IN THE COURT OF APPEALS OF IOWA

No. 1999-476 (9-733) / 98-2170
Filed January 26, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NICHOLAS ANDREW O'SHEA,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee County, William L. Dowell, Judge.

On appeal from his conviction for second-degree murder, the defendant challenges the sufficiency of the evidence to support the conviction. He also contends the trial court erroneously used a sufficiency-of-the-evidence standard in ruling on his motion for a new trial and his counsel was ineffective. **REVERSED AND REMANDED WITH DIRECTIONS.**

Alfredo Parrish and Andrew J. Dunn of Parrish, Kruidenier, Moss, Dunn & Montgomery, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Michael P. Short, County Attorney, and Bruce McDonald, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

HECHT, J.

Defendant Nicholas Andrew O'Shea ("O'Shea") appeals from his conviction of second-degree murder. He challenges the sufficiency of the evidence to support his conviction. O'Shea also contends the district court erred when it applied the wrong legal standard in ruling on his motion for new trial. He also claims he received ineffective assistance, in several respects, from his trial counsel. We reverse and remand to the district court with directions.

I. Background Facts and Proceedings. O'Shea (age 17) lived with his parents next door to Mark and Jan Boley. Over a period of approximately three years, O'Shea and the Boleys had considerable conflict. O'Shea made phone complaints to the Keokuk police department on several occasions when screaming and sounds of violence emanating from the Boley house made it difficult for him to sleep. O'Shea presented evidence in the district court tending to prove Mark and Jan Boley had a history of violent interpersonal encounters. Before the transaction which is the subject of this case, Mr. Boley had been convicted of spousal abuse as a result of two of their altercations. The Boleys' animosity was not confined to their marital relationship, however. They became enraged and uttered foul and racist epithets at O'Shea's friend on more than one occasion after he sounded his vehicle horn in the neighborhood when he came to pick up O'Shea to transport him to school. When summoned to the neighborhood about such an incident, a police officer advised O'Shea to try to avoid the Boleys. O'Shea testified he tried to avoid going outdoors if he saw the Boleys outside their house. When he encountered Jan Boley in public, she would call him vulgar names.

The conflict between the Boleys and O'Shea escalated after the Boleys came to believe O'Shea was involved in an assault against one of their relatives who also lived in the neighborhood. O'Shea learned from police investigators the Boleys had implicated him as a participant in the assault though he denied involvement and was not prosecuted for it. He also learned from friends that the Boleys had threatened to kill him in retaliation for the assault. O'Shea believed during this time period Boleys were stalking him at school. Mr. Boley admitted he had driven to the school "to let [O'Shea] know he was around." O'Shea testified his fear of the Boleys prompted him to quit school over his mother's protestations. He was very intimidated by the Boleys and believed they had attempted to fire bomb the residence of another young man who had been implicated in the assault on the Boleys' relative.

In a claimed effort to shield his parents from his conflict with the Boleys, O'Shea moved in with his teenaged girlfriend, Billie Jo Bouchard ("Bouchard") who lived in Hamilton, Illinois. A high school senior, Bouchard lived essentially unsupervised in a house owned by her grandmother who visited infrequently. According to O'Shea, his move to Hamilton did not result in cessation of his harassment at the hands of the Boleys who drove their car by Bouchard's house and hurled verbal threats against him to those who visited the house. O'Shea moved back to his parents' home at their request after living with Bouchard for less than two weeks.

Bouchard had known the Boleys even before she met O'Shea. Her acquaintance with the Boleys had begun when she befriended one of Mrs. Boley's sons. As a result of that friendship, Bouchard was a guest in the Boley home on

numerous previous occasions. While there, she smoked marijuana with Mrs. Boley, and witnessed verbal and physical abuse involving the Boleys. Drug usage in the Boley household was not an aberration. Both Mr. and Mrs. Boley had been convicted of delivery of cocaine.

Bouchard's contacts with the Boleys diminished when her friend, Mrs. Boley's son, left home to join the military service. When Bouchard subsequently began dating O'Shea, Mrs. Boley began verbally abusing her as well. The abuse would occur even at Bouchard's place of employment where Mrs. Boley taunted her about dating O'Shea.

On occasion, Bouchard was permitted to stay overnight in the O'Shea residence. She came there about 11:00 p.m. on the evening of March 24, 1998. The next morning, Bouchard left the O'Shea home to go to school. As she walked to her pickup, Mrs. Boley began screaming and moving toward her. Bouchard hurried to her vehicle and entered it.

O'Shea was awakened when he heard the front door slam. He then heard Mrs. Boley screaming outside. He jumped out of bed and ran to the window. He saw Mrs. Boley approach the driver's side door of Bouchard's truck and heard her cussing and threatening to "kick [Bouchard's] ass."

Bouchard testified Mrs. Boley pounded on the truck window, pulled the door open, and began striking Bouchard whose left arm was in a sling as a result of a recent collarbone fracture. Meanwhile, O'Shea, still inside the house, ran to the hutch and grabbed the phone. He then entered the kitchen and picked up a knife. O'Shea testified he began to dial the police department, but dropped the phone

when he saw Mrs. Boley assaulting Bouchard. Though dressed only in socks and shorts, he ran outside.

There was ambiguity in the evidence with respect to the position of Bouchard and Mrs. Boley when O'Shea approached them. Two motorists testified they witnessed Mrs. Boley standing on her feet during the altercation. One of these witnesses recalled seeing Bouchard inside the truck during the assault. The other witness recalled seeing both Bouchard and Mrs. Boley grappling outside but near the truck. Bouchard recalled having her head slammed against an object, but did not know if the object was the street or another surface. O'Shea testified Bouchard was on her back on the street, and Mrs. Boley was straddling her as he approached them with the knife in his left hand.

O'Shea claimed, as he approached, Mrs. Boley rolled off Bouchard and toward him. He testified, as he attempted to push her away from him, the knife entered Mrs. Boley's chest. She subsequently died. O'Shea claimed he had no intention to stab Mrs. Boley, but simply intended to get her off Bouchard. O'Shea was charged with first-degree murder. Following jury trial, O'Shea was convicted of murder in the second degree and sentenced to a term of fifty years in prison.

II. Sufficiency of the Evidence – Preservation of Error.

O'Shea's trial counsel[1] made the following general motion for judgment of acquittal:

> Your honor, pursuant to Rule 18(8) of the Rules of Criminal Procedure, at this point, the defense would make a motion for an entry of judgment of acquittal based upon the lack of evidence to prove beyond a reasonable doubt that this was a murder.

[1] O'Shea's appellate counsel did not represent him in the district court.

A general motion for judgment of acquittal does not preserve error. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999) (holding error is not preserved when defendant fails to identify the specific elements of the charge which he claims are insufficiently supported by the evidence). In this case, O'Shea's counsel failed to identify the specific elements of the murder charge he claimed were insufficiently supported by the evidence. Accordingly, he failed to preserve error on his claim his motion for judgment of acquittal should have been granted.

III. Ruling on Motion for New Trial.

A. Standard of Review. Rulings on motions for new trial are reviewed for abuse of discretion. *State v. Weaver*, 554 N.W.2d 240, 244 (Iowa 1996); *State v. LaDouceur*, 366 N.W.2d 174, 178 (Iowa 1985). In ruling on motions for new trial, the district court has broad but not unlimited discretion. Iowa R. App. P. 14(f)(3). This court is slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4). The district court must apply the "weight of the evidence" test in its ruling on motions for new trial. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998).

B. Merits. O'Shea moved for a new trial contending the guilty verdict was contrary to the law or evidence. Iowa R. Crim. P. 23(2)(b)(6). In its ruling, the district court noted "that a rational trier of fact could find the evidence to warrant the conviction in this matter . . ." and denied the motion. O'Shea claims the district court applied the wrong legal standard in deciding his motion. We agree.

The words "contrary to . . . the evidence" in rule 23(2)(b)(6) mean "contrary to the weight of the evidence." Ellis, 578 N.W.2d at 658. They constitute the standard to be applied by the district court in deciding motions for new trial. *Id.* at 659. This

standard is different in important respects from the "sufficiency of the evidence" test applied in ruling on motions for judgment of acquittal. *Id.* at 658. It draws the court into questions of credibility and requires an analysis of whether a greater amount of credible evidence supports one side of an issue or cause than the other. *Id.*

The record in this case indicates the district court applied the "sufficiency of the evidence" standard to O'Shea's motion for new trial. This was error, and we conclude the case must be remanded to the district court solely for application of the correct legal standard.

IV. Ineffective Assistance of Counsel. O'Shea asserts he received ineffective assistance of trial counsel in three respects: (1) failure to request a jury instruction on resisting a forcible felony; (2) failure to object to a jury instruction which permitted an inference of malice aforethought from his use of a weapon; and (3) failure to request the reporting of voir dire, opening statements, and closing statements. Insofar as we have decided this case must be remanded to the district court for application of the correct legal standard to the merits of O'Shea's motion for new trial, we decline to decide his claims of ineffective assistance of counsel which would be moot if a new trial is granted. If the motion for new trial is denied on remand, such claims are preserved for postconviction proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994).

REVERSED AND REMANDED WITH DIRECTIONS.