[Cite as *State v. Warner,* 2010-Ohio-4940.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-P-0052**
- vs -	:	
JAMES K. WARNER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2005 CR 0617.

Judgment: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Donald Butler and *Russell W. Tye*, 75 Public Square, Suite 600, Cleveland, OH 44113 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, James K. Warner, appeals the judgment entered by the Portage County Court of Common Pleas. Warner received a prison term of 15 years to life for his conviction for felony murder.

{¶2} Warner was a member of the United States Marine Corp. While in the military, he served a tour of duty in Vietnam. According to Warner, he was involved in significant combat while in Vietnam. In the 1980s, Warner was diagnosed with post-traumatic stress disorder stemming from his service in Vietnam.

{¶3} Warner receives Social Security disability benefits due to his post-traumatic stress disorder. In addition, Warner owns rental homes in Cleveland.

{¶4} Warner lived in the upper portion of one of the homes he owned for several years. A friend, Linda Miller, lived in the lower portion of the home. Warner married his wife, Carolyn Warner ("Carolyn"), in March 2003. The two of them lived in Warner's residence in Cleveland for a few months. Then, they moved to a house in Aurora to be closer to Carolyn's work.

{¶5} Warner and Carolyn's marriage was unstable. Warner filed for divorce twice; however, on both occasions, he dismissed the complaints for divorce with the hope of reconciling with Carolyn. Also, several domestic disputes were reported to the Aurora Police Department.

{¶6} On the afternoon of Saturday, November 12, 2005, Warner went to Cleveland to check on his rental properties. While he was in Cleveland, Carolyn also went to Cleveland and took his car. Warner called Carolyn and asked why she took his car, and she accused him of visiting Linda Miller. According to Warner, Carolyn told Warner she was going to pick up her boyfriend and have sex and oral sex with him in Warner's car.

{¶7} Warner obtained a ride home from Cleveland from his daughter. Carolyn was not home when Warner arrived at their house, which was approximately 6:00 p.m. Carolyn arrived home later that night and awoke Warner, who was sleeping. Carolyn told him they needed to go to Cleveland to get her car, which she left there when she took Warner's car. Warner did not want to go to Cleveland at that time but decided he could not go back to sleep, so he went to the kitchen and made coffee. In the kitchen,

Carolyn threw a clock at Warner, which hit him and broke. She continued to question Warner about his activities in Cleveland.

{¶8} Warner decided to leave the house. Once in his car, he realized that Carolyn had removed his house keys from his keychain. Warner left the residence and went to the Aurora Police Station. There, he met with Officer Bill Byers. After learning of the situation, Officer Byers suggested that Warner spend the night at a local hotel, and Warner agreed to do so. Officer Byers called the residence and spoke with Carolyn. Officer Byers advised Carolyn to leave the house unlocked so he could accompany Warner to allow Warner to retrieve some clothes. Carolyn was not present when Officer Byers and Warner arrived at the residence. Warner got some clothes and went to the hotel, where he spent the night without incident.

{¶9} While Officer Byers was at the Warner residence, Carolyn called. Officer Byers requested that she come to the Aurora Police Station for questioning. Carolyn arrived at the police station about one hour later, in the early morning hours of Sunday, November 13, 2005. Officer Byers interviewed Carolyn at that time. This interview was recorded by video.

{¶10} The following is Warner's version of events after he left the hotel on Sunday morning, November 13, 2005. He arrived home at approximately 10:30 a.m., and Carolyn let him into the house. She again questioned Warner about what he was doing in Cleveland the previous day. When Warner asked her where his keys were, Carolyn responded they were at a friend's house.

{¶11} Warner and Carolyn began arguing. During the argument, Carolyn told Warner that she had sexual intercourse and oral sex with her boyfriend. Warner called Carolyn a tramp because of her reputation from when she previously lived in Georgia.

Carolyn became upset and entered the kitchen, where Warner was sitting. Carolyn grabbed a skillet and hit Warner on the head with it. She attempted to hit him with the skillet again, but Warner "rushed toward her" and knocked the skillet out of her hand. Warner retrieved the skillet and hit Carolyn with it. He testified that "all of a sudden that instant anger hit me, was like I just lost, like I lost all control of me[.]"

{¶12} After Warner hit Carolyn with the skillet two or three times, she grabbed a knife from the counter. At that point, Warner dropped the skillet, and he and Carolyn fought for control of the knife. During the struggle, the knife went into Carolyn. Carolyn died from her injuries.

{¶13} Upon realizing that Carolyn was dead, Warner decided to commit suicide. He went on a trip to visit Linda Miller; his daughter, Simone Carnail; and his brother, Bobby Warner. He gave a stereo to Linda Miller, and he gave some family pictures to his daughter. Also, he made peace with Bobby Warner regarding an ongoing real estate dispute. Bobby Warner testified that Warner was acting very differently that day, while Linda Miller and Simone Carnail described Warner's behavior as normal.

{¶14} After this trip, Warner returned home. He covered Carolyn's body with rugs and a towel. At some point, he started both cars in the garage, opened the service door between the house and the garage, and lay on the couch.

{¶15} On the evening of November 13, 2005, Bobby Warner called Warner at approximately 8:30 p.m. Bobby Warner testified that, during this call, Warner indicated he was going to bed.

{¶16} The state's theory of the case is that Warner decided to kill Carolyn when he was at the hotel. The next day, he left the hotel and went directly to visit his

daughter, his brother, and Linda Miller. Then, he returned home and killed Carolyn. Finally, he started the vehicles and lay on the couch.

{¶17} On Monday, November 14, 2005, Bobby Warner was supposed to meet Warner. Bobby Warner called Warner's residence several times, with no answer. Eventually, Bobby Warner and his fiancée, Diane Boyd, went to Warner's residence to check on him. Bobby Warner and Boyd both knocked on the doors and windows of the house, with no response. Eventually, they found an automatic garage door opener in a car parked in the driveway. Upon opening the garage door, they discovered the two cars in the garage with their engines running and noted that the service door to the house was open. They called 9-1-1 and reported the incident.

{¶18} Members of the Aurora Police and Fire Departments responded to Warner's house. Paramedics turned off the vehicles in the garage and began searching the house. They found Warner on a couch in the living room. He was unconscious. In the rescue squad, Warner briefly awoke in a confused state and said that Carolyn hit him in the head with a hammer. Warner was removed from the house and transported via helicopter to Metro Health Medical Center in Cleveland. Metro did not have a hyperbaric chamber to treat carbon monoxide poisoning, so Warner was transported to St. Vincent's Hospital, where a hyperbaric chamber was available.

{¶19} Initially, the paramedics and police officers did not find Carolyn's body. However, a few minutes after Warner was found, Captain Ronald Matkowski of the Aurora Fire Department found her body in the kitchen. Carolyn's body was covered in rugs. The paramedics tried to remove Carolyn from the house, but they soon realized she was dead.

{¶20} Warner was indicted on November 22, 2005. He was charged with one count of aggravated murder, in violation of R.C. 2903.01, and one count of felony murder, in violation of R.C. 2903.02(B). The felony-murder charge alleged that Warner caused the death of Carolyn while committing felonious assault.

{¶21} At his arraignment, Warner pled not guilty to the charges against him.

{¶22} A jury trial was held. The jury found Warner not guilty of the aggravated murder charge. However, the jury found appellant guilty of a lesser-included offense of aggravated murder, to wit: murder, in violation of R.C. 2903.02. The jury also found appellant guilty of the felony-murder charge, in violation of R.C. 2903.02(B).

{¶23} Warner appealed his murder convictions and sentence to this court. This court reversed the judgment of the trial court and remanded the matter for a new trial. *State v. Warner*, 11th Dist. No. 2006-P-0048, 2007-Ohio-3016, at ¶121 ("*Warner* I"). The basis for this court's reversal was that the trial court erred by refusing to admit expert evidence regarding post-traumatic stress disorder and by failing to instruct the jury on the inferior-degree offenses of voluntary manslaughter and aggravated assault. Id. at ¶47 and 72. This court held that the Double Jeopardy Clause prohibited Warner from being retried on the aggravated murder charge, since the jury found him not guilty of that offense. Id. at ¶121. Thus, a new trial was ordered on Count 1, murder in violation of R.C. 2903.02, and Count 2, felony murder. Id.

{¶24} In April 2008, the trial court conducted the retrial. The state presented evidence that was substantially similar to what it presented in the first trial. At the close of the state's case in chief, Warner moved for acquittal pursuant to Crim.R. 29 on both counts as they were charged. The trial court denied his motion. Warner testified on his own behalf. In addition, he called several witnesses, including Dr. James Karpawich, an

expert on post-traumatic stress disorder who examined Warner. After the defense rested, Warner renewed his motion for acquittal, which the trial court denied.

{¶25} Warner requested jury instructions on the inferior-degree offenses of voluntary manslaughter in relation to Count 1 and aggravated assault in relation to Count 2. The trial court instructed the jury on voluntary manslaughter in relation to both counts. The trial court did not give the jury an instruction on aggravated assault.

{¶26} The jury did not find Warner guilty of purposeful murder on Count 1. Instead, the jury found Warner guilty of voluntary manslaughter, a first-degree felony, on Count 1, and in regard to Count 2, the jury found Warner guilty of felony murder. The trial court merged the offenses for purposes of sentencing. The trial court sentenced Warner to a term of life imprisonment, with parole eligibility after 15 years.

{¶27} Warner has appealed the trial court's judgment entry to this court.

{¶28} Warner raises ten assignments of error. We will address these assigned errors in numerical order. His first and second assignments of error are:

{¶29} "[1.] Appellant was denied due process, and his right under Criminal Rule 30(A), when the trial court failed to instruct the jury on aggravated assault after appellant adduced competent testimony that he was seriously provoked into harming his wife while under the influence of sudden passion or a fit of rage.

{¶30} "[2.] The trial court erred when it refused to instruct the jury on evidence affecting its determination of whether the appellant possessed the requisite intent to commit murder."

{¶31} Warner argues the trial court erred by failing to give an instruction on aggravated assault in relation to Count 2.

{¶32} This court has previously held that "[r]equested jury instructions should be given if they are (1) correct statements of the applicable law, (2) relevant to the facts of the case, and (3) not included in the general charge to the jury." *State v. Mitchell*, 11th Dist. No. 2001-L-042, 2003-Ohio-190, at ¶10, citing *State v. DeRose*, 11th Dist. No. 2000-L-076, 2002-Ohio-4357, at ¶33, quoting *State v. Edwards*, 11th Dist. No. 2001-L-005, 2002-Ohio-3359, at ¶20. The decision of whether to give a particular jury instruction lies within the trial court's discretion. (Citation omitted.) *State v. Nichols*, 11th Dist. No. 2005-L-017, 2006-Ohio-2934, at ¶28. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. (Citations omitted.)

{¶33} Voluntary manslaughter is codified in R.C. 2903.03, which provides, in part:

{¶34} "(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another ***."

{¶35} Aggravated assault is codified in R.C. 2903.12, which provides, in part:

{¶36} "(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:

{¶37} "(1) Cause serious physical harm to another ***."

{¶38} There are two prongs to an analysis of whether the provocation was reasonably sufficient to prompt sudden passion or a sudden fit of rage—an objective prong and a subjective prong. *State v. Shane* (1992), 63 Ohio St.3d 630, 634. The subjective standard concerns "whether the defendant in the particular case 'actually was under the influence of sudden passion or in a sudden fit of rage[.]'" *State v. Mack* (1998), 82 Ohio St.3d 198, 201, quoting *State v. Shane*, 63 Ohio St.3d at 634-635.

{¶39} Aggravated assault is an offense of an inferior degree to felonious assault. *State v. Deem* (1988), 40 Ohio St.3d 205, paragraphs two and four of the syllabus. This is because the elements of aggravated assault are identical to the elements of felonious assault, except that aggravated assault has an additional mitigating element. Id. Similarly, voluntary manslaughter is an offense of an inferior degree to murder. See *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, at ¶80, citing *State v. Benge* (1996), 75 Ohio St.3d 136, 140.

{¶40} "The law of the case is a longstanding doctrine in Ohio jurisprudence. 'The doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.' *** The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. ***" *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, at ¶15. (Internal citations omitted.) See, also, *State v. Payne*, 11th Dist. No. 2006-L-272, 2007-Ohio-6740, at ¶24, citing *Weller v. Weller*, 11th Dist. No. 2004-G-2599, 2005-Ohio-6892, at ¶14-15.

{¶41} In *Warner I*, this court concluded that an instruction on aggravated assault was required:

{¶42} "Warner provided sufficient evidence of serious provocation brought on by Carolyn and that he acted under the influence of sudden passion or in a fit of rage. As such, the trial court erred by failing to give the jury instructions on voluntary manslaughter and aggravated assault." *State v. Warner*, 2007-Ohio-3016, at ¶72.

{¶43} On remand, Warner presented similar evidence as was presented in his first trial. Thus, pursuant to the law of the case doctrine, the trial court should have instructed the jury on aggravated assault.

{¶44} Moreover, in the second trial, the trial court *specifically found* that Warner presented sufficient evidence of serious provocation brought on by Carolyn and that he acted under the influence of sudden passion or in a sudden fit of rage. Thus, the trial court appropriately instructed the jury on voluntary manslaughter in relation to Count 1. In fact, the jury concluded that Warner acted under serious provocation brought on by Carolyn and that he acted under the influence of sudden passion or in a sudden fit of rage, as it found Warner guilty of voluntary manslaughter in relation to Count 1. Since there was sufficient evidence presented by Warner that he acted under serious provocation brought on by Carolyn and that he acted under the influence of sudden passion or in a sudden fit of rage, the trial court should have instructed the jury on aggravated assault.

{¶45} The state argues that the trial court properly instructed the jury on voluntary manslaughter in relation to Count 2. While this instruction presented a similar question to the jury, it asked the jury to consider whether Warner acted under serious provocation brought on by Carolyn and whether he acted under the influence of sudden

passion or in a sudden fit of rage *after* it found that he caused the death of Carolyn as a result of committing the offense of felonious assault. For the following reasons, the trial court should have instructed the jury on aggravated assault. This would have permitted the jury to decide whether Warner acted under the influence of sudden passion or in a sudden fit of rage as a result of provocation brought on by Carolyn when he committed the act of felonious assault.

{¶46} Had the jury concluded that Warner acted under the influence of sudden passion or in a sudden fit of rage, he would not have committed felonious assault, but aggravated assault. Aggravated assault cannot form the basis for a felony-murder conviction. Instead, when an individual causes the death of another as a result of committing aggravated assault, the crime is involuntary manslaughter in violation of R.C. 2903.04.

{¶47} Involuntary manslaughter is a lesser-included offense of felony murder. *State v. Williams*, 8th Dist. No. 88873, 2007-Ohio-4845, at ¶32, quoting *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284. See, also, *State v. Cutts*, 5th Dist. No. 2008CA00079, 2009-Ohio-3563, at ¶71, citing *State v. Deem* (1988), 40 Ohio St.3d 205.

{¶48} Thus, in this case, the trial court should have instructed the jury that if it found that Warner acted under the influence of sudden passion or in a sudden fit of rage as a result of provocation by Carolyn, it would find that he committed the predicate offense of aggravated assault. Then, if the jury found that Warner's commission of the offense of aggravated assault resulted in the death of Carolyn, it should find him guilty of involuntary manslaughter.

{¶49} Thus, the trial court should have instructed the jury on aggravated assault and involuntary manslaughter.[1]

{¶50} The state argues that "[t]here is no legal requirement for a trial court to provide a lesser degree offense instruction for a predicate or underlying offense." However, the state cites no authority for this statement.

{¶51} We note there are several cases that sanction instructions on aggravated assault and involuntary manslaughter when the defendant is charged with felony murder with the predicate offense of felonious assault, provided the record contains sufficient evidence that the defendant acted under serious provocation from the victim.

{¶52} In *State v. Maske*, the defendant was charged with felony murder in violation of R.C. 2903.02(B). *State v. Maske*, 5th Dist. No. 2002CA00336, 2003-Ohio-5767, at ¶4. The jury found the defendant and a co-defendant "not guilty of felony-murder, but guilty of involuntary manslaughter predicated upon aggravated assault." Id. at ¶5. Although the Fifth Appellate District did not conduct an analysis of this issue, the jury must have been instructed on the lesser-included offense of involuntary manslaughter to the felony-murder charges, based on the predicate offense of aggravated assault.

{¶53} In *State v. Williams*, the defendant was charged with purposeful murder, as well as felony murder, based on the predicate offense of felonious assault. *State v. Williams*, 8th Dist. No. 88873, 2007-Ohio-4845, at ¶2. The state requested an instruction on voluntary manslaughter as an inferior-degree offense of purposeful

1. While Warner did not specifically request an instruction on involuntary manslaughter, he argued to the trial court in support of his request for an instruction on aggravated assault that, if the jury found he committed aggravated assault, "they could actually find [Warner] not guilty of felony murder but guilty of involuntary manslaughter." Accordingly, Warner has preserved this error for appeal.

murder.[2] Id. at ¶14. The state also requested an instruction "on involuntary manslaughter as a lesser included offense of felony-murder, with aggravated assault as the underlying felony." Id. The defendant was convicted of involuntary manslaughter. Id. In conducting an analysis of the defendant's sufficiency argument, the Eighth District concluded that the state presented sufficient evidence on the charge of involuntary manslaughter, with aggravated assault as the predicate offense, since there was evidence presented that the defendant caused the death of the victim while acting under serious provocation. Id. at ¶38.

{¶54} In *State v. Haney*, the Twelfth Appellate District considered whether an aggravated assault instruction and an involuntary manslaughter instruction were appropriate in a case where the defendant was charged with felony murder with a predicate offense of felonious assault. *State v. Haney*, 12th Dist. No. CA2005-07-068, 2006-Ohio-3899, at ¶50-61. The court analyzed whether there was sufficient evidence of sudden passion brought on by serious provocation of the victim. Id. at ¶59. The court concluded that the record did not contain evidence to support an aggravated assault instruction. Id. In addition, the court held, "even if the refusal to instruct the jury on involuntary manslaughter was error, it was harmless. If the jurors believed appellant was under a sudden fit of passion brought on by serious provocation occasioned by [the victim], they could have found appellant guilty of voluntary manslaughter, the lesser included offense in Count 1." Id. at ¶60. The court noted the jury in that case did not find that the appellant acted under a sudden fit of passion brought on by serious provocation from the victim, as the jury did not find the appellant guilty of voluntary

2. The Eighth District incorrectly referred to voluntary manslaughter as a lesser-included offense of murder.

manslaughter in regard to Count 1, but instead found him guilty of purposeful murder. Id.

{¶55} In *State v. Brown*, the defendant was charged with and convicted of felony murder with the predicate offense of felonious assault. *State v. Brown* (Jan. 16, 2002), 9th Dist. No. 20662, 2002 Ohio App. LEXIS 91, at 5. The defendant argued:

{¶56} "[T]he jury could have found him guilty of aggravated assault, a fourth-degree felony, rather than felonious assault, a first-degree felony, and therefore an involuntary manslaughter instruction was required. Appellant has contended that the involuntary manslaughter instruction was warranted because aggravated assault is not an enumerated felony under the felony murder doctrine." Id. at 10.

{¶57} The Ninth District accepted the legal analysis presented by the appellant. Id. at 10-15. However, the court concluded that the record in that case did not contain sufficient evidence that the defendant acted under serious provocation. Id. at 14.

{¶58} Finally, we note a significant problem with the state's position. Accepting the state's position, if a defendant is charged with felonious assault and felony murder with the predicate offense of felonious assault, the defendant would be entitled to the inferior-offense instruction of aggravated assault with respect to the felonious assault charge, provided there was sufficient evidence in the record of serious provocation. However, according to the position proposed by the state, he would not be entitled to the instruction of aggravated assault in relation to felonious assault as the predicate offense of the felony-murder count. *It is important to remember that where an instruction on an offense of an inferior degree is appropriate, the jury must first find the appellant committed all of the elements necessary to establish the superior offense, in this case, felonious assault.* Thus, in theory, under the state's position, the jury could

find the defendant guilty of the independent offense of aggravated assault and not guilty of felonious assault, but would have to conclude that the defendant committed felonious assault as it relates to the felony-murder count. The jury would not have the option of returning a consistent verdict if it found the defendant committed the offense of aggravated assault.

{¶59} In this matter, the jury submitted a question to the trial court: "is it possible to have voluntary manslaughter on 1 count and murder on the other count, or do both counts have or need to be the same (both murder, both manslaughter, and/or both not guilty?"

{¶60} Had the jury been properly instructed on aggravated assault, it would not have needed to ask this question. This is because the jury's inquiry would have ended when it concluded Warner acted under the influence of sudden passion or in a sudden fit of rage as a result of provocation by Carolyn. After reaching that conclusion (as it did with regard to Count 1), the jury would have found that Warner's actions constituted aggravated assault instead of felonious assault. Accordingly, it would have returned a guilty verdict of involuntary manslaughter on Count 2 instead of felony murder.

{¶61} The trial court erred by failing to instruct the jury on aggravated assault and involuntary manslaughter. We now address whether this error was harmless in light of the trial court's instruction on voluntary manslaughter in regard to Count 2.

{¶62} Warner had a right for the jury to consider whether he acted under the influence of sudden passion or in a sudden fit of rage as a result of serious provocation brought on by Carolyn *prior to* the jury considering whether his actions caused the death of Carolyn. Had the jury concluded that Warner acted under the influence of sudden passion or in a sudden fit of rage as a result of serious provocation brought on by

Carolyn, the result would have been that he committed the underlying offense of aggravated assault instead of felonious assault. Were the jury to then conclude his actions caused the death of Carolyn, the jury would have had to find him guilty of involuntary manslaughter.

{¶63} Based on the instruction of the trial court, the jury was to consider whether Warner acted under the influence of sudden passion or in a sudden fit of rage as a result of serious provocation brought on by Carolyn both when he committed the action constituting felonious assault *and* when he "caused the death" of Carolyn. This distinction is significant, because the assistant prosecutor argued during his closing argument that Warner did not call 9-1-1 and permitted Carolyn to lay there and die. If the jury believed this argument, they could have concluded that Warner did not act under the influence of sudden passion or in a sudden fit of rage as a result of serious provocation brought on by Carolyn when he permitted her to die. Such a conclusion could explain the inconsistent results of the jury's findings.

{¶64} The state argues that the jury's verdict was not necessarily inconsistent since the jury could have found that Warner's acting under the influence of sudden passion or in a sudden fit of rage as a result of serious provocation brought on by Carolyn was sufficient to mitigate the culpable mental state of Count 1 (purposefully) but was not sufficient to mitigate the culpable mental state of Count 2 (knowingly). The state's argument is fundamentally flawed. First, we note the instruction the trial court gave the jury in regard to Count 1:

{¶65} "If you find the State proved beyond a reasonable doubt the defendant as to Count One purposely caused the death of Carolyn Warner, but you also find the defendant proved by a greater weight of the evidence that he acted knowingly while

under the influence of sudden passion or in a fit of sudden rage, either of which was brought on by serious provocation occasioned by the victim that was reasonably sufficient to incite the defendant into using deadly force, you must find the defendant guilty of voluntary manslaughter."

{¶66} Thus, in finding Warner guilty of voluntary manslaughter in regard to Count 1, the jury must have concluded that Warner acted purposely in killing Carolyn *and* acted knowingly while under the influence of sudden passion or in a sudden fit of rage, either of which was brought on by serious provocation of Carolyn. Thus, contrary to the state's argument, the jury did not find the mitigating factors negated the applicable mental state of purposefully. Instead, the jury found that Warner acted purposely in killing Carolyn *and*, *in addition*, that the mitigating factors were present.

{¶67} Second, we note that the same mental state exists for the mitigating factors for voluntary manslaughter and aggravated assault, which is knowingly. See R.C. 2903.03(A) and 2903.12(A). Thus, it does not matter what the mental state is for the underlying offense, in regard to both voluntary manslaughter and aggravated assault; the jury must find the defendant *knowingly* acted while under the influence of sudden passion or in a sudden fit of rage, either of which was brought on by serious provocation of the victim.

{¶68} Having concluded that the trial court erred by failing to instruct the jury on aggravated assault and involuntary manslaughter, we next determine what the appropriate remedy should be.

{¶69} Normally, an improper jury instruction requires the matter be reversed and remanded for a new trial. See, e.g., *State v. Duncan*, 154 Ohio App.3d 254, 2003-Ohio-4695, at ¶38. We note that in this case, the jury necessarily found that Warner acted in

a sudden passion or fit of rage provoked by Carolyn, since it found him guilty of voluntary manslaughter on Count 1. In such a situation it might be thought that the doctrine of collateral estoppel prevents Warner's retrial for felony murder, since a jury has already concluded that serious provocation, an element of aggravated assault, existed. As stated by the Supreme Court of Ohio in *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 443-444:

{¶70} "Collateral estoppel is the doctrine that recognizes that a determination of facts litigated between two parties in a proceeding is binding on those parties in all future proceedings. Collateral estoppel 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer* (1916), 242 U.S. 85 ***.' *Ashe* [*v. Swenson* (1970)], 397 U.S. [436], 443, ***. Collateral estoppel generally refers to the acquittal prong of double jeopardy." (Parallel citations omitted.)

{¶71} However, in *Lovejoy*, the Supreme Court of Ohio held, at paragraph one of the syllabus: "The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." In this case, there were counts for both murder, and felony murder. Consequently, the bars of double jeopardy and "constitutional collateral estoppel" do not prevent the retrial of Warner in this case regarding the issue of serious provocation.

{¶72} The first and second assignments of error have merit.

{¶73} Warner's third assignment of error reads:

{¶74} "[3.] The trial court's decision not to dismiss the felony-murder charge in the absence of *Colon* notice requirements was erroneous."

{¶75} Warner cites to the decision of the Supreme Court of Ohio in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon* I"), for the proposition that failure to include the mens rea for a crime in an indictment constitutes "structural error," rendering his indictment for felony murder fatally defective. He asserts the indictment failed to contain the element of knowledge. However, he fails to note that the holding in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon* II"), severely circumscribed the effect of *Colon* I. In *Colon* II, the court held that structural error analysis "is appropriate only in rare cases, such as *Colon* I, in which multiple errors at the trial follow the defective indictment." *Colon* II at ¶8. As Warner does not assert he actually lacked notice that the state was required to show he acted knowingly, nor point to any trial error resulting from the alleged defect in the indictment, we find any error by the trial court harmless.

{¶76} Warner's remaining seven assignments of error are as follows:

{¶77} "[4.] The trial court erred to the substantial prejudice of the appellant when it admitted inflammatory photographs over defense objections of the decedent's body which showed injuries and autopsical incisions and after permitting the state to parade them before the jury[.]

{¶78} "[5.] When the state, before the appellant testified, introduced appellant's prior domestic violence conviction on cross-examination of a defense witness, which had the effect of influencing the jury that appellant was guilty of murder, appellant's right to due process was violated[.]

{¶79} "[6.] The prosecutor's misconduct and the trial court's failure to even attempt to correct it violated appellant's right to due process and prevented a fair trial[.]

{¶80} "[7.] Appellant was denied due process of law when the court overruled his motion for a new trial[.]

{¶81} "[8.] The verdicts finding the accused guilty of murder were not sustained by sufficient evidence and are contrary to law[.]

{¶82} "[9.] Both verdicts finding the appellant guilty are against the manifest weight of the evidence and are contrary to law[.]

{¶83} "[10.] The cumulative effect of the errors in the trial violated due process and rendered the trial fundamentally unfair[.]" [3]

{¶84} Due to our disposition of Warner's first and second assignments of error, we find these remaining assignments of error to be moot. App.R. 12(A)(1)(c).

{¶85} The judgment of the Portage County Court of Common Pleas is reversed, and this matter is remanded for a new trial.

{¶86} It is the further order of this court that appellee is assessed costs herein taxed.

{¶87} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J., concurs,

TIMOTHY P. CANNON, J., concurs in part and dissents in part with Concurring/ Dissenting Opinion.

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3. There are certain discrepancies of phrasing between some of the assignments of error as they appear in the table of contents and the body of appellant's brief. We repeat them as they appear in the table of contents. There is no difference in meaning.

TIMOTHY P. CANNON, J., concurring in part and dissenting in part.

{¶88} I respectfully concur in part and dissent in part from the opinion of the majority.

{¶89} In this matter, the jury was properly instructed on Count 1. The jury resolved Count 1 by concluding Warner committed the act while under serious provocation brought on by Carolyn and that he acted under the influence of sudden passion or in a sudden fit of rage. Thus, the jury found Warner guilty of voluntary manslaughter instead of purposeful murder. Neither the state nor Warner is claiming any error occurred in regard to Count 1.

{¶90} Regarding the erroneous jury instruction on Count 2, the remedy proposed by the majority is a third trial on the felony murder charge. There are three possible outcomes that could occur. One, the new jury could find Warner not guilty. Two, the jury could find Warner guilty of involuntary manslaughter instead of felony murder. (In either of these instances, the end result is that Warner would only be convicted and sentenced on Count 1, as the involuntary manslaughter charge should merge with the voluntary manslaughter conviction.) Three, the jury could find Warner guilty of felony murder. However, since this offense is the result of a single act of thrusting a knife into Carolyn, this third outcome would result in inconsistent verdicts found by two different juries.

{¶91} In *State v. Duncan*, the First Appellate District held that "[a] person cannot be convicted of both murder and voluntary manslaughter for the same killing." *State v. Duncan*, 154 Ohio App.3d 254, 2003-Ohio-4695, at ¶24. In *Duncan*, the defendant was charged with, and found guilty of, murder, felony murder, and voluntary manslaughter. Id. at ¶25, 28. The First District concluded that the Double Jeopardy Clauses of the

Ohio and United States Constitutions did not prevent the defendant from being retried on all three charges. Id. at ¶46.

{¶92} It is important to note that, unlike the case sub judice, the defendant in *Duncan* was separately charged with two counts of murder and an independent count of voluntary manslaughter; the jury returned guilty verdicts on all three counts. Id. at ¶1. In this matter, Warner was only charged with two counts of murder. In regard to Count 1, after reviewing the evidence, the jury found Warner guilty of voluntary manslaughter. The jury did not find Warner guilty of purposeful murder. The court in *Duncan* concluded that the trial court erred in giving its jury instructions. In this matter, the trial court *did not err* when it instructed the jury on Count 1. Accordingly, this case is distinguishable from the holding in *Duncan* regarding the double jeopardy analysis.

{¶93} In *State v. Griffin*, the defendant was charged with, and found guilty of, felony murder and voluntary manslaughter. *State v. Griffin*, 175 Ohio App.3d 325, 2008-Ohio-702, at ¶1. The *Griffin* Court held that the jury was not properly instructed as to the mitigating circumstances associated with voluntary manslaughter. Id. at ¶17-18. The First District followed its prior holding in *State v. Duncan* and remanded the matter for a new trial on both counts. Id. at ¶14, 18. Also, the defendant in *Griffin* was independently charged with voluntary manslaughter and felony murder, and the First District concluded that the trial court committed error when it instructed the jury. Id. at ¶17-18.

{¶94} The state notes that *State v. Duncan* cited *State v. Rhodes* (1992), 63 Ohio St.3d 613 and argues that *State v. Rhodes* was a case involving a single-count indictment. Id. at 614. The state contends the First District misapplied the *Rhodes* holding in *Duncan* and *Griffin*, since there were multiple-count indictments in those

cases. *State v. Griffin*, supra, at ¶1; *State v. Duncan*, supra, at ¶25. However, in *State v. Rhodes*, the Supreme Court of Ohio held:

{¶95} "[T]he jury must find a defendant guilty of voluntary manslaughter rather than murder if the prosecution has proven, beyond a reasonable doubt, that the defendant knowingly caused the victim's death and if the defendant has established by a preponderance of the evidence the existence of one or both of the mitigating circumstances." *State v. Rhodes*, 63 Ohio St.3d at 617.

{¶96} The state dedicates a significant portion of its brief to arguing that compromise verdicts are permissible. However, since we determined that the jury was not properly instructed in regard to aggravated assault in relation to Count 2, its verdict on that count is fundamentally flawed. As such, we should not consider this to be a typical "compromise verdict" case, since the differing verdicts were the result of improper jury instructions.

{¶97} I would follow the analysis of the First District and conclude that, based on the improper instruction and the facts and circumstances of this case, Warner cannot be convicted of both felony murder and voluntary manslaughter for one killing as a result of a single act. *State v. Duncan*, 2003-Ohio-4695, at ¶24. In this matter, Carolyn died as the result of a single thrust of a knife. Dr. Dorothy Dean, a medical examiner and the state's expert witness in regard to the cause of death, concluded that Carolyn suffered "one fatal injury," which was a "stab wound [that] entered the left side of her torso, it perforated the diaphragm, *** went through her left kidney, and her aorta." In regard to Count 1, the jury, when properly instructed, concluded that this thrust was delivered by Warner, who at that specific time was acting under the influence of sudden passion or in a sudden fit of rage as a result of serious provocation brought on by Carolyn. Since the

jury was not properly instructed in regard to Count 2, the jury did not have the opportunity to answer the question of whether Warner was acting under the influence of sudden passion or in a sudden fit of rage as a result of serious provocation brought on by Carolyn when he delivered the thrust of the knife in relation to his commission of felonious assault—the underlying offense of the felony-murder charge. However, both charges in this case arose out of a single act of Warner. As a matter of law, if the jury found the mitigating factor existed, it was clearly relevant and applicable to both charges of murder, not one versus the other.

{¶98} "Collateral estoppel applies when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 183. (Citation omitted.) Collateral estoppel applies in criminal cases. See *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 443. Moreover, in *Lovejoy*, the Supreme Court of Ohio held that "[o]nce a tribunal has decided an issue of ultimate fact in the defendant's favor, the double jeopardy doctrine also *precludes a second jury* from ever considering that same or identical issue in a later trial." (Emphasis added.) Id., citing *Dowling v. United States* (1990), 493 U.S. 342, 348.

{¶99} The jury in *Lovejoy* found the defendant not guilty of purposeful murder as charged in Count 1 and the lesser-included offenses arising out of that count. Id. at 422. However, the jury was hung on the charge of felony murder based on the predicate offense of aggravated robbery and the lesser-included offenses of that charge. Id. The Supreme Court of Ohio held that the defendant could be retried on the

felony-murder count because it took a different "track." Id. at 488.[4] The offenses charged in *Lovejoy* necessarily require a different analysis, in that one charge asked the jury to consider whether the defendant acted with prior calculation and design, and the other count asked the jury to decide whether the defendant caused the victim's death as a result of committing aggravated robbery. Id. The *Lovejoy* Court distinguished that case from the Supreme Court of Ohio's prior holding in *State v. Liberatore* (1983), 4 Ohio St.3d 13. Id.

{¶100} In *State v. Liberatore*, the jury found the defendant not guilty of aggravated arson, but was hung on the felony-murder count, which was also based on aggravated arson. *State v. Liberatore*, 4 Ohio St.3d at 14. The Supreme Court of Ohio held that the defendant could not be retried on the felony-murder count due to double jeopardy protections, because the jury had already determined that the defendant did not commit aggravated arson; thus, he could not be found guilty of felony murder with the predicate offense of aggravated arson. Id. at 14-15.

{¶101} I believe the case at hand is analogous to *State v. Liberatore* since the jury, in its resolution of Count 1, has already answered the identical question that a second jury will be asked to consider. Since the first jury answered that question in Warner's favor, the Double Jeopardy Clause prohibits Warner from having to stand trial on the felony-murder charge. Warner should not have to convince *another* jury that he acted under the influence of sudden passion or in a sudden fit of rage as a result of

4. I note the Sixth Circuit Court of Appeals disagreed with the Supreme Court of Ohio on this issue. See *Lovejoy v. Collins* (C.A.6, 2002), 54 Fed Appx. 617, 2002 Ohio App. LEXIS 27183. In determining that Lovejoy was entitled to a writ of habeas corpus, the Sixth Circuit concluded that the second trial of the petitioner for murder was barred by the Double Jeopardy Clause and the doctrine of collateral estoppel. Id. at *4-8.

serious provocation brought on by Carolyn when he committed the act of thrusting the knife into her.

{¶102} App.R. 12(B) provides, in part: "[i]n all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly." The jury concluded that Warner acted under the influence of sudden passion or in a sudden fit of rage as a result of serious provocation brought on by Carolyn when he committed the specific act in question. Applying this determination to the proper jury instructions on Count 2 results in a finding that Warner committed the offense of aggravated assault, which caused the death of Carolyn. Therefore, the jury would have found he committed the offense of involuntary manslaughter. In its opinion, the majority *agrees*, stating: "After reaching that conclusion (as it did with regard to Count 1), the jury would have found that Warner's actions constituted aggravated assault instead of felonious assault. Accordingly it would have returned a guilty verdict of involuntary manslaughter on Count 2 instead of felony murder."

{¶103} As a result, we should modify Warner's felony-murder conviction to an involuntary-manslaughter conviction. Warner would then stand convicted of voluntary manslaughter and involuntary manslaughter. These convictions should be merged and considered allied offenses of similar import.

{¶104} The trial court merged Warner's convictions of felony murder and voluntary manslaughter for the purposes of sentencing. Likewise, for the following reasons, Warner's convictions for voluntary manslaughter and involuntary manslaughter should be merged and considered allied offenses of similar import upon remand, instead of another murder trial.

{¶105} R.C. 2941.25, Ohio's multiple-count statute, provides:

{¶106} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶107} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶108} In conducting an analysis pursuant to R.C. 2941.25, courts employ a two-step process when considering whether two offenses are allied offenses of similar import. *State v. Rance* (1999), 85 Ohio St.3d 632, paragraph three of the syllabus. The Supreme Court of Ohio has recently clarified the first step of the process:

{¶109} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the element of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, paragraph one of the syllabus, clarifying *State v. Rance*, supra.

{¶110} If a court determines that the offenses are allied, it proceeds to the second step, which is to analyze the defendant's conduct to determine if he or she acted with a separate animus in committing the two offenses.

{¶111} Regarding the first step, the elements of (1) voluntary manslaughter and (2) involuntary manslaughter based on the underlying offense of aggravated assault are nearly identical. To commit voluntary manslaughter, an individual must knowingly (1) cause the death of another (2) "while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim." See R.C. 2903.03. To commit involuntary manslaughter based on the underlying offense of aggravated assault, an individual must knowingly (1) cause serious physical harm to another (2) "while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim," and (3) such action results in the death of that person. See R.C. 2903.12 and 2903.04. Thus, the only practical difference between these offenses is that involuntary manslaughter based on the underlying offense of aggravated assault involves an extra step in the analysis. Accordingly, when viewing the elements of these offenses in the abstract, the elements of the offenses significantly align so that commission of one of the offenses will result in commission of the other.

{¶112} This conclusion is consistent with the Supreme Court of Ohio's recent holding in *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147. In *Williams*, the court held that felonious assault under R.C. 2903.11(A)(1) is an allied offense of attempted felony murder. Id. at paragraph one of the syllabus. In its analysis, the Supreme Court of Ohio considered the underlying offense of violence, to wit: felonious assault, that was applicable in that case to trigger the felony-murder statute. Id. at ¶23. In addition, we note the court concluded that felonious assault under R.C. 2903.11(A)(2) is an allied offense of attempted purposeful murder. Id. at paragraph two of the syllabus. In its analysis of these offenses, the court held, "[c]onsidering these elements in the abstract,

although they do not align exactly, when Williams attempted to cause harm by means of a deadly weapon, he also engaged in conduct which, if successful, would have resulted in the death of the victim." Id. at ¶26.

{¶113} The Sixth Appellate District has reached a different conclusion in a similar case. See *State v. Mason*, 6th Dist. Nos. L-02-1211 & L-02-1189, 2003-Ohio-5974. (Affirmed on other grounds by *State v. Mason*, 105 Ohio St.3d 126, 2005-Ohio-791.) In *Mason*, the defendant was convicted of two counts of involuntary manslaughter and one count of voluntary manslaughter in a stabbing death. Id. at ¶2, 3, and 29. The Sixth District concluded that, since R.C. 2903.03(A) requires the defendant to act under the influence of sudden passion or in a sudden fit of rage brought on by serious provocation of the victim, and R.C. 2903.04(A) requires the commission of (or attempt to commit) a felony, the offenses are not allied.[5] Id. at ¶46. Specifically, the court held the offenses do not correspond "to such a degree that the commission of one *requires* the commission of [the other]." (Emphasis added.) Id. It is important to note that the Sixth District conducted its analysis prior to the clarification of *State v. Rance* in *State v. Cabrales*, supra. After the Supreme Court of Ohio's decision in *Cabrales*, the first step of the *Rance* test "*** requires a comparison of the elements of the offense in the abstract, without considering the evidence in the case, *but does not require an exact alignment of those elements*." (Emphasis added.) *State v. Williams*, 2010-Ohio-147, at ¶22. In explaining that all elements of the offense need not exactly align, the *Cabrales* Court noted that no two statutes would have identical elements. *State v. Cabrales*,

5. While the trial court in *Mason* imposed separate sentences for each of the offenses, it imposed the sentences concurrently; thus, the defendant's aggregate prison term was six years. *State v. Mason*, 2003-Ohio-5974, at ¶3.

2008-Ohio-1625, at ¶22. Instead, the court mentioned as part of its reasoning for clarifying the *Rance* test that "courts must avoid statutory interpretations that create absurd or unreasonable results." Id. at ¶21. (Citations omitted.)

{¶114} Moving to the second step, the question is whether Warner acted with a single or separate animus. As indicated, both charges arise from the single, fatal knife wound. Accordingly, Warner acted with a single animus.

{¶115} Since both prongs of the allied offense of similar import test have been met, Warner is entitled to have the offenses merged.

{¶116} This is the *second* time the trial court erred by failing to instruct the jury on aggravated assault. The previous time this court considered this case, the matter was remanded for a new trial due, in part, to the trial court's failure to give an instruction on aggravated assault. *State v. Warner*, 2007-Ohio-3016, at ¶72 ("*Warner I*"). Yet, inexplicably, the trial court again failed to give that instruction at the second trial. The state has provided no logical explanation to suggest why it was appropriate for the trial court to deviate from this court's previous direction. Requiring Warner to stand trial a third time for a murder charge, and again have the burden of trying to convince yet another jury of his peers that the mitigating factors applied, would offend the principles of fairness and due process, the doctrine of collateral estoppel, and the Double Jeopardy Clauses of the Ohio and United States Constitutions. Like the majority, I find merit in Warner's first and second assignments of error, but I disagree with the remedy.

{¶117} In addition, I disagree with the majority's decision to moot most of Warner's assignments of error. If sustained, some of the assignments of error, namely 8, 9, and 10, could be dispositive of the case. In addition, other assignments of error

relate to evidentiary issues that may occur in the retrial of this case. Therefore, they should be addressed.

{¶118} For example, Warner's fourth assignment of error is:

{¶119} "The trial court erred to the substantial prejudice of the appellant when it admitted inflammatory photographs over defense objections of the decedent's body which showed injuries and autopsical incisions and after permitting the state to parade them before the jury."

{¶120} This issue was decided by this court in *Warner I*, where this court held:

{¶121} "Next, we address certain autopsy photographs identified as state's exhibits 58, 59, and 60. These images show a small cut on Carolyn's head. Doctor Dorothy Dean testified that this cut was caused by a blunt impact, such as a baseball bat, rather than being sliced with a sharp object. While pictures of this injury would normally be admissible, the photographs also depict a much larger cut next to the blunt force injury. Dr. Dean testified this cut was made by her staff in preparation to reflect the scalp. These photographs have probative value, in that the jury was able to view the blunt force injury. However, these photographs are prejudicial, because they show injuries to Carolyn's scalp beyond those inflicted by her killer. Upon review, we conclude the probative value of these photographs was substantially outweighed by the danger of unfair prejudice.

{¶122} "Also, we need to individually address state's exhibits 61, 62, and 63. These are pictures of Carolyn's head after her scalp had been reflected. The fact that the scalp has been reflected does not, per se, preclude the admission of the photographs. [*State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, at ¶95-97.] However, we conclude these particular pictures are gruesome. [See, e.g., *State v.*

Tibbetts (2001), 92 Ohio St.3d 146, 156.] Carolyn's facial features are not visible because her scalp is covering them. These photographs did have minimal probative value, as they corroborated Dr. Dean's testimony regarding the bruising underneath Carolyn's scalp. However, the gruesome nature of these pictures was prejudicial. The probative value of these photographs was substantially outweighed by the danger of unfair prejudice.

{¶123} "The trial court abused its discretion by admitting state's exhibits 58-63. However, Warner has not demonstrated plain error in relation to any of the complained-of photographs. This is because we cannot conclude the results of the trial would have been different without the admission of these photographs. However, since this matter is being remanded for a new trial, the state should be extremely cautious in attempting to introduce or admit state's exhibits 58-63. The better practice in relation to these photographs, we believe, would be to have the witness explain what was discovered during the autopsy 'by way of precise and candid descriptive testimony.' [*State v. Hall*, 11th Dist. No. 2002-P-0048, 2003-Ohio-1979, at ¶52 (Ford, P.J., concurring.)] This approach will avoid the possible danger of unfair prejudice, while still portraying the details of the autopsy examination to the jury. [Id.]" *State v. Warner*, 2007-Ohio-3016, at ¶88-90.

{¶124} Pursuant to the law of the case doctrine, the trial court abused its discretion in admitting these photographs, as the "probative value of the photographs was substantially outweighed by the danger of unfair prejudice." Id. at ¶88-89.

{¶125} It is important to note that, in the first trial, Warner did not object to the admission of the photographs in state's exhibits 58-63. Id. at ¶86. Thus, this court reviewed the issue under the plain error standard. Id. While this court concluded that

the trial court abused its discretion by admitting these photographs, the error did not rise to the level of plain error. Id. at ¶90.

{¶126} In the second trial, however, Warner properly objected to the admission of state's exhibits 58-63 and preserved this issue for appellate review. We should address this assignment of error because, based on the majority ruling, this case is destined for yet another trial, where once again the state may try to admit the photographs.

{¶127} The conviction on Count 1 should stand. In relation to Count 2, the judgment of the Portage County Court of Common Pleas entering a conviction for felony murder should be modified to reflect a conviction for involuntary manslaughter. We should reverse the entire sentence imposed by the trial court and remand. On remand, the trial court should merge the involuntary manslaughter conviction in Count 2 with the voluntary manslaughter conviction in Count 1. Thereafter, the trial court should resentence Warner on his voluntary manslaughter or involuntary manslaughter conviction according to the state's election pursuant to *State v. Williams*, 2010-Ohio-147, paragraph three of the syllabus.