Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2012-006869-001 DT 02/28/2014

HONORABLE KAREN A. MULLINS

CLERK OF THE COURT
D. Charnick
Deputy

STATE OF ARIZONA JAY ROBERT RADEMACHER

v.

ROBERT FISCHER (001) DWANE M CATES

UNDER ADVISEMENT RULING

The Court has considered the Defendant's Motion for New Trial Based Upon Prosecutorial Misconduct and Other Grounds [and] Renewed Rule 20 Motion for Judgment of Acquittal, the State's Response thereto, the Defendant's Reply, and the oral argument of counsel.

The Defendant seeks a new trial pursuant to Ariz.R.Crim.P. 24.1(c) based on two grounds: (1) the jury verdict is contrary to the weight of evidence, and (2) the prosecutor engaged in misconduct. The Defendant also renews his motion for judgment of acquittal under Ariz.R.Crim.P. 20.

This ruling addresses the Defendant's motion for a new trial based on the argument that the jury verdict is contrary to the weight of evidence and his renewed Rule 20 motion. The Defendant's request for a new trial based on prosecutorial misconduct remains under advisement.

I. THE EVIDENCE ADMITTED AT TRIAL

The Defendant, Robert Fischer, was charged with one count of second degree murder in the death of Lee Radder ("Lee") on December 30, 2010. The Defendant is the step-father of Belinda Radder ("Belinda"), Lee's wife, having been previously married to Belinda's mother who passed away in 2005. After her mother's passing, the Defendant remained close with

Belinda, Lee, and their two minor daughters, often spending holidays with them. In late December 2010, the Defendant arrived for a holiday visit, as was the family's practice, staying in the guest room of Lee's and Belinda's house. On December 29th, the family went to dinner and, upon returning to the house, the adults spent the remainder of the night talking and drinking wine and vodka. Early the next morning, Lee was found dead on the floor near the kitchen with a single gunshot wound to his head and the handgun from which the shot was fired in his hand.

To place the Defendant's Motion in context, an overview of the evidence admitted at trial is necessary. This overview is not intended to include everything admitted at trial but rather to set forth a fair summary of the evidence pertinent to the Motion at hand.

A. The Evening Before Lee's Death

Lee, Belinda, their two daughters, and the Defendant were the only persons in the house at the time of Lee's death. Of those, only Belinda testified at trial. The following is taken from her trial testimony.

On December 29, 2010, Belinda arrived home from work at 5:30 p.m. to find that her daughters had already opened the Christmas gifts the Defendant had given them. The Radder family and the Defendant went out to dinner that evening. Belinda drank wine and the Defendant drank mixed drinks during dinner; Lee did not drink at all as he was driving. When they returned to the house at about 8:00 p.m., the adults sat around the kitchen table and continued to drink and talk. Lee and the Defendant began drinking vodka and Belinda continued drinking wine.

At approximately 10:00 p.m., Lee left the table for an extended time to make a phone call and/or check his email. While he was gone, Belinda and the Defendant talked about Belinda's mother and how much they missed her. Belinda put the children to bed at 10:30 p.m.

When Lee returned to the table, he showed the Defendant an email he had received about a non-compete agreement related to a business deal he was working on. Belinda testified that Lee felt betrayed by the email, and returned to the table worried and upset. The three adults continued to drink and talk until about 11:30 p.m. when Belinda went to bed. It was common for Lee and the Defendant to stay up late drinking; they had done it many times before. Belinda testified that she was drunk when she went to bed and still felt the affects of the alcohol the next morning.

Belinda was awakened in her bed early the next morning by the Defendant shaking her and asking, "Where's Lee? Where's Lee?" Belinda went to the kitchen area and saw Lee on the floor in a pool of blood. She thought it was some kind of joke and returned to the master

bathroom to urinate. When she returned, she saw the Defendant either standing or kneeling next to Lee. He motioned for her to stop. Belinda stood there frozen. She began to realize that the scene before her was real. Once the police arrived, she focused on getting her daughters out of the house.

Since that morning, Belinda has never questioned the Defendant about what happened. The only thing that the Defendant has ever said to her was that Lee killed himself. She has never pushed him for details about what had happened.

B. The 911 Call

The Defendant called 911 a few minutes after 5:00 a.m. on December 30, 2010. The following is a verbatim transcript of that call:

911: 911. What's your emergency?
Def: He shot himself. I don't get it. He shot himself.
991: Okay, who shot himself?
Def: I don't know who he is, he's like, like (unintelligible) wife's cousin.
911: Okay, what's the address?
Def: I gotta look. I don't know. It's my family's house. Let me look. You don't have it on your--I'm a retired police officer. I don't know.
911: Let's see, are you at--
Def: I'm at the house.
Def: Quick, please, quick, please come quick.
911: Well I'm trying to get your information. Okay?
Def: Huh?
911: I'm just trying to get your information.
Def: No, I know. And, I'm, we heard a shot, and we're all asleep, we heard a shot. I came out (unintelligible) family room. He's laying here dead. Or I think he's dead. I'm a retired police officer.
[Conversation regarding address omitted.]
Def: Please come quick.
911: Okay hold on I got deputies on their way over. What's your name?
Def: I'm Rob Fischer.
911: And who is this person who's shot, it is a family friend?
Def: He is my daughter-in-law's cousin I think. We're sitting around, I don't, I mean, I think he's my step-daughter's cousin, I think, I'm not sure.
911: Do you know old he is?
Def: He looks, no I don't know his age but looking at him--
911: How long ago did he shoot himself?

Def: Like two, a minute ago.
911: Can you see if he's breathing still?
Def: No, I don't, doesn't look like it. I'm (unintelligible) touch him but it doesn't look like he's breathing.
911: Did you see where he shot himself?
Def: Looks like he shot himself in the face.
[Conversation between 911 and the Fire Department.]
911: I have deputies on their way, okay?
Def: Please hurry. I'm not sure he's dead.
[Conversation between 911 and Fire Department in the background]
Def: (To Belinda[1].) He shot himself. He shot himself. Come out here, I don't… He shot himself. I heard, I heard the gunshot. Where's Lee? Where's Lee? Where's Lee? Stop! Where's Lee? [Belinda speaking in background.] What--you think? [Belinda speaking in background.] I heard a shot. I came out. (Unintelligible.) Where's Lee?
Fire 911: Sir, sir, sir, can you hear me?
Def: Hi, I'm here. What?
Fire 911: Are you with anyone that's actually injured?
Def: No, nobody's injured except he looks like he's not alive.
Fire 911: Okay, do you think you did this to himself?
Def: What?
Fire 991: Do you think he did this to himself?
Def: Well he had too. We're all asleep and we heard a gunshot, I heard a gunshot and I came out and he's laying here.
Fire 911: So is he breathing?
Def: No, he's not. And I'm with my daughter-in-law and she's a nurse and he's…not.
Fire 911: Okay, so you're not willing to try CPR then?
Def: What?
Fire 911: You're not willing to try CPR?
Def: I will, but I don't think it will do any good.
Fire 911: He's not conscious, he's not alert—
Def: Do you want me to try? Do you want me to try?
Fire 911: It's up to you.
Def: I will, of course I'll try. Let me try. Do you want me to set the phone down?
Fire 911: Well, I can tell you what to do if you'd like.
Def: I'll set the phone down if you want me too. [Belinda speaks in background.]
Fire 911: (Unintelligible) Who is this person to you?

[1] The Defendant is, on occasion, speaking to Belinda, who apparently has walked into the room.

Def: What?
Fire 911: Who is this person to you?
Def: He—(To Belinda) Who is he?
Belinda: Who's who?
Def: (To Belinda.) He!
Fire 911: Is it a friend or relative or—
Def: He is my daughter-in-law's--friend?
Fire 911: Okay, and are you gonna try CPR?
Def: I will. If it will help I'll try.
Fire 911: How old is he?
Def: (To Belinda) How old is he?
[In background, Belinda: Fifty.]
Def: Fifty?
Fire 911: Okay, now can you—
Def: Are you there?
Fire 911: Yes. Now can you lie him on a hard flat surface?
Def: Say it again, I can't hear you.
Fire 911: Can you lie him on a hard flat surface?
Def: I'm sorry I can't hear you. Say it again.
Fire 911: Can you lay him down on a hard flat surface?
Def: He is flat on a surface right now.
Fire 911: Okay, can you open up his airway by placing the heel of one hand on his forehead until—
Def: I can try! I can try! Oh my God! He doesn't—you know what, I'm a retired police office. He does not appear to be responsive to anything. Please hurry.
Fire 911: Okay, they are still driving, this does not delay them whatsoever.
Def: What?
Fire 911: This does not delay them whatsoever. They're on the way.
Def: Okay, good. And I, I've tried to open his mouth and fix his airway and there's no response at all.
Fire 911: Okay, so then, can you just open up the airway by placing the heel of one of your hands on his forehead and tilt his head back.
Def: No I've tried that. And, and, and, he shot himself in the eye and it's really bad. I don't know why he did this.
Fire 911: Okay, so you're not gonna try then?
Def: Well I'll try it, I'll try--of course I will. So I've opened his airway. I'm trying to do CPR.
Fire 911: Okay I just want you to take two fingers under his chin and lift it up.
Def: Okay.

Fire 911: And I just want to check to see if he's breathing by looking at his chest, listening for air, and feeling for air. And just do that for—
Def: No, he's not--
Fire 911: --five to ten seconds.
Def: --he's not.
Fire 911: What is your name?
Def: Rob Fischer.
[Police heard at door]
Fire 911: How do you spell your last name?
Def: F-I-S-C-H-E-R.
[Police heard at door]
Def: Come in, come in, please (unintelligible). Sheriffs are here now.
Fire 911: Okay, I'll let you go talk to the Sheriffs.
Def: Okay. Thank you.

Trial Exhibit 231.

The Defendant's tone of voice during the call is, of course, not reflected in the transcript. His tone of voice reflects confusion and uncertainty as to the identity of the person who has been shot. The calm tone of Belinda's voice in the background appears to corroborate her testimony that she initially did not believe the scene was real. The Defendant's statement to Belinda to "stop" also corroborates Belinda's testimony that the Defendant held up his hand to stop her from going closer when she entered the room after returning from the bathroom.

C. The Arrival of the Police

The five law enforcement officers that initially responded to the 911 call were all from the Maricopa County Sherriff's Office (Sgt. Christopher Lafko, Deputy Todd Burkhalter, Deputy Shane Painter, Deputy Ryan Kelleher, and Deputy Matthew Hunter). The first responding officer was Sgt. Christopher Lafko, who arrived at 5:13 a.m. The door was unlocked so he opened it and heard the Defendant say, "I'm here, over here." Upon entering the home, he saw the Defendant with a cell phone in his hand apparently talking to a 911 operator and kneeling on one knee next to a man lying on the floor in a large pool of blood. The man, later determined to be Lee, had a gunshot wound to his right eye and a semiautomatic handgun in his right hand.[2] Sgt. Lafko testified that the scene didn't "feel right" and that the gun appeared to have been placed in Lee's hand because Lee's thumb was on the side of the trigger and not on the trigger itself.[3]

[2] Belinda testified that Lee did everything but write with his right hand.
[3] Several photographs of the crime scene show that Lee's thumb is in fact through the trigger, contrary to Sgt. Lafko's testimony. *E.g. Trial Exhibit 110*.

Sgt. Lafko approached Lee's body and told the Defendant to step away. The Defendant stood up, put up his hands, and asked if he could wash the blood off his hands. Sgt. Lafko did not see any obvious signs of blood on the Defendant's hands but told the Defendant that he could not. Sgt. Lafko checked Lee's body for signs of a heartbeat. Finding none, he concluded that Lee was dead. Sgt. Lafko recalled hearing water running in the kitchen and instructed Deputy Todd Burkhalter, who arrived at the house moments after Sgt. Lafko, not to let the Defendant wash his hands. Deputy Burkhalter recalls that when he entered the house, the Defendant was in the kitchen washing his hands.

Belinda was in the master bedroom when Sgt. Lafko arrived. She subsequently came out of the bedroom and was walking around the house asking questions. As the situation progressed, she started to become hysterical. Sgt. Lafko instructed Deputy Shane Painter, who arrived a minute after Sgt. Lafko and Deputy Burkhalter, to get Belinda out of the house. By this time Deputy Ryan Kelleher and Deputy Matthew Hunter had also arrived. Several deputies took the Defendant and Belinda to an outside patio. The Deputies then learned from Belinda that there were two minor children still in the house. Deputies Burkholder and Kelleher escorted Belinda back into the house to assist in removing the children. One of the deputies held up a blanket between the bedrooms and the kitchen so the children could not see their father's body as they exited the house.[4]

While on the patio, Deputy Painter noticed the Defendant's eyes were watery and bloodshot and that he smelled of alcohol. He asked the Defendant what happened. The Defendant said he had been dozing in the front (guest) bedroom and he heard a pop. Deputy Painter testified that the Defendant and Belinda sat next to each other outside and were talking to each other. Another Deputy testified that the Defendant and Belinda were kept separate while on the patio. Deputy Hunter testified that the Defendant said he was a retired police officer and a lawyer, and suggested that Deputy Hunter hug Belinda and show her some compassion.

At some point, Sgt. Lafko went to the outside patio and made "small talk" with the Defendant. The Defendant told Sgt. Lafko that he was in town visiting his step-daughter and her husband for the holidays and then asked if the body was Lee. Because the Defendant was barefoot and it was quite cold, Sgt. Lafko asked the Defendant if he could get the Defendant a pair of shoes. The Defendant said that his shoes were in a bag in the first bedroom on the right. Sgt Lafko found boots and socks by a bag in the guest bedroom and noticed that there was a holster in the bag. Sgt. Lafko brought the boots to the Defendant. The Defendant told Sgt. Lafko that he was formerly a police officer and was now a practicing attorney. He also said that

[4] Detective Jon Felbab interviewed one of Lee and Belinda's daughters but not the other. He testified that he did not obtain any information that aided the investigation from that interview.

he was going to do some cowboy roping, but he guessed he wouldn't be allowed to go roping. When the Sgt. asked why, the Defendant said, well, you guys are investigating a homicide.

After all occupants were removed from the house, Deputy Kelleher and Sgt. Lafko took photographs of two glasses with ice in them on the kitchen table near where Lee's body was lying and of another glass with ice in it on the kitchen counter, a short distance away. *Trial Exhibits 74, 75.* They also took photographs of the gun in Lee's hand lying in the pool of blood. *Trial Exhibits 12, 25, 110.*

Eventually, Deputy Kelleher drove Belinda and the Defendant to a police substation.

D. The Interview of the Defendant

The Defendant was interviewed by Detective Michael Brooks. *Trial Exhibit 464*. Det. Brooks testified that during the interview, the Defendant smelled of alcohol and had bloodshot eyes, but was not slurring his speech and did not seem incoherent.

The Defendant asked if Belinda was safe and if the children were okay at the start of the interview. When Det. Brooks asked him what happened, he said that the family had gone out to dinner and returned home and talked. They were talking about Belinda's mother (his wife) who had passed away of cancer. Lee and Belinda had told the Defendant if they both died, they wanted him to raise their children. He described it as "probably the greatest night of my life." The Defendant said he loved Lee and considered him his stepson.

The Defendant and Lee were drinking vodka and consumed an entire bottle over several hours; they all had a "buzz" but were not falling over drunk. Later in the interview he said they consumed two bottles. (There are two empty vodka bottles on the kitchen counter, and multiple empty wine bottles on the kitchen counter and in the kitchen trash can. *Trial Exhibits 31, 362, 362, 365*.) Everyone went to bed and he heard a popping sound. He came out of his room and saw somebody lying on the floor; the Defendant didn't recognize Lee when he saw him on the floor. He went into Lee's and Belinda's bedroom, it was dark, and he thought they were both there. He wasn't sure if he moved anything, but he didn't think so. He didn't want the girls to see the scene because there was a lot of blood.

The Defendant owned a gun and for safety reasons had previously taken the bullets from the magazine and the chamber and then placed the bullets in the front of his bag and the gun in the main part of the bag. The Defendant possessed a concealed weapon permit.

The Defendant seemed confused during the interview and many of his answers are unintelligible on the recording of the interview due to the softness of his voice. He frequently said he didn't know in response to questions and he asked several times if Belinda was okay. He thought he'd been at the police station for 20 hours after the officer told him it was 11:00, mistakenly believing it was 11:00 p.m. rather than a.m. He also repeatedly asked for a telephone so he could call his wife.

Towards the end of the interview, Det. Brooks tells the Defendant that it looked like Lee didn't commit suicide and asked the Defendant to help fill in some of the gaps. In response to the Detective's repeated requests for assistance, the following exchange occurred:

A. I wish I could.
Q. Is it because you don't know?
A. Because I don't (unintelligible), I was sobering up this morning and I walked out of the bathroom and (unintelligible) bits and pieces in my mind, some those things I think I told you about some of those things I don't think are accurate (unintelligible). I'm afraid to say anything because I don't—I don't know if it's right, you know?
Q. What do you feel happened?
A. I don't believe (unintelligible) shot him (unintelligible) I don't believe I shot him. I would never shoot him. (Unintelligible) love him. We've never fought, we haven't fought and I have an image of him lying on the floor and I wasn't even sure it was him because I—you know?
Q. I can tell you that somebody moved him.
A. I don't know (unintelligible).
Q. He's a big guy. I mean, you know (Lee), he's a big guy, someone would have to be pretty strong to move him.
A. Well I have no—I have no recollection of—I'm not lying to you, I haven't lied to you.
* * *
I have no—I have no recollection of (unintelligible) I have no recollection. I mean, obviously I have blood on my feet so I was in the (unintelligible).
* * *
I'm sorry I can't answer your questions, I'm not being evasive and I'm not lying to anyone. I just can't answer your questions (unintelligible) doesn't make sense to me and I don't want to say something to you that's inaccurate. I said earlier I believe I probably told you something that was inaccurate (unintelligible) I'm not really sure (unintelligible) because this is all so surreal but I'm afraid to saying something to you that isn't truthful, isn't accurate because I don't—I can't—it's not (unintelligible).
* * *

> Understand I—I want to cooperate, I understand (unintelligible) if I say something that's not accurate as your job (unintelligible) your job is to build a case against me and put me in jail from the rest of my life (unintelligible).

Trial Exhibit 466.

After the interview, a search warrant was executed to obtain physical evidence from the Defendant and Belinda. The police took photos of the Defendant and impounded his clothing and boots. The photographs of the Defendant, who was wearing a tank top, do not reveal the presence of any blood on his hands, arms, shoulders, or head. *Trial Exhibits 64, 65*. There was blood on the Defendant's left foot. *Trial Exhibits 66, 67, 108, 109*. Blood was found on the left side of his left pajama pant leg. *Trial Exhibits 111, 113, 383, 384.* The Defendant's left and right feet were swabbed; a gunshot residue test was performed; fingerprints and a blood sample were obtained. A similar search warrant was executed in regard to Belinda.

E. The Evidence at the House

At approximately noon on December 30th, a search warrant was executed at the house. Detective Arthur Johnson accompanied crime scene specialists as they processed the scene. Amy Wilson, a crime scene specialist, took hundreds of photographs throughout the house. The kitchen table and chairs were seized because there appeared to be blood on them. Ms. Wilson took swabs from the main living room and kitchen area, the master and guest bedrooms, and from the grip, slide, hammer, and magazine of the gun. She lifted footprint impressions from the floor between the living room and the kitchen. A chemical was applied to parts of the floor to determine if non-visible blood was present. A bullet was found in the wall near Lee's body and the shell casing was found a short distance away. *Trial Exhibits 2, 40, 41*. Some measurements were taken in the vicinity of Lee's body. As discussed later, not all of the evidence swabbed or collected was processed for DNA or fingerprints.

F. The Cause of Death

Dr. Diane Karluk, the Maricopa County Medical Examiner, determined the cause of Lee's death to be a gunshot wound to the head. The bullet entered the right eye, went through the brain, and exited the back of the head. *Trial Exhibits 71, 73.* Lee was 6'4" and weighed 221 pounds at the time of his death. His blood alcohol concentration was .18, more than twice the legal limit. Dr. Karluk opined that the gunshot was at "close range", which she defined as either touching Lee's eye or a hair away from his eye.

Blood would have exited both the eye wound and the exit wound in the back of Lee's head and would have continued to flow out of both wounds as the heart continued to pump. Lee lived for a while after the gun shot as evidenced by aspirated blood found in his lungs.

Because of the path of the bullet through the brain, Lee would not have been able to make any voluntary movements after he was shot. Involuntary movements, known as posturing (extending or flexing of limbs), were possible but it was not possible to determine if posturing occurred by examining Lee's body.

There was brown discoloration of Lee's right hand which appeared to match parts of the gun, including the trigger. *Trial Exhibit 11*. Dr. Karluk had never seen markings like these before. She testified that rust can form after several hours but did not opine that these markings were rust.

G. The Blood Spatter Experts

Detective Rudy Acosta: Det, Acosta testified as the State's primary blood spatter expert. Det. Acosta arrived at the house at about 9:30 a.m. and conducted a more thorough blood spatter analysis after the search warrant was executed. Det. Acosta's opined that the Defendant fired the shot that killed Lee and then manipulated the scene to make it look like a suicide. Specifically, Det. Acosta theorized that Lee and the Defendant were sitting at the kitchen table when the Defendant shot Lee. Lee slumped forward in his chair and the blood began to drain directly onto the front of the chair from his eye wound. Det. Acosta testified that the Defendant was seated in a second chair perpendicular to Lee because the blood on the side of the Defendant's pajama pants and the blood on the side of the second chair appear to have a consistent pattern, indicating that the blood from Lee's eye wound sprayed onto the side of the Defendant's leg and the side of the chair in which he was sitting. Det. Acosta had another officer wear the Defendant's pajama pants and sit in the second chair to support this theory that the pattern on the Defendant's pajamas matches the pattern on the side of the second chair. *See Trial Exhibit 113*. (The Defense did not contest that the Defendant was seated in a chair near Lee when the gun was fired.)

Det. Acosta further testified that the Defendant reacted to the gunshot by stepping into the blood, stepping around Lee's chair, picking up Lee's body, knocking or kicking over the chair, and then laying his body down in the place in which he is ultimately found, manipulating it further because a wall was in the way. Det. Acosta relied on stains on the table to support his theory that the Defendant had blood on his fingers and touched the table. *Trial Exhibit 84*. He relied on the bloody footprints (three of which were matched to the Defendant) on the opposite side of the body to support his theory that the Defendant stepped behind Lee's chair and picked up his body. *Trial Exhibits 2, 18*. He relied on a trail of 90 degree "passive" blood drops

between Lee's chair and where his body was found to support his theory that the Defendant held up Lee's body and slowly moved it off the chair and onto the floor. *Trial Exhibit 20*. He relied on other passive blood drops found under the chair as evidence that the chair was moved after the blood dripped onto the floor. *Trial Exhibits 447, 448, 449, 450*.

Det. Acosta opined that because Lee could not voluntarily move after he was shot, there would not be more than one pool of blood on the floor, yet there were two: a small pool of blood in front of where he believed Lee was seated at the time of the gunshot and a much larger pool of blood by Lee's head on the floor. He also relied on the location of Lee's arm in relation to the larger pool of blood to support his theory that Lee's arm was placed there after the pool formed. *Trial Exhibit 5*. Det. Acosta notes that there is a smear on Lee's right bicep and a blood wipe under his right arm as evidence of movement after he was shot. Finally, Det. Acosta opined that blood drained down Lee's hands, and there was no high velocity impact spatter on his hands. *Trial Exhibits 12, 104*. He further concluded that if Lee had been holding the gun when it was shot, there wouldn't be blood on both sides of the gun or on the grip, and that it would have fallen out of Lee's hand after he slumped forward.

Norman Reeves: Norman Reeves testified as the blood spatter expert on behalf of the Defendant. Mr. Reeves opined that he believed this was a self-inflicted gunshot wound and that he found no evidence that anyone picked up Lee's body and laid it on the floor. In support, Mr. Reeves relied upon the high velocity back spatter on Lee's right hand for his opinion that the gun was in Lee's hand when it was fired. *Trial Exhibit 10*. (All of the blood experts agreed that the high velocity impact of a bullet makes blood break up into tiny drops which is unique to a gunshot.) The direction of the back spatter was from the heel of the hand toward the fingertips, consistent with holding a gun backwards, the same position it was found in Lee's hand. Lee's left hand also had high velocity back spatter on it. *Trial Exhibit 467*. Mr. Reeves relied on the void, or absence of spatter, in the middle of Lee's hands to support his conclusion that the gun was in Lee's hands when it was fired. Mr. Reeves relied upon the void on Lee's thumb found in the trigger of the gun for his conclusion that Lee's thumb was on the trigger when the gun was fired. The horizontal dam of blood on the thumb, which matched the trigger of the gun in Lee's hand, was the result of the blood damming against the trigger when Lee fired the shot, and was relied upon as further support of his opinion that the gun was in Lee's hand at the time the blood spattered onto his hand. Lee's hand also had an imprint on his palm which perfectly matched the screw on the grip of the gun. *Trial Exhibit 11*.

Mr. Reeves did not find any evidence that the gun was placed in Lee's hand. There was no swiping or wiping found around the body or on the hand. There was no evidence someone manipulated the hand and there was no evidence the thumb had been manipulated. Mr. Reeves concluded that it would have been quite difficult to put the gun in Lee's hand without disturbing the blood flow, if the gun had been placed there after the gunshot.

Mr. Reeves did not find the Defendant's three bloody footprints significant to the issue of whether the gunshot wound was self-inflicted because the footprints were behind the chair and there were no footprints by Lee's hand, where the gun would have been placed if the scene had been manipulated.

Contrary to Det. Acosta's opinion, Mr. Reeves opined that after the gunshot, Lee bled in the area of his chair quickly and profusely and, as the chair tipped over, blood drops came off the chair and fell onto the floor. The blood drops that Det. Acosta noted were under the chair were traced to blood dripping from the underside of the chair seat. There was no evidence the chair moved once it hit the floor. Nothing on the chair indicated that Lee had been moved or dragged across it; the blood on the chair was "remarkable" in that it had not been disturbed in any way. Trial Exhibit 477 shows that Lee's wrist is above the floor allowing the blood to flow under it, and thus the arm was not later placed in the pool of blood. If the Defendant fired the gun or moved the body, there would be much more blood on his arms, shoulders, and clothing.

Thomas Griffin: Mr. Thomas Griffin was the State's rebuttal blood spatter expert. Mr. Griffin looked only at the blood stain patterns on Lee's hands, and at the specific blood flows and voids on Lee's hands with respect to various hypothetical positions in which the gun could have been held by Lee if the gun shot was self-inflicted. Mr. Griffin testified that when he experimented with a mock gun using a grip with the thumb through the trigger, parts of the palms of his hands were exposed to a blood source. Based upon the directionality of the spatter, he opined that back spatter could not have created the stains and some could have been created by a defensive motion. He concluded two separate events produced the different directionality of the blood stains.

Mr. Griffin testified that the blood spatter evidence alone was simply not sufficient to support a conclusion as to whether this was a self-inflicted gunshot wound. On cross examination, Mr. Griffin admitted that some of the spatter on Lee's hand was consistent with high velocity back spatter. He further admitted that based on the blood evidence, it was possible that this was a self-inflicted gunshot wound.

H. The Gun Expert

Aaron Brudenell, the State's gun expert, described the operation of the gun. The gun was found in Lee's hand with the trigger in the rear position, the position the trigger would automatically return to after being fired. The "blue gun", used as a demonstrative exhibit, had a trigger in the forward position. He measured the trigger position in a forward and rear position in open court. In the forward position, there was a 3/4 inch space in the trigger guard; in the rear

position there was a 1 1/8 inch space in the trigger guard. (This testimony was relevant to the issue of whether Lee's thumb would have fit into the trigger.)

The bullet entered the wall behind Lee approximately 15 inches over from the center of the initial blood pool; the bullet hole in the wall was 74 inches behind the initial blood pool and 41 inches up the wall from the floor. He calculated the angle of shot through the head at 24 degrees based upon the entry and exit wounds. Mr. Brudenell was unable to complete a trajectory analysis of the bullet because the wallboard crumbled upon impact and he could not say where the chair, or Lee's body in the chair, was positioned at the time of the shooting. Without those points of reference, he was unable to calculate the angle in which the bullet passed through the wall both laterally and vertically.

I. The DNA and Fingerprint Evidence

Kathleen Press testified that she tested the gun for DNA. On the magazine of the gun, she found a DNA mixture and was able to identify Lee as one of the contributors, but her tests were inconclusive for the other contributor. The DNA on the hammer of the gun matched Lee. On the gun grip she found a mixture that matched Lee but it was inconclusive for the other person. Neither the bullets nor the slide were tested for DNA, despite the swabs taken. There was a fingerprint on the trigger of the gun that was not smudged and was in the same place where Lee's thumb was found after his death. *Trial Exhibit 81*. While the analysis was inconclusive, there were points in the print that matched Lee; no points matched the Defendant.

Not all of the swabs taken at the house were tested. Red stains were found on the carpet and on a light switch in the guest bedroom but were never tested. A red spot in a dish in the sink was tested for blood and it was determined to not be blood. The magazine of the gun was not tested for blood. The defense challenged the assumption that all red stains found at the scene were blood due to the fact that pizza boxes and pizza sauce were also found at the scene

J. Other State Evidence

Mahesh Patel, the State's gunshot residue expert, testified that no gunshot residue was found on either of the Defendant's hands or on Lee's hands. One particle of gunshot residue was found on the Defendant's shirt; the other three samples taken from the Defendant's shirt were negative. The presence of gunshot residue indicates that you either touched or were in the vicinity of a gunshot, but not that you shot a gun. A lack of gunshot residue does not mean you did not fire a gun or were not in the vicinity of a gun shot. Blood can mask gunshot residue. If there was gunshot residue under the blood on Lee's hands, Mr. Patel would not have been able to find it.

Three of the six footprint impressions taken by Amy Wilson were matched to the Defendant. Tests for blood on the Defendant's clothes came back positive.

Dr. Philip Keen, a former medical examiner, testified that he has attended approximately 15-20 suicide scenes where the gun was still in the decedent's hand, or about 25% of gun related suicides. He further testified that he has seen less than ten where the decedent's thumb is in the trigger area. He further testified that it is typical for a head to droop after a head wound and it would take a few seconds to a minute or two for gravity to take hold. Finally, Dr. Keen testified that posturing could not fling a person backwards over a chair. One's center of gravity and the bulk of the torso takes over when a person is unable to hold himself up voluntarily.

K. Defense Blackout Expert

Dr. Michael Sucher, an expert witness, opined that he believed the Defendant blacked out sometime during the night and early morning hours, based upon the confusion the Defendant exhibited during the 911 call and the police interview video, the Defendant's blood alcohol concentration, and the odd request he made to a police officer to the effect that he should hug Belinda. He further testified that memory does not form during a blackout and persons suffering from blackout are often confused when they come out of a blackout. The Defendant had a blood alcohol concentration of .068 at 2:45 p.m. the afternoon after Lee's death. He used a retrograde analysis to calculate the Defendant's blood alcohol concentration to be between .20 and .25 at 5:00 a.m., the time of Lee's death. Dr. Sucher relied upon the Defendant's inability to identify Lee to the 911 operator, his confusion of being in bed when he clearly was not, and his request that one of the officers give Belinda a hug as examples of his confused state.

L. Lee Radder's Business and Family Affairs

The question of whether there was reason to believe that Lee would have committed suicide is deemed by the Court as having no significant weight. It is a matter of common knowledge that family and friends sometimes express surprise and disbelief when a loved one commits suicide and often never learn the impetus for it. It is also a matter of common knowledge that suicide can be the result of careful planning or the result of impulse, and can be influenced by a multitude of factors, including the decedent's mental health, historical or incidental substance abuse, or trauma. While the court allowed the defense to offer evidence of Lee's personal, financial, and business dealings in order to rebut the State's evidence that Lee was an "optimist" who "always bounced back", the question of the Defendant's guilt cannot be answered by attempting to weigh the personal, financial, or business plight of Lee at the time of his death.

For this reason, a detailed summary of the testimony of the witnesses who addressed the business, financial, and personal successes and failures in Lee's life is not set forth herein. Suffice it to say that the lay witnesses testified that: Lee was an optimistic and enthusiastic entrepreneur; he was a "glass half full" kind of person; he frequently said, "You can always make more money"; he had a penchant for poker; he loved his wife and daughters; his earnings from his various business ventures were dramatically uneven and included at one point bankruptcy; and he was struggling financially at the time of his death.

The house that Lee and Belinda resided in at the time of Lee's death had been purchased by the Defendant after Lee and Belinda lost their home to bankruptcy. They paid the Defendant the equivalent of the mortgage payment every month, never missing a payment although money was frequently tight.

II. THE VERDICT IS CONTRARY TO THE WEIGHT OF THE EVIDENCE

A. The Law

The Defendant seeks a new trial pursuant to Ariz.R.Civ.P. 24.1(c)(1) for the reason that the verdict is contrary to the weight of the evidence. In considering a motion for new trial based on this Rule, "the object is to promote justice and protect the innocent", and thus the court's power is "significantly broader" than it is in considering a motion that the evidence is insufficient under Rule 20. See *State v. Clifton***,** 134 Ariz. 345, 348, 656 P.2d 634, 637 (App. 1982). It is often said that the trial court sits, in effect, as a "thirteenth juror" to ensure that a miscarriage of justice does not occur and that justice is done. *Id*. Indeed, in 1932 the Arizona Supreme Court stated:

> [W]e have held with equal emphasis that it is not only the right of the trial court to set aside [a verdict that is contrary to the weight of the evidence], but that it is its duty, and we have even gone so far as to express our regret that trial courts did not more courageously and frequently exercise their prerogative in this respect. [Citation omitted.] The trial judge, so far as this duty is concerned, sits as a thirteenth juror, and he, as well as the jury, must be convinced that the weight of the evidence sustains the verdict, or it is his imperative duty to set it aside[.]

*State v. Thomas***,** 104 Ariz. 408, 454 P.2d 153 (1969), quoting *Brownell v. Freedman*, 39 Ariz. 385, 6 P.2d 1115 (1932).

The Arizona Supreme Court has held that a motion for new trial should be granted "only if the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime." *State v. Landrigan, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993).* In *State v. McIver*, the Arizona Supreme Court relied upon an opinion from New York when analyzing the

standard to be applied in a motion for new trial on the ground that the verdict was contrary to the weight of the evidence:

> [I]n a particular criminal case, the evidence may be sufficient to require submission to a jury and yet be so unsatisfactory that a verdict of guilty would be so against the weight of the evidence that it should be set aside. Where, on the coming in of a verdict of guilty, the trial court conscientiously concludes that the weight of the evidence does not support a finding of guilt beyond a reasonable doubt, the court should set aside a verdict of guilty and grant a new trial. [Citations omitted.]

State v. McIver, 109 Ariz. 71, 505 P.2d. 242 (1973).

In *State v. McIver*, the only contested issue at the trial was the identity of the perpetrator of the offense. The complaining witness was a clerk in an auto supply house who was robbed at the point of a gun by a clean-shaven individual. A week later, he saw the defendant in the auto supply house and caused his arrest as the perpetrator of the offense. Defendant at that time had a beard which he had been growing for three weeks in anticipation of a community celebration. The trial court ruled that the convicted Defendant could not have committed the crime given the fact that he was growing a beard at the time of the crime whereas the perpetrator of the crime was clean shaven. The appellate court upheld the trial court's ruling. *State v. McIver*, 109 Ariz. at 72, 505 P.2d at 243.

In *State v. Hill*, the Court of Appeals reversed the trial court's denial of a motion for new trial on the ground that the verdict was contrary to the weight of the evidence:

> The only evidence presented which supported defendant's conviction was that he was present at the scene of the crime on the morning of the burglary. There was also some inconsistency in his story concerning the order in which he visited the front and back doors of the house and where he parked his car. However, no evidence was presented linking defendant to the crime. His fingerprints were not found, no one saw him enter or inside the house, and since nothing was taken from the house he was not found in possession of any stolen property. On the basis of these facts, we do not believe the jury could find that defendant entered a dwelling with the intent of committing theft. Presence and lack of truthfulness is not enough.

State v. Hill, 12 Ariz.App. 196, 197, 469 P.3d 88, 89 (App. 1970).

B. The Weight of the Evidence at Trial

With the foregoing principles in mind and after a careful and comprehensive review of the evidence, the Court finds that the verdict in this case is contrary to the weight of the evidence and the Defendant's request for a new trial must be granted in order to avoid a serious miscarriage of justice. The factual basis of the Court's finding is set forth below.[5]

The only persons in the house at the time of Lee's death were the Defendant, Belinda, and Lee's and Belinda's two minor daughters. Only Belinda testified at trial and she testified that she was asleep at the time of Lee's death. Thus, the only evidence available to the jury to reconstruct the events surrounding Lee's death consisted of the physical evidence from the scene as interpreted by the blood experts and the statements of the Defendant made prior to trial.

The Court relies primarily on the physical evidence from the scene in finding that the verdict in this case is contrary to the weight of the evidence. There was, quite simply, no physical evidence that the Defendant fired the gun that killed Lee. The physical evidence establishes only that the Defendant was present in a chair near where Lee was sitting at the time of the gun was fired. Det. Acosta's opinion that the Defendant staged the scene by manipulating Lee's body is not supported by the physical evidence, lacks credibility, and is sheer speculation.

1. Lee's DNA and Partial Fingerprint Were Found on the Gun, While Neither the Defendant's DNA nor His Fingerprints Were Found on the Gun.

The DNA and fingerprint evidence are completely inconsistent with the verdict in that this evidence links Lee to the firing of the gun and fails to link the Defendant to the firing of the gun. The gun itself was swabbed for DNA and fingerprints. Lee's non-blood DNA was found on the hammer, the grip, and the magazine of the gun. His DNA on the grip is evidence that he held the gun, and his DNA on the hammer is evidence that he cocked the gun. (The amount of strength needed to fire a gun is lessened if the hammer is cocked before the trigger is pulled.) Lee's DNA on the magazine of the gun means that he at one point held the magazine of the gun. The Defendant told police that he had broken down the gun by removing the magazine and the bullets so that it would be in a safe condition given that his minor step-grandchildren were in the house during his visit.[6] Thus, before this gun was fired, someone had to re-load it.

[5] The Trial Exhibits cites are illustrative and not intended to be a complete inventory of all the relevant photographs admitted at trial.

[6] While the gun was owned by the Defendant, he had left the gun in a holster in his luggage in the guest room where he was sleeping during his visit. Thus, the gun was equally available to the Defendant, Lee, and Belinda.

The fingerprint analysis of the trigger of the gun was inconclusive because only a partial fingerprint was found. However, the State's criminalist testified that several points on the partial fingerprint found on the trigger of the gun matched Lee's fingerprint, while no points on this partial fingerprint matched the Defendant.

For the Defendant to be found guilty of second degree murder, the jury would have to conclude that the Defendant fired the gunshot that killed Lee. If the Defendant fired the gun, he would have left DNA and fingerprint evidence on the gun itself. Thus, the presence of Lee's DNA and possible partial fingerprint on key parts of the gun, parts one would have to touch to fire it, are compelling evidence that Lee fired the fatal gunshot. Conversely, the absence of the Defendant's DNA and fingerprints on the gun means that it is highly improbable that the Defendant fired the gun.

The State argued that the Defendant manipulated the scene to make it look like a suicide, however it defies common sense to believe that the Defendant would have been able to remove his DNA and fingerprints and replace them with Lee's DNA and partial fingerprint in order to make it look like a suicide. In fact, the Defendant would have had to complete a series of sophisticated steps to stage Lee's DNA and partial fingerprint on the gun.

For example, if the Defendant had fired the gun, he would have had thoroughly clean the gun after Lee was shot in order to remove his own DNA and fingerprints. A thorough cleaning of the gun would be impossible without either removing the blood that would have been on the gun or at least significantly impacting the blood, given that the gun was either touching Lee's eye or a hair from his eye at the time it was fired. Next, the Defendant would then have to somehow plant Lee's DNA on the magazine, grip, and hammer of the gun and plant Lee's partial fingerprint on the trigger of the gun. Next, the Defendant would have to somehow remove Lee's blood from some part of the scene and re-apply that blood to the gun. *See Trial Exhibits 44, 104, and 474.* Finally, all of the foregoing would have to be accomplished in an extremely short period of time, without disturbing the blood at the scene, and while having a blood alcohol content of between .068 and .25 percent. *Trial Exhibit 452*.

In summary, none of the DNA and fingerprint evidence on the gun supports the verdict that the Defendant fired the fatal gunshot, whereas all of the DNA and fingerprint evidence support a conclusion that Lee himself fired the fatal gunshot. Furthermore, there was no evidence admitted at trial that the blood at the scene had been disturbed in a manner consistent with the intricate tasks required to plant Lee's DNA and partial fingerprint on the gun. This evidence alone requires the Court to conclude that there is reasonable doubt that the Defendant is guilty of second degree murder.

2. The Gun in Lee's Hand and the High Velocity Back Spatter on Lee's Hands is Compelling Evidence of a Self-Inflicted Gunshot Wound.

In ruling on motion for new trial under Rule 24.1(c)(1), the Court may weigh the evidence. In weighing the opinions of the three blood experts, the Court finds that the testimony of Mr. Reeves, a seasoned and experienced blood spatter expert, was highly credible in regard to interpreting the blood spatter found on Lee's hands. The Court also found the testimony of Mr. Griffin, also a seasoned and experienced blood spatter expert, to be credible in his conclusion that some high velocity back spatter was found on Lee's hands, and that he could not rule out the possibility of a self-inflicted gunshot wound. As set forth in another section of this ruling, the Court did not find Det. Acosta's interpretation of the blood spatter at the scene to be credible.

The position of the gun found in Lee's hand, together with the blood evidence on Lee's hand, is completely inconsistent with the verdict. The photographs admitted as Trial Exhibits 12, 81, 82, 110, 298, 299, and 475 depict the precise position of the gun found in Lee's hand. In Trial Exhibits 110 and 298, one can see that Lee's thumb was through the trigger and that the trigger was in the rear position, the same position the trigger would have automatically returned to after the gun was fired one time, according to Mr. Brudenell, the State's gun expert. These photographs support the conclusion that Lee fired the gun by pointing the barrel of the gun toward his head, holding the grip of the gun in the palms of his hands and placing his thumb through the trigger. Several witnesses, including witnesses called by both the State and the Defense, testified that they witnessed suicide scenes wherein the gun was held in this fashion, with the thumb used to pull the trigger. Indeed, there was testimony that it is easier to fire a gun at one's head by holding it in this manner and using one's thumb to pull the trigger. This is because holding a gun in the typical fashion—pulling the trigger with one's index finger--requires the wrist to be acutely bent in order to point the gun directly at one's head.

The foregoing photographs, and the photographs admitted as Trial Exhibits 11, 468, and 476, show a distinct void (a place where there is an absence of blood) on Lee's thumb at the exact location of the trigger. All of the blood experts testified that a void occurs when something is in the way of blood spatter thereby blocking the presence of blood at that particular place. In addition to the void, the photographs show a dam (a thick line of blood) on Lee's thumb at the location of the trigger.

Mr. Reeves is a respected blood spatter expert, with experience dating back to 1974. *Trial Transcript, Day 14, 5:5-12:10.* Relying primarily on the blood evidence on Lee's hands, Mr. Reeves opined that the gunshot wound that killed Lee was self-inflicted. *Id. at 13:6-13.* All of the experts agreed that a bullet produces high velocity back spatter, consisting of very tiny drops of blood; such spatter is only the result of high speed impact such as that produced by a gunshot. Mr. Reeves used Trial Exhibit 10 as an example of the presence of high speed gunshot

spatter on Lee's right hand. *See id. at 16-17:15.* This particular spatter also reflects directionality, from the heel of the hand towards the fingertips. *Id.* Mr. Reeves testified that this spatter would result from a gun being held backwards, with the barrel toward the heel of one's hands and the grip between the palms of the hands; Mr. Reeves noted a recent case depicting this same grip in a forensic publication. *See id. at 18:7-19:7.*[7]

In its rebuttal case, the State offered the testimony of Mr. Griffin, another blood expert, who admitted that there was high velocity back spatter on Lee's hands and who testified that the blood evidence did not rule out a self-inflicted gunshot wound:

> Q. Now, you were asked—in your report you said you were asked to answer one question, whether or not you could—whether or not you could refute the theory that Mr. Radder discharged the firearm himself, correct.
> A. Correct.
> Q. And you weren't able to refute that theory, correct?
> A. Correct. My conclusion—or my results were inconclusive.
> Q. And so with an inconclusive result, it's a possibility that this was a self-inflicted gunshot wound, correct?
> A. Yes, sir.

Trial Transcript, Day 17, 66:8-20.

Mr. Reeves next relied upon Trial Exhibit 11, a photograph of Lee's hand after crime scene technicians removed the gun, which shows (1) an absence of blood spatter on the palm where the grip of the gun rested, (2) an imprint of the screw from the grip of the gun which shows where the gun rested, (3) voids on the thumb where the trigger guard was found, and (4) a damming effect on the thumb where the blood flowed and stopped. *See id. at 21:11-22:24.* The damming of the blood on the thumb against the trigger, and the blood on the trigger itself, means that the blood flowed after the thumb was in the trigger. *See id. at 35:12-36:37:21.* Further, he found no evidence that the thumb had been moved or manipulated. *See id.*

If the Defendant had fired the gun, he would have had to somehow create a void and a dam of blood on Lee's thumb, and place Lee's thumb through the trigger at the exact location of this void and dam. Of course in doing this, he would have had to avoid disturbing the DNA and partial fingerprint which he would have planted on the gun itself. Mr. Reeves testified, and common sense again dictates, that staging the thumb in the trigger and staging blood on the thumb to create both a void and a damming of blood effect would require a great deal of

[7] The lack of uniformity in the blood spatter is explained by the impact of the blood on the uneven contours of the hands. *Id. at 24:11-21.*

precision. *Id*. Mr. Reeves also did not find any evidence that the Defendant was ever near Lee's hand, pointing out that Defendant's footprints at the scene were near Lee's feet, not his hand. *Trial Transcript, Day 14, 54:7-23.*

Thus, the blood evidence on Lee's hand is compelling evidence that Lee fired the gun, and constitutes reasonable doubt as to the Defendant's guilt.

3. The Presence of Lee's Body on the Floor Does Not Alter the Weight of the Evidence.

Lee's body was found on the floor by the kitchen table. One small pool of blood was found near Lee's feet and a large pool of blood was found under and around Lee's head. Det. Acosta also relied upon the presence of Lee's body on the floor (rather than in the chair) and the presence of two pools of blood (rather than one pool of blood) as evidence that the Defendant shot Lee and then manipulated the scene to make it look like the gunshot wound was self-inflicted.

All of the blood spatter experts testified that Lee was sitting in a chair and, upon suffering the gunshot wound, slumped forward in his chair and began to bleed onto the chair and the floor. This conclusion is based on the blood evidence on the chair itself, the void of blood on the chair where Lee's legs would have been situated, and the small pool of blood on the floor by his feet. *Trial Exhibits 293, 469*. (This initial pool of blood was quite small; it looks larger in the photographs because a footprint smeared the blood.)

However the existence of two pools of blood and the presence of Lee's body on the floor rather than in the chair do not lead to the conclusion that the fired the gun. It seems highly unlikely that a person of Lee's size--6'4" and 221 pounds--would remain seated in a narrow and armless dining room chair regardless of who fired the gun. The Medical Examiner testified that after the bullet travelled through Lee's brain, he would have been unable to move voluntarily. Thus, unless Lee was perfectly balanced in the chair when he slumped forward, meaning he was not tipping to one side or the other, the combination of body mass and gravity would have caused Lee's body to fall out of the chair.

Several witnesses referred to body mass when questioned about the presence of Lee's body on the floor. Mr. Reeves testified that the blood spatter on the floor is consistent with blood coming off the chair as it tipped over, and that there was no evidence of swiping or wiping in the blood, which would have been found if somebody lifted or dragged Lee from the chair. *Id. at 12:717:2.*

4. Det. Acosta's Opinion that the Defendant Manipulated Lee's Body and Staged the Scene is Not Supported by the Physical Evidence and Lacked Credibility.

The State's case was predicated entirely on Det. Acosta's theory that the Defendant manipulated the scene by picking up or dragging Lee's body from his chair onto the floor.[8] Det. Acosta is a fledging in the field of blood spatter, and his conclusion that the Defendant manipulated the scene was not supported by the physical evidence, rendering it wholly lacking in credibility. Additionally, his flawed interpretation of the bloody footprints at the scene simply cannot be ignored when weighing his other conclusions and his overall credibility.

Det. Acosta summarized his opinion on direct examination:

> It's my opinion that after Mr. Radder sustained the shot, that Mr. Fischer moved Mr. Radder's body and manipulated the—the—the area to make it look like Mr. Radder had sustained the shot and had fell backwards because of the—the gunshot wound. So my belief is that it wasn't self-inflicted, it was a cover-up based on some type of—that's my opinion.

Trial Transcript, Day 9, 81:3-12. Det. Acosta explained his theory in greater detail:

> Q. …Take us through what your opinion is, and then we'll break it down, on how Lee ended up on the floor there, which is Exhibit 5 that we're showing?
> A. If we go back into this—this same type of situation where we believe Lee is now slumped over and bleeding onto the ground [floor], and that I believe Mr. Fischer is sitting in this chair, the blood evidence shows he's now bleeding onto the ground [floor], onto the pants. Mr. Fischer then, at this point, it's my opinion Mr. Fischer at this point reacts to this by stepping into the blood, moving back Mr. -–Mr. [Radder], moving him back at that point, moving his chair to get some type of—well, he moves his chair at some point. I'm not sure when he moves his chair, but he moves his chair at some point. When I say he, obviously, Mr. Fischer moves his chair at some point. But also steps into this blood, moves Mr. Radder up. And then at this point we have a table that's here, so as he's now moving him up, the hand now becomes kind of a stable point. So now that bloody hand from moving [Lee] up, blood is now onto the [Defendant's] hand, because he's moving [Lee], onto the table. And at that point [the Defendant] now scoots around, gets away—gets over past [Lee] and is now trying to—that's where [the Defendant] begins the manipulation of the scene, of the—of the—of this situation. The Defendant],

[8] Det. Acosta never explained how Lee's DNA and partial fingerprint would have been on the gun if the Defendant had fired the shot that killed Lee. Det. Acosta also did not explain how the Defendant placed the gun in Lee's hand.

> at this point, my opinion is, is that he starts to, either lift him out of the chair, move him of some type, manipulate him. And then what you have is, remember, we have the bloody footprints that are in the origin of blood. You're going to see a photograph where there is other footprints that are not what—what you have is you have footprints that are—that have blood on them but the blood is starting to dissipate. As blood continues to transfer onto another surface, the blood starts to minimize, and minimize, and minimize and becomes faint. But you have a pivoting type of motion where I believe that [the Defendant's] picking [Lee] up at this point, either somehow either moving the chair out of the way, picking him up, and now laying him down into a place which is away from this location and—and positioning him into—in a way to make it look like that this was a self-inflicted wound and that—that Mr.—Mr. Radder fell into that position, when the blood clearly shows—the evidence clearly shows that he was…[Objections made and overruled] Okay. That the origin of blood, the origin of that clearly suggests that he didn't move. He was in that position, he never would have moved again, but that the manipulation of him moving into the blood, handprint, getting cross, picking him up, manipulating, stepping, stepping, moving, and then the blood drops. The blood drops that are on the floor, we talked about passive blood drops, remember passive blood drops are—it's kind of like the bloody nose. You continue to bleed, you're going to continue to bleed in that area. If you start to move, you're going to continue to bleed, but it's going to be passive and they're going to be circular and they're going to be round. They're not going to have direction. You're not going to have any of that. And on the floor you have—not only do you have the passive blood drops, but you have the drip trail. …

Trial Transcript, Day 9, 76:24-79:13.

Det. Acosta's opinion is grounded upon his interpretation of the blood spatter evidence in three respects. First, he testified that a series of bloody footprints purportedly showed that the Defendant picked up Lee's body after he was shot and slumped over in his chair, and moved Lee's body off the chair and onto the floor to make it look like Lee fell off the chair as a result of the gunshot. Second, a trail of "passive" blood drops leading from the smaller pool of blood to the larger pool of blood where Lee's body was found purportedly showed that Lee's body was held over the floor by the Defendant as he moved the body from the chair to the floor. And third, the blood pool under Lee's arm purportedly showed that the Defendant placed Lee's arm on top of that blood pool after the pool had already formed. These three interpretations of the blood evidence are, quite simply, contrary to the physical evidence at the scene.

Bloody Footprints: Det. Acosta opined that there was a series of three left footprints which showed how the Defendant manipulated Lee's body after Lee was shot. (No one disputes that these three footprints are those of the Defendant.) Relying on photographs of the scene, Det. Acosta testified that the Defendant's first bloody footprint appears in the original pool of blood,

formed after Lee was shot and he slumped forward in his chair. Thee Defendant took a second step and slid, likely due to the slippery nature of blood, and then took a third step, pivoting on a common point:

> But here, what's more important in this photograph, is that you can see the common—the commonality of all three of those. And that's that this remains on the floor, if you will, but these continue to move, which suggests a pivoting motion. And I believe that's part of the now lift him up, or lift up some point, and now he's starting to—to manipulate the body and move it in a different direction. [Question omitted.] I believe he—I think he just dragged him onto the ground [floor]. I don't think he's going to—it would be—it would be—you would be—it would be very heavy, so he would—it would be very minimal movement, but as you can tell there is a lot of—a lot of movement with the feet to try to get underneath and get some type of reinforcement, if you will.

Trial Transcript, Day 9, 86:12-87:4.

The flaw in Det. Acosta's opinion is that the footprints upon which he relies are actually facing the opposite direction, meaning that at the time the Defendant purportedly picked up Lee's body, he would have had his back to Lee. In other words, the footprints actually show that the Defendant stepped into the blood, stepped past and to the right of Lee's feet, and then stepped even farther past Lee's feet so that Lee's body would be even farther behind the Defendant and the Defendant would be travelling in a direction away from Lee's body. Trial Exhibits 451 and 76 clearly show the Defendant's left footprint in the original pool of blood perpendicular to Lee's feet. Trial Exhibits 2, 18, 97, and 427 clearly show the Defendant's left footprint, likely made after the step in the pool of blood, beyond Lee's feet, facing so the Defendant would have had his back to Lee's body. Trial Exhibits 2, 28, 429, and 462 clearly show three of the Defendant's left footprints, pivoting on his heel, in a direction to the right of and with his back to Lee's body.[9] No footprints are near Lee's upper torso; rather all of the footprints are to the right of Lee's feet facing backwards to Lee's body and moving away from his body. There is simply no way someone could have picked up or dragged Lee's body, recalling that Lee was 6'4" and weighed 221 pounds, off the chair and onto the floor if that person had his back to Lee's body and was moving in a direction farther and farther away.

It is important to note here that the reason Det. Acosta uses these footprints to support his theory is because he interpreted the footprints as facing the opposite direction than they are clearly facing. For example, Det. Acosta testified that the Defendant was pivoting on the ball of his foot and not on the heel of his foot, as seen in Trial Exhibits 429 and 462. *Trial Transcript, Day 9, 86:2-3.* One does not need to be a blood spatter expert to recognize that the footprints in the trial

[9] The parties agreed that the tiles were 18 inch tiles and the three footprints appear in three different tiles.

photographs quite clearly show that the Defendant is pivoting on his heel, not on the ball of his feet. The photographs clearly show a narrowing of the print at the heel, the arch on the right side (reflecting that it is a print from a left foot), a broadening at the ball of the print, and the outline of at least two toes above the ball of the foot. The same is true for the single footprint in Trial Exhibits 97 and 427; there is a narrowing of the print at the heel, the arch on the right side (reflecting that it is a print from a left foot), a broadening at the ball of the print, and the outline of one toe above the ball of the foot. This is important because the footprints mean the Defendant had his back to Lee's body rendering it physically impossible for the Defendant to have picked Lee's body up and move him to the floor. When confronted with the obvious direction of these footprints during cross-examination, Det. Acosta admitted that the first footprint shows the Defendant was facing away from Lee's body and the second shows that the Defendant is pivoting on the heel of his foot, rather than the ball of his foot:

> Q. And isn't it true that you previously testified that the feet and the pivoting motion was a result of him picking Mr. Radder up and laying him down?
> A. I think the way I testified and--is that that was the way of him being able to gain control and—and balance the weight and moving. And that's just, once again, that's a theory. Because as you start to lift something and move something, especially something heavy, you've got to have a foundation underneath you to allow you to move, so that was just, once again, a theory.
>
> * * *
>
> Q. Okay. Well, wouldn't Mr. Radder be behind him if he was facing the direction of the footprint?
> A. Could be, I don't know. I don't know what happened. …
>
> * * *
>
> Q. …So this footprint here, okay, we went over, is facing away from the chair, correct?
> A. Yes.
> Q. And so—and so that wouldn't be a footprint indicating that Mr. Fischer picked somebody up out of the chair and moved him, correct?
> A. I—once again, I—I can't answer how he picked him up and how he moved him.
> Q. Well, he didn't pick him up backwards, did he, I mean, behind his back?
> A. No, no. He's not going to do that.

Trial Transcript, Day 10, 145:25-146:9; 120:24-121:1-2; 143:16-144:1; see also 121:10-122:7; 124:19-125:21; 127:1-12. It is a matter of common sense that the Defendant could not have

gained the foundation to get underneath someone of Lee's size and weight if he was behind Lee with his back to him.

In addition to this fatal flaw in the factual basis of his opinion, Det. Acosta repeatedly backtracked, repeatedly provided inconsistent and vague testimony, and flatly admitting that he could not explain exactly how the Defendant moved Lee's body, even during re-direct examination by the State:

> Q. Can you show us the different direction of footprints, if you can? …
> A. There is several different footprints you can see that they're just going in different directions. …Yeah, these are—obviously you got his one going that way and this one going that way. This one is not as precise. This one appears to be going that way. These are obviously going that way. So you've got movement in different directions all over the place in that—in that—on that floor, which was pretty obvious that somebody—and it was—appeared to be the same footprint, it was only the left, and it was moving all over that place….
> Q. Can you give us an actual step-by-step process that the defendant took when moving the body or anything like that?
> A. No.
> Q. Why can't you do that?
> A. Because there is—there is—there is too much—there is too much—too much movement in different directions, what was first, second, third, what they did after they—after the body was placed on the ground. It just—there is just a lot of unknowns, or there is just, not unknowns, but there is a lot of different directions, so I don't know what he did first, second, third where he went. I mean, I can tell you what he did first and second, and, you know, obviously stepping in the blood, the origin of the blood, crossing over, moving the body with—based off the rotation there, and then place the body down. Now, what happens after that, it's hard to say, because you've got footprints that are going away toward the front, then they're going back. So I don't know, they're all over the place.

Trial Transcript, Day 11, 29:7-31:2.

This flaw in the footprint evidence is significant because, as Det. Acosta admits, there was no other evidence in the area of Lee's trunk or head to indicate the Defendant walked in that region of Lee's body. *Trial Transcript, Day 10, 135:20-138:1*. The Defendant also had no blood on his arms, shoulders, or upper torso, making the theory that he picked up or dragged Lee and placed him on the floor highly unlikely even without regard to the lack of other physical evidence. *Trial Exhibit 64, 65*.

In summary, given that the footprints are facing in the opposite direction and are moving away from Lee's body, the Defendant's footprints directly contradict Det. Acosta's theory that the Defendant got underneath Lee's body and picked him up or dragged his body to the location where it was found. Without facts to support the opinion that the Defendant moved Lee's body, the opinion is sheer speculation and not entitled to any measurable weight.

Passive Blood Trail. Det. Acosta testified that a trail of "passive" blood drops also support his theory that the Defendant moved Lee's body. According to Det. Acosta, the Defendant held Lee's body over the floor while he was moving him and blood dropped from his head wounds and fell in a 90 degree angle to the floor. *Trial Transcript, Day 9, 98:25-101:8.* However, the photographs show that only some of the blood drops are passive; others have "tails" which means they are directional. *Trial Exhibits 6, 470, 471*. Mr. Reeves testified that these directional blood drops moved in the direction of Lee's upper body, thus the so-called trail of blood drops could have been made simply by Lee falling out of his chair. For the body to have been moved off the chair, rather than having fallen off the chair due to gravity and mass, there would have to be some kind of disturbance of the blood on the floor. Yet Mr. Reeves found no evidence of swiping or wiping or separate pools of blood to support the conclusion that Lee's body had been picked up and moved. *Trial Transcript, Day 9, at 25:6-25*. Because there is no evidence supporting the conclusion that the Defendant was holding Lee's body,[10] Det. Acosta's opinion that the Defendant was holding Lee's body is sheer speculation and not entitled to any measurable weight.

Arm in Pool of Blood: The final basis for Det. Acosta's opinion that the Defendant manipulated the scene was his conclusion that once Lee was placed on the floor by the Defendant, he manipulated Lee's body by placing Lee's arm in the larger pool of blood after the pool of blood had formed. *Trial Transcript, Day 9, 104:15-106:6.* Det. Acosta explained that when Lee was bleeding on the floor, his arm would have acted like a dam stopping the flow of blood past the arm. However, he reasoned, because blood is on both sides of the arm, Lee's body was held over the floor, the blood pool formed, and then his arm was placed on top of the blood pool. *Id.* A simple review of Trial Exhibit 288, and 477 show that Lee's forearm was raised while his upper arm was against the floor. Thus, blood was able to freely pass under his forearm and it was only his upper arm acted like a dam. Thus again, the physical evidence does not support Det. Acosta's conclusion.

In summary, Det. Acosta's opinion that the Defendant manipulated the scene by moving Lee's body off his chair and onto the floor is not supported by the physical evidence admitted at trial,

[10] Det. Acosta testified that a blood swipe or wipe on Lee's arm supported his theory that Lee was moved, however he later agreed that it could have occurred as the result of an involuntary movement and it would not change his theory, thus it is not considered further. *Trial Transcript, Day 10, 48:23-49:6.*

rendering it wholly lacking in credibility and nothing more than sheer speculation. Furthermore, Det. Acosta's inability to recognize the direction in which a person is facing by viewing a photograph of a footprint that clearly shows the heel, ball, toe, and arch of the foot, leads the Court to conclude that his testimony as a blood spatter expert is simply not entitled to any significant weight.[11]

5. The Defendant's Presence at the Time of the Gunshot.

The experts all agreed that the Defendant was present at the time the gun was fired based upon the blood on the left side and top of the Defendant's pajama bottoms, which he was wearing when the police arrived, and the blood on the side of a second chair near Lee's body. *Trial Exhibits 294, 383, 384, 472*. Det. Brooks conducted an experiment wherein a law enforcement officer put on the Defendant's pajama bottoms and sat in the second chair, to compare the blood on each. The photographs support the conclusion that the Defendant was present.

However mere presence does not render one guilty of a crime. In *State v. Hill*, 12 Ariz.App. at 197, 469 P.3d at 89, the court found that the Defendant's presence in the yard of a house that had been burglarized did not mean he entered the house and committed the burglary. Likewise, the presence of the Defendant in a chair at a table near the chair Lee was sitting in when the shot was fired does not mean the Defendant fired the gun. Moreover, the fact that the Defendant stated that he was in the bedroom and heard a popping sound, does not negate this fact. Presence plus untruthfulness is not enough to support a conviction. *See id*.

6. The Defendant's Statements.

Lastly, the statements made by the Defendant to the police which the State argued are inculpatory are not worthy of any significant weight. First, the statement that the police were investigating a homicide, purportedly made while the Defendant was talking to Sgt. Lafko on the patio of the house, was based on the Sgt.'s memory and was not documented at the time. Mere memory, without context and precision, is not enough to erode the weight of the physical evidence. Second, the statement made to Det. Brooks at the interview, when viewed in context, appears to be likely made as a result of the Det.'s statement that he knew the gunshot was not self-inflicted. The Defendant was a police officer for ten years. He knew likely knew when he

[11] Other reasons support the Court's conclusion that Det. Acosta's testimony lacked credibility. For example, he appeared unfamiliar with the photographs of the physical evidence in the case and had difficulty on at least two occasions placing on a mock floor, that he created, the Defendant's footprints and the chairs Lee and the Defendant were sitting in when the gun was fired. *See e.g. FTR, November 21, 2013, 11:46 a.m. et. seq., 3:22 p.m. et seq.* Additionally, throughout his testimony, he repeatedly referred to his opinions as a "theory", and when faced with physical evidence clearly inconsistent with his opinions he frequently stated that he didn't know how the Defendant moved Lee's body, but that he somehow moved it.

and Belinda were removed from the house, and more and more police arrived, that the scene was under investigation. Likewise, Det. Brooks flat out statement that they "knew" the gunshot was not self inflicted implied that they believed he was responsible in some way. In short, the Court does not consider either statement inculpatory.

III. RENEWED RULE 20 MOTION

A Motion for judgment of acquittal may be renewed after a verdict is returned. Ariz.R.Crim.P. 20(b). To grant such a motion, the court must find that there is no substantial evidence to warrant a conviction. *Id*. A trial court may not properly grant a motion for acquittal after a verdict of guilty unless it is satisfied that it erred in previously considering improper evidence. *State ex rel. Hyder v. Superior Court In and For Maricopa County*, 128 Ariz 216, 624 P.2d 1264 (1981). Moveover, a motion for acquittal raises questions of sufficiency of the evidence, and not its competency. *Id*. The evidence must be considered in the light favorable to the State, and if reasonable minds could differ as to the inferences to be drawn from the evidence, the motion must be denied. *State v. Landrigan*, 176 Ariz. 859 P.2d 111 (1993), cert. den. 510 U.S. 927.

Here, the State presented the expert testimony of Det. Acosta and presented other evidence. The Court may not weigh the State's evidence in deciding a Rule 20 motion, a standard different than that under Rule 24.1(c)(1). Given this standard, the Court finds that its initial ruling was not incorrect and denies the Defendant's renewed motion.

IT IS ORDERED granting in part and denying in part the Defendant's Motion for New Trial Based Upon Prosecutorial Misconduct and Other Grounds [and] Renewed Rule 20 Motion for Judgment of Acquittal. The Court grants the Defendant's request for a new trial pursuant to Ariz.R.Crim.P. 24(c)(1) based upon the Court's finding that the verdict is contrary to the weight of the evidence. The verdict is thus set aside and a new trial is hereby granted. The Defendant is no longer non-bondable. The Court denies the Defendant's renewed motion under Ariz.R.Crim.P. 20. The Defendant's motion for new trial based upon prosecutorial misconduct remains under advisement.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2012-006869-001 DT 02/28/2014

IT IS FURTHER ORDERED vacating sentencing set for March 7, 2014, at 8:30 a.m. and setting at that same time (1 hour) a hearing to determine bond/release conditions.

_____
HONORABLE KAREN A. MULLINS
JUDGE OF THE SUPERIOR COURT

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.