DIVISION ONE
FILED: 03/08/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellant, v. STEVEN GUAJARDO, Appellee.	)	1 CA-CR 11-0161 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR20100442

The Honorable John P. Plante, Judge

AFFIRMED

Jon R. Smith, Yuma County Attorney — Yuma
By Roger Nelson, Chief Criminal Deputy
Criminal Division
and William P. Katz, Deputy County Attorney
Attorneys for Appellant

Yuma County Public Defender — Yuma
By Edward F. McGee, Deputy Public Defender
Attorneys for Appellee

N O R R I S, Judge

¶1 The State timely appeals the superior court's order granting Steven Guajardo a new trial, arguing the court abused its discretion by, first, applying the wrong legal standard, and

second, determining the jury's verdict finding Guajardo guilty of second-degree murder was against the weight of the evidence. We disagree.

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶2 On the evening of April 4, 2010, Guajardo was at home in the apartment he shared with his then-girlfriend H.S., and had just begun showing some work to a potential tattoo customer and a friend of the customer when H.S. returned home and banged loudly on the front door. She entered "angry," and the customer's friend described her as "in a rage." The two men, one of whom had never met Guajardo before, testified at trial Guajardo was "real chill about it" and was "trying to defuse the situation." After the two men left, H.S. retrieved her children from the truck in which her brother, the victim, had given them a ride home. The victim remained by or inside the truck.

¶3 H.S. and Guajardo both walked outside the apartment, then returned to the apartment, closed the door, and apparently began arguing -- one neighbor testified she heard H.S. arguing loudly, but did not think she heard "anybody else arguing back." Although H.S. testified at trial Guajardo pushed her to the bed and covered her throat and mouth with his hands, she did not

[1]We do not reweigh the evidence, but "inquire whether substantial evidence exists to support the [superior] court's determination." *See Reeves v. Markle*, 119 Ariz. 159, 164, 579 P.2d 1382, 1387 (1978).

mention this in at least two police interviews or a written statement she gave to police that night. According to H.S. -- the only witness who saw the events in the apartment -- after she stood up from the bed and told Guajardo to leave, the victim, who was 6'1" tall and weighed 258 pounds, knocked so loudly on the front door she "thought it was the cops." The next door neighbor who was watching through his window also testified the victim ran to the front door and started "banging on [it] and yelling for them to open it."

¶4 H.S. testified that when Guajardo opened the door, the victim came inside and "was yelling at [Guajardo] and [Guajardo] was yelling at him" and the victim told Guajardo to "get out of the house." H.S. then explained,

> as soon as [the victim] told [Guajardo] that he needed to leave, he . . . then proceeded to hit [Guajardo]. And he hit him and then [Guajardo] hit him back. And as they were fighting, they went from the speaker in the living room all the way down to the kitchen, up against [the] stove. And [the victim] had [Guajardo] over the stove hitting him, and that's when . . . . [Guajardo] put his hand behind him, . . . up on the stove, and grabbed a knife and he started to stab [the victim].

H.S. further testified the victim was between Guajardo and the only door out of the apartment and, "kept hitting [Guajardo]" even as Guajardo stabbed him. Guajardo was then able to push

the victim away and run next door. H.S. was certain the victim was "winning the fight" before Guajardo escaped.

¶5 The next door neighbor testified Guajardo ran to his apartment looking "very scared" and asked for a ride, but then ran away with H.S. and the victim chasing him down the street. The neighbor further testified that as he chased Guajardo, the victim yelled, "I'm going to kill you."

¶6 After chasing Guajardo a short distance, the victim returned to the apartment with problems breathing and died later that night. Although H.S., who had been with the victim since 3 o'clock in the afternoon, testified she had not seen him ingest any alcohol or drugs, an autopsy revealed alcohol and methamphetamine in the victim's system. The victim's pants pocket also contained a package of "white crystalline substance" the police described as consistent with methamphetamine, but never tested.

¶7 Police soon found Guajardo at a friend's house. The friend testified Guajardo had "sounded scared" when he called her and, when he arrived, his "face was swollen" and he had a scratch on his side, but did not appear drunk or high.

¶8 After the jury returned its verdict, Guajardo's counsel moved for a new trial under Arizona Rule of Criminal Procedure ("Rule") 24.1 asserting, *inter alia*, the verdict was "contrary to law or to the weight of the evidence." *See* Ariz.

R. Crim. P. 24.1(c)(1). Although the superior court initially denied the motion, it reversed its denial after concluding, "the Court was treating the standard much as the standard for a motion for acquittal, and I believe that that perhaps [was] not the right standard." Upon reconsideration, the court noted "the question here is whether . . . I think the verdict was against the weight of the evidence."

DISCUSSION

I. The New Trial Motion and the Applicable Legal Standard [2]

¶9 When evaluating the weight of the evidence, as the superior court ultimately did here, the court "sits as a thirteenth juror, and [it], as well as the jury, must be convinced that the weight of the evidence sustains the verdict, or it is [the court's] imperative duty to set it aside." *State v. Thomas*, 104 Ariz. 408, 412, 454 P.2d 153, 157 (1969) (quoting *Brownell v. Freedman*, 39 Ariz. 385, 389, 6 P.2d 1115, 1116 (1932)). In performing this duty, "[u]nder the court's broad power it may weigh the evidence and consider the credibility of

[2]Although we normally review a superior court's ruling on a new trial motion for an abuse of discretion, *State v. McIver*, 109 Ariz. 71, 72, 505 P.2d 242, 243 (1973), the pivotal question here is whether the court applied the correct legal standard in granting Guajardo a new trial. "Whether the superior court applied the correct legal standard in reaching its discretionary conclusion is a matter of law that we review de novo." *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 107, 170 P.3d 712, 716 (App. 2007) (citation omitted).

witnesses." *State v. Clifton*, 134 Ariz. 345, 348, 656 P.2d 634, 637 (1982). As our supreme court has explained,

> in 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.

McIver, 109 Ariz. at 72, 505 P.2d at 243 (quotation omitted).

¶10 Despite the foregoing, the State argues *State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996) "provide[d] the correct standard for the [superior] court's [Rule 24.1] inquiry." We disagree.

¶11 In *Spears*, the superior court denied a new trial motion under Rule 24.1 that asserted "no substantial evidence warranted [the defendant's] convictions." *Id.* at 290, 908 P.2d at 1075. Our supreme court affirmed the superior court's denial of the motion, noting a new trial was not required because the evidence was sufficient "to support a finding beyond a reasonable doubt that the defendant committed the crime." *Id.* Relying on this language, the State argues the superior court should only have granted Guajardo's motion for a new trial if the evidence was "insufficient" to support the verdict.

¶12 *Spears* is inapposite to this case for two reasons. First, there, the new trial motion argued the evidence was insufficient to support the verdicts. A review of the *sufficiency* of the evidence is not the same as a review of the *weight* of the evidence. As the United States Supreme Court has explained,

> a conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. A reversal based on the weight of the evidence, on the other hand, draws the . . . court into questions of credibility. The "weight of the evidence" refers to "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other."

Tibbs v. Florida, 457 U.S. 31, 37-38, 102 S. Ct. 2211, 2216, 72 L. Ed. 2d 652 (1982) (citation omitted); *see also Peak v. Acuna*, 203 Ariz. 83, 85, ¶¶ 8-10, 50 P.3d 833, 835 (2002) (adopting *Tibbs* holding; noting difference between insufficiency and weight of evidence). As the Court noted, "[a] reversal based on the weight of the evidence . . . can occur only after the State both has presented sufficient evidence to support conviction and has persuaded the jury to convict." *Tibbs*, 457 U.S. at 42-43, 102 S. Ct. at 2218. Further, as our supreme court recognized in the civil context,

> [w]e do not agree . . . that the [superior] court abuses its discretion in granting a motion for new trial where the evidence is equiponderant or nearly so or where there is substantial evidence to support a verdict.
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> [A] motion for new trial questions the weight of the evidence in the [sense] that it goes to the quality. Even though the plaintiffs concede the sufficiency of the evidence to sustain a verdict, their position is not inconsistent when questioning the weight of the evidence.

Smith v. Moroney, 79 Ariz. 35, 39, 41, 282 P.2d 470, 471, 474 (1955); *see generally State v. Saenz*, 88 Ariz. 154, 156, 353 P.2d 1026, 1208 (1960) (scope of review of order granting new trial "essentially the same in both civil and criminal proceedings, taking into consideration the differences in the applicable burdens of proof").

¶13 Second, in *Spears*, the superior court denied the defendant's new trial motion. Because the superior court had found the evidence sufficient under the principles explained above, the supreme court discussed the "sufficiency" of the evidence simply to explain the superior court's decision was supported by the record. Again, unlike *Spears*, in this case the superior court was charged with deciding whether the verdict was against the weight of the evidence, not whether, on deferential appellate review, the superior court's decision was supported by the record.

¶14 In sum, the question in *Spears* was whether the superior court had incorrectly denied a motion for new trial based on the sufficiency of the evidence when the record reflected sufficient evidence supported the verdicts. Here, the question before the superior court was whether, after weighing the evidence and credibility of witnesses, the verdict was contrary to the weight of the evidence. As the superior court correctly recognized, *Spears* did not establish the legal standard applicable to the new trial motion Guajardo's counsel actually made. The superior court thus applied the correct standard.

II. The Weight of the Evidence

¶15 Based on our review of the record, we reject the State's argument the superior court abused its discretion in finding the verdict against the weight of the evidence. *See McIver*, 109 Ariz. at 72, 505 P.2d at 243 (1973) (quotation omitted) (when superior court grants new trial because verdict contrary to weight of evidence, "'[w]e will not disturb . . . [that order] unless the probative force of the evidence clearly demonstrates that the trial court's action is wrong and unjust and therefore unreasonable and a manifest abuse of discretion'")[3]; *see also State v. Meehan*, 139 Ariz. 20, 22, 676

[3]We accord the superior court's decision such "broad discretion" because it "sees the witnesses, hears the testimony,

P.2d 654, 656 (App. 1983) (superior court does not abuse discretion unless record shows guilt "clearly" proven beyond a reasonable doubt).

¶16 As the superior court noted, the evidence described above presented a question of self-defense. Thus, in addition to the elements of second-degree murder, *see* Arizona Revised Statutes ("A.R.S.") § 13-1104(A)(2) (2010), the State was required to prove beyond a reasonable doubt that Guajardo was not justified in using deadly force against the victim. A.R.S. § 13-205(A) (2010). As relevant to the court's ruling, Guajardo was justified in using deadly force "[w]hen and to the degree a reasonable person would [have] believe[d] that deadly physical force [was] immediately necessary to protect himself against the [victim's] use or attempted use of unlawful deadly physical force." A.R.S. § 13-405 (2010); *see also* A.R.S. § 13-105(14) (2010) (defining "deadly physical force").

¶17 Applying the applicable legal principles regarding self-defense to the evidence presented at trial, the superior court concluded the jury's verdict was contrary to the weight of the evidence. The court did not abuse its discretion in making the following findings:

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and has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record." *Reeves*, 119 Ariz. at 163, 579 P.2d at 1386.

> [Guajardo] was in his own house . . . there was not a problem of the safety of [H.S] after [the victim] came in the house, . . . and all [the victim] had to do was either call the police or take [H.S.] with him. . . . Instead, what he did was start a fight . . . he was a bigger man . . . and tougher than Mr. Guajardo . . . he was obviously winning the fight. [The victim] obviously had [Guajardo] . . . pinned against the stove, and [Guajardo] did what he had to do to get out. . . . I just simply do not find that the weight of the evidence is that the prosecution has proved beyond a reasonable doubt that Mr. Guajardo was not [acting] in self-defense.
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> [Guajardo] was backed over the stove, he was being slugged . . . and it appeared to me that from hearing the testimony that he tried to get away and he wasn't able to. . . . [H]e got away after he stabbed [the victim], and the question[] . . . [is] whether the state met its burden beyond a reasonable doubt of proving that it wasn't self-defense. That's what the issue is and I did not feel that they met that burden.

¶18 Finally, the State argues the superior court's ruling denying Guajardo's motion for a judgment of acquittal, *see* Rule 20, demonstrates the court must have abused its discretion in granting his motion for new trial. First, this argument ignores that different standards govern motions for acquittal and motions for new trial. *Clifton*, 134 Ariz. at 347-48, 656 P.2d at 636-37; *McIver*, 109 Ariz. at 72, 505 P.2d at 243. Second, although the court denied the Rule 20 motion, it was far more equivocal in reviewing the evidence at that juncture than the

State acknowledges. Denying Guajardo's Rule 20 motion did not prevent the court from evaluating the weight of the evidence when Guajardo moved for a new trial on that basis. *See McIver*, 109 Ariz. at 72, 505 P.2d at 243 (1973); *see also State v. West*, 226 Ariz. 559, ¶¶ 7-14, 250 P.3d 1188, 1190 (2011) (even in post-verdict Rule 20 context, court not "confined to [its] denial of the pre-verdict" Rule 20 ruling).

CONCLUSION

¶19 For the foregoing reasons, we affirm the superior court's order granting Guajardo a new trial.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
ANN A. SCOTT TIMMER, Judge