

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	Case No. 2007-1478
)	
Plaintiff-Appellant,)	On Appeal from the
)	Lake County Court of Appeals,
v.)	Eleventh Appellate District
)	
JENNIFER L. JEFFRIES)	
)	
Defendant-Appellee.)	Court of Appeals Case No. 2005-L-057

MERIT BRIEF OF APPELLANT STATE OF OHIO

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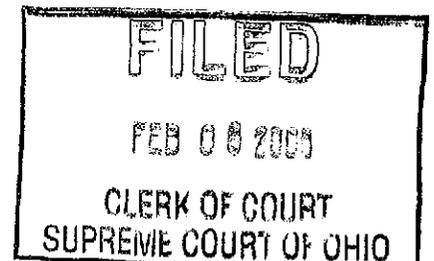


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STATEMENT OF THE CASE AND FACTS

The bloodied, battered body of 21 year old Dustin Spaller was found lying face up on the roadside in Recreation Park at 3:09 a. m. (T.p. 872-876). The coroner would later identify the muzzle of a gun imprinted on his skull. The cause of death was bleeding from a gunshot wound anywhere between 1:30 a. m. and 3:00 a. m. (State's Exhibit 29, T.p. 1221-1233). Based on his injuries, age and size of approximately 200 pounds, the coroner estimated it would have taken him at a minimum ten minutes to two hours to bleed to death. Id. In addition to a muzzle imprint on his skull, numerous blunt force injuries covered his head and body. (State's Exhibit 29, T.p. 1218-1234).

Hours after Dustin's death, at 4:48 a. m., the Lake County Sheriff's Department received a 911 call from one Jennifer Jeffries. (T.p. 867-869, State's Exhibit 3). She claimed that she and her friend, Dustin, had been ambushed by three men at Recreation Park. Id. She claimed she could not identify the men. Id. Further, she told the dispatcher \$200 had been stolen from her and that she felt that she and Dustin had been "set up." Id. She fled and was unaware of what happened to Dustin. Id.

A detective from the Painesville Police Department responded to Jennifer's residence to speak with her. (T.p. 1363-1365). Again Jennifer reiterated that she was the victim of a robbery at the hands of three unknown men. (T.p. 1363-1371). Jennifer Jeffries accompanied the detective to the Painesville Police Department where she made a statement which included the fact that she was looking to sell crack cocaine to Dustin and his friends that evening per Dustin's request. (T.p. 1370-1376). She said after she left Tony's Inn, she had gone to the BP gas station in Painesville for cigarettes that night, then indicated that after she and Dustin drove around some apartment complexes where she

talked to three males, one being black and two white, about the purchase of some drugs, she saw a cop, so they went down to Recreation Park. (T.p. 1377-1383). At Recreation Park she claimed she backed into a parking spot and a male behind a split rail fence ran up toward her. At that time she was robbed and Dustin was beaten. Id.

While standing in Jennifer Jeffries' driveway, the detective noticed what appeared to be blood smeared on the side of her car. The vehicle was towed to the Lake County Regional Forensics Laboratory for examination. (T.p. 1366-1367).

In the meantime, Painesville police officers continued their investigation by speaking to two of Dustin Spaller's friends, Brett Cameron and David Tills. (T.p. 1023-1024). In their interviews to the police, the men said the previous day had begun when Dustin Spaller, who worked for a local car dealership, was assigned to retrieve a car from Pennsylvania for the dealership and had asked his friends to accompany him on the trip. (T.p. 1006). So, Brett and David went to Pennsylvania with Dustin to retrieve the vehicle and upon returning to Painesville they decided to go out partying. (T.p. 1006-1007). They began their evening at Just Teaz'in and after several drinks proceeded to Tony's Inn in Painesville, a local hot spot for drug activity. (T.p. 932, 1010).

When the three arrived at Tony's they were approached by Jennifer Jeffries. (T.p. 1008-1009). Jennifer Jeffries sold drugs to Dustin and his friends in the past. (T.p. 1010). Dustin asked Jennifer if he could purchase cocaine from her and he offered up a wad of money from his pocket as proof of payment. (T.p. 1011). Jennifer claimed she didn't have any drugs on her at the moment and left to seek out a source. (T.p. 1012, 1048).

After speaking with her ex-husband, Tyrone Jeffries, near the mens room, Jennifer Jeffries returned to Dustin and his friends telling them to meet her at Rec Park. Id. When

David Tills told her, "No, we don't want to go down there." She asked him, "What's your problem?" (T.p. 1012-1013). Dustin then told David Tills and Brett Cameron to wait while he spoke with Jennifer in private. (T.p. 1013, 1037-1038). After Dustin's conversation with Jennifer all parties left the bar. Id. David Tills and Brett Cameron in their car were following Jennifer and Dustin in Jennifer's car. Id. But as they were headed to Rec Park, Dustin got out of the car he was traveling in with Jennifer and told his friends to go back to Tony's Inn and wait for them. Id.

Throughout the course of the next few hours, Dustin's friends made numerous attempts to contact Jennifer Jeffries via her cell phone. (T.p. 1014). Phone records confirmed the testimony of David Tills that some of the calls were not returned, however when Jennifer Jeffries did contact Dustin's friends she gave them varying stories as to Dustin's location and what happened that night. (T.p. 1014-1023, 1042, 1048, State's Exhibits 2 A-C). The stories Jennifer gave to Dave and Brett differed from the story she gave to the police. (T.p. 1385-1386). Consequently Ms. Jeffries was called in for a second interview with the police and during this interview she maintained her first statements and refused to give any more information. (T.p. 1390-1404).

Meanwhile, the criminalists at the Lake County Regional Forensic Lab were examining Jennifer Jeffries car. (T.p. 961). The scientists found that someone had wiped the passenger side of the car with a cloth or a sponge. (T.p. 968-979, State's Exhibits 9, 9A-G). Later it was revealed that Dustin Spaller's blood appeared all over the side of Jennifer Jeffries' car and, in fact, his bloody fingerprint was evident on the top of the passenger door. (T.p. 968-979, State's Exhibits 9A-G, 20, 21, 22, 33, 34).

As the investigation progressed, the police spoke with an acquaintance of Jennifer Jeffries, one Monica Griswold. She revealed that during the early morning hours of the day in question, Jennifer Jeffries appeared at Monica's doorway nervously demanding a rag or sponge. (T.p. 1081-1086). When Monica complied, Jennifer used the sponge and cloth to wipe down both inside and outside the passenger door of her car. (T.p. 1086-1087). When Monica asked what was going on, she was told to shut up. (T.p. 1088). Then Jennifer put her car in Monica's garage and asked Monica to drive her to the Spaller home, where David Tills and Brett Cameron were waiting. (T.p. 1090, 1095).

Jennifer picked up David Tills and told Tills that there had been a robbery and that she had dropped Dustin off at Tony's Inn. She insisted that they needed to go and find Dustin. After a short drive in the car, Tills became apprehensive and asked to be taken home. (T.p. 1018-1020, 1093-1096).

But after Tills got out of the car, Jennifer directed Monica down to Recreation Park. (T.p. 1096-1102). There they came upon Dustin Spaller lying on the side of the road. *Id.* Neither bothered to get out of the car to check on him. *Id.*

Next, Jennifer and Monica picked up Gary Bafford, Monica's friend. (T.p. 803, 1102). While Mr. Bafford was in the car, Jennifer was busy on her cell phone. (T.p. 109). In between her discussions on the phone, she offered Gary Bafford \$100 to help her move a body; he declined. (T.p. 804-809, 825-826, 1104-1106). Jennifer warned Monica not to mention Tyrone's name or anything about that night by threatening her grandson. (T.p. 1108-1109, 1141). Days later she called Monica to tell her to "tell your boy to quit running his mouth." (T.p. 1156). Cell phone records confirm the calls made by Jennifer Jeffries

and confirm that she and Tyrone Jeffries were communicating numerous times during the early morning hours of that day. (State's Exhibit 2 A, B, C, T.p. 854-855).

Later in the investigation one Gina Groskopf revealed she had a conversation with Jennifer wherein Jennifer told her that she and others set Dustin Spaller up for a robbery. (T.p. 1573-1589). Jennifer claimed that she and Tyrone and other people went to a meeting place without crack cocaine intending to rob Dustin. Id.¹

In October of 2002, the Public Defender's office wanted to test a new story their client was telling them about Dustin Spaller's murder. (Supp.T.p. 201). They brought her to a polygraphist by the name of Mary Ann Feathers. She was tested on October 28, 2002. Id.

Prior to anyone being indicted for the murder of Dustin Spaller, in the spring of 2003, the Public Defender's office approached the State with regard to their client, Jennifer Jeffries, and proposed that Jennifer could help the State prosecute the trigger puller in the murder of Dustin Spaller. (Supp.T.p. 284-286). Jennifer's attorneys told the prosecutors that she had passed a polygraph and was willing to cooperate with the State in order to prosecute the alleged shooter. During this meeting the public defender read from a piece of paper the questions asked of their client and the test results. (Supp. T.p. 284-285).

Shortly after that meeting, efforts were made to formulate a cooperation agreement. Id. Eventually after negotiation, a cooperation agreement was signed in May 2003. (Supp.T.p. 164, 283, State's Supp. Exhibit 6). As part of that agreement, Jennifer Jeffries

¹As a result of the events of that evening, Jennifer Jeffries was initially charged with Trafficking in Drugs and Tampering with Evidence. She was appointed a public defender. No one had been charged with Dustin's homicide; the investigation was ongoing.

agreed to submit to a polygraph at the State's choosing and to give a detailed statement to the Painesville Police Department concerning the murder. Id. The cooperation agreement stated as follows:

As a result of discussions between Charles Grieshammer, Esquire, and Carolyn Kucharski, Esquire, counsel for Jennifer Jeffries aka Meyers, and Lake County Chief Assistant Prosecuting Attorney, Vincent A. Culotta, and Assistant Prosecuting Attorney, Karen A. Sheppert, counsel for the State of Ohio, the following agreement has been reached:

1. Jennifer Jeffries will cooperate with law enforcement officials and the Lake County Prosecutor's Office and agree to give a complete and truthful statement to the Painesville Police Department concerning her knowledge of the death of Dustin Spaller including the names of all those involved in the murder and their actions and any conversations Jennifer Jeffries had with any of said perpetrators and their statements regarding Dustin Spaller's death;
2. Jennifer Jeffries agrees to submit to a polygraph examination conducted by an examiner chosen by the Lake County Prosecutor's Office, to confirm that the information she has provided to law enforcement officials is the complete truth;
3. Jennifer Jeffries, upon successfully passing the polygraph examination, will continue to cooperate with law enforcement officials prior to and throughout any trials or hearings that may result regarding the death of Dustin Spaller, and will agree to be available for debriefing and/or trial preparation by staff of the Lake County Prosecutor's Office and appropriate law enforcement agencies, and will agree to provide truthful testimony in Court in any of said trials or hearings;
4. It is understood that if Jennifer Jeffries does not successfully pass the polygraph to the satisfaction of the Lake County Prosecutor and/or fails to cooperate with the Lake County Prosecutor or law enforcement, this agreement will be null and void;

5. It is understood that it may be necessary for Jennifer Jeffries, in order to tell the whole truth about the events of December 3, 4, and 5, 2001, to disclose matters concerning drug usage and/or trafficking. Any statements made by Ms. Jeffries in this regard will not be used against her in any later proceedings, including and especially in the event that this agreement should fail;
6. As part of her cooperation with law enforcement officials, it is agreed that Jennifer Jeffries will, if requested by law enforcement official, participate in monitored and recorded phone conversations and/or wear wires to monitor and record conversations, in addition to participating in other investigative techniques;
7. Previously, Jennifer Jeffries was charged with one count of Trafficking in Cocaine, a Felony of the fifth degree, and one count of Tampering with Evidence, a felony of the third degree, in relation to the Spaller homicide investigation. These two charges were dismissed to conduct further investigation. At the conclusion of all cases that may be indicted in which Jennifer Jeffries may be called to testify on behalf of the State of Ohio involving the Spaller homicide, Jennifer Jeffries, regardless of the result of said cases, will plead Guilty to a charge of Obstruction of Justice, a felony of the fifth degree, in violation of O.R.C. 2921.32;
8. It is understood between the parties that a sentence will be imposed on the charge of Obstructing Justice, a felony of the fifth degree, and that sentencing is the sole discretion of the judge. However, at the time of Jennifer Jeffries' sentencing the Lake County Prosecutor's Office will make known to the sentencing court the full extent and nature of Ms. Jeffries' cooperation and will recommend community control sanctions to be served concurrently with the community control sanctions she is currently under;
9. It is understood between the parties that if all previously mentioned conditions are met, that Jennifer Jeffries will not be subjected to any further criminal charges in relation to the death of Dustin Spaller;

10. It is understood that should Jennifer Jeffries fail to meet any term set forward in this agreement, the agreement is null and void and no terms will be binding on law enforcement or the Lake County Prosecutor's Office.

By signing this agreement, the defendant, Jennifer Jeffries, her counsel, Charles Grieshammer, Esquire, and Carolyn Kucharski, Esquire, and counsel for the State of Ohio, acknowledge complete understanding of all conditions set forth in this agreement and that the terms set forth above represent the entire agreement.

Pursuant to said agreement, Jennifer Jeffries, with her counsel, met with the detective at the Painesville Police Department on June 2, 2003, and provided him with a detailed, four-page, typed statement concerning the murder. (T.p. 1436-1458, Trial State's Exhibit 43, Supp. State's Exhibit 2). Based on that statement, a polygraph was arranged and administered on June 23, 2003. Ms. Jeffries failed the State's polygraph. (Supp.T.p. 272). Prior to the administration of the State's polygraph, the assistant prosecutor asked one of the public defenders for any written statement affiliated with Ms. Jeffries' October, 2002 polygraph.² (Supp.T.p. 250). That was provided. (Supp.T.p. 238).

Shortly after the failed polygraph, Ms. Jeffries failed to report to her probation officer in Lake County, and a warrant was issued for her arrest (she was on Community Control Sanctions for another charge). (Supp.T.p. 233). The police were actively searching for her for months, and she was finally arrested in Cleveland in March of 2004. (T.p. 1303-1314)

A Lake County Grand Jury then indicted her on one count of Trafficking in Cocaine, a felony of the fifth degree in violation of R.C. 2925.03(A)(1) and Tampering with Evidence, a third degree felony in violation of R.C. 2921.12(A)(1) on July 18, 2003. (T.d.

²A copy of Ms. Jeffries' written statement which was provided to defense counsel's polygraphist in October, 2002 was provided. This statement was made outside of any plea negotiations with the State.

1). Ms. Jeffries, who was represented by the public defender, waived her right to be present at arraignment and the court entered pleas of "Not Guilty" on her behalf. (T.d. 4). On August 5, 2004, private counsel entered an appearance on the case, and on September 20, 2004, after a Task Force Investigation, Jeffries was additionally indicted on two counts of Complicity to Robbery with Firearms Specifications, second degree felonies in violation of R.C. 2923.03; one count of Murder with a Firearms Specification, a first degree felony in violation of R.C. 2903.02; and one count of Involuntary Manslaughter with a Firearms Specification, a first degree felony in violation of R.C. 2903.04. (T.d. 1, Tr. Ct. No. 04CR570). Ms. Jeffries waived her right to be present at arraignment and the court entered pleas of "Not Guilty" on her behalf. (T.d. 5).

Prior to trial, dozens of motions were filed on the Defendant-Appellee's behalf including several motions to suppress and a motion to enforce the cooperation agreement. (T.d. 89, 91). The trial court granted a motion to exclude the statement taken by the Painesville Police Department on June 23, 2003 pursuant to Evid.R. 410, but denied a request to exclude the October 28, 2002 statement. (Supp.T.p. 334-350). The remaining parts of the motions to suppress were denied. *Id.*: Trial commenced February 4, 2005. A Lake County jury convicted on all the counts with the exception of one count of Complicity to Robbery. (T.d. 194-195). The trial court sentenced Jeffries to serve four years in prison for Tampering with Evidence, one year for each Firearms Specification, and fifteen years to life for Murder with all the sentences to be served consecutively. (T.d. 198). She was furthered sentenced to one year in prison for Trafficking in Cocaine and ten years for Involuntary Manslaughter with a the sentences to run concurrent to the other convictions. *Id.*

Jeffries filed a timely appeal to the Eleventh District Court of Appeals and the court issued its decision on June 29, 2007. That two to one decision reversed the jury conviction, concluding that the trial court's admission of the October, 2002 statement of the defendant at trial was an abuse of discretion. The State timely filed a memorandum and this Court accepted jurisdiction in this matter. Now the State timely files its Merit Brief.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1

Proposition of Law No. 1: Statements made by defendants to third parties outside of plea negotiations and later provided to the State are not protected by Evid.R. 410 because they are not “made in the course of plea negotiations.”

The assistant prosecutors in this case relied upon the plain wording of Evid.R. 410 when they utilized a factual statement of the defendant at trial. Likewise the trial court relied upon the plain wording of Evid.R. 410 when it ruled at a suppression hearing that Jennifer Jeffries' written statement to a third party, which was provided to the State was admissible. The black letter meaning of the rule is indisputable. Evid.R. 410 excludes statements *made during the course of plea negotiations involving counsel*. Since the disputed statement was not made during the course of plea negotiations, and not to counsel, the exclusion does not apply. Evid.R. 410 states in relevant part:

(A) *******, evidence of the following is not admissible in any civil or criminal proceeding against the defendant who made the plea or was a participant personally or through counsel in the plea discussions:

(5) Any statement made in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant and that do not result in a plea of guilty or that result in a plea of guilty later withdrawn.

Attorneys on both sides make judgment calls in the heat of trial. They should be able to rely on the evidence rules as written. Likewise, a trial court should not be told it abused its discretion when the court in fact followed and applied the plain language of the rules.

Evid. R. 410 is similar to its federal counterpart and was amended in 1991 due to its unintended and overbroad application. The amendment changed the statute to include the phrase "counsel for the prosecuting authority". Prior to the amendment, the rule was used to suppress voluntary statements to police officers made by defendants who claimed they were plea bargaining. This application was unintended and resulted in suppression of voluntary statements by defendants to police officers.

In this case, the statement was "made" by Jennifer Jeffries on October 28, 2002 to a third party. The statement itself was a handwritten factual paragraph which placed Jennifer Jeffries at Recreation Park with Dustin Spaller and Tyrone Jeffries on the night in question. It claimed that Tyrone had a gun and the gun accidentally fired when Tyrone and Dustin were tussling. Tyrone ran away and Jennifer sped off in her car. (Supp. Ex. 35).

This paragraph was given to the State by Jennifer Jeffries' first set of attorneys. It was not required by the terms of the cooperation agreement signed in May of 2003. It served to deflect blame for the crime onto Jennifer Jeffries' ex-husband, Tyrone Jeffries. Pursuant to the testimony of one of Jennifer Jeffries' attorneys, the purpose in obtaining the statement in October of 2002 was to test his client on her new story with regard to this investigation. (Supp. T. p. 201).

Unfortunately, Jennifer Jeffries never completed the terms of her cooperation agreement she eventually made with the State. In fact, after providing a four-page, typed, detailed statement to the detective, she failed the polygraph administered by the State and then was on the run for eight months. Upon her arrest and return to Lake County, she was indicted and tried in this case. The polygraph administered by the State was based on the written statement she provided to law enforcement in the presence of her attorneys which

was required by the plea agreement.³ That statement is a document of approximately 4 pages from the Painesville Police Department which details the events of the night in question. That is the statement which was required by the State pursuant to the cooperation agreement. The State agreed to suppress that statement under Evid.R. 410 as a statement of the defendant "made during the course of plea negotiations" and the trial court did so order.

There is no disputing the timing of the making of the statement. Approximately half a year passed before the Public Defender's Office approached the State to initiate a plea bargain discussion. It is likely that this statement and polygraph put counsel for Jennifer Jeffries in a position to approach the State, but the statement was not made in the course of plea discussions, nor for that matter was it required pursuant to the cooperation agreement.

Jennifer Jeffries was represented by counsel and they imposed no restrictions with respect to the use of the statement they provided. The statement was factual; there was no admission of guilt. In fact it deflected blame by placing the gun in someone else's hands and claiming the firing of the weapon was accidental. Prior to the statement made to investigators pursuant to the cooperation agreement, the physical evidence and witness statements all pointed to Jennifer Jeffries. She arranged the meeting at Rec Park, she was the last person seen with the victim, she wiped the victim's blood off her car, she offered to pay someone \$100 to move the body. She also gave damaging, inconsistent statements to the police and other witnesses about her activities that evening. The

³Plea agreement paragraphs 1 and 2.

objective of her attorneys was to prevent her from being charged with the murder of Dustin Spaller and to blame someone else. Their providing of the statement made to their polygraphist was sound strategy in representing their client and minimizing their client's exposure on serious charges of murder considering the damaging physical evidence and witnesses connecting her with his death. Unfortunately, Jennifer Jeffries did not pass the polygraph and she fled the county so the cooperation failed.

In addition to a reading of the rule, we look to the decision from this Honorable Court addressing Evid.R. 410 in *State v. Frazier* (1995), 73 Ohio St.3d 323, 652 N.E.2d 1000. In *Frazier* statements were made by a defendant to police officers, then used by prosecutors. This Court espoused a two tiered analysis and a temporal requirement to determine whether exclusion under this rule applied.

In determining admissibility of statements made during alleged plea discussions the trial court must first determine whether, at the time of the statements, the accused had a subjective expectation that a plea was being negotiated. The trial court must then determine whether such an expectation was reasonable under the circumstances. *Id* at 837.

When the test in *Frazier* is applied in this case, it fails both tiers of the analysis and the temporal requirement. There was no evidence even suggesting Jeffries had an expectation a plea was being negotiated when she made the statement. The statement was made within the earlier interaction of Ms. Jeffries with her attorneys. But, the Eleventh District seemed to both reject, and apply the *Frazier* case. The majority admitted the parties were not engaged in active plea discussions at the time Jeffries made her statement and that the statement was not made to an agent of the state. But then they ignore the temporal requirement insisting that the State's request for the statement satisfied this part of the test. Jeffries' attorney admits at a hearing on this matter that the

sole purpose at the time Jeffries' made her statement was to "test [] [Jeffries] on the new story *** that she told us." *Jeffries* at ¶118. *Frazier* looks to the nature of the discussion of the suspect with police and whether or not at that time, a plea was being negotiated. So both on its face and according to established case law, the statement should have been admitted. The trial judge simply could not have abused his discretion in admitting this statement.

A more factually similar scenario was set forth in another case whose reasoning and logic should apply here. In *State v. Beach*, 6th Dist. No. L-02-1087, 2004-Ohio-5232, the suspect, like Jeffries, made several statements to police during the initial stages of the investigation of a murder. But the final two statements he made to police were in the presence of his attorney. Later, this suspect was indicted for the murder. At a hearing on a motion addressing the statements, the suspect's attorney testified that no plea negotiations induced the last two statements. In fact, specific plea negotiations were not undertaken until several days later. The attorney testified that "everything I did was in the furtherance of putting Mr. Beach in a posture that would render him a proper subject for a plea negotiation." *Id* at ¶43. The appellate court found that nowhere in either of the suspects statements was there any indication that he was induced to make the statements with the promise of a plea bargain. Therefore the court could not find that the appellant had a subjective expectation that a plea was being negotiated. Consequently, that appeals court found that the trial court did not abuse its discretion in allowing the statements to be used as evidence in the trial.

Just as in the *Beach* case, here, the police already knew that Dustin Spaller was involved in a drug transaction taking place at Recreation Park. They knew Jennifer Jeffries

set up the transaction and drove him there. They knew that he had been shot and beaten at Recreation Park and that Jennifer Jeffries was the last person to have been seen with him alive. Furthermore they knew based on her earliest statements on the 911 call and to police, which were inconsistent to both the police and Dustin's friends, that she was lying. They knew that she had offered to pay someone \$100 to move a body, and that she in fact had driven down to Recreation Park to view the body prior to making her 911 call where she claimed she did not know what happened to Dustin. All this was known prior to October 28, 2002 and the inception of plea negotiations. It can be said that Jennifer Jeffries' counsel's goal was to remove, just as in the *Beach* case, "the cloud of suspicion" that suggested that Defendant-Appellee was the actual trigger puller prior to initiating plea negotiations. *Id* at ¶48.

In the *Beach* case the attorney arranged for a third and fourth interview in the hopes that his client's additional statements would prevent the State from indicting him on murder charges. While that strategy did not succeed, the court found in an examination of an ineffective assistance of counsel claim that his conduct fell within the reasonable realm of representation. Often, the success of counsel's strategy depends on the appellant's truthfulness and cooperation. If she had cooperated, counsel's strategy would be deemed to be prudent and highly successful.

More recently, portions of a defendant's statement in his letter to the judge, pre-sentence investigation and plea hearing were admitted into evidence after appellant withdrew his plea. *State v. Prunty*, 8th Dist. No. 88778, 2007-Ohio-4290. The court ruled that because the statements were made after the initial plea was accepted, they were not barred by Crim.R. 11. Moreover they were not made during plea negotiations pursuant to

Evid.R. 410, because they were made after the plea, so were available to the State when he later withdrew his plea and went to trial. In another more unusual scenario, a defendant's letter to a third party, a judge, requesting pre-trial diversion was provided to the State and utilized in its case in chief. *State v. Dehler*, (July 14, 1994), 8th Dist. No. 65716.

In Jennifer Jeffries' case, the dissenting opinion points out that it is of course possible to waive a protected statement under Evid.R. 410. See *United States v. Mezzanatto* (1995), 513 U.S. 196, 210, 115 S.Ct. 797; *State v. Miller* (Oct. 31, 1997), 2nd Dist. No. 15552, 1997 Ohio App. Lexus 4774, at *7-*8. If the Court considered that Evid.R. 410 applied in this case, it should have considered that the Defendant-Appellee was represented by counsel, and counsel delivered the statement with no strings attached. While there was no express waiver that the State is aware of, Defendant-Appellee was represented by counsel, so the State should be able to presume the statement was given to it voluntarily, there was no evidence presented to the contrary at the evidentiary hearing.

Just like in *Beach*, the statement put counsel in a position to approach the State for positive consideration for their client. Representations had already been made by Jeffries' counsel regarding said statement and they knew that the State would not be making deals with the actual trigger puller. Again Jeffries had already made untruthful, inconsistent statements to the police and others prior to the plea negotiations which put her in danger of more serious charges. Her attorneys wanted to know the truth, so they could figure out whether they could prevent Jeffries from being indicted for murder. The strategy of preventing an indictment in this case and pointing the finger to someone other than herself as the trigger puller may have been accomplished had she passed the polygraph and

worked with the State. Her October, 2002 statement had a purpose not covered by the protections of Evid.R. 410. So even though Jeffries was represented by counsel when the statement was handed to the State, and no limitations accompanied the statement, the majority ignores waiver despite "ample evidence in the record to support a finding that this privilege had been voluntarily waived." (*Jeffries* Dissenting Opinion, ¶ 122).

Perhaps when her trial team changed, a new set of attorneys had a different approach to this case, but, a "criminal defendant is not entitled 'to evade the consequences of an unsuccessful tactical decision' made in welcoming admission of otherwise inadmissible evidence". *Mezzanatto* at *203 citing *United State v. Coonan*, 938 F.2nd 1553, 1561 (CA2 1991).

While the policy behind Evid.R. 410 may indeed be to protect the plea negotiation process and thus encourage plea negotiations in our court systems, as mentioned above this rule has been overextended in the past and abused by criminal defendants. It is easy to ensure a suspect's protection by including various terms within the cooperation agreement. Those terms could have been insisted upon by defense counsel and either completely eliminated the State's use of any statements or restricted the State's use of statements for impeachment purposes only. Neither of those conditions was requested here.

A prosecutor has an obligation to prosecute diligently. Or as a supreme court in another state with a similar rule so eloquently put it:

***facilitating the plea bargain process is not the sole policy concern implicated by the waiver of MRE 410 protections. The integrity of the legal process is also a consideration, and it is arguably undermined when the courts ignore relevant evidence of criminal activity simply because that evidence was discovered during the course of plea negotiations. The truth-

finding function of our legal system is best served when as much evidence as possible relevant to the charged crimes is submitted to the finder of fact, and the prosecutor has a duty to the public to present all such evidence of a crime that he obtains. These concerns about the integrity of the legal process must be balanced with the interest of facilitating plea bargaining, and we believe that an appropriate balance is struck by retaining MRE 410 protections, but allowing criminal defendants to waive those protections as long as they are appropriately advised and as long as the statements admitted into evidence are voluntarily, knowingly, and understandably made.

People v. Stevens, 461 Mich. 655, 610 N.W.2d 881 at 669, 887. There is no allegation coming from the second defense team in this case that said statement was given in response to fraud or coercion. At the hearing on this matter, the State was unable to call Jennifer Jeffries to the stand. By virtue of the fact that her counsel physically provided the document to the prosecutor without any strings attached, the State should be able to presume waiver.

The rules of evidence are constructed by virtue of their own declaration so that the truth may be ascertained. Evid.R. 102. This statement made to a third party at the request of her defense attorneys for the purpose for which it was being obtained holds within it indications of truthfulness and trustworthiness. When the State has such a statement at its disposal and the plain meaning of the evidence rules allows its introduction, it should be used. By the time Ms. Jeffries was indicted for the murder of Dustin Spaller, additional evidence had come forward through other witnesses, and she was prosecuted accordingly.

Yet, the majority opinion from the Eleventh District Court of Appeals even refused to find any alleged error in this case harmless. Instead they bootstrapped the second statement which the court ordered suppressed and lumped it into an analysis of cumulative error. Though the trial court properly ruled that the second June 2, 2003 statement should be suppressed, the defense claimed that because of the introduction of the October 28,

2002 statement they were forced to bring the second statement into evidence. (T.p. 1181, 1193). They then attribute the cumulative effect of both statements to error in this case. Both statements point to an accidental shooting by someone else. However it is the June 2, 2003 statement wherein Defendant-Appellee admits to tampering with evidence (wiping blood evidence off of her car) and returning to the park to see Dustin lying on the ground without ever checking on his condition. (State's Ex. 35). Defense counsel did not have to let this statement in. This must be attributed to trial tactic. The other evidence against Jennifer Jeffries pertaining to the drug sale and her connection to Tyrone Jeffries that evening was all known to the State through other witnesses.

The reversal of this jury conviction is an injustice.

CONCLUSION

For the reasons discussed above the Appellant respectfully requests this Honorable Court adopt its proposition of law, reverse the Eleventh District Court of Appeals ruling, and reinstate the jury verdict or in the alternative find any error harmless.

Respectfully submitted,

By: Charles E. Coulson, Prosecuting Attorney

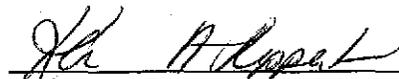
By: 

Karen A. Sheppert (0042500)
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PROOF OF SERVICE

A copy of the foregoing Merit Brief of Appellant, State of Ohio, was sent by Interoffice Mail, to counsel for the appellee, Vanessa R. Clapp, Esquire, 125 East Erie Street, Painesville, OH 44077, and, pursuant to S.Ct.R. XIV, Section 2, by regular U.S. Mail, postage prepaid to the Ohio Public Defender, David Bodiker, 8 East Long Street, 11th Floor, Columbus, Ohio 43215, on this 6th day of February, 2008.



Karen A. Sheppert (0042500)
Assistant Prosecuting Attorney

KAS/klb

APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)
)
Plaintiff-Appellant,)
)
v.)
)
JENNIFER L. JEFFRIES,)
)
Defendant-Appellee.)

Case No. **07-1478**
On Appeal from the
Lake County Court of Appeals,
Eleventh Appellate District

Court of Appeals Case No. 2005-L-057CA

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

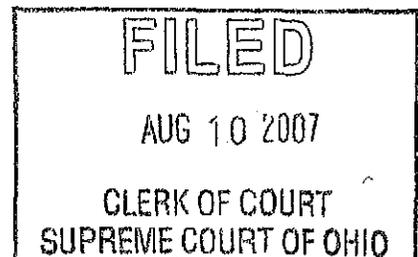
CHARLES E. COULSON (0008667)
PROSECUTING ATTORNEY
LAKE COUNTY, OHIO

Karen A. Sheppert (0042500) (COUNSEL OF RECORD)
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COUNSEL FOR APPELLEE, JENNIFER L. JEFFRIES
A-1

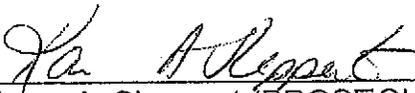
Notice of Appeal of Appellant State of Ohio

Appellant State of Ohio, gives notice of appeal to the Supreme Court of Ohio from the opinion judgment entry of the Lake County Court of Appeals, Eleventh Appellate District, entered in *State v. Jeffries*, Court of Appeals Case No. 2005-L-057CA on June 29, 2007.

This case is a Claimed Appeal of Right, pursuant to S.Ct. R. II, Section 1(A)(2) as it involves a substantial constitutional question, and/or this case is a Discretionary Appeal, pursuant to S.Ct. R. II, Section 1(A)(3) as it involves a felony and raises issues of public or great general interest.

Respectfully submitted,

By: Charles E. Coulson (0008667)
Lake County Prosecuting Attorney

By: 
Karen A. Sheppert (PROSECUTOR BAR#)
Assistant Prosecuting Attorney
Counsel of Record

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PROOF OF SERVICE

A copy of the foregoing Notice of Appeal was sent by regular U.S. Mail, postage prepaid, to counsel for the appellee, Vanessa R. Clapp, Esquire, Supervising Attorney-Appellate Division, Lake County Public Defender's Office, 125 East Erie Street, Painesville, OH 44077, and, pursuant to S.Ct.R. XIV, Section 2, the Ohio Public Defender, David Bodiker, 8 East Long Street, 11th Floor, Columbus, Ohio 43215, on this 9th day of August, 2007.



Karen A. Sheppert (0042500)
Assistant Prosecuting Attorney

KAS/kib

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

STATE OF OHIO,

: OPINION

Plaintiff-Appellee,

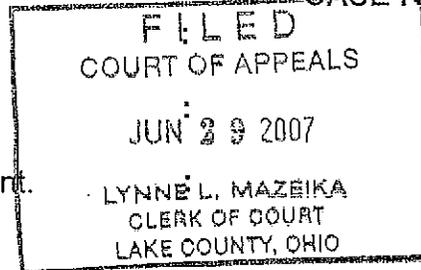
:

CASE NO. 2005-L-057

- vs -

JENNIFER L. JEFFRIES,

Defendant-Appellant.



Criminal Appeal from the Lake County Court of Common Pleas, Case No. 03 CR 000429.

Judgment: Reversed and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Karen A. Sheppert*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Jennifer L. Jeffries, appeals the judgment entry of the Lake County Court of Common Pleas resulting from a jury verdict convicting her of one count of trafficking in cocaine, in violation of R.C. 2925.03(A)(1) and (C)(4)(a); one count of tampering with evidence, in violation of R.C. 2921.12(A)(1); one count of involuntary manslaughter, with a firearm specification, in violation of R.C. 2903.04(A) and R.C. 2941.145; one count of complicity to robbery, with a firearm specification, in violation of R.C. 2923.03(A)(2) and R.C. 2941.145; and one count of felony murder, with a firearm

✓

specification, in violation of R.C. 2903.02(B) and R.C. 2941.145. Jeffries also appeals from the trial court's judgment entry of sentence. We reverse the judgment entry of the trial court and remand this matter to the trial court for further proceedings.

{¶2} The charges against Jeffries arose from an incident which occurred in the early morning hours of December 4, 2001, resulting in the death of twenty-one-year-old Dustin Spaller. A fisherman discovered Spaller's body at approximately 3:09 a.m., in a small gravel parking lot located inside Recreation Park, in Painesville, Ohio.

{¶3} An autopsy revealed that Spaller had died of bleeding from a gunshot wound. He also appeared to have been seriously beaten and had several blunt force head wounds consistent with being hit by the muzzle of a gun. The coroner estimated the time of Spaller's death to have occurred between 1:30 and 3:00 a.m. on December 4, 2001.

{¶4} At approximately 4:48 a.m., a dispatcher from the Lake County Sheriff's Department received a 9-1-1 call from Jeffries claiming that she and her friend, Spaller, were victims of a robbery which had occurred earlier that morning.

{¶5} Detective Bob Sayer, of the Painesville Police Department, was initially assigned as the lead investigator in the case. Following the 9-1-1 call, Sayer headed to 91 Branch Avenue, where Jeffries lived with her grandparents and her two small children. After gathering some general information about the incident, Sayer asked Jeffries to accompany him to the police station to give a victim statement.

{¶6} As they were preparing to leave Jeffries' grandmother's home, Sayer, who had parked next to Jeffries' vehicle in the driveway, noticed what appeared to be a blood smear along the passenger door, as well as blood spots and a bloody handprint

on various portions of the vehicle. Sayer radioed to have the vehicle towed to the Lake County Crime Lab. At approximately 6:15 a.m., Sayer and Jeffries arrived at the Painesville Police Department to complete a victim statement.

{¶7} Jeffries told Sayer essentially the same version of events she told the dispatcher. She stated that she arrived at Tony's Subway Inn at around 11:00 p.m. for a few drinks. While at Tony's, she ran into David Tills, Dustin Spaller, and Brett Cameron, and the four hung out until closing time. Spaller and his friends expressed an interest in buying about \$100 worth of crack cocaine, and asked Jeffries if she could help "hook him up." Jeffries told Sayer that she agreed to take him around town to see if they could find someone willing to sell crack to him.

{¶8} With Jeffries at the wheel, the two proceeded first to the BP station and then to Sanders Avenue, where their search for drugs proved unsuccessful. Eventually, Jeffries and Spaller met the three men at Argonne Arms, who agreed to sell some crack to them. Upon arriving at Recreation Park, the two were ambushed, and she was robbed by the aforementioned males. Jeffries claimed that immediately after Spaller fled his attackers, she got in her car, drove straight home, and notified police. While taking Jeffries' statement, Sayer testified that he noticed what appeared to be a blood smear on Jeffries' pants. Jeffries explained that she must have brushed up against her car. Sayer then took photographs of some bruises and red marks on Jeffries' arms and neck, and drove her home from the police station between 8:30 and 9:00 a.m.

{¶9} In the meantime, other officers continued the investigation. As part of the investigation, Detective Manley, of the Painesville Police Department, interviewed

Spaller's friends, David Tills and Brett Cameron, and a different version of events began to emerge.

{¶10} Tills stated that around 3:00 p.m. on December 3, 2001, he and Cameron accompanied Spaller on a trip to Pennsylvania, where Spaller had been assigned the task of delivering a car from the dealership where he worked to another dealership and retrieving a second car in exchange.

{¶11} Upon returning to Ohio, the three decided to go to Just Teazin', an adult night club in Painesville, where they had drinks. Spaller was carrying a large amount of cash that night, and some time between midnight and 1:00 a.m., the three decided to leave Just Teazin' and go to Tony's Inn to see if they could find someone who would sell them \$100 worth of crack.

{¶12} While at Tony's, the men encountered Jeffries, whom Tills knew from school. Jeffries had sold the men drugs in the past. While the three were drinking and playing pool, Jeffries approached them. Spaller asked Jeffries if she had any crack to sell, producing a large wad of cash from his pocket to show her that he had money. Jeffries stated that she was not holding any drugs at the moment, but that she would check with others around the bar to see if anyone had any to sell.

{¶13} Tills stated that he later saw Jeffries speaking with Jameson ("Tyrone") Jeffries, her then-estranged husband, who was also at Tony's that evening, outside the men's room. Eventually, Jeffries returned and told the men that they would meet at Recreation Park to consummate the deal. Tills protested, stating that he did not want to go to the park, but Spaller told Tills and Cameron to wait for him, and left Tony's with Jeffries.

{¶14} After Spaller failed to return, Tills and Cameron attempted to reach Jeffries on her cell phone, but she failed to answer. The two men decided to go to Spaller's home to see if he had been dropped off there.

{¶15} Upon arriving at Spaller's home and failing to find him there, Tills again attempted to contact Jeffries and was finally successful. Over the course of the night, Tills had several phone conversations with Jeffries. During these conversations, Jeffries gave Tills conflicting accounts of what happened.

{¶16} Based upon this conflicting information, Sayer called Jeffries on the afternoon of December 4, 2001, and asked her if she would return to the police station. Jeffries agreed to do so, and returned to the station shortly after 2:00 p.m. Upon her return to the station, Sayer informed Jeffries that there were some discrepancies between the statement that she had given earlier and the statements given by Tills and Cameron. Sayer asked her if she wanted to clarify her earlier victim statement. Jeffries recounted her earlier statement without any changes. Sayer then read Jeffries her rights from a Miranda card and asked her to sign it, but she refused. Sayer proceeded to inform Jeffries of the inconsistencies between her statement and those of Tills and Cameron, and indicated that he believed she may not have been entirely truthful with him earlier, and that he was beginning to think of her less as a victim and more as a potential suspect. Jeffries, however, refused to change the essential details of her story, and suggested that Tills and Cameron were lying. After Sayer had finished questioning Jeffries, he drove her back to her home.

{¶17} Over the course of a year and a half, the investigation into the death of Spaller continued. Although some evidence was gathered which implicated Tyrone as the assailant, Jeffries had never corroborated this information.

{¶18} On October 28, 2002, Jeffries submitted to a polygraph test, requested by her defense counsel. Pursuant to the test, Jeffries submitted a written statement to Maryann Feathers, the polygraphist, which indicated for the first time that Tyrone was Spaller's attacker.

{¶19} In the spring of 2003, a meeting was held between representatives of the Lake County Public Defender's Office and representatives of the Lake County Prosecutor's Office. At the meeting, the public defender indicated that Jeffries had passed a polygraph test. At the request of the prosecution, the results of this test, as well as the statement written by Jeffries, were forwarded to the Prosecutor's Office.

{¶20} On May 7, 2003, the Prosecutor's Office and the Public Defender's Office, entered into a cooperation agreement, which provided, in relevant part, as follows:

{¶21} "1. Jennifer Jeffries will cooperate with law enforcement officials and the Lake County Prosecutor's Office and agree to give a complete and truthful statement to the Painesville Police Department concerning her knowledge of the death of Dustin Spaller[,] including the names of all those involved in the murder and their actions[,] and any conversations Jennifer Jeffries had with any of said perpetrators and their statements regarding Dustin Spaller's death;

{¶22} "2. Jennifer Jeffries agrees to submit to a polygraph examination conducted by an examiner chosen by the Lake County Prosecutor's Office, to confirm that the information she has provided to law enforcement officials is the complete truth;

{¶23} "3. Jennifer Jeffries, upon successfully passing the polygraph examination, will continue to cooperate with law enforcement officials prior to and throughout any trials or hearings that may result regarding the death of Dustin Spaller, and will agree to be available for debriefing and/or trial preparation by staff of the Lake County Prosecutor's Office and appropriate law enforcement agencies, and will agree to provide truthful testimony in Court in any of said trials or hearings;

{¶24} "4. It is understood that if Jennifer Jeffries does not successfully pass the polygraph to the satisfaction of the Lake County Prosecutor and/or fails to cooperate with the Lake County Prosecutor or law enforcement, this agreement will be null and void.

{¶25} "5. It is understood that it may be necessary for Jennifer Jeffries, in order to tell the whole truth about the events *** to disclose matters concerning drug usage and/or trafficking. Any statements made by Ms. Jeffries in this regard will not be used against her in any later proceedings, including and especially in the event that this agreement should fail;

{¶26} "6. As part of her cooperation with law enforcement officials, it is agreed that Jennifer Jeffries will, if requested by law enforcement official [sic], participate in monitored and recorded phone conversations and/or wearing wires to monitor and record conversations, in addition to participating in other investigative techniques;

{¶27} "7. Previously, Jennifer Jeffries was charged with one count of Trafficking in Cocaine, *** and one count of Tampering with Evidence ***, in relation to the Spaller homicide investigation. These two charges were dismissed to conduct further investigation. At the conclusion of all cases *** in which Jennifer Jeffries may be called

to testify on behalf of the State of Ohio involving the Spaller homicide, Jennifer Jeffries, regardless of the result of said cases, will plead Guilty to a charge of Obstruction of Justice ***, in violation of O.R.C. 2921.32;

{¶28} "8. It is understood between the parties that a sentence will be imposed on the charge of Obstructing Justice *** and that sentencing is the sole discretion of the judge. However, at the time of Jennifer Jeffries' sentencing[,] the Lake County Prosecutor's Office will make known to the sentencing court the full extent and nature of Ms. Jeffries' cooperation and will recommend community control sanctions to be served concurrently with the community control sanctions she is currently under;

{¶29} "9. It is understood between the parties that if all previously mentioned conditions are met, that Jennifer Jeffries will not be subjected to any further criminal charges in relation to the death of Dustin Spaller; ***."

{¶30} The agreement was signed by Jeffries, her defense attorneys, and representatives from the Lake County Prosecutor's Office.

{¶31} On June 2, 2003, Jeffries provided a statement to Sayer in anticipation of the second polygraph test. This statement furnished greater detail of the events occurring during the early morning hours of December 4, 2001. It indicated that when she stopped her car, she got out to "take a pee," when a man approached the car from behind the fence. Jeffries claimed that she did not recognize the man at first and headed back to her car. Jeffries stated that it was only when the passenger door was yanked open that she realized the man who had appeared from behind the fence was Tyrone, her then-estranged husband (Jeffries and Tyrone were divorced in 2002). Jeffries stated that Tyrone punched Spaller in the face, before Spaller either got out of

the vehicle or was pulled out by Tyrone. Once outside of the car, the two men began fighting. As the men were fighting, Jeffries stated that she noticed a gun in Tyrone's hands. Jeffries then heard the gun go off, and she jumped into her car and left the area.

{¶32} On June 23, 2003, a polygraph was conducted on behalf of the prosecution by William Evans at the Lake County Prosecutor's Office. Jeffries arrived with her defense counsel, Carolyn Kucharski. Also present were Assistant Prosecutor Karen Sheppert and Sayer.

{¶33} Initial results of the polygraph test indicated that Jeffries was not being truthful with respect to one or more of her responses. All persons involved discussed the matter, trying to determine what Jeffries could do to achieve a passing result. This process included additional questioning and testing. Jeffries eventually left the Prosecutor's Office without having successfully completed the test.

{¶34} Two weeks after the failed polygraph test, Jeffries did not report for probation, and a warrant was issued for her arrest. Police were unable to locate her until March 2004.

{¶35} On July 18, 2003, after she had disappeared, the Lake County Grand Jury re-indicted Jeffries, by way of secret indictment, on one count of trafficking in cocaine, a felony of the fifth degree (count one), and one count of tampering with evidence, a felony of the third degree (count two). A warrant for Jeffries' arrest on the indictment was issued. In March 2004, through her attorney, she waived her right to be present at her arraignment on these charges. The trial court entered a "not guilty" plea on her behalf.

{¶36} In April 2004, with her defense counsel present, Jeffries was again interviewed by Sayer concerning the events of December 4, 2001. Her counsel advised her to talk to Sayer because he was of the belief that murder charges could be avoided if she cooperated with the police and because he believed that the state of Ohio was still seeking her cooperation.

{¶37} On September 20, 2004, the grand jury returned a second indictment charging Jeffries with one count of involuntary manslaughter with a firearm specification, a felony of the first degree (count three); two counts of complicity to robbery, felonies of the second degree (counts four and five), with firearm specifications; and one count of felony-murder, a felony of the first degree (count six), with a firearm specification. These charges were consolidated with the aforementioned charges. Jeffries waived her right to be present at this arraignment and the trial court entered pleas of "not guilty" on her behalf with respect to the additional charges.

{¶38} On January 21, 2005, Jeffries' defense counsel filed a "Motion to Enforce Post Indictment Cooperation/Plea Agreement," and a motion to suppress. The trial court denied Jeffries' motion to enforce the cooperation agreement and granted in part, and denied in part, her motion to suppress. The trial court held a two-day hearing on this motion beginning on January 27, 2005. Relevant to this appeal, the trial court denied Jeffries' motion to suppress with respect to the statement made to Feathers, but granted her motion to suppress with respect to the statement made to Sayer on June 2, 2003. The trial court denied the motion to suppress the statement made to Feathers on the basis that the statement was not made by Jeffries during the course of plea discussions.

{¶39} The matter proceeded to a jury trial on February 4, 2005. On February 17, 2005, the jury reached its verdict, finding Jeffries guilty as charged on all charges against her, except for one count of complicity to robbery (count four), for which she was acquitted.

{¶40} The case proceeded to sentencing on February 17, 2005, at which time the trial court sentenced Jeffries to serve one year for trafficking in cocaine, to be served concurrently with her other sentences; four years for the tampering with evidence charge, to be served consecutively; ten years for involuntary manslaughter, to be served concurrently; and fifteen years to life on the felony-murder charge, to be served consecutively. Jeffries was not sentenced for her complicity to robbery conviction, since this charge was merged with the felony-murder charge for the purposes of sentencing.

{¶41} In addition to the aforementioned sentences, Jeffries was additionally sentenced to one year for each of the three firearm specifications, to be served concurrently with each other, and to be served prior to and consecutive with the other terms, for a total prison term of twenty-two years to life. Jeffries was given credit for three hundred sixteen days for time served.

{¶42} Jeffries timely appealed, assigning the following as error:

{¶43} “[1.] The trial court abused its discretion when it denied [appellant’s] motion to enforce the cooperation agreement.

{¶44} “[2.] The trial court erred when it denied [appellant’s] motion to suppress in violation of her due process rights guaranteed under the Fifth, Sixth, and Fourteenth

Amendments of the United States Constitution and Section 10, Article 1 of the Ohio Constitution.

{¶45} “[3.] The causation jury instructions given by the trial court undercut the mens rea requirement for the charges and thus violated [appellant’s] rights to due process and fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

{¶46} “[4.] The trial court committed reversible error when it refused to submit [appellant’s] proposed jury instruction on superceding and intervening causes in violation of [appellant’s] rights to due process and fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

{¶47} “[5.] The trial court committed plain error when it mischaracterized the degree of one of the offenses in its instruction to the jury and limited the jury’s consideration of alternative offenses in violation of [appellant’s] rights to due process and fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

{¶48} “[6.] The trial court erred to the prejudice of the [appellant] when it instructed the jury on flight contrary to the proffered evidence.

{¶49} “[7.] The trial court erred to the prejudice of [appellant] when it denied her motion for acquittal made pursuant to Crim.R. 29(A).

{¶50} “[8.] The trial court erred to the prejudice of [appellant] when it returned a verdict of guilty against the manifest weight of the evidence.

{¶51} “[9.] The trial court erred to the prejudice of [appellant] when it failed to dismiss the felony-murder charge due to its being in violation of [appellant’s] due process and equal protection rights and rights against cruel and unusual punishment as guaranteed by the Ohio and United States Constitutions.

{¶52} “[10.] The trial court ruled contrary to law when it ordered consecutive sentences.

{¶53} “[11.] The trial court erred when it sentenced [appellant] to consecutive sentences based upon a finding of factors not found by the jury or admitted by [appellant] in violation of [appellant’s] state and federal constitutional rights to trial by jury.”

{¶54} These assignments of error will be treated out of order.

{¶55} In her second assignment of error, Jeffries raises two separate issues for our consideration: Jeffries first argues that the trial court erred and abused its discretion by failing to suppress the statement she made to Sayer on the afternoon of December 4, 2001, since this statement was made when she was “under extreme emotional trauma and stress at the time of the questioning and could not validly waive her *Miranda* rights.” Secondly, Jeffries argues that the trial court improperly failed to suppress the written statement she had submitted to Maryann Feathers, a polygraphist hired by defense counsel, on October 28, 2002. Her reasoning is that, under Evid.R. 410, this statement was made in contemplation of entering into a plea negotiation and should have been suppressed.

{¶56} At a suppression hearing, the trial court acts as the trier of fact and must weigh the evidence and judge the credibility of the witnesses. *State v. Hill* (1996), 75

Ohio St.3d 195, 208. Since the trial court is in the best position to resolve the factual issues, an appellate court is bound to accept the trial court's factual determinations as long as they are supported by competent and credible evidence. *State v. Searls* (1997), 118 Ohio App.3d 739, 741, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Once the appellate court accepts the trial court's factual determinations, the appellate court must "independently determine as a matter of law whether the acceptable legal standard has been satisfied." See *State v. Burrows* (Apr. 19, 2002), 11th Dist. No. 2000-T-0089, 2002 Ohio App. LEXIS 1918, at 8, citing *State v. Retherford* (1994), 93 Ohio App.3d 586, 592.

{¶57} The United States Supreme Court, in *Miranda v. Arizona* (1966), 384 U.S. 436, 444, held that the state may not use statements stemming from custodial interrogation, unless it demonstrates that procedural safeguards were taken to secure the defendant's privilege against self-incrimination. These safeguards include *Miranda* warnings, one of which is the right to end questioning at any time until an attorney is obtained, unless there is an intelligent, knowing and voluntary waiver of this privilege. *Id.*

{¶58} Police officers are not required to administer *Miranda* warnings to everyone whom they question. This is true even if the questioning takes place in the police station or the person questioned is the individual the police suspect. *Oregon v. Mathiason* (1977), 429 U.S. 492, 495. The safeguards prescribed by *Miranda* become applicable *only* after an individual becomes subject to custodial interrogation. *Berkemer v. McCarty* (1984), 468 U.S. 420, 440. Custodial interrogation has been defined as "questioning initiated by law enforcement officers after a person has been taken into

custody or otherwise deprived of his freedom of action in *any significant way*." *Miranda*, supra, at 444. (Emphasis added.)

{¶59} "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there (was) a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" *Stansbury v. California* (1994), 511 U.S. 318, 322, citing *California v. Beheler* (1983), 463 U.S. 1121, 1125. Whether a custodial interrogation has occurred is based upon an objective inquiry into the facts and circumstances surrounding the questioning – in other words, how a reasonable person in a similar situation would have understood it. *Id.* at 325; *State v. Biros*, 78 Ohio St.3d 426, 440. The subjective views of the suspect and the interrogating officers have no bearing upon this initial determination. *Stansbury*, supra, at 318. However, the officer's knowledge or beliefs, "if they are conveyed *** by word or deed, to the individual being questioned[,]" may have some bearing upon the custody issue, but only if they would have affected how a reasonable person in that position would perceive his or her freedom to leave. *Id.* at 325.

{¶60} According to testimony given at the suppression hearing, Jeffries voluntarily agreed to return to the police station to go over her earlier statement. Jeffries had earlier consented to have her vehicle towed to the Lake County Crime Lab for analysis. She was driven to the station for this second interview by Sayer in an unmarked police vehicle, as she had been earlier in the day. The interview was conducted in a police trailer being used by the detective bureau, which was the same location and in the same manner as before. Sayer testified that the door to the police

trailer was unlocked. It is clear from the record that by the conclusion of the second interview Jeffries was a suspect.

{¶61} Upon arrival at the police trailer, Sayer informed Jeffries that there were discrepancies between her earlier statement and statements subsequently received from Tills and Cameron. He advised her that he could not treat her “as a victim anymore.” At this juncture, Jeffries was still holding herself out as a victim who was at the police station to make a victim’s statement. In this context, Jeffries’ subjective voluntary motivation to answer questions at the police station clearly makes the officer’s objective motive to continue the encounter legally irrelevant. Notwithstanding Sayer’s statement to her, Jeffries still considered herself a victim. Thus, there were no reliable indicia of custody in this encounter.

{¶62} Although Sayer never suggested that Jeffries was under arrest, as a precautionary measure, Jeffries was read her *Miranda* rights from a card and asked if she understood her rights. Jeffries responded in the affirmative. Sayer then asked Jeffries to sign the *Miranda* card, but she refused. Sayer made a note of this, and then proceeded with questioning her. There is no evidence that Jeffries ever demanded an attorney or requested that the police cease questioning. Approximately two hours later, Jeffries was driven back to her home by Sayer.

{¶63} In determining the voluntary nature of a waiver of *Miranda* rights, a reviewing court will look at the “totality of the circumstances.” *State v. Gumm* (1995), 73 Ohio St.3d 413, 429. In deciding whether a defendant’s statement is voluntary, the trial court should consider factors including, “the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the

existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Worley*, 11th Dist. No. 2001-T-0048, 2002-Ohio-4516, at ¶161.

{¶64} In considering the facts from the second interview on December 4, 2001, none of the aforementioned factors lead us to conclude that Jeffries' statements to police either before or after the Miranda warnings were administered were anything but voluntary, based upon the totality of the circumstances. The mere refusal to sign a written acknowledgment of waiver of *Miranda* rights is not conclusive evidence of such waiver being involuntary. *State v. Scott* (1980), 61 Ohio St.2d 155, 161; *State v. Harvey* (Dec. 31, 1990), 12th Dist. No. CA90-06-117, 1990 Ohio App. LEXIS 5833, at 2.

{¶65} We conclude that Jeffries' statements, both before and after she was Mirandized, to the police at 2:15 p.m., on December 4, 2001, were given voluntarily and/or were subject to a voluntary waiver of her *Miranda* rights.

{¶66} The statements given to the polygraphists, on October 28, 2002 and June 2, 2003, before and during plea negotiations, present a much different question. Jeffries argues that her written statement given to Maryann Feathers on October 28, 2002, in preparation for the polygraph test administered at the request of her defense counsel, and later given to the prosecution, should be suppressed. She reasons that the statement was given during the course of plea discussions and, therefore, subject to exclusion under Evid.R. 410. In this statement, Jeffries disclosed that she was responsible for putting together the drug transaction between Spaller and Tyrone, that she was present in Recreation Park when Spaller was attacked and shot, and that Tyrone was the shooter.

{¶67} Evid.R. 410 provides for the exclusion of “[a]ny statement made in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant and that [did] not result in a plea of guilty ***.” Evid.R. 410(A)(5).

{¶68} “Upon appellate review, ‘the admission or exclusion of relevant evidence rests within the sound discretion of the trial court and its decision regarding that evidence cannot be reversed absent an abuse of that discretion.’” *State v. Beach*, 6th Dist. No. L-02-1087, 2004-Ohio-5232, at ¶42, citing *State v. Combs* (1991), 62 Ohio St.3d 278, 284.

{¶69} The Supreme Court of Ohio has stated that the test of “whether an accused’s statements were made during plea discussions is to be determined on a case-by-case basis in light of all the facts.” *State v. Frazier* (1995), 73 Ohio St.3d 323, 337. To this end, that court adopted a two-part test: (1) the trial court must determine whether, at the time the statements were made, the accused had a subjective expectation that a plea was being negotiated; and (2) the trial court must then determine whether such expectation was reasonable under the circumstances. *Id.*

{¶70} Here, the evidence adduced at the suppression hearing showed that the statement was made to Feathers on October 28, 2002, in connection with a polygraph test to be performed at defense counsel’s request. Attorney Grieshammer, one of Jeffries’ attorneys, testified at the suppression hearing that a polygraph test was requested by his office because “we were testing [Jeffries] on the new story, if you will, that she told us.” That is, his office wished to verify the accuracy of the story Jeffries was then telling them concerning the events of December 4, 2001.

{¶71} Evidence also showed that discussions related to a possible plea negotiation were not commenced until the Spring of 2003. At that time, defense counsel mentioned to the prosecutor that Jeffries had passed a polygraph test. The state of Ohio requested a copy of the statement made to Feathers together with Feathers' report for purposes of formulating questions for the state's own polygraph examination.

{¶72} Even though the parties were not engaged in active plea negotiations in October 2002, we conclude that when the state requested a copy of the October 28, 2002 statement and polygraphist's report, and when Jeffries complied with that request, those documents were in furtherance of verifying the validity of Jeffries' statements for the purpose of offering her a deal in exchange for her testimony, i.e., a plea negotiation.

{¶73} Unlike the appellant in the *Frazier* case, who made statements to agents of the state in the hope of obtaining a favorable plea bargain, and where the court stated that his subjective intent must be determined "at the time of the statements," Jeffries' subjective intent on October 28, 2002, is not germane because her statement was made to Feathers, who was not an agent of the state, and because Evid.R. 410 merely requires that the statement be "made in the course of plea discussions." Jeffries' statement, though given months earlier, did not come to light until the Spring of 2003. At that time, it was furnished to the state at its request for the purpose of preparing questions for its own polygraphist. But for the state's request for the statement and polygraphist's report, they would not have been "made in the course of plea discussions," because these documents are privileged and constitutionally

protected under Jeffries' Fourth and Fifth Amendment privileges and would not have been provided to the prosecutor otherwise.

{¶74} Further, as for Jeffries' subjective expectation that a plea bargain was being negotiated, she may not have had a subjective expectation that her counsel was preparing for a plea negotiation at the time the statement was given, but she definitely had such an expectation by the time the statement was presented to the prosecutor in the Spring of 2003. The October 28, 2002 statement and report were integral to the "course of plea negotiations" and gave Jeffries a bargaining chip that she would not otherwise have had if she had not obtained a positive result from the October 28, 2002 polygraph test.

{¶75} Thus, we deem Jeffries' statement and report from the October 28, 2002 polygraph test to have been "made in the course of plea negotiations."

{¶76} Under these circumstances, we conclude the trial court abused its discretion by not suppressing this statement and report.

{¶77} Moreover, we find merit to Jeffries' argument that the admission of her October 28, 2002 statement to Feathers "forced" defense counsel to waive the properly suppressed statement made to the police on June 2, 2003. This latter statement had previously been suppressed by the court. While it is well-settled that the exclusionary provisions of Evid.R. 410 are subject to waiver, such waiver must be knowing and voluntary. *United States v. Mezzanatto* (1995), 513 U.S. 196, 210; *State v. Miller* (Oct. 31, 1997), 2nd Dist. No. 15552, 1997 Ohio App. LEXIS 4774, at 7-8. A review of both statements (October 28, 2002 and June 2, 2003) reveals that there were substantial additional details in the June 2, 2003 statement which were not part of the statement

Jeffries previously made to Feathers. Significantly, the thrust of the June 2, 2003 statement, which was properly suppressed by the trial court as a statement subject to exclusion under Evid.R. 410, was that the shooting was accidental. Therefore, defense counsel, as part of the theory of the case, waived suppression of the June 2, 2003 statement in order to let in additional evidence that the shooting was accidental, in an effort to explain facts improperly put into evidence from the October 28, 2002 statement. Based upon the trial court's ruling in regard to the statement given to Feathers on October 28, 2002, the defense was left with no other viable alternative after Feathers' statement was admitted. The trial court, in effect, let the cat out of the bag by allowing Feathers' statement into evidence, but then suppressed any explanation of how it escaped.

{¶78} For the reasons indicated, the trial court committed reversible error when it allowed the October 28, 2002 statement to be heard by the jury. Jeffries' statements to the 9-1-1 dispatcher and to the police on December 4, 2001, are admissible.

{¶79} We shall now consider whether the error of the trial court was harmless error.

{¶80} While the Sixth and Fourteenth Amendments do not require a perfect trial, they do mandate fairness. *Lutwak v. United States* (1953), 344 U.S. 604. As stated by the United States Supreme Court, "the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusation." *Chambers v. Mississippi* (1973), 410 U.S. 284, 294.

{¶81} "Nevertheless, [a finding that the trial court committed error] does not require an automatic reversal. A constitutional error can be held harmless if we

determine that it was harmless beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, 24. Whether a Sixth Amendment error was harmless beyond a reasonable doubt is not simply an inquiry into the sufficiency of the remaining evidence. Instead, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Id.* at 23; *State v. Madrigal* (2000), 87 Ohio St.3d 378, 388.” *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, at ¶78.

{¶82} The Eighth Appellate District has stated the matter another way, that the remaining evidence by itself must constitute “overwhelming” proof of guilt. Quoting a prior decision of the Supreme Court of Ohio and the United States Supreme Court, that court stated:

{¶83} “Where evidence has been improperly admitted in derogation of a criminal defendant’s constitutional rights, the admission is harmless “beyond a reasonable doubt” if the remaining evidence alone comprises “overwhelming” proof of defendant’s guilt.’ *State v. Williams* (1983), 6 Ohio St.3d 281 ***, quoting *Harrington v. California* (1969), 395 U.S. 250, 254 ***.” *State v. Person*, 167 Ohio App.3d 419 ***, 2006-Ohio-2889, at ¶32. (Parallel citations omitted.)

{¶84} A fair reading of the record before us clearly demonstrates two things. First, absent the statements of appellant to the polygraphists, there is no “overwhelming” evidence of her guilt in this matter; and certainly, no proof beyond a reasonable doubt. Secondly, it is clear that the erroneous admission of those statements did in fact “contribute” to her conviction.

{¶85} The only remedy available is a new trial.

{¶86} Jeffries' second assignment of error is with merit.

{¶87} Even though we are reversing this matter on the basis of the second assignment of error, we still need to address assignments of error numbers one and seven. These other assignments of error concern the viability of the cooperation agreement, the sufficiency of the evidence, and whether the trial court should have dismissed the felony-murder charge. In the absence of a further discussion of these assignments of error, the question may arise on remand as to whether the issues challenged by those assignments of error are res judicata. See *State v. Freeman* (2000), 138 Ohio App.3d 408, 428. It follows from our discussion below that they are not res judicata.

{¶88} In her first assignment of error, Jeffries contends that the trial court erred and abused its discretion by denying her motion to enforce the cooperation agreement, since, if a "good faith" standard is applied, she passed the polygraph test required by the state. In essence, Jeffries alleges that she substantially performed under the terms of the cooperation agreement, and thus, the trial court abused its discretion by not enforcing it.

{¶89} The plain language of the cooperation agreement indicates that there are two circumstances under which the agreement would be considered "null and void:" either the results of the polygraph exam, as conducted and interpreted by an examiner of the prosecution's choosing, indicate that Jeffries' answers to questions related to the Spaller homicide were untruthful; or by Jeffries not making herself available to law enforcement and representatives of the prosecution for the purposes of investigation and trial preparation. Furthermore, paragraph five also contains a provision that

statements made by Jeffries concerning drug usage and/or drug trafficking will not be used against her, in the event the cooperation agreement "should fail."

{¶90} Here, where Jeffries knowingly and voluntarily conditioned her agreement on the *outcome* of a polygraph test that required her "successfully passing" the test and that would be satisfactory to the prosecutor, without conditioning the agreement on the *accuracy* of such tests, we cannot say the trial court abused its discretion by finding that the cooperation agreement had been breached by Jeffries for her nontruthful participation in the polygraph.

{¶91} Jeffries' breach was contemplated within the agreement. Paragraph five provided that "any statements made by Ms. Jeffries [regarding drug usage and/or drug trafficking] will not be used against her in any later proceedings, including and especially in the event that this agreement should fail." In the event of such failure or breach, the state of Ohio agreed not to use any statements concerning drug usage and/or drug trafficking against her in any future proceedings as consideration for her cooperation.

{¶92} This clause is clearly enforceable. However, in this instance, due to the trial court's suppression of the June 2, 2003 statement, we conclude it to be harmless error.

{¶93} Our analysis under the second assignment of error dovetails with this assignment of error in the sense that, had Jeffries not been compelled to let the June 2, 2003 statement into evidence due the trial court's erroneous ruling on her October 28, 2002 statement, the bar to using statements made by her regarding drug usage and/or drug trafficking (¶15 of Cooperation Agreement) would have been a viable defense strategy. As it was, the strategy was rendered meaningless by the trial court's ruling to

admit the October 28, 2002 statement into evidence. In making the decision to allow the June 2, 2003 statement to be admitted into evidence, Jeffries had to live with the consequences of her admissions regarding drug usage and/or drug trafficking that were contained in that statement.

{¶94} We conclude that the trial court erred and abused its discretion in not enforcing the relevant provision that provided the remedy in case of breach, namely that any statements made by Jeffries regarding drug usage and/or trafficking cannot be used against her in any subsequent proceedings arising or occurring after the date of the contract, however, this error is harmless error in light of the fact that the trial court suppressed her subsequent statement of June 2, 2003, which included statements regarding drug usage and/or drug trafficking. In other words, the statement she made on June 2, 2003 was suppressed by the trial court and, in this respect, she was not prejudiced by the trial court's failure to enforce paragraph five of the agreement. At trial, she was still permitted to waive the inadmissibility of the June 2, 2003 statement, and she did so, not pursuant a direction from the trial court, but pursuant to her counsel's advice. The prejudice that did befall her from the admission of the June 2, 2003 statement resulted not from the trial court's failure to enforce paragraph five of the cooperation agreement, but from its ruling that the October 28, 2002 statement was admissible, as discussed in our analysis under the second assignment of error.

{¶95} In sum, the trial court did not abuse its discretion in failing to enforce the entire cooperation agreement and further, even though the agreement contained a remedial provision, which was enforceable, under paragraph five of that agreement that

the trial court did not enforce, the trial court's failure to honor that paragraph was harmless error in light of the fact that it suppressed her statement of June 2, 2003.

{¶96} Jeffries' first assignment of error is without merit.

{¶97} In the seventh assignment of error, Jeffries argues that there was insufficient evidence to sustain her convictions and that the trial court should have granted her Crim.R. 29 motion at the conclusion of the state's case.

{¶98} A Crim.R. 29 motion challenges the sufficiency of the evidence introduced by the state. *State v. Schlee*, 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at 12.

{¶99} "[P]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus.

{¶100} We are reversing the judgment entry of the trial court pursuant to our analysis of assignment of error number two. We concluded that the trial court's admission of the statement and report of the polygraphist of October 28, 2002, was prejudicial error. If those documents and the statement of June 2, 2003, were excluded from evidence, a reasonable argument could be made that there was insufficient evidence to convict Jeffries. After all, it was her admissions in those statements that convicted her. However, in this part of our review, we confine ourselves to the sufficiency of the evidence as it was presented at Jeffries' trial, including both erroneously admitted and properly admitted evidence. *Lockhart v. Nelson*, 488 U.S. 33,

34. In addition, we do not consider evidence that might be admissible at a future trial. Id. Justice Brennan explained the rationale for this consideration:

{¶101} "When a defendant challenging his conviction on appeal contends both that the trial was infected by error and that the evidence was constitutionally insufficient, the court may not *** ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial. Because the first trial has plainly ended, 'retrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the (constitutional standard for sufficiency). *** if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict.'" *Justices of Boston Municipal Court v. Lydon* (1984), 466 U.S. 294, 321-322 (Brennan, J., concurring) (citations omitted). See, also, *State v. Freeman* (2000), 138 Ohio App.3d 408, 424; *State v. Jones*, 11th Dist. No. 2001-A-0027, 2003-Ohio-621, at ¶7.

{¶102} Jeffries focuses her argument in this assignment of error on the insufficiency of the evidence to sustain her convictions for trafficking in cocaine and involuntary manslaughter. However, our review of the evidence, admitted at the trial court level, including the statements of Jeffries that were erroneously admitted, leads us to conclude that sufficient evidence was presented to sustain her convictions for these offenses. Our conclusion is based solely upon the evidence as it was adduced at the first trial, and not upon the evidence as it will be forthcoming at a retrial.

{¶103} Therefore, Jeffries' seventh assignment of error is without merit.

{¶104} In light of our disposition of appellant's first, second, and seventh assignments of error, appellant's third, fourth, fifth, sixth, eighth, ninth, tenth, and eleventh assignments of error are moot. Accordingly, the judgment of the Lake County

Court of Common Pleas is reversed, and the matter is remanded for further proceedings consistent with this opinion.

WILLIAM M. O'NEILL, J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

{¶105} In Jeffries' second assignment of error, the majority reverses her conviction based upon the proposition that "the trial court committed reversible error when it allowed the October 28, 2002 statement [made by Jeffries to Maryann Feathers, the defense polygraphist] to be heard by the jury." Since the trial court's admission of this statement into evidence was not error, I respectfully dissent.

{¶106} The majority admits that "the parties were not engaged in active plea discussions" at the time Jeffries made her statement to polygraphist Maryann Feathers on October 28, 2002, and correctly concludes that the Ohio Supreme Court's decision in *State v. Frazier*, 73 Ohio St.3d 323, 1995-Ohio-235, did not apply since "Feathers was not an agent of the state." The majority subsequently creates a legal and logical fiction by concluding that Evid.R. 410 applied, *despite* the inapplicability of *Frazier*, merely because this *same* statement was later forwarded to the prosecution "in the course of plea discussions."

{¶107} Evid.R. 410 provides, in relevant part, that “evidence of the following is not admissible in any *** criminal proceeding against the defendant *** who was a participant personally or through counsel in the plea discussions:

{¶108} “Any statement made in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant and that do not result in a plea of guilty or that result in a plea of guilty later withdrawn.” Evid.R. 410(A)(5).

{¶109} A reading of the Staff Notes to Evid.R. 410 reveals that the rule was amended on July 7, 1991, to comport with changes made to the corresponding Federal Rule, which were made in response to federal courts reading the rule broadly to “cover some statements made during ‘plea bargain’ discussions between defendants and police officers.” These decisions raised concerns among the drafters of the federal rule “that an otherwise voluntary admission to law enforcement officials [might be] rendered inadmissible merely because it was made in the hope of obtaining leniency by a plea.” Thus, Federal Rule 410 was amended to specify that “*only plea discussions with the ‘attorney for the prosecuting authority’ are covered by the rule.*” (Emphasis added).

{¶110} The Staff Notes to Ohio Evid.R. 410 further specify that “[t]he amendment [of July 7, 1991] *incorporates the same limitation into the Ohio Rule.* It is intended to clarify an area of ambiguity. The amended rule is designed to protect plea bargaining statements *involving attorneys* in order to promote the disposition of criminal cases by compromise. Statements made by an accused to police are not covered by this rationale.” (Emphasis added); see also *Frazier*, 73 Ohio St.3d at 336.

{¶111} The majority notes in distinguishing *Frazier*, that Feathers, “was not an agent of the state,” but a polygraphist hired by defense counsel. I agree with this

conclusion. It then necessarily follows that Evid.R. 410 *cannot possibly apply*, since, according to the Staff Notes to the rule, Feathers is clearly not an “attorney for the prosecuting authority.”

{¶112} This should be the end to our inquiry.

{¶113} In effect, the majority attempts to convert a previously rendered statement which is clearly *not* subject to the protections of Evid.R. 410 (i.e., one made to a non-attorney) into a statement which *is* subject to the rule’s protections through the mere act of defense counsel handing the prosecution a copy upon request. The majority justifies its conclusion by stating that “[b]ut for the state’s request for the statement *** [it] would not have been ‘made in the course of plea discussions.’” It then incorrectly applies the *Frazier* test to exclude the statement, by stating that while Jeffries “may not have had a subjective expectation that her counsel was preparing for a plea negotiation *at the time the statement was given*, *** she definitely had such an expectation by the time the statement was presented to the prosecutor in the Spring of 2003.” (Emphasis added).

{¶114} This conclusion ignores the fact that courts have repeatedly refused to treat statements made to third parties and subsequently provided to prosecutors as separate “statements” for the purpose of an analysis under Evid.R. 410. See *State v. Dehler* (July 14, 1994), No. 65716, 1994 Ohio App. LEXIS 3103, at *25 (A letter sent by appellant to a judge admitting certain allegations and requesting placement into a pre-trial diversion program, which was *subsequently forwarded to the prosecution and used at trial* was found not to violate Evid.R. 410, since the “request to enter a pre-trial diversion program *** is not equivalent to a[n] *** offer to plead *** as is required in order to invoke the proscription contained in Evid.R. 410.”); *United States v. Ceballos* (C.A.11,

1983), 706 F.2d 1198, 1203 (A letter sent by defendant to the United States Marshall following his arrest for delivery to the DEA agent in charge of his case, and subsequently admitted into evidence did "not come within the terms" of Evid.R. 410, since the accused, in his letter, "did not offer to plead guilty" and the letter "was not addressed to an attorney for the government."); *Bottoson v. State* (Fla.1983), 443 So.2d 962, 965 (A letter documenting a criminal defendant's jailhouse admission of a crime, which was given to two ministers "to enlist their support in negotiating a plea," with prosecutors was deemed admissible under Evid.R. 410, since "[t]he ministers were not agents for the state.").

{¶115} Furthermore, the majority, in erroneously attempting to apply the *Frazier* test after concluding it did not apply, ignores the main purpose of the test, i.e., to determine whether or not a statement given to prosecutors by a criminal defendant is *subject to the protections* of Evid.R. 410. The reason the test was originally created was because criminal defendants were alleging certain statements made to prosecutors were "in the course of plea discussions" and therefore, subject to the rule, when in fact, they were not. In other words, not all statements made by defendants to prosecutors regarding possible leniency in return for cooperation should be considered "in the course of plea discussions," depending on whether or not the *Frazier* factors are satisfied.

{¶116} The *Frazier* test examines whether a statement made by a defendant during the course of an alleged plea discussion is admissible by (1) determining whether, *at the time of the statement*, the accused had a subjective expectation that a plea was being negotiated; and, if so, (2) the court must then determine whether the

accused's *expectation was reasonable* under the circumstances. 73 Ohio St.3d 323, at syllabus. Accordingly, to be properly applied, the *Frazier* test specifically requires that Jeffries, *at the time the statement was made*, must have had a "subjective expectation that a plea was being negotiated."

{¶117} "Plea bargaining is defined, in part, as 'the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval.'" *Id.* at 336 (citation omitted). "[I]n order to trigger the protection of Evid.R. 410, the parties must actually be involved in plea negotiations." *Id.*

{¶118} As the majority notes, Jeffries' defense attorney admitted during the hearing on the motion to suppress that the sole purpose at the time Jeffries' made her statement to Flowers was to "test[] [Jeffries] on the new story *** that she told us." Accepting this as true, Jeffries could not have possibly had any reasonable expectation, *at the time the statement was made*, that a plea was being negotiated. Put another way, the majority cannot apply the *Frazier* test while simultaneously ignoring its temporal requirement.

{¶119} For these reasons, the trial court did not abuse its discretion, or even err, by admitting Jeffries' statement to Feathers into evidence.

{¶120} Moreover, even if the act of handing the prosecutor Jeffries' written statement *could have been* construed as a separate statement, it is well-settled that the exclusionary provisions under Evid.R. 410 can be waived, provided the waiver is knowing and voluntary. *United States v. Mezzanatto* (1995), 513 U.S. 196, 210; *State v. Miller* (Oct. 31, 1997), 2nd Dist. No. 15552, 1997 Ohio App. LEXIS 4774, at *7-*8.

{¶121} The majority's opinion elects not to directly address the subject of waiver with regard to Jeffries' October 28, 2002 statement to Feathers. Instead, the majority attempts to justify reversal of the Jeffries' convictions on the basis of alleged "cumulative" errors by concentrating solely upon an alleged "forced" waiver of Jeffries' properly suppressed June 2, 2003 statement. Such a conclusion is not supported by the record.

{¶122} Even if we were to assume, *arguendo*, that Jeffries' October statement to Feathers *had* been privileged there was ample evidence in the record to support a finding that this privilege had been voluntarily waived. As a result, defense counsel's later decision to allow for the admission of the June 2, 2003 statement at trial, which the court had previously suppressed, was simply a matter of trial strategy and not "forced error," as the majority incorrectly contends.

{¶123} For these reasons, the judgment of the Lake County Court of Common Pleas should be affirmed.

STATE OF OHIO)
)SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO,

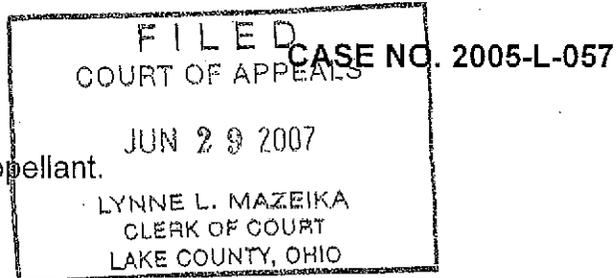
Plaintiff-Appellee.

- VS -

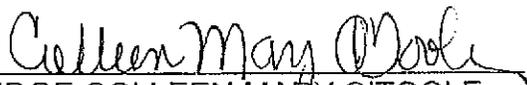
JENNIFER L. JEFFRIES,

Defendant-Appellant.

JUDGMENT ENTRY



For the reasons stated in the opinion of this court, in light of our disposition of appellant's first, second and seventh assignments of error, appellant's third, fourth, fifth, sixth, eighth, ninth, tenth, and eleventh assignments of error are moot. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is reversed and the matter is remanded for further proceedings consistent with this opinion.


JUDGE COLLEEN MARY O'TOOLE

WILLIAM M. O'NEILL, J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

Crim.R. 11

Rule 11. Pleas

1. (a) Entering a Plea.

(1) *In General.*

A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea.*

With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea.*

Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea.*

If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) *Advising and Questioning the Defendant.*

Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel -- and if necessary have the court appoint counsel -- at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to apply calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary.

Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea.

Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) *In General.*

An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement.*

The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.*

If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement.

If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea.

A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea.

After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.

The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings.

The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error.

A variance from the requirements of this rule is harmless error if it does not affect substantial rights.