

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELL CRAWFORD,

Defendant-Appellant.

UNPUBLISHED

January 11, 2011

No. 290422

Wayne Circuit Court

LC No. 07-023226-FC

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

WHITBECK, J. (*dissenting*).

I respectfully dissent. This case presents us with a number of problems. The first is that the prosecution substantially changed its theory of the case during trial and on appeal. The second is the posture of the case itself; there was no motion for new trial below and so we are in the paradoxical position of reviewing for plain error an event that did not occur, as the trial judge never ruled on a great weight of the evidence challenge to the jury verdict. Third, we must deal with the relative imprecision of Supreme Court decisions on great weight of the evidence cases coupled with the fact the evidentiary challenge here is basically to evidence that *didn't* exist. Finally, we have our mutual, and instinctive, aversion to overturning a jury verdict of guilty in a murder case.

I suggest that, despite its best efforts, the majority either fails to confront these problems or deals with them inadequately. The result is the very real prospect that the jury may have convicted an innocent person of the crime of murder. In my opinion, it would be a manifest injustice to let the jury's guilty verdict stand. In essence, the prosecution has invited us to guess Dell Crawford into state prison. I would decline the invitation.

I. THEORIES OF THE CASE

A. THE PROSECUTOR'S THEORIES

1. THE PROSECUTOR'S INITIAL THEORY

In her opening statement, the prosecutor said:

You will hear testimony about the rather strange scene that greeted the police at Ms. Williams' home. The medical examiner will testify that Ms.

Williams had four gaping wounds in her head. Despite that, in what should have been a very bloody scene, the home and the bed had been carefully cleaned and sanitized. You will hear that there were cleaning supplies around and damp clothes in the dryer.

The scene was so clean that the initial officers theorized that perhaps she had been killed elsewhere and placed in bed. *As you will see and hear from the testimony and from the photographs, this is really unsupported speculation. What is true is that the scene was manipulated and cleaned in order to obliterate as much evidence as possible.*

Thus, the prosecutor's initial theory clearly was that Williams had been killed in the bed, which had then been "carefully cleaned and sanitized" and "manipulated and cleaned." The idea that Williams had been killed elsewhere and placed in the bed was, according to the prosecutor, "unsupported speculation."

In the prosecutor's initial closing, she essentially reiterated her theory. She said that:

This woman [Williams] was hit with a tool that someone picked up, brought it into her bedroom and struck her over and over again. Six times according to the medical examiner.

And the Judge will tell you in order to determine premeditation, there's no set time you have to decide, yes I'm gonna kill them. But this woman fought back. Mr. Ranier told us she said, I don't want—don't you're hurting me. And she tried to defend herself with her hands.

And despite that Mr. Crawford made the decision to continue hitting her in the head until she was dead.

Again, the prosecutor was arguing the same theory: Williams had been killed *in the bedroom*, if not on the bed.

2. THE PROSECUTOR'S REBUTTAL THEORY

In her rebuttal, the prosecutor moved sharply away from her initial theory. She said:

And he [Crawford] told the witness [Ranier] to get out. So the answer to the question, is *no I can't tell you exactly where he beat her to death.* I don't know for sure. Because I wasn't there. And nobody was there, 'cause he [Crawford] didn't do it, he didn't finish her off. *He didn't put every single whole [sic] in her head in front of the witness [Ranier].*

So, in rebuttal the prosecutor apparently was arguing that Crawford began the attack in the bedroom, but then "finished off" Williams elsewhere in the house, although the prosecutor did not know exactly where. The prosecutor made no effort in her rebuttal to explain why the police found no traces of blood elsewhere in the house.

3. THE PROSECUTION'S THEORY ON APPEAL

On appeal, the prosecution has firmed its argument up, stating:

The People understand that there was no blood spatter on the bedding or walls, *but the victim could have been killed in the area of the house that looked like it had been cleaned.* Cathy Carr, the serologist, apparently told Clark that there were no traces of blood on the mop or floor, but there is no evidence that she tested the areas for blood. Moreover, there was a smell of cleaning fluid and bleach in the house and the floor was streaked as if had been mopped. The mop was damp.

4. SUMMARY

In the course of this case, the prosecution has circled almost exactly 180 degrees in terms of its theory. The prosecutor initially argued (1) that Crawford killed Williams by striking her in the head, leaving four gaping wounds, while she in the bedroom on the bed, (2) that Crawford then cleaned and sanitized the bed and (3) that any assertion that Williams had been killed elsewhere was “unsupported speculation.”

The prosecution now argues almost exactly the opposite. It speculates that Williams “could have been killed” in the area of the house that “looked like it had been cleaned.” It then argues, although the serologist found no traces blood on the mop or floor, that the smell of cleaning fluid and bleach in the house, the mop streaks on the floor, and the fact that the mop was damp were sufficient (in addition, of course, to Ranier’s testimony) to support a guilty verdict. The only constant in the prosecution’s theory is the assertion, based upon Ranier’s testimony, that Crawford commenced the attack on Williams while she was in the bedroom sitting on the bed.

B. CRAWFORD'S THEORY

Crawford’s lawyer reserved his opening statement and apparently did not make one when he opened his case. In his closing, however, Crawford’s lawyer made his theory clear. His theory was that Ranier killed Williams, that the killing did not take place on the bed or in the bedroom because there was no blood there, and, in fact, that the killing did not even take place in the house. On appeal, Crawford, although not labeling Ranier as the killer, contends that the overwhelming weight of the evidence compels the conclusion that Crawford did not commit the crime.

II. POSTURE OF THE CASE

For whatever reason, Crawford failed to preserve the issue of whether the jury’s verdict was against the great weight of the evidence by asking for a new trial, although he did make a motion for a directed verdict as to the issue of premeditation. Thus, the trial judge was not put in

the position of being the “thirteenth juror,” as was the case in *People v Herbert*¹ and *People v Lemmon*,² the two seminal cases on this issue that I will discuss below. Applying the formulaic approach, we are to review Crawford’s claim under the plain error standard.³ To avoid forfeiture under the plain error standard, a defendant bears the burden to show that: (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error prejudiced substantial rights, i.e., that the error affected the outcome of the lower court proceedings.⁴

At the outset, I acknowledge that fitting a great weight of the evidence issue, when there was no motion for a new trial below, into a plain error review is the classic problem of fitting a square peg into a round hole: there is no trial court “error” to review here because there was no trial court decision relating to the great weight of the evidence. Consequently, it is perhaps best simply to look at the relevant cases concerning verdicts against the great weight of the evidence as standing by themselves, while realizing that, somehow, we are in plain error review territory.

I also note that there is some case law to the effect that a jury can interpret the evidence differently than the prosecutor. In *People v Johnson*,⁵ in a footnote, the majority of the Michigan Supreme Court stated that: “The dissent notes the prosecution did not advance the theory that the enzyme broke down or that defendant committed a sexual assault. *The jury, however, was free to interpret the evidence differently than the prosecution.*”

We cannot know, of course, how the jury interpreted the evidence. We do know, however, that the prosecution’s own witness, Officer Falk, testified unequivocally that:

- There was no blood on the pillow, on the bed, on Williams’ clothing, or on the blankets;
- There was no blood spattering on the wall or headboard;
- There was nothing in the bedroom that was indicative of any cleaning of the bedroom;
- Cleaning fluid and bleach could not have been used to clean the bed because “[t]he sheeting or bedding or clothing would absorb the blood”;
- Therefore, Williams was not assaulted on the bed.

¹ *People v Herbert*, 444 Mich 466; 511 NW2d 654 (1993).

² *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998).

³ *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

⁴ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

⁵ *People v Johnson*, 460 Mich 720, 729 n 6; 597 NW2d 73 (1999) (emphasis added).

Sergeant Howell concurred, further noting that the mattress had apparently slid away in the opposite direction when Williams' body was placed on the bed, "like her body was like placed or thrown on the bed."

Thus, the jury could *not* have interpreted the evidence in accordance with the prosecutor's initial theory—that Williams had been killed in the bed, which was then "carefully cleaned and sanitized" and "manipulated and cleaned"—because Officer Falk explicitly rejected that theory and there was no evidence to support it.

Therefore, we are left with the prosecution's final theory, as re-stated in its brief on appeal, and as amplified by the majority opinion. Basically, this theory is that Crawford could have *killed* Williams elsewhere in the house. Under this theory, Crawford *began* the assault with the attack on Williams that Ranier witnessed and described. He then *continued* the assault after Williams silently fled the bedroom, ultimately killed her, dragged her back to the bed, and then cleaned up the substantial bleeding that occurred elsewhere. The majority states that this theory of the crime—that Crawford committed the murder somewhere outside the bedroom and then cleaned up the scene of the crime—is supported by the evidence.

I obviously, and respectfully, disagree. The only *evidence* for this theory is (1) the smell of cleaning fluid and bleach in the house (2) streaks on the floor as if had been mopped, and (3) a damp mop and a dustpan. While these facts might be consistent with the prosecution's ultimate theory, they scarcely support it. And, needless to say, these facts are also consistent with Crawford's assertion that *Ranier* committed the murder.

The majority concedes that this theory is "perhaps somewhat speculative."⁶ Respectfully, it is considerably more than that; it is *entirely* speculative. I suggest that this is a classic example of manifest injustice flowing, in considerable part, from the prosecution's absolute repudiation of its initial theory of the case.

III. THE LEGAL STANDARDS IN GREAT WEIGHT OF THE EVIDENCE CASES

A. *PEOPLE v HERBERT*

1. MOTIONS FOR DIRECTED VERDICT

In *People v Herbert*, the Michigan Supreme Court dealt with two separate issues. The first issue concerned the standards for deciding a motion for directed verdict. With respect to such motions, the Court relied on *People v Hampton*⁷ for the proposition that the test is whether, viewed in a light most favorable to the prosecution, the evidence is sufficient to permit a rational trier of fact to find the essential elements of the crime to be proven beyond a reasonable doubt.⁸

⁶ See *ante* at ____.

⁷ *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979).

⁸ *Herbert*, 444 Mich at 473, citing *Hampton*, 407 Mich at 368, 377.

Although the *Herbert* Court did refer to the *Hampton* standard as remaining the test for “determining whether there is sufficient evidence to support a conviction[,]”⁹ it did so within the context of a motion for directed verdict.¹⁰ And the *Herbert* Court made it clear that it was not permissible for a trial court to determine the credibility of the witnesses in the course of deciding such a motion.¹¹

2. MOTIONS FOR NEW TRIAL

The *Herbert* Court then turned to the issue of the standards for deciding a motion for a new trial. The Court stated at the outset that the standards are not the same as the rule in *Hampton* for deciding a motion for a directed verdict.¹² It noted that a new trial may be granted where the verdict is against the great weight of the evidence, citing *Hampton*, or to prevent an injustice, citing MCR 6.431.

The Court went on to deal with the question of witness credibility. It noted that, normally, the task of determining the credibility of witnesses is for the jurors, not the trial judge.¹³ But then the Court noted that to determine whether a verdict is against the great weight of the evidence, or has worked an injustice, a judge “necessarily reviews the whole body of proofs.” And, in a footnote, the Court specifically contrasted such a judicial role with the role of a judge in deciding a motion for directed verdict “which requires that the proofs be considered in a light most favorable to the prosecution.”¹⁴

The Court recognized that while the trial judge cannot take from the jury their right of judgment, the judge may set aside a “‘perverse verdict’ and grant a new trial.”¹⁵ The Court went on to say that when a trial court grants a new trial on the ground that the prosecution’s witnesses lack credibility, it is finding, in effect that the verdict is against the great weight of the evidence.¹⁶ Then, fatally, the Court quoted Judge Frank’s concurring opinion in *Dyer v MacDougall*¹⁷ to the effect that: “‘On a motion for new trial, the judge acts ‘as the 13th juror,’

⁹ *Id.*

¹⁰ *Id.* at 474.

¹¹ *Id.* (“To the extent that [the judge’s] opinion granting a directed verdict was premised upon such an evaluation of the credibility of the prosecution witnesses, it was error.”).

¹² *Id.* at 475.

¹³ *Id.*

¹⁴ *Id.* at 475 n 14, citing *Arrington v Detroit Osteopathic Hosp Corp (On Remand)*, 160 Mich App 544, 551-555; 493 NW2d 492 (1992).

¹⁵ *Id.* at 476, citing *Woodin v Durfee*, 46 Mich 424, 427; 9 NW 457 (1881).

¹⁶ *Id.*

¹⁷ *Dyer v MacDougall*, 201 F2d 265; 272-272 (CA 2, 1952).

i.e., he evaluates the credibility of the orally testifying witnesses and therefore their demeanor. But on a motion for a directed verdict he does not.”¹⁸ The Court concluded by stating:

We thus reaffirm our statement in *Johnson*^[19] that a judge may grant a new trial after finding that the testimony of witnesses for the prevailing party not to be credible. We caution, however, that this is an exercise of judicial power to be undertaken with great caution, mindful of the special role accorded jurors under our constitutional systems of justice.^[20]

B. *PEOPLE v LEMMON*

1. MOTIONS FOR DIRECTED VERDICT

In *Lemmon*, the defendant, after sentencing, moved for a directed verdict *or* a new trial.²¹ The trial judge allowed a new trial based upon *Herbert*.²² The Supreme Court maintained the standard of viewing the evidence in the light most favorable to the prosecution for motions for directed verdict that *Hampton* articulated.²³

2. MOTIONS FOR NEW TRIAL

However, the Court prospectively disavowed the “thirteenth juror” formulation for dealing with a motion for new trial.²⁴ Specifically, the Court “clarif[ied]” that “a judge may not repudiate a jury verdict on the ground that ‘he disbelieves the testimony of witnesses for the prevailing party.’”²⁵ The Court based this clarification upon the age-old principle that it is the province of the juror to determine questions of fact and assess the credibility of witnesses and it quoted *Johnson* to the effect that, “[a]s the trier of fact, the jury is the final judge of credibility.”²⁶

The Court then noted a conundrum: in deciding motions for a new trial based on the claim that the verdict is against the great weight of the evidence, the issue of credibility of the

¹⁸ *Herbert*, 444 Mich at 476.

¹⁹ *People v Johnson*, 397 Mich 686; 246 NW2d 836 (1976).

²⁰ *Herbert*, 444 Mich at 477.

²¹ *Lemmon*, 456 Mich at 631.

²² *Id.*

²³ *Id.* at 634.

²⁴ *Id.* at 648.

²⁵ *Id.* at 636, quoting *Johnson*, 397 Mich at 687.

²⁶ *Id.* at 637, quoting *Johnson*, 397 Mich at 687.

witnesses is implicit in determining the great weight or the overwhelming weight of that evidence.²⁷ But, in this regard, the Court noted that the “thirteenth juror approach has a potential to undermine the jury function and why we now reject it.”²⁸

In lieu of the *Herbert* thirteenth-juror standard, the Court referred to several other inquiries. The first turns its focus to the “defendant’s innocence; that is whether it would be a manifest injustice to allow the verdict to stand.”²⁹ The Supreme Court adopted this standard, observing that it was in full accord with the language of statute and court rule.³⁰ Thus, it stated, “a new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict, and a serious miscarriage of justice would otherwise result.”³¹

The Court went on to note that courts have carved out very narrow exceptions to the rule that the trial court may not take the testimony away from the jury.³² In its conclusion, the Court basically enumerated these exceptions, finding that they did not justify the trial court’s grant of a new trial. The Court said:

- “Conflicting testimony, even when impeached to some extent, is an insufficient basis for granting a new trial.”³³
- The offending testimony must contradict indisputable physical facts or law or be patently incredible or so inherently implausible that it could not be believed by a reasonable juror.³⁴

C. CONCLUSION

1. MOTIONS FOR DIRECTED VERDICT

With respect to motions for directed verdict, I believe we can reach a two-part conclusion. The first part of that conclusion is that the test is whether, viewed in a light most favorable to the prosecution, the evidence is sufficient to permit a rational trier of fact to find the essential elements of the crime to be proven beyond a reasonable doubt. The second part of that

²⁷ *Id.* at 638, citing *Sloan v Kramer-Orloff Co*, 371 Mich 403, 412; 124 NW2d 255 (1963).

²⁸ *Id.* at 640.

²⁹ *Id.*

³⁰ *Id.* at 642.

³¹ *Id.*, quoting *Vermont v LaDabouche*, 502 A2d 852 (Vt, 1985).

³² *Id.* at 643.

³³ *Id.* at 647.

³⁴ *Id.*

conclusion is that it is not permissible for a trial court to determine the credibility of the witnesses in the course of deciding a motion for a directed verdict.

2. MOTIONS FOR NEW TRIAL

Concerning motions for new trial, I believe we can conclude that the standard *with respect to evidence generally* is that a new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.

With respect to the somewhat narrower issue of *witness credibility*, the Court has obviously rejected the “thirteenth juror” formulation. Rather, I believe we can conclude that under *Lemmon* a trial court can consider witness credibility only if (1) directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it or (2) the offending testimony contradicts indisputable physical facts or law or is patently incredible or so inherently implausible that it could not be believed by a reasonable juror. I believe that these are the standards we must apply in this case.

IV. APPLYING THE STANDARDS

A. MOTION FOR DIRECTED VERDICT

There was a motion for a directed verdict in this case that the trial court denied, viewing the evidence in a light most favorable to the prosecution. I can find nothing to indicate that Crawford has appealed this decision and it is therefore not before us. If this case were before us on appeal from the trial court’s denial of the motion for directed verdict, it would be fairly easy to decide. We would view the evidence in a light most favorable to the prosecution and decide all questionable issues in its favor. I suspect, using this standard, I would vote to affirm. But this is *not* the applicable evidentiary standard.

B. MOTION FOR NEW TRIAL

1. LACK OF BLOOD IN THE BEDROOM

There was no motion for a new trial in this case. Had Crawford made one, I suggest that the trial court would have had to consider at least three areas of the prosecution’s case. First, although Ranier did not testify that he actually saw Crawford strike Williams with a crescent wrench, he said he was there when she was beaten; that he saw Crawford take a couple of swings at Williams with a crescent wrench (although Ranier also said that he didn’t actually see Crawford swing the wrench) while she was sitting on the edge of the bed with her feet on the floor; and that he heard a several thumps.

Therefore, Ranier’s testimony is that he saw Crawford *begin* his assault on Williams. According to Ranier, Williams pleaded with Crawford, saying “stop, please stop.” We know from other testimony that Williams had gaping wounds in her head, a fractured skull and other injuries. And yet there is absolutely no evidence whatsoever of any blood on the bed or in the bedroom and the prosecution’s own witness stated unequivocally that the bed and bedding could not have been cleaned. Thus, we are left with the proposition that, although Crawford attacked

and struck Williams with a crescent wrench—struck her heavily enough that Ranier could hear one or more “thumps,” presumably from the blow(s)—while she was in her bedroom on the bed, she only began to bleed after she fled the bedroom.

Using the *Lemmon* formulation, does the lack of blood anywhere in the bedroom preponderate heavily against the verdict such that a serious miscarriage of justice would otherwise result? Standing alone, I am inclined to think that it does not, although it is certainly very, very troublesome in that it flatly contradicts the prosecutor’s initial theory. With respect to Ranier’s testimony on this point, while I find it contrived at best, I do not consider it standing alone to contradict indisputable physical facts or law or to be patently incredible or so inherently implausible that it could not be believed by a reasonable juror. I realize that, in making this statement, I am to some extent commenting on Ranier’s credibility, but I do so within the boundaries of the *Lemmon* language.

2. FLIGHT BY WILLIAMS

Second, Ranier testified that after the attack on Williams, Crawford desisted and followed him to the door to tell him that if anybody asked, he (Ranier) left at 1:30 a.m. that night/morning and that he (Crawford) knew where Ranier lived and worked. From this, we are apparently to assume that Williams, having survived the first attack without shedding a drop of blood, fled elsewhere in the house without making another sound and without any further contact with Ranier, despite the fact that Ranier and Crawford were having a conversation at the door.

Does the strangeness, perhaps even the unlikeliness, of a possible flight by Williams under the circumstances that Ranier described preponderate heavily against the verdict? Again, standing alone, probably not; such a flight, while certainly not plausible, is conceivable. And Ranier’s testimony does not itself contradict indisputable physical facts or law nor is it patently incredible or inherently implausible.

3. CLEANING UP THE CRIME SCENE

Third, we must believe that Crawford cleaned up the “substantial bleeding” that occurred elsewhere in the house, using cleaning fluid, bleach, and a mop. The only evidence supporting this is Office Falk’s testimony about the smell of cleaning solution in the rear kitchen area in the sink, a damp mop with a bucket, and a dustpan that appeared to be damp, as well as streaking on the floor. From this, we must conclude that Crawford cleaned up the entire crime scene, leaving not a trace of Williams’ blood anywhere in the house. Applying the *Lemmon* tests, the extraordinary thinness of the prosecution’s case on this point suggests that what it asserts *might* have happened did not *actually* happen. Ranier did not testify on this point, so we cannot say that his testimony contradicted indisputable physical facts or law or was patently incredible or inherently implausible.

4. CONCLUSION

Taking the more specific of the *Lemmon* tests first—that test relating directly to witness credibility—I would concede that Ranier’s testimony does not itself contradict physical facts or defy physical realities. Rather, it forms the basis for a theory—revised and then revised again so that it directly contradicts the prosecutor’s initial theory—that goes beyond hypothesis into pure

speculation, speculation whose only support outside of Ranier’s testimony itself is (1) the smell of cleaning fluid and bleach in the house (2) streaks on the floor as if had been mopped, and (3) a damp mop and a dustpan. In the prosecutor’s own words, this is “really unsupported speculation.”

With respect to the more general *Lemmon* evidentiary test—that a new trial is proper only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result—we are confronted here not with contradictory evidence but rather with a general *lack* of evidence advanced by the prosecution to support its theory. Were I the trial judge, I would be inclined to grant a new trial motion based upon this lack of evidentiary support.

But, of course, I was not the trial judge. Ranier was the crucial witness and I did not have the opportunity to see and hear him testify or to evaluate not only his words but his “tonal quality, volume, speech patterns, and demeanor[.]”³⁵ And we, because Crawford did not file a motion for a new trial, have no idea what Judge Breck, who actually tried the case, might have thought on these matters. The posture of the case, combined with the peculiar evidentiary circumstances and the relative lack of precise legal standards—Justice Boyle writing for the majority in *Lemmon* referred to the “mystic borderline” between credibility issues that must remain with the jury and a court’s authority to overturn that finding³⁶—make this case extraordinarily difficult to decide. And Judge Breck is not available, as he died in April 2009. As a result, a remand to the trial court to consider a motion for a new trial, the remedy Crawford earlier sought and which this Court denied on November 23, 2009, would simply place a new trial judge in the exactly the same position as the one in which we find ourselves.

Consequently, I believe we should order a new trial in the matter. I believe that, cumulatively and taken as a whole, the evidence was insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt.³⁷ I believe that, cumulatively, the *lack* of evidentiary support preponderates heavily against the verdict. I believe that a serious miscarriage of justice may have occurred³⁸ and that it would be a manifest injustice to allow the verdict to stand.³⁹

I note that in my years on this court, I have rarely voted to overturn a jury verdict in a criminal case. But if there ever was a circumstance that cries out for such a vote, it is here. To accept the prosecution’s ultimate theory—as the majority does—we must accept three propositions.

³⁵ *Id.* at 646, citing *Wisconsin v Turner*, 521 NW2d 148 (Wis App, 1994).

³⁶ *Id.* at 645.

³⁷ *Id.* at 634, citing *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

³⁸ *Id.* at 641, citing *North Dakota v Kringstaad*, 353 NW2d 302, 306 (ND, 1984).

³⁹ *Id.*, citing *United States v Polin*, 824 F Supp 542, 551 (ED Pa, 1993).

First, we must accept that, although Crawford commenced his attack on Williams in the bedroom, he left not a trace of blood anywhere on the bed or on the walls.

Second, we must accept that, after Crawford commenced his attack on Williams, she fled the bedroom silently, without making any contact with Ranier.

Third, we must accept that Crawford killed Williams elsewhere in the house, dragged her into the bedroom, placed her on the bed, and then, using only cleaning fluid and a mop, cleaned the crime scene so thoroughly that the police found no traces of blood whatsoever.

Individually, each of these propositions might be conceivable. Collectively, they are simply not believable. To accept them, one must pile conjecture on top of conjecture. Without attempting to sit as a 13th juror—and indeed without assessing Ranier’s credibility—I suggest that to accept such a construct is to participate in a miscarriage of justice. This I decline to do.

There is, of course, a rational interpretation of the evidence at the crime scene as the police found it. That explanation is that someone killed Williams outside of and away from the house. But that interpretation requires the conclusion that Charles Ranier lied in his testimony and that his testimony was therefore inherently implausible. Applying the *Lemmon* tests to this conclusion, the inescapable result is that there must be a new trial.

I would therefore reverse and remand for a new trial.

/s/ William C. Whitbeck