement, the prior statement is considered inconsistent and is therefore admissible. *State v. Wilbon*, 8th Dist. Cuyahoga No. 82934, 2004-Ohio-1784, ¶ 26, citing *State v. Portis*, 10th Dist. Franklin No. 01AP-1458, 2002-Ohio-4501 (a proper foundation for the admission of extrinsic evidence of a prior inconsistent statement is made

upon a witness stating that she did not recall making the prior statement.).

{¶37} During his questioning, Bruner testified that he and Marshall discussed the payment of money and that the amount mentioned was $50,000. After Bruner testified, Marshall's trial counsel claimed that Bruner made prior statements to investigator Bob DeSimone that were inconsistent with Bruner's trial testimony and sought to have DeSimone testify about those statements. Most significantly, Marshall's trial counsel proffered that DeSimone would testify that Bruner told him that he and Marshall did not discuss a specific amount of money and that he (Bruner) could not recall whether he and Marshall discussed the payment of money.

{¶38} The trial court did not allow DeSimone to testify, concluding that trial counsel did not lay the proper foundation for his testimony by presenting the statements to Bruner and allowing him a chance to admit or deny making the statements. After reviewing the record, we cannot conclude that the trial court abused its discretion because it is unclear whether Marshall's trial counsel laid a proper foundation to admit the extrinsic evidence. Trial counsel's attempt to lay a proper foundation for this evidence was very confusing. In any event, even if there was a proper foundation, we conclude that the extrinsic evidence was inadmissible under Evid.R. 613(B) for another reason.

{¶39} Evid.R. 613(B) allows the admission of extrinsic evidence of a prior inconsistent statement only to impeach a witness's credibility. *State v. Bethel*,

110 Ohio St.3d 416, 2006-Ohio-4853, ¶ 180. Here, it appears that Marshall sought to use Bruner's alleged prior inconsistent statement not solely to impeach him but also to prove that Marshall did not attempt to offer M.T. a bribe through Bruner. Because the extrinsic evidence of a prior inconsistent statement was not offered solely for the purpose of impeaching Bruner, it was not admissible under Evid.R. 613(B). *State v. Trefney*, 11th Dist. Portage No. 2011-P-0032, 2012-Ohio-869, ¶ 90 (rejecting the attempt to introduce out-of-court statement for its truth "under the guise" of Evid.R. 613(B)); *Bethel* at ¶ 182. Therefore, even if the trial court made the correct evidentiary ruling for the wrong reason, Marshall suffered no prejudice. *See State v. Varholick*, 8th Dist. Cuyahoga No. 96464, 2011-Ohio-5277, ¶ 7 (appellate courts "shall affirm a trial court's judgment that is legally correct on other grounds, that is one that achieves the right result for the wrong reason, because such error is not prejudicial").

{¶40} For this reason, we overrule Marshall's sixth assignment of error.

C. Marshall's First and Third Assignments of Error

{¶41} Marshall's first and third assignments of error address alleged errors in the trial court's jury instructions and will, therefore, also be addressed together.

{¶42} When instructing the jury, a trial court is required to provide a plain, distinct, and unambiguous statement of the law applicable to the evidence. *State v. Driggins*, 8th Dist. Cuyahoga No. 98073, 2012-Ohio-5287, ¶ 73, citing

Marshall v. Gibson, 19 Ohio St.3d 10, 12 (1985). "A jury instruction is proper where '(1) the instruction is relevant to the facts of the case; (2) the instruction gives a correct statement of the relevant law; and (3) the instruction is not covered in the general charge to the jury.'" *State v. Walker*, 8th Dist. Cuyahoga No. 97648, 2012-Ohio-4274, ¶ 53, quoting *State v. Kovacic*, 11th Dist. Lake No. 2010-L-065, 2012-Ohio-219, ¶ 15. We review a trial court's decision on jury instructions under an abuse of discretion standard. *State v. Leonard*, 8th Dist. Cuyahoga No. 98626, 2013-Ohio-1446, ¶ 33.

1. Marshall's Arguments

{¶43} First, Marshall argues that the trial court improperly instructed the jury on the elements of bribery. We disagree.

{¶44} Marshall was charged with two counts of bribery in violation of R.C. 2921.02(C). That statute provides:

> No person, with purpose to corrupt a witness or improperly to influence a witness with respect to the witness's testimony in an official proceeding, either before or after the witness is subpoenaed or sworn, shall promise, offer, or give the witness or another person any valuable thing or valuable benefit.

{¶45} The trial court, parroting the language of the statute, instructed the jury that in order to find Marshall guilty of bribery, it had to find beyond a reasonable doubt that he "did promise, offer or give [M.T.], a witness or another person, any valuable thing or valuable benefit, to wit: money, with purpose to

corrupt [M.T.] or to improperly influence her with respect to her testimony in an official proceeding either before or after she was subpoenaed or sworn." (Tr. 1529.)

{¶46} Marshall argues that this instruction was improper because there are two distinct ways to commit bribery under the statute: (1) offering or giving any valuable thing or benefit with purpose to corrupt a witness; or (2) offering or giving any valuable thing or benefit to improperly influence a witness. Marshall argues that the modifier, "with respect to the witness's testimony in an official proceeding" that follows the second form of bribery, applies to both forms of bribery. We disagree.

{¶47} Pursuant to R.C. 1.42, words and phrases shall be read in context and construed according to the rules of grammar and common usage. The "last antecedent" rule of grammar provides that referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. *Wohl v. Swinney*, 118 Ohio St.3d 277, 2008-Ohio-2334, ¶ 12; *Safeco Ins. Co. v. Motorists Mut. Ins. Co.*, 8th Dist. Cuyahoga No. 86124, 2006-Ohio-2063, ¶ 18. Here, we discern no intention by the legislature to read the statute in the manner argued by Marshall. Indeed, a requirement that all acts of bribery in violation of R.C. 2921.02(C) be "with respect to the witness's testimony" would render the corrupting a witness form of bribery superfluous and meaningless. The two forms of bribery would essentially be equivalent, as any acts done to corrupt a witness with respect to testimony would also improperly influence that

witness with respect to testimony. *See State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, ¶ 19, quoting *State ex rel. Myers v. Bd. of Edn. of Rural School Dist. of Spencer Twp.*, 95 Ohio St. 367, 373 ("No part [of the statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative."). In light of the legislature's use of the word "or" to separate the two forms of bribery, we reject Marshall's interpretation of the statute. *See Penn v. A-Best Prods. Co.*, 10th Dist. Franklin No. 07AP-404, 2007-Ohio-7145, ¶ 9 (noting that "or" is a function word indicating alternatives between different things and that the use of "or" indicates the legislature intended a "separate and distinct identity to each of the articulated phrases").

{¶48} Absent an intention to the contrary, we read the statute in accordance with the last antecedent rule and conclude that the trial court's jury instruction on bribery was not error.

{¶49} To the extent Marshall argues his interpretation of the statute comports with the rule of lenity, such rule applies only where there is an ambiguity in a statute or a conflict between multiple statutes. *U.S. v. Lanier*, 520 U.S. 259, 266 (1997). Marshall, however, does not claim that the statute is ambiguous. Nor do we find any ambiguity. Therefore, the rule of lenity does not apply.

{¶50} Marshall also argues in his third assignment of error that the trial court should have, apparently sua sponte, instructed the jury that the law generally permits a criminal defendant to negotiate and consummate civil settlements with a crime victim. Marshall did not request such an instruction and, therefore, has forfeited all but plain error. *State v. Morrow*, 8th Dist. Cuyahoga No. 79738, 2002-Ohio-5320, ¶ 18, citing *State v. Hartman*, 93 Ohio St.3d 274, 289 (2001). Marshall has not provided any legal support from this state to support his claim that such an instruction is a correct statement of the law. *Walker* at ¶ 53. Indeed, his citations to decisions from other states addressing bribery convictions are not persuasive because the statutes in each of those states differ widely from Ohio. *See, e.g., People v. Harper*, 75 N.Y.2d 313, 317 (Ct. App.1990); *Lichens v. Superior Court*, 181 Cal.App.2d 573, 576 (3d Dist.1960). The trial court did not commit plain error by not sua sponte giving this jury instruction.

{¶51} Finding no error in the trial court's jury instructions, we overrule Marshall's first and third assignments of error.

D. Marshall's Fifth and Ninth Assignments of Error

{¶52} In his fifth and ninth assignments of error, Marshall contends that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. Again, we disagree.

{¶53} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Wells*, 8th Dist. Cuyahoga No. 98388, 2013-Ohio-3722, ¶ 119, citing *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial and to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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. *Id.*, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

{¶54} "'A manifest weight challenge, on the other hand, questions whether the prosecution met its burden of persuasion.'" *Wells* at ¶ 127, quoting *State v. Ponce*, 8th Dist. Cuyahoga No. 91329, 2010-Ohio-1741, ¶ 17, quoting *State v. Thomas*, 70 Ohio St.2d 79, 80 (1982). The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Id.*, citing *State v. Otten*, 33 Ohio App.3d 339 (9th Dist.1986), paragraph one of the syllabus. The

discretionary power to grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶55} The weight to be given the evidence and the credibility of the witnesses are matters primarily for the trier of fact. *State v. Patterson*, 8th Dist. Cuyahoga No. 98127, 2012-Ohio-5511, ¶ 13, citing *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill*, 176 Ohio St. 61, 67 (1964). "The choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123 (1986).

{¶56} In order to find Marshall guilty of bribery in this case, the state had to prove beyond a reasonable doubt that he promised, offered or gave M.T. any valuable thing or benefit, to wit: money, with purpose to corrupt M.T. or to improperly influence her with respect to her testimony in an official proceeding either before or after she was subpoenaed or sworn. R.C. 2921.029(C).

{¶57} The trial court defined: (1) an "offer" as a means to present for acceptance or rejection; (2) "to corrupt" as a means to destroy or undermine the honesty or integrity of another, to taint, to affect; and (3) an "official proceeding" as any proceeding before a legislative, judicial, administrative, or other

governmental agency or official authorized to take evidence under oath. The parties do not dispute these definitions.

1. Marshall's Arguments

{¶58} Marshall first argues that the state did not prove that he promised, offered, or gave M.T. a benefit or thing of value. He argues that at most, he extended an invitation to enter into settlement negotiations, which is not a valuable thing or benefit. Marshall also argues that the state failed to prove that he acted with purpose to corrupt M.T. or to improperly influence her with respect to her testimony in an official proceeding because there was no evidence that M.T. was ever asked to lie or change her testimony. We find these arguments unpersuasive.

a. The Blue Point Lunch Communication

{¶59} Fenn testified that Marshall told her during the lunch there was $54,000 available for M.T. should M.T. want to settle her claims against Castro. O'Toole left the lunch thinking that Marshall asked Fenn to approach M.T. to see if she would drop the criminal charges against Castro in exchange for a cash payment. M.T. testified that when Fenn talked to her about the conversation with Marshall, Fenn told her that Marshall offered $50,000 if M.T. would agree to drop the charges.

{¶60} Marshall argues that his comments were intended only as an invitation to M.T. to enter into settlement negotiations, not the offer of a

valuable thing or benefit. There can be no doubt that money is a "valuable thing or benefit" for purposes of R.C. 2921.02. The testimony from Fenn and O'Toole indicate that Marshall offered money to M.T. in exchange for her agreement to drop the criminal charges against Castro. This was a specific offer not just an invitation to M.T. to enter into negotiations for a civil settlement. There was no evidence that M.T. had initiated a civil lawsuit against Castro, or had even retained an attorney to represent her. Nor was there any evidence that Marshall had investigated M.T.'s damages to assess the value of a potential civil claim. The testimony of Fenn, O'Toole, and M.T. is sufficient evidence to show that Marshall offered M.T. a valuable thing or benefit.

{¶61} The next question is whether the state also presented sufficient evidence to demonstrate that Marshall made the offer of money with the purpose to corrupt M.T. or to improperly influence her with respect to her testimony in an official proceeding either before or after she was subpoenaed or sworn. Although there was no evidence that Marshall expressly asked M.T. to change her testimony, such evidence is not required for all forms of bribery. As we previously noted, one way to commit bribery under R.C. 2921.02(C) is to offer a valuable thing or benefit with the purpose to corrupt a witness. That form of bribery does not require an act done for the purpose of improperly influencing a witness's testimony.

{¶62} Based upon the trial testimony, rational minds could conclude that Marshall's offer of money to M.T. in exchange for her agreement to drop the criminal charges against Marshall's client was done with the purpose to corrupt. M.T. went to the police and reported her allegations against Castro. Offering M.T. money in exchange for her agreement to drop (or to request the prosecutor to drop) criminal charges is conduct that seeks to undermine M.T.'s honesty or integrity. Cf. *State v. Hoehn*, 9th Dist. Medina No. 03CA0076-M, 2004-Ohio-1419, ¶ 38-41 (affirming bribery conviction where defendant offered wife anything she wanted during divorce action if she would recant allegations of criminal charges against him); *State v. Jurek*, 55 Ohio App.3d 70, 75 (8th Dist.1989) (sufficient evidence to affirm bribery conviction where defendant offered victim money in exchange for testimony that she would like to drop pending charges against defendant's client). Therefore, the evidence is sufficient to prove that Marshall acted with purpose to corrupt.

b. The Bruner Telephone Call

{¶63} Bruner testified that Marshall offered M.T. $50,000 to compensate her if she would "say something nice to the Judge when the man is sentenced." (Tr. 738.) Again, just like at the Blue Point lunch, this was an offer of money, a valuable thing or benefit. Whether this offer was made with the purpose to corrupt M.T. is a closer call and we look to case law for guidance. In *State v. Lieberman*, 114 Ohio App. 339, 344 (10th Dist.1961), Lieberman was

convicted for violations of two former but similar bribery statutes. Lieberman was an attorney that represented a man charged with selling property of another. He was told by the woman who purchased the property that his client had sold the furniture to her. Lieberman offered to return her money if she testified that she was only storing the furniture. The court, considering the language of one of the former statutes that addressed corrupt acts to influence, intimidate, or impede a juror or witness in their duty or otherwise obstruct or impede the due administration of justice, concluded that it is a violation of the statute to offer any valuable thing for the purpose of inducing the witness to testify contrary to her belief as to the facts. The court reasoned that an offer of money to induce a witness to testify contrary to what the witness believes to be the truth would constitute an offer to corrupt. *Id.* Thus, because Lieberman knew that the witness would testify she purchased the property, and because he offered the witness money in an attempt to get her to change that testimony, the appellate court affirmed his conviction.

{¶64} Here, there was evidence that Marshall offered M.T. money if she would "say something nice" about Castro at his sentencing. Given the context, a reasonable jury could conclude that Marshall made this offer with purpose to corrupt. Although Marshall contends he conveyed this offer through Bruner in the context of a civil settlement, Bruner was not representing M.T. As previously noted, there is no evidence that M.T. had filed a lawsuit or intended

to do so. Nor was there any evidence that Marshall made any attempt to calculate the value of a potential civil claim against his client or that he conditioned the offer of money on an agreement from M.T. to release Castro from further civil liability for his conduct.

{¶65} Furthermore, Marshall's offer to M.T. through Bruner could also be reasonably viewed in the context of Marshall's previous attempt to get M.T. to drop the criminal charges against his client in exchange for money. Viewing the evidence in a light most favorable to the prosecution, as we must in a sufficiency analysis, a reasonable jury could conclude that after Marshall's attempt to get M.T. to drop the charges failed, he tried again to improperly influence her to help his client at sentencing. Marshall knew that M.T. went to the police and reported that Castro raped her. Castro pled guilty to sexual battery. A reasonable jury could conclude that Marshall knew it was unlikely that M.T. intended to say something nice at Castro's sentencing under these circumstances. A reasonable jury could also conclude that Marshall acted with purpose to corrupt when he sought to influence or change M.T.'s likely position at Castro's sentencing by offering her money. Therefore, there was sufficient evidence presented to permit a reasonable trier of fact to find that the prosecution proved the essential element of bribery beyond a reasonable doubt.

{¶66} We also find that the bribery convictions are not against the manifest weight of the evidence. This is not the exceptional case where the

evidence weighs heavily against the convictions. The facts were largely not disputed. The outcome of the case turned on the jury's determination of the purpose behind Marshall's communications. The jury was in the best position to assess the credibility of witnesses and the context of Marshall's statements in determining whether Marshall acted with purpose to corrupt. The jury obviously rejected Marshall's defense theory that his conduct was intended solely to secure a civil settlement and not to corrupt a witness, and we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice. Accordingly, Marshall's convictions are not against the manifest weight of the evidence. We overrule Marshall's fifth and ninth assignments of error.

E. Marshall's Seventh Assignment of Error

{¶67} In Marshall's seventh assignment of error, he alleges multiple instances of prosecutorial misconduct during Marshall's trial. We find that none of the alleged instances of prosecutorial misconduct warrant reversal of Marshall's convictions.

{¶68} The test for prosecutorial misconduct is whether the prosecutor's remarks or questions were improper, and if so, whether they prejudicially affected substantial rights of the accused. *State v. Majid*, 8th Dist. Cuyahoga No. 96855, 2012-Ohio-1192, citing *State v. Hicks*, 194 Ohio App.3d 743, 2011-Ohio-3578, ¶ 30 (8th Dist.). A prosecutor's conduct during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial. *State*

v. Apanovitch, 33 Ohio St.3d 19, 24 (1987). The focus of that inquiry is on the fairness of the trial, not on the culpability of the prosecutor. *State v. Bey*, 85 Ohio St.3d 487, 496 (1999). "[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and * * * the Constitution does not guarantee such a trial." *Majid* at ¶ 40, quoting *U.S. v. Hasting*, 461 U.S. 499, 508-09 (1983) (emphasis omitted). Our focus upon review is whether the prosecutor's comments violated appellant's substantial rights, thereby depriving appellant of a fair trial such that there is a reasonable probability that, but for the prosecutor's misconduct, the result of the proceeding would have been different. *Hicks* at ¶ 30; *State v. Onunwor*, 8th Dist. Cuyahoga No. 93937, 2010-Ohio-5587, ¶ 42. We also note, however, that alleged instances of prosecutorial misconduct that were not objected to below are forfeited but for plain error. *Majid* at ¶ 43.

1. Marshall's Arguments

{¶69} First, Marshall alleges that the prosecutor improperly cast Marshall in an unfavorable light by (1) asking Fenn if Marshall had previously represented murderers, and (2) characterizing the Blue Point lunch as a way for Marshall to "dig up dirt" about M.T. Although Marshall's counsel objected to the question about Marshall's representation of "murderers," defense counsel did not object to any of the prosecutor's questions concerning Marshall's alleged desire

to "dig up dirt" about M.T. We also note that after characterizing the Blue Point lunch as a way for Marshall to dig up dirt on M.T., the prosecutor conceded that "in fairness, that's not unusual in the defense of a case * * * [y]ou learn everything you can about [victims]." (Tr. 1442.) With respect to both of these comments, even assuming they were improper, we cannot say that they deprived Marshall of a fair trial or that there is a reasonable probability that the comments would have affected the outcome of the trial. Juries understand the role of a criminal defense attorney in our system of justice. The issue here was whether Marshall committed bribery by offering M.T. money with the purpose to corrupt. The challenged questions by the prosecution had little impact on that determination.

{¶70} Next, Marshall argues that the prosecutor improperly vouched for the credibility of the sexual battery victims in closing argument. Specifically, the prosecutor told the jury that "the only heroes in this case, ladies and gentlemen, the only witnesses who I think stood up for what's right were these victims." (Tr. 1627.)

{¶71} Marshall did not object to this comment and has, therefore, waived all but plain error. *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶ 181. We do not interpret the prosecutor's comment as vouching for the victims' credibility. The prosecutor's comment was not related to the victims' veracity or to any factual assertions in their testimony. *See State v. Davis*, 116 Ohio St.3d

404, 2008-Ohio-2, ¶ 232 ("Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue."). Even if the comment was improper, we do not believe that there is a reasonable probability that the comment would have affected the outcome of the trial. *State v. Allen*, 190 Ohio App.3d 240, 2010-Ohio-3999, ¶ 42 (8th Dist.). Moments before this comment, the trial court instructed the jury that what the attorneys say during closing argument is not evidence and that the attorneys are not allowed to give personal opinions. The trial court also instructed the jury that it was the sole judge of credibility and the weight to be given to witness testimony. In light of these warnings, Marshall has not demonstrated that the alleged misconduct of the prosecutor deprived Marshall of a fair trial. *State v. Elliott*, 8th Dist. Cuyahoga No. 91999, 2009-Ohio-5816, ¶ 42-45.

{¶72} Marshall also argues that the prosecutor improperly argued in his opening statement that Fenn was fired by the new county prosecutor because the prosecutor believed that Fenn failed to report to her supervisors that she knew of a potential bribe in a criminal case. Fenn did testify that the new county prosecutor fired her after these events. Marshall argues that the prosecutor's comment injected the personal opinions of the new prosecutor into the trial and again constituted improper vouching. Marshall's trial counsel did not object to the comment and has forfeited all but plain error. For the reasons

previously noted, this isolated comment did not deprive Marshall of a fair trial. Additionally, defense counsel stipulated before trial to these exact facts. (Tr. 43.)

{¶73} Further, Marshall argues that the prosecutor misrepresented a case to the jury during questioning of a witness. Marshall does not explain how the prosecutor misrepresented the case; nor did his counsel object to the alleged misrepresentation. Marshall has not demonstrated how this alleged misrepresentation constituted prosecutorial misconduct and deprived him of a fair trial.

{¶74} Lastly, Marshall argues that the prosecutor's conduct complained of in his second assignment of error (offering Jonson's expert testimony) and his fourth assignment of error (offering lay witness opinion testimony) also constituted misconduct. Having found no merit to those assignments of error, there is no basis for finding prosecutorial misconduct.

{¶75} We reject Marshall's claims of prosecutorial misconduct and, therefore, we overrule his seventh assignment of error.

F. Marshall's Eighth Assignment of Error

{¶76} Marshall argues in his eighth assignment of error that he received ineffective assistance of counsel. We disagree.

{¶77} To establish ineffective assistance of counsel, a defendant must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a

reasonable probability that but for counsel's errors, the proceeding's result would have been different. *State v. Ferrell*, 8th Dist. Cuyahoga No. 100659, 2014-Ohio-4377, ¶ 36, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984); *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraphs two and three of the syllabus.

{¶78} The first element requires a showing that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* at 687. It necessarily requires that when a defendant complains of the ineffectiveness of counsel's assistance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88. To establish the second element, the defendant must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Moreover, a defendant's failure to satisfy one element of the *Strickland* test negates the court's need to consider the other. *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000).

{¶79} In deciding a claim of ineffective assistance of counsel, we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689. "[T]hat is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Citation omitted.)

Id. "Trial strategy, including debatable trial tactics, does not constitute ineffective assistance of counsel." *State v. Benitez*, 8th Dist. Cuyahoga No. 98930, 2013-Ohio-2334, ¶ 31.

1. Marshall's Arguments

{¶80} Marshall first argues that his trial counsel was ineffective for failing to seek the exclusion of Jonson's expert testimony from this case. We disagree.

{¶81} The first mention of any expert testimony in this case (be it Jonson or Glickman, Marshall's expert witness) appears to be in a witness disclosure list filed by Castro (who at the time was still a defendant) on October 11, 2013. In that disclosure, Glickman is identified as a potential expert witness. The state apparently received Glickman's expert report the same day that the disclosure was filed. Subsequently, the state filed a supplemental discovery response in which for the first time it identified Jonson as a potential witness and also provided his curriculum vitae. On October 31, 2013, the state provided Marshall with Jonson's expert report. That same day, Marshall filed a supplemental witness list that included Glickman's name as a witness.

{¶82} Apparently, a dispute arose over the admissibility of Jonson's expert testimony because the state was late in providing his report to the defendants. As a result, the state filed a pretrial motion addressing that dispute. According to the trial court's November 14, 2013 order on pretrial motions, however, counsel for defendants had no objection to Jonson testifying at trial. Nor did

defendant's counsel object to his testimony during the trial.

{¶83} Marshall now claims that trial counsel should have objected to Jonson's testimony based on relevancy. The decision not to object to Jonson's expert testimony could have been strategic because Marshall wanted to present his own expert witness to support his contention that his conduct was a legal and ethical attempt to settle a civil claim against his client. It appears that this contention was the heart of Marshall's entire defense. Challenging Jonson's testimony based upon relevancy might have undermined Marshall's ability to use Glickman to support his defense theory. Trial strategy, even if unsuccessful, does not constitute ineffective assistance of counsel. *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶ 83.

{¶84} Marshall next argues that trial counsel was ineffective for failing to request the jury instruction discussed in his third assignment of error and for failing to object to the instruction given by the trial court. As noted in our discussion of the first and third assignments of error, Marshall has cited no authority from this state to support his contention that he was entitled to such a jury instruction or that the instruction given by the trial court was an inaccurate statement of the law. Therefore, trial counsel was not ineffective for failing to request a jury instruction to which he was not entitled or in failing to object to a proper jury instruction. *State v. Brooks*, 8th Dist. Cuyahoga No. 83668, 2005-Ohio-3567, ¶ 61.

{¶85} Marshall also argues that trial counsel was ineffective for not objecting to the lay witness opinion testimony that Marshall challenged in his fourth assignment of error, or to every instance of prosecutorial misconduct as detailed in his seventh assignment of error. We note that trial counsel's failure to make objections is within the realm of trial tactics and is not a per se indicator of ineffective assistance of counsel. *See State v. Wright*, 8th Dist. Cuyahoga No. 92344, 2009-Ohio-5229, ¶ 45; *State v. Patterson*, 8th Dist. Cuyahoga No. 98127, 2012-Ohio-5511, ¶ 28. Moreover, we rejected Marshall's argument in his fourth assignment of error that the trial court improperly admitted the lay opinion or impression testimony. Accordingly, trial counsel was not ineffective for failing to object to the properly admitted testimony. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 109. Similarly, because we found no prosecutorial misconduct that would have deprived Marshall of a fair trial or that would have affected the outcome of the trial, Marshall has not shown a reasonable probability that, but for these alleged errors of counsel, the outcome of the proceeding would have been different. *Strickland*.

{¶86} Lastly, Marshall argues that if this court concludes in our analysis of his sixth assignment of error that trial counsel failed to lay the proper foundation for the admission of extrinsic evidence to prove Bruner's prior inconsistent statements, such failure would be ineffective. As previously noted, even if Marshall's trial counsel was ineffective for not laying a proper

foundation, that failure was of no consequence because the extrinsic evidence was inadmissible under Evid.R. 613(B) for a different reason. Therefore, Marshall has not shown that there was a reasonable probability that, but for the alleged errors of his counsel, the outcome of the trial would have been different.

{¶87} Marshall has not demonstrated the ineffective assistance of trial counsel. Accordingly, we overrule his eighth assignment of error.

IV. Conclusion

{¶88} Having overruled all of Marshall's assignments of error, we affirm the judgment of the Cuyahoga County Court of Common Pleas.

{¶89} Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

WILLIAM A. KLATT, JUDGE

LISA L. SADLER, P.J., and
JULIA L. DORRIAN, J., CONCUR*

*(Klatt, Sadler and Dorrian, Judges, of the Tenth Appellate District, sitting by assignment in the Eighth Appellate District.)

FILED AND JOURNALIZED
PER APP.R. 22(C)

JUN 25 2015

CUYAHOGA COUNTY CLERK
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