BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE SELF-COMPLAINT OF SUBURBAN NATURAL GAS COMPANY CONCERNING ITS EXISTING TARIFF PROVISIONS	))))	CASE NO. 11-5846-GA-SLF

SUBURBAN NATURAL GAS COMPANY'S APPLICATON FOR REVIEW AND MOTION FOR CERTIFICATION

Under Ohio Administrative Code 4901-1-15, and as more fully described in the Memorandum in Support attached hereto and incorporated herein, Suburban Natural Gas Company ("Suburban") hereby files its application for review and moves for certification in order to take an interlocutory appeal from an oral evidentiary ruling issued during the evidentiary hearing held in this matter on June 12, 2012. The Commission has recognized that O.A.C. 4901-1-15 is a proper vehicle to contest an attorney examiner's evidentiary ruling. *See In the Matter of the Complaint of Westside Cellular, Inc. dba Cellnet,* 2001 Ohio PUC Lexis 972, * 31 (2001).

As of the date of this filing, the record is unavailable.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

The Ruling

The ruling at issue was made when Suburban attempted upon re-cross examination to ask questions of Staff witness Stephen E. Puican about the costs incurred by Columbia Gas of Ohio, Inc. ("Columbia") in connection with that component of Columbia's demand-side management program ("DSM") known as "New Home Solutions." The questioning was going to begin based on the "Study-Rider DSM" that Columbia filed in *In the Matter of the Annual Application of Columbia Gas of Ohio, Inc. for an Adjustment to Rider IRP and Rider DSM Rates*, Case No. 11-5803-GA-RDR. A copy of the "Study-Rider DSM" was provided to the Assistant Attorney General and the Attorney Examiner during the hearing. When counsel for Suburban provided Mr. Puican with a copy of the "Study-Rider DSM," the Attorney Examiner inquired about the nature of the questioning that Suburban intended to pursue. Counsel for Suburban explained that questions of Suburban's only witness, David L. Pemberton, Jr., Suburban's President, had been asked – including by the Attorney Examiner himself – about the potential cost of Suburban's proposed DSM program. Counsel for Suburban further explained that the "Study-Rider DSM" and the proposed line of questioning was meant to provide evidence of what Suburban's proposed plan might cost based on the best available method and data since Suburban's proposed DSM program mirrors Columbia's "New Homes Solutions" program. In the course of questioning Mr. Puican, Suburban intended to use Columbia's costs for its "New Home Solutions" program, make reasonable adjustments arrived at through the course of questioning Mr. Puican to account for the difference in Columbia's and Suburban's size, and use that data as a benchmark, or yardstick, to establish a range of what Suburban's proposed DSM might cost.

At that point, the Assistant Attorney General objected, without citing a specific rule, stating that re-cross is limited to matters brought out on re-direct. Counsel for Suburban indicated that he was

unaware of any rule requiring that re-cross be limited to matters brought out on re-direct. The Attorney Examiner ruled that, yes, that is the rule (although without citing to a specific rule) and did not permit Suburban to offer evidence directly relevant to questions the Attorney Examiner himself asked. The Assistant Attorney General and the Attorney Examiner saw fit to also suggest that Suburban should have brought out the information during Mr. Pemberton's direct examination. Suburban explained that that would not have been appropriate since it was Staff – not Suburban – who had received and evaluated the "Study-Rider DSM."

Basis For Appeal

1. There Is No Rule That Requires Limiting The Scope Of Re-Cross

At the outset, it is important to reiterate the well-established principle that the Commission is not bound by the Rules of Evidence. *See, e.g., Greater Cleveland Welfare Rights Organization v. PUCO*, 2 Ohio St. 3d 62 (1982). During the hearing, the Attorney Examiner asserted as much when, in response to an objection made by the Assistant Attorney General, Suburban relied on Rule 803 as allowing Suburban to proceed with its cross-examination of Mr. Puican about a matter. The Commission has discretion on the application of the Rules of Evidence. *See id.* Thus, the Attorney Examiner would have been well within his authority to allow Suburban to question Mr. Puican as proposed. And as explained more fully below, the Attorney Examiner should have allowed the questioning, especially since it would have elicited testimony responsive to questions asked by the Attorney Examiner and related to Mr. Puican's previous testimony.

To the degree the Rules of Evidence apply, the scope of cross-examination is governed by Evidence Rule 611. It provides, in its entirety:

Rule 611. Mode and Order of Interrogation and Presentation

(A) Control by court.
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.

(B) Scope of cross-examination.
Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

(C) Leading questions.
Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Evid. R. 611. Obviously, nothing in Rule 611 limits the scope of re-cross.

Under Rule 611, courts have held that re-cross "generally" cannot exceed the scope of re-direct. *See, e.g., State v. Watson*, 2009 Ohio 2120, p. 64 (Cuyahoga 2009); *Emerald Estates Homeowner's Assoc. v. Albert*, 2009 Ohio 6627, pp. 57-60 (Stark 2009). But as with nearly every other evidentiary ruling, the decision is within the trial judge's discretion and is reviewed on an abuse of discretion standard. *See id.*; *see also State v. Freeze*, 1990 Ohio App. Lexis 5796, * 27 (Clark 1990) (Exhibit A) (affirming trial court decision not to limit scope of re-cross).

Quite clearly, there is no evidentiary rule requiring that re-cross be limited to matters brought out on re-direct.

2. The Ruling Was An Abuse Of Discretion To Suburban's Prejudice

Though there is no rule that requires limiting the scope of re-cross, Suburban concedes the unremarkable point that the Attorney Examiner has discretion in evidentiary rulings and the conduct of evidentiary hearings, including re-cross. But that discretion cannot be abused. *See, e.g.,* Evid. R. 611; *Watson*, supra; *Greater Cleveland*, supra. The ruling at issue here was an abuse of discretion to Suburban's detriment.

Throughout the course of the hearing, questions were asked about the potential cost of Suburban's proposed DSM. The Attorney Examiner himself asked Mr. Pemberton such questions.

Additionally, on cross-examination, Mr. Puican acknowledged that increasing throughput would, all else equal, reduce fixed costs resulting in benefits to non-participating customers (that is, customers who would not receive DSM services from Suburban under its proposed program). Mr. Puican also confirmed on cross-examination his statement in his prepared testimony that non-participating customers would benefit from "increased load which will result in lower rates in the event of a subsequent rate case." Prepared Testimony of Stephen E. Puican filed on behalf of The Public Utilities Commission of Ohio, page 5, lines 16-18. Yet Mr. Puican also suggested during cross-examination that the costs of Suburban's proposed DSM program would have to be weighed against any benefits. Suburban's attempted line of questioning described herein would have been relevant to the potential cost of Suburban's proposed DSM and Mr. Puican's suggestion regarding weighing the costs and benefits.

Given the questions from the Assistant Attorney General, the Attorney Examiner, and Mr. Puican's testimony, it is clear that Suburban is prejudiced by not being able to offer evidence on the potential cost of its proposed DSM. Questions asked by the Attorney Examiner and points raised by Mr. Puican confirm that the potential cost were germane to them. Further, Mr. Puican's testimony during the hearing and his prepared testimony confirm that a concern of Staff is the extent to which non-participating customers would be funding a program that, in its mind, may benefit only a few at too high a cost. Paraphrasing Mr. Puican, "the costs and benefits have to be weighed." Needless to say, Staff would not have been prejudiced if Suburban had been able to proceed with the line of questioning it sought – it would have elicited testimony addressing questions asked by the Attorney Examiner himself and points raised by Mr. Puican himself. Suburban attempted to provide the best evidence regarding the costs, but the Attorney Examiner forbade it.

Put simply, the ruling at issue here was an abuse of discretion since it prohibited Suburban from presenting evidence directly responsive to, and relevant to, questions asked – including by the Attorney

Examiner himself – and points raised throughout the hearing about the potential cost of Suburban's proposed DSM.[1]

The Proposed Appeal Is Warranted

1. The Appeal Presents A New And Novel Question Of Law And Policy

Under O.A.C 4901-1-15, this application for review is but the first step in the process for taking an interlocutory appeal. O.A.C. 4901-1-15(B) provides that an interlocutory appeal may not be taken unless certified to the Commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer. The legal director, deputy legal director, attorney examiner, or presiding hearing officer cannot certify an appeal unless he or she finds that the "appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question." O.A.C. 4901-1-15(B). This standard is met here.

The issue is:

> Where an attorney examiner has discretion to prevent the presentation of irrelevant evidence; argumentative, repetitious, cumulative, or irrelevant cross-examination; and to permit re-cross on any matter, is it an abuse of discretion to prohibit, to a party's detriment, the presentation of relevant evidence on re-cross that is neither argumentative, repetitious, cumulative, nor irrelevant and is directly responsive to the attorney examiner's own questions just because such evidence is sought to be offered on re-cross?

The new and novel legal and policy question is whether this question should be answered affirmatively or negatively. As explained earlier, the Attorney Examiner's ruling – that there is a binding rule prohibiting re-cross on matters not raised on re-direct – is wrong. Suburban

[1] That the ruling at issue here was an abuse of discretion is underscored by Rule 611, to the degree it applies. Rule 611 provides that a court should exercise reasonable control over the mode and order of cross-examination for the "effective ascertainment of the truth[.]" *See* Evid. R. 611(A)(1). Since the re-cross sought by Suburban would have elicited testimony directly responsive to questions asked and points raised during the hearing, and allowing the re-cross would not have prejudiced Staff and disallowing it prejudices Suburban, ascertaining the truth was inhibited.

concedes that the Attorney Examiner had discretion in making his ruling. But under the circumstances, the ruling was an abuse of discretion. Accordingly, Suburban submits that the question should be answered affirmatively.

2. An Immediate Determination By The Commission Is Needed To Prevent The Likelihood Of Undue Prejudice

Without immediate determination by the Commission, there is a likelihood of undue prejudice to Suburban, as a decision in this case may be reached without the benefit of full, accurate, relevant evidence responsive to questions raised during the June 12, 2012 evidentiary hearing.

Conclusion

The ruling at issue here was an abuse of discretion because:

- The re-cross sought by Suburban was permissible under Commission practice and the Rules of Evidence;
- It sought to elicit testimony directly responsive to the Attorney Examiner's questions and points raised by Staff; and
- It prejudices Suburban, and a ruling permitting the re-cross would not have prejudiced Staff.

Suburban and its customers are entitled to a decision in this case based on full, accurate, relevant evidence responsive to questions raised during the June 12, 2012 evidentiary hearing. Depriving Suburban and its customers of that based on an inaccurate evidentiary ruling raises new and novel questions of law and policy necessitating immediate determination by the Commission to prevent the likelihood of undue prejudice and expense to Suburban. Accordingly, Suburban's Application for Review and Motion for Certification should be granted.

Respectfully submitted,

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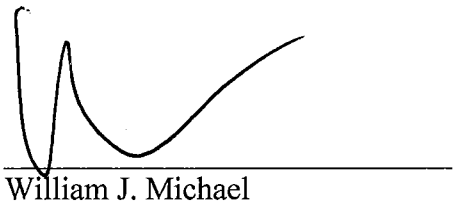
PROOF OF SERVICE

I hereby certify that a copy of the foregoing Application for Review and Motion for Certification was served upon the following as a courtesy, via U.S. Mail, postage prepaid, on this 18th day of June 2012.

Thomas G. Lindgren
Attorney General
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215



William J. Michael

*1990 Ohio App. LEXIS 5796, **

STATE OF OHIO, Plaintiff-Appellee v. GERALD FREEZE, Defendant-Appellant

Case No. 2421

Court of Appeals of Ohio, Second Appellate District, Clark County

1990 Ohio App. LEXIS 5796

December 21, 1990, Rendered

PRIOR HISTORY: [*1] Appeal from T.C. No. 87CR157.

DISPOSITION: The judgment of the trial court will be affirmed.

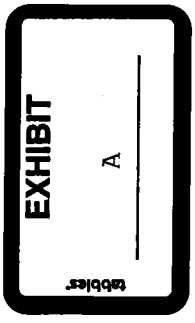
CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed the order of the trial court (Ohio), which entered judgment on a jury verdict finding defendant guilty of involuntary manslaughter in the death of the victim, which occurred pursuant to a fight in the parking lot of a tavern.

OVERVIEW: Defendant and a co-defendant were charged with causing the death of another customer of the tavern they were patronizing. A fight had initially begun inside the tavern, but had been broken up by other customers. After the bar closed, the fight resumed in the parking lot, and concluded when the victim was stabbed to death. The state alleged that defendant had stabbed the victim in the leg, and had then held him in a head lock while the co-defendant fatally stabbed the victim in the chest. The codefendant was found guilty of murder, but the jury found defendant guilty of involuntary manslaughter. Defendant appealed his conviction, and the court affirmed. The court first held that the jury verdicts were not inconsistent, and the jury was properly instructed on the lesser-included offense of involuntary manslaughter. The court further held that defendant's counsel was not ineffective and the evidence supported defendant's conviction. Finally, the court held that the trial court properly admitted, for impeachment purposes only, statements defendant had made to a jailer regarding his involvement in the death of the victim.

OUTCOME: The court affirmed defendant's conviction.

CORE TERMS: involuntary manslaughter, decedent, stabbed, felonious assault, headlock, fight, opening statement, murder, intervening cause, prosecutor, impeachment, felony, convicted, thigh, assignments of error, plain error, chest, wound, assistance of counsel, fair



trial, ineffective, prejudiced, lesser, acting in concert, stabbing, assault, merger, advice, credible, instruct

LEXISNEXIS® HEADNOTES Hide

Criminal Law & Procedure > Criminal Offenses > Homicide > Involuntary Manslaughter > Elements

HN1 Involuntary manslaughter is defined in Ohio Rev. Code Ann. § 2903.04 as follows: no person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Lesser Included Offenses > General Overview

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses

HN2 A charge on a lesser included offense is required if the trier could reasonably find against the state for the accused upon one or more of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Criminal Law & Procedure > Appeals > Reversible Errors > General Overview

HN3 An appellant arguing reversible error based on a claim of ineffective assistance of counsel bears a heavy burden, not the least of which is to overcome the presumption that his trial counsel, being properly licensed in Ohio, is competent. Additionally, Sixth Amendment claims of denial of a fair trial based on ineffective assistance of counsel must satisfy the following two prong test: first, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as a counsel guaranteed the Defendant by the 6th Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions

HN4 Plain errors which affect substantial rights may be noticed although they were not brought to the attention of the court. Ohio R. Crim. P. 52(B). The power to notice plain error is one which courts exercise only in exceptional circumstances, and even then only with caution. The normal rule is that an appellate court should not consider questions which have not been properly raised in the trial court and upon which the trial court has had no opportunity to pass. The plain error rule should be applied with caution and should be invoked only to avoid a clear miscarriage of justice. To exercise the right freely would undermine and impair the administration of justice and detract from the advantages derived from orderly rules of procedure. More Like This Headnote

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Impeachment at Trial

HN5 Statements made by a defendant in circumstances violating the strictures of Miranda v. Arizona are admissible for impeachment if their trustworthiness satisfies legal standards. But any criminal trial use against a defendant of his involuntary statement is a denial of due process law. More Like This Headnote

Criminal Law & Procedure > Discovery & Inspection > Discovery Misconduct > Appellate Review & Judicial Discretion

Criminal Law & Procedure > Discovery & Inspection > Discovery Misconduct > Sanctions > Continuances

Criminal Law & Procedure > Pretrial Motions & Procedures > Suppression of Evidence

HN6 The trial court enjoys broad discretion in admitting evidence. Ohio R. Crim. P. 16(E)(3) provides for the regulation of discovery and permits the trial court to exercise its discretion in determining the sanction to be imposed for a party's nondisclosure of discoverable material. These sanctions include court ordered discovery, the granting of a continuance, or suppression of the evidence. Three factors are applied when determining whether the trial court has abused its discretion in admitting discoverable evidence which was undisclosed before trial. These factors are: whether the State's failure to disclose was a willful violation of Rule 16 or merely a negligent omission; how foreknowledge of the nondisclosed statement would have benefitted the accused in the preparation of his defense; and, how the accused was prejudiced by the admission of the statement. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: RICHARD P. CAREY, Assistant Prosecuting Attorney, Springfield, Ohio, Attorney for Plaintiff-Appellee.

RICHARD E. MAYHALL, Springfield, Ohio, Attorney for Defendant-Appellant.

JUDGES: Wolff, P.J. Brogan, J. and Fain, J., concur.

OPINION BY: WOLFF

OPINION

OPINION

Gerald Freeze was convicted of involuntary manslaughter in the death of Vincent Craig and was sentenced to a term of ten to twenty-five years of incarceration, ten of which were actual incarceration. Freeze appeals this judgment and sentence.

Freeze advances eight assignments of error as follows:

Assignment of Error I

THE TRIAL COURT ERRED IN ACCEPTING THE JURY'S VERDICT THAT FREEZE WAS GUILTY OF INVOLUNTARY MANSLAUGHTER BECAUSE THAT VERDICT WAS NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Assignment of Error II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE LESSER INCLUDED OFFENSE OF

INVOLUNTARY MANSLAUGHTER.

Assignment of Error III

FREEZE'S CONVICTION FOR INVOLUNTARY MANSLAUGHTER IS BARRED BY **[*2]** THE DOCTRINE OF MERGER.

Assignment of Error IV

FREEZE WAS DENIED HIS 6TH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND DEPRIVED OF A FAIR TRIAL BECAUSE OF TRIAL COUNSEL'S INCOMPETENCE IN FAILING TO REQUEST THE TRIAL COURT TO INSTRUCT THE JURY ON THE DEFENSE OF "INDEPENDENT INTERVENING CAUSE."

Assignment of Error V

THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO INSTRUCT THE JURY ON THE DEFENSE OF INDEPENDENT INTERVENING CAUSE.

Assignment of Error VI

THE TRIAL COURT ERRED IN ALLOWING FREEZE'S PRIOR INCULPATORY STATEMENTS, AS RELATED BY DEPUTY HICKS, TO BE USED TO IMPEACH FREEZE.

Assignment of Error VII

MISCONDUCT OF THE PROSECUTOR DENIED FREEZE HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

Assignment of Error VIII

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN PERMITTING THE PROSECUTOR TO QUESTION DENNIS HOWELL ON MATTERS THAT WERE CLEARLY OUTSIDE THE SCOPE OF RE-CROSS EXAMINATION.

Freeze and his co-defendant, Russell Kunkle, were arrested and charged with the murder of Vincent Craig. Craig died in the early morning of August 11, 1987, after being stabbed at AJ's Bar in Springfield, Ohio. That evening, AJ's had hosted **[*3]** an "all you can drink beer blast. " Freeze, Kunkle and the decedent were all present at the bar. Kunkle and Freeze had arrived together. During the evening, the decedent engaged in a fist fight with Jimmy Powell. Patrons of the bar broke up the fight. The fight resumed around 2:00 a.m. outside, in front of the bar. Most of the remaining patrons, approximately twenty people, followed the fight outside. As soon as the fight moved outside, the scene became confusing due to the shouting, yelling, and milling about of people. There was eyewitness testimony that during the ensuing melee, Freeze grabbed the decedent in a headlock, stabbed him in the thigh, and held him in a headlock while Kunkle fatally stabbed him twice in the chest.

Freeze and Kunkle were jointly tried before a jury. Freeze was convicted of involuntary manslaughter and Kunkle was convicted of murder.

In his first assignment, Freeze argues that his conviction for involuntary manslaughter was against the manifest weight of the evidence and unsupported by sufficient credible evidence. He contends that since the jury found only Kunkle guilty of murder and convicted Freeze of involuntary manslaughter, it necessarily concluded **[*4]** that Freeze neither purposely caused Craig's death nor aided and abetted Kunkle in the purposeful killing of Craig. Furthermore, since Freeze did not inflict the fatal wound, nor proximately cause Craig's death, he could not have been convicted of involuntary manslaughter. We do not agree with this interpretation of the

jury's verdict.

HN1 Involuntary manslaughter is defined in R.C. 2903.04 as follows:

No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.

The record discloses sufficient evidence upon which Freeze could have been convicted of either involuntary manslaughter or murder, depending on the level of mental culpability the jury determined Freeze had. Involuntary manslaughter does not require proof of the purpose or intent to cause the death of another; rather, the mens rea requirement is supplied by the commission of a felony. Here, the felony upon which the involuntary manslaughter conviction was predicated was felonious assault. The record discloses sufficient evidence upon which the jury could have found Freeze guilty of involuntary manslaughter. Two witnesses, Mildred Palmer and Melissa Masters, **[*5]** both testified that they saw Freeze hold the decedent in a headlock while Kunkle fatally stabbed him in the chest. Mildred Palmer also testified that she saw Freeze stab the decedent once in the thigh before Kunkle stabbed him. This testimony would be sufficient to support the conclusion that Freeze was guilty of committing or attempting to commit felonious assault.

The pathologist who conducted the autopsy testified that the stab wound in the thigh was not a cause of death and that the chest wounds were the sole cause of death. Assuming, arguendo, that he had stabbed the decedent in the thigh, Freeze argues that nevertheless, the verdict of involuntary manslaughter was unsupported by the evidence because the thigh wound could not have proximately caused Craig's death. This argument fails because it overlooks the fact that the testimony of Mildred Palmer and Melissa Masters supported a reasonable determination that Freeze aided and abetted Kunkle in committing a felonious assault and that Kunkle's assault proximately cause Craig's death. Thus, it appears that although the jury found that Freeze had aided and abetted Kunkle in committing a felonious assault which resulted in death, **[*6]** they found that, unlike Kunkle, Freeze did not specifically intend to kill Vincent Craig. This result is supported by competent, credible evidence.

The first assignment is overruled.

Freeze contends in his second assignment of error that the trial court erroneously gave a jury instruction on the lesser included offense of involuntary manslaughter. HN2 A charge on a lesser included offense is required:

If the trier could reasonably find against the state for the accused upon one or more of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense. . .

State v. Nolton (1969), 19 Ohio St. 2d 133, 135.

The offenses of murder and involuntary manslaughter are distinguished by the element of purpose. Since involuntary manslaughter does not require a showing of purpose, it is a lesser included offense of murder. Thus, the jury could have found Freeze guilty of murder if the State produced evidence which satisfied the jury beyond a reasonable doubt that Freeze intended to cause Craig's death. If however, the jury could have reasonably found (1) that Freeze aided and **[*7]** abetted Kunkle in committing feloneous assault but (2) that Freeze did not intend Craig's death, then the state would be entitled to a charge on involuntary manslaughter.

In this case, the charge on involuntary manslaughter was warranted. The evidence was such that a jury could have reasonably concluded, based on Freeze's actions of stabbing the decedent in the thigh and then holding him in a headlock while Kunkle fatally stabbed him, that although the two defendants were acting in concert in committing a felonious assault upon the decedent, Kunkle acted with the purpose to kill, while Freeze did not. Despite Freeze's denial of

involvement in the stabbing, the jury could have reasonably disbelieved Freeze's disavowal, and nonetheless found that he was aiding Kunkle in the felonious assault which did result in Vincent Craig's death. Under these facts, a charge on involuntary manslaughter was proper.

The second assignment is overruled.

We reject Freeze's third error assignment wherein he claims that his conviction for involuntary manslaughter was barred by the doctrine of merger because it was improperly premised on the underlying felony of felonious assault.

Freeze argues that Ohio's **[*8]** involuntary manslaughter statute is a codification of the common law felony-murder rule. Merger operates to bar application of the felony-murder rule whenever the underlying felony directly results in or is an integral element of the homicide. Under the merger rule, the charge of felonious assault, the felony upon which the charge of involuntary manslaughter was based in this case, could not serve is as the underlying felony for a charge of felony-murder.

We are not presented with a case of felony-murder, i.e. under Ohio law, involuntary manslaughter is not the equivalent of murder but is, rather, a less grievous crime. Further, we are not persuaded by this argument since Freeze has cited no Ohio authority in support of this position and this argument is contrary to our holding in *State v. Bailey* (April 1, 1985), Mont. App. No. CA 1974, unreported, where we held that:

the defendant has cited no Ohio authority in support of his merger argument that the offense of felonious assault may not be used as the underlying felony to warrant a charge of involuntary manslaughter when the assault is an integral part of the murder. Under Ohio schema of criminal procedure felonious assault **[*9]** is an included offense if its supported by the evidence.

We conclude that the charge of felonious assault could properly serve as the basis for Freeze's conviction for involuntary manslaughter.

The third assignment of error is overruled.

In the fourth assignment, Freeze claims he was subjected to ineffective assistance of counsel because his defense counsel failed to request a jury instruction on independent intervening cause. Thus, he claims he was deprived of his Sixth Amendment right to a fair trial.

HN3An appellant arguing reversible error based on a claim of ineffective assistance of counsel bears a heavy burden, not the least of which is to overcome the presumption that his trial counsel, being properly licensed in Ohio, is competent. *State v. Williams* (1969), 19 Ohio App. 2d 234. Additionally, Sixth Amendment claims of denial of a fair trial based on ineffective assistance of counsel must satisfy the following two prong test established in *Strickland v. Washington* (1984), 466 U.S. 668, 687.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as a "counsel" **[*10]** guaranteed the Defendant by the 6th Amendment. Second, the Defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive Defendant of a fair trial, a trial whose result is reliable.

The charge on the defense of independent intervening cause is as follows:

If the Defendant inflicted an injury not likely to produce death, and if the sole and only cause of death was a fatal injury inflicted by another, the Defendant, who inflicted the original wound is relieved of the liability for the death.

The instruction on causation actually given by the trial court is as follows:

Cause is an act which in the natural and continuous sequence directly produces the death and without which it would not have occurred. Cause occurs when the death is the natural and foreseeable result of the act . . . You must decide separately the question of the guilt or the innocence of each of the two Defendants . . . you must separately consider the evidence applicable to each Defendant as though he were being separately tried . . .

In this case, the jury apparently construed the evidence as demonstrating that Freeze was **[*11]** acting in concert with Kunkle to commit a felonious assault upon Craig, which ultimately resulted in his death. Although Freeze did not himself inflict the fatal wound, he was acting in concert with the person who did.

Nevertheless, a charge on independent intervening cause would have been proper given Freeze's theory of the case. Freeze admitted he held the decedent in a headlock, but denied that he stabbed the decedent in the thigh or held him to enable Kunkle to stab him. Instead, Freeze at all times maintained that he held the decedent in a headlock in order to break up the fight when it resumed in front of the bar. Freeze's theory of the case therefore was that by holding the decedent in a headlock, he facilitated the stabbing, albeit unwittingly. Thus, the evidence would have supported a charge on independent intervening cause and if the charge had been requested it should have been given. However, this is not a case where a requested instruction was not given. Instead, we are faced with the question of whether failure to request such a charge subjected Freeze to ineffective assistance of counsel. We think not.

Not requesting the charge could have been a legitimate trial tactic **[*12]** calculated to avoid accentuation of the evidence against Freeze. The evidence disclosed that Freeze and Kunkle were at the bar together. The evidence further disclosed that Freeze and Kunkle both left the bar together and followed the fight outside. Finally, the evidence disclosed that Freeze held the decedent in a headlock while Kunkle stabbed him. Taken together, this evidence could have been construed as showing that Freeze and Kunkle were acting in concert. A charge on intervening cause, although not intended to do so, would have necessarily highlighted the apparently concerted nature of the attack, notwithstanding Freeze's assertion that he unwittingly enabled Kunkle to kill the decedent. Therefore, defense counsel's failure to request such a charge can be reasonably viewed as a legitimate trial tactic and not as ineffective assistance of counsel.

In addition, the similarity between the charge at issue and that actually given dispels the concern that Freeze was prejudiced by his counsel's actions. The charge actually given embodies the essence of the charge at issue. The charge on independent intervening cause is a refinement of the charge on causation actually given. If the **[*13]** jury were to have believed that Freeze did no more than hold Craig in a headlock to break up a fight, i.e. that Freeze did not aid and abet a felonious assault, the causation instruction actually given gave the jury sufficient direction to find Freeze not guilty of involuntary manslaughter.

The fourth assignment is overruled.

In the fifth assignment of error, Freeze argues that the trial court committed plain error by failing to give an instruction on the defense of independent intervening cause.

HN4Plain errors which affect substantial rights may be noticed although they were not brought to the attention of the court. Crim. R. 52(B). The power to notice plain error is one which courts exercise only in exceptional circumstances, and even then only with caution. *State v. Long* (1978), 53 Ohio St. 2d 91, 94. In explaining the prudent application of Rule 52(B), the Ohio Supreme Court has held:

The normal rule is that an appellate court should not consider questions which have not been properly raised in the trial court and upon which the trial court has had no opportunity to pass.

The plain error rule should be applied with caution and should be invoked only to avoid a clear miscarriage **[*14]** of justice. To exercise the right freely would undermine and impair the administration of justice and detract from the advantages derived from orderly rules of procedure.

Id. at 95-96.

Freeze reasons that the failure to instruct on the defense of independent intervening cause rises to the level of plain error because the jury, by its verdict of involuntary manslaughter, distinguished between the conduct and culpability of the two defendants. Freeze argues that Kunkle purposefully murdered Craig and since he, Freeze, was not also convicted of murder, it proves that the jury did not find that Freeze and Kunkle were acting in concert and hence Kunkle's actions constituted an independent intervening cause of death. We have already rejected this as the only possible analysis of the verdict, finding that the jury could have found that Freeze and Kunkle were acting together to assault the decedent but that only Kunkle had the purpose to kill. We conclude, for the reason stated in connection with the preceding assignment of error, that it was not necessary for the jury to receive such an instruction in order for Freeze to receive a fair trial, and that the failure to so instruct was **[*15]** not plain error.

The fifth assignment is overruled.

We reject Freeze's sixth error assignment that the trial court erred by allowing the testimony of Clark County Deputy Pat Hicks, which concerned a conversation he had with Freeze, to be used to impeach Freeze.

Hicks was a Clark County Deputy who met Freeze while Freeze was confined in the Clark County jail following his arrest for Craig's homicide. Hicks was also the security officer assigned to the court during the joint trial of Freeze and Kunkle. The pertinent portion of this contested testimony is as follows:

Q. Did you ever have occasion to talk with Gerald Freeze there over at the Clark County Jail?

A. Yes, I did.

Q. And did you ever have occasion to talk with Gerald Freeze specifically about a matter here at hand, to wit, assault at AJ's Bar?

A. Yes, I do.

* * *

A. I opened the panel and Mr. Freeze said, "I need to talk to you." And I told him I was busy; and he said, "I've got to talk to you, I need your advice." So I closed the panel back up and stepped back a couple steps with Mr. Freeze. And he said, "I need your advice. Are you familiar with my case?" And I told him I knew something about his case. And he said, **[*16]** "I need your, I need to know how to plead." He said, "I'm not guilty of murder." And I said, "Have you talked to your attorney about this?" And he said, shrugged, and said, "I need to, I need your advice, I want your advice on it." So I said, "Did you stab Vincent Craig?" And he nodded and said that he hit him low and then that he held him while the other guy hit him in the, stabbed him in the chest area. And I said, "Kunkle?" And he said, "Yeah."

Q. Now, Deputy, when you stated that Gerald Freeze nodded after your question about whether or not he stabbed Vincent Craig, what type of nod was that?

A. An affirmative nod.

Q. What happened after he affirmed that it was Kunkle that had stabbed him in the chest?

A. I asked him, he said, "I need your advice on how to plead. " And I asked him, I said, "But I'm not an attorney." I said, "You should, haven't you talked to your attorney?" And he was insistent on asking me what his plea should be, what he should do.

Freeze and Kunkle both objected to the admission of this testimony because Hicks first came forward with this information after two full days of testimony at trial, after having heard the testimony of a number of state witnesses. **[*17]** Both defendants claimed that the admission of this testimony would constitute unfair surprise and prejudice because their entire defenses were based upon the premise that neither had been involved in the stabbing. Therefore, they argued, if the statement were admitted, they would have to change their defenses mid-stream.

The Court conducted an *in camera* hearing to determine: the exact nature of Hicks' proposed testimony; the reasons for the late notice to the prosecutor's office; and, whether to allow Hicks to testify at trial. At the hearing, Hicks testified that although he could not recall the exact date or month of the conversation, he believed that it had occurred within two weeks of Freeze's arrest. He testified that he had made a written notation of the conversation, but had no idea where that notation was at the time of the hearing. Hicks, however, failed to notify his superiors, or anyone else, as to the existence and substance of the confession.

Both defendants moved to have the evidence excluded. The Court denied both motions and ruled that Hicks' testimony would be admissible, but only to impeach Freeze on rebuttal. The Court refused to allow it in for substantive **[*18]** purposes, finding that it was elicited in violation of *Miranda v. Arizona* (1966), 384 U.S. 439.

Freeze challenges the admissibility of this testimony for any purpose relying on *Mincey v. Arizona* (1978), 437 U.S. 385, wherein the Supreme Court held that:

HN5statements made by a defendant in circumstances violating the strictures of *Miranda v. Arizona, supra*, are admissible for impeachment if their 'trustworthiness . . . satisfies legal standards.' But *any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process law . . .(Citations omitted.)

Id. at 397, 398.

Freeze claims that the statement he made to Hicks while incarcerated was unreliable and did not meet the requisite legal standards of trustworthiness and, therefore, was inadmissible for any purpose. We find no evidence to support a finding of unreliability. In determining whether any statement is reliable, courts consider whether it was voluntarily given, not whether the witness testifying as to the statement was credible. Freeze attempts to bolster his argument with a recitation of the facts surrounding Hicks' testimony such as the fact that he could not specifically **[*19]** identify when the statement was made, nor could he locate the notes he made about the statement at the time the *in camera* hearing was held, and finally, the fact that Hicks waited until two days of testimony had been heard before coming forward. We think these facts are irrelevant to the issue of whether Freeze voluntarily made such a statement to Hicks. Rather, these facts bear more on the issue of the credibility of Hicks' testimony. Consequently, we are not persuaded to a finding of unreliability on the basis of the circumstances surrounding the late disclosure of the statement. The trial court could have reasonably found that Freeze voluntarily made the statement to Hicks, thereby satisfying the "trustworthiness" prerequisite for use of the statement for impeachment purposes. Furthermore, inasmuch as

Freeze never challenged the voluntariness of the statement, this objection may be deemed waived.

Freeze also argues that the lateness of the disclosure caused unfair surprise, resulting in prejudice to his defense. He claims he was surprised because he denied making the inculpatory

statement. Furthermore, although he has admitted that he did hold the decedent in a headlock, **[*20]** he denied any involvement in the stabbing, and steadfastly maintained that he restrained the decedent in order to break up the fight between the decedent and Jimmy Powell. Prejudice resulted because his defense strategy was that he was not guilty of any crime, and that he would take the stand without fear of impeachment.

HN6The trial court enjoys broad discretion in admitting evidence. Crim R. 16(E)(3) provides for the regulation of discovery and permits the trial court to exercise its discretion in determining the sanction to be imposed for a party's nondisclosure of discoverable material. *State v. Parson* (1983), 6 Ohio St. 3d 442. These sanctions include court ordered discovery, the granting of a continuance, or suppression of the evidence. Three factors are applied when determining whether the trial court has abused its discretion in admitting discoverable evidence which was undisclosed before trial. These factors are: whether the State's failure to disclose was a willful violation of Crim. R. 16 or merely a negligent omission; how foreknowledge of the nondisclosed statement would have benefitted the accused in the preparation of his defense; and, how the accused was prejudiced **[*21]** by the admission of the statement. *Id.* at 445.

From our review of the record, we are unable to find that the trial court abused its discretion by admitting Hicks' testimony. This is not a case which involves intentional, willful nondisclosure by the State since the State disclosed the statement to defense counsel immediately after Hicks informed Prosecutor Carey.

Freeze has also failed to prove how foreknowledge of the nondisclosed statement would have benefitted his defense. In opening statement, defense counsel told the jury that Freeze would testify. Freeze now claims that because the trial court allowed Hicks' alleged surprising testimony, he had to either take the stand and risk impeachment or refuse to testify and break faith with the jury, and that he thus was forced to take the stand in order to keep his promise to the jury. He claims he would not have so promised if he had known of Hicks' testimony before trial.

There is no denying that Hicks' testimony was damaging to Freeze, but every piece of prosecution evidence is damaging to a defendant. Freeze argues that his defense strategy was that he would take the stand and testify that he committed no crime, but merely held **[*22]** the decedent in a headlock to break up the fight. Freeze claims that this strategy was no longer practicable once Hicks' testimony was admitted because he could no longer take the stand and deny his involvement without fear of impeachment. We are unpersuaded by this argument.

If Freeze had known before trial that Hicks was to testify, he would nonetheless, as a practical matter, have had to testify.

Although we cannot tell from the record what Freeze knew of the proposed testimony of the State's witnesses via pretrial discovery, we do know that the State's opening statement informed Freeze that Mildred Palmer would testify that he stabbed Craig in the hip and then held Craig in a headlock while another man stabbed Craig in the chest. If Freeze had not testified, this critical testimony would have stood unchallenged. Therefore, as a practical matter, Freeze had to testify to refute this evidence, and may well have informed the jury during opening statement that he would testify, even if he had known of the Hicks' statement.

The risk of impeachment is a risk that is run by any witness who testifies. If the statement had been disclosed prior to trial, Freeze would still have been faced **[*23]** with the dilemma of whether to testify. The only difference would have been that he would have known of a second source of testimony that would have cast doubt on his testimony that he had not committed any crime. To say that Freeze was damaged by Hicks' testimony is not to say that he was prejudiced by it.

Alternatively, we are not persuaded that Freeze's opening statement actually obligated him to take the stand or risk disbelief by the jury because of his "breaking the promise made to the

jury" during opening statement to testify.

Although his opening statement clearly indicated that he would testify, the opening statement did not emphasize Freeze's expected testimony. The only specific mention of Freeze's testimony pertained to how he came to contact the Springfield police after the incident. While the opening statement was to the effect that Freeze's only involvement was trying to break up the fight between Powell and Craig, the opening statement did not state that Freeze would so testify.

The trial court ruled that Freeze's statement to Hicks could only be used for impeachment of Freeze. The jury was thus unaware of Freeze's alleged statement at the time the State rested its **[*24]** case. Had Freeze decided not to take the stand because of his concern about Hicks' impending testimony, he would have had an absolute right to an instruction to the jury that Freeze had a constitutional right not to testify and that his not testifying could not be held against him. The jury would not have known the reason for Freeze's deciding not to testify. We have no reason to think that other witnesses could not have testified to those facts which Freeze's opening statement referred to. For example, Earl Freeze was called by defendant Freeze and testified that defendant Freeze had held Craig in a headlock in an effort to break up the fight between Craig and Powell.

In short, we think as a practical matter that Freeze had to take the stand, and would have done so regardless of Hicks' impeaching testimony. If, however, he would have decided not to testify for fear of impeachment, we do not think Freeze's opening statement emphasized his testimony to the extent that Freeze would have risked jury disbelief solely on account of his deciding not to testify.

The sixth assignment is overruled.

Freeze argues in his seventh assignment of error that he was prejudiced by prosecutorial misconduct **[*25]** which occurred during cross-examination of defense witness Dennis Howell. Howell, Freeze and Kunkle had all been members of the Death Motorcycle Club. The issue of club membership had been raised on direct examination. On cross-examination, the State inquired about the existence of a loyalty oath among members. Defense counsel objected on the grounds that the State had no good faith belief that a factual predicate for the question existed. The court questioned the prosecutor as to his basis for belief in a sidebar conference as follows:

The Court: I don't know what the oath is.

Mr. Carey: I don't know it either . . .

The Court: Do you know if there is an oath or what it is?

Mr. Carey: I don't know if there is or not. You're talking about a gang, a club, usually clubs have oaths and we're talking about conspiracy of two people working together and also about his testifying about two members of the gang he is in. I believe the --

The Court: Some kind of loyalty oath.

Mr. Carey: I think they do.

The judge overruled the objection, finding that the defense had opened the door on the subject of membership in the club. When questioned, Howell denied the existence of the oath.

[*26] The State, in its brief, denies that it was "fishing" by inquiring into the subject and claims that it asked such questions to impeach the witness' credibility. It sought to show bias on the grounds that such an oath meant members stuck together, even to the point of perjuring themselves for a fellow, or as in this case, former member. While the prosecutor's

statement that he thought there was an oath is barely enough to satisfy the requirement of having a good faith basis for belief for so inquiring, *State v. Gillard* (1989), 40 Ohio St. 3d 226, 230-31, we cannot say that the trial court abused its discretion in so concluding, and by permitting the prosecutor to pursue a line of questioning pertaining to an area raised by the defendant.

Freeze also alleges that the prosecutor acted improperly when he attempted to impugn the integrity of Dennis Howell in closing arguments by implying that Howell lied when he denied the existence of a loyalty oath. Defense counsel did not object to this remark, and the objection thereto on appeal is deemed waived.

Finally, Freeze claims the prosecutor acted improperly when he made the following statement about witness Mildred Palmer on closing argument:

[*27] Yeah, she's not a professional witness here. She's easy cannon fodder for a professional hired gun to go after her and rip her up and down one side.

Defense counsel's objection to the reference to defense counsel as a "hired gun" was sustained. While the statement may be overwrought, we fail to see how these remarks, designed to support the credibility of a state's witness, were prejudicial to Freeze. We do not read this statement as impugning the professionalism of defense counsel.

The seventh assignment is overruled.

We reject Freeze's final assignment that the lower court erred by allowing the State to question defense witness Howell on cross-examination on matters pertaining to membership in the Death Motorcycle Club. We disposed of a similar concern in the seventh error assignment. Here, the specific complaint is that the questions ranged beyond the scope of re-cross examination, but we find no abuse of discretion because the trial court could have reasonably concluded that the issue of a loyalty oath was properly within the scope of re-cross-examination since the defense had brought up the subject of club membership in the first place.

The eighth assignment is overruled.

[*28] The judgment of the trial court will be affirmed.

Summary: Application for Review and Motion for Certification electronically filed by Ms. Brandi L. Kayser on behalf of Suburban Natural Gas Company