

IN THE COURT OF APPEALS OF IOWA

No. 1999-345 (9-598) / 98-1684

Filed December 27, 1999

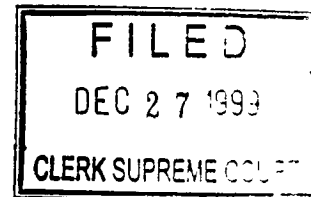
STATE OF IOWA,

Appellee,

vs.

VALERIE REEVES,

Appellant.



Appeal from the Iowa District Court for Clinton County, Mark J. Smith, Judge

Appellant appeals from her conviction for second-degree murder.

REVERSED AND REMANDED WITH DIRECTIONS.

Jon Kinnamon and Jerald Kinnamon of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Mike L. Wolf, County Attorney, and Lawrence H. Schultz, Assistant County Attorney for appellee.

Heard by Streit, P.J., and Vaitheswaran, J., and Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

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VAITHESWARAN, J.

Valerie Reeves appeals her second degree murder conviction, contending the trial court applied an incorrect standard in denying her motion for new trial. We agree, and reverse and remand with directions.

I. Background Facts and Proceedings

On September 28, 1997, Reeves packed some clothes and her husband's gun, and hitchhiked from Illinois to Sabula, Iowa for a short vacation. Having grown up in New Orleans, Sabula reminded her of the bayou. At Sabula, she entered a bar for a drink, inquired about lodging, and after learning the local inn was full, accepted the offer of bar patron Eugene Malone to stay at a home he shared with his mother.

Early the following morning, a sheriff discovered Malone dead in a pickup truck on the side of a road. Four bullets had entered his body, the final one causing his death. Authorities later found Reeves's bag, clothes, and gun nearby. The following day, they found Reeves and took her into custody.

The State charged Reeves with first degree murder. Reeves asserted defenses of diminished responsibility and self-defense. On July 10, 1998, the jury returned a verdict of second degree murder. The trial court denied Reeves's combined motions for new trial and in arrest of judgment and sentenced her to a term of imprisonment not to exceed fifty years. This appeal followed.

II. Legal Standard Governing Motions for New Trial

Iowa Rule of Criminal Procedure 23(2)(b)(6) authorizes motions for new trial where the verdict is contrary to the law or evidence. Until May 28, 1998, the Iowa

~~Supreme Court equated~~ “contrary to the evidence” with against the “weight of the evidence,” which it used interchangeably with “insufficiency of the evidence.” See *State v. Tokatlian*, 203 N.W.2d 116, 119 (Iowa 1972). Under this standard, a court determined whether the evidence viewed in the light most favorable to the prosecution would permit a rational fact-finder to find the defendant guilty beyond a reasonable doubt. See *State v. Nunn*, 356 N.W.2d 601, 603 (Iowa App. 1984).

Less than three months before Reeves moved for a new trial, the Iowa Supreme Court reversed *Tokatlian* and distinguished “insufficiency of the evidence” from “contrary to the weight of the evidence.” *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). The new standard requires a trier of fact to review credibility and determine “that a greater amount of credible evidence supports one side of an issue or cause than the other.” *Id.* at 658 (quoting *Tibbs v. Florida*, 457 U.S. 31, 37-8, 102 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982)).

In this case, the trial court reviewed the evidence under a sufficiency of the evidence standard. We must address: (1) whether Reeves properly raised this new standard and (2) whether the trial court erred in analyzing her motion for sufficiency of the evidence, rather than for the weight of the evidence.

A. Preservation of Error

In the new trial portion of her combined motion, Reeves claimed the verdict was contrary to the law and evidence. See Iowa R. Crim. P. 23(2)(b)(6). The State contends the body of Reeves’s motion challenged only the law and not the evidence. Therefore, the State asserts, Reeves failed to preserve error with respect to her

~~challenge to the legal standard~~ used by the court. We disagree. Although Reeves did not explicitly ask the court to apply the *Ellis* weight of the evidence standard, one prong of her legal challenge rests on impermissible inferences the jury may have drawn as to her credibility. Additionally, in the arrest of judgment portion of her combined motion, Reeves asserted the verdict was contrary to the weight of the evidence. We agree with the State that a motion in arrest of judgment may not be used to challenge the sufficiency of the evidence. *See State v. Dallen*, 452 N.W.2d 398, 399 (Iowa 1990). However, we believe Reeves's reference to the weight of the evidence standard in her combined motion supports our conclusion she preserved error.

B. Disposition

The State concedes the trial court applied the incorrect standard, but contends reversal is not mandated because the error was harmless. In *Ellis*, however, the court did not apply a harmless error analysis. *Ellis*, 578 N.W.2d at 659. Therefore, neither do we. We reverse and remand solely for the trial court to apply the weight of the evidence standard to the new trial portion of Reeves's combined motion.

In light of our conclusion on the legal standard, we need not address Reeves's ~~challenge to the sufficiency~~ of the evidence. Because we have decided Reeves's ~~challenge to the legal standard~~ on the merits, we reject Reeves's ineffective assistance of counsel claim, to the extent it is based on this challenge. We preserve the following ineffective assistance claims for postconviction relief: (1) failure to raise and present to the jury the defense of "imperfect self-defense;" (2) failure to raise a

challenge to Iowa's sentencing laws under the separation of powers doctrine; (3) failure to raise and Eighth Amendment challenge to Iowa's sentencing laws; (4) failure to object to marshalling instructions; and (5) failure to object to jury instructions 16, 17 and 18. See *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997) (noting trial record alone is rarely sufficient to resolve ineffective assistance of counsel claims).

REVERSED AND REMANDED WITH DIRECTIONS.