

**IN THE COURT OF APPEALS OF IOWA**

No. 6-819 / 05-1685  
Filed November 16, 2006

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**TROY JAYSON O'ROURKE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart  
Scoles, Judge.

Troy O'Rourke appeals his conviction for willful injury causing serious  
injury as an habitual offender. He contends the district court applied the wrong  
legal standard in ruling on his motion for new trial. **CONVICTION**  
**CONDITIONALLY AFFIRMED; RULING ON MOTION REVERSED IN PART;**  
**REMANDED WITH DIRECTIONS.**

Linda Del Gallo, State Appellate Defender, and Martha Lucey, Assistant  
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert Ewald, Assistant Attorney  
General, Paul L. Martin, County Attorney, and Carlyle Dalen, Assistant County  
Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

**MILLER, J.**

Troy O'Rourke appeals his conviction for willful injury causing serious injury as an habitual offender. He contends the district court applied the wrong legal standard in ruling on his motion for new trial. We conditionally affirm the conviction, reverse in part the district court's ruling on the motion, and remand with directions.

The State charged O'Rourke, by trial information, with willful injury causing serious injury as an habitual offender, in violation of Iowa Code sections 708.4(1), 902.8 and 902.9(2) (2005). A jury found him guilty of willful injury causing serious injury. O'Rourke waived his right to have a jury determine whether he was an habitual offender. Following a bench trial the court concluded O'Rourke was subject to the habitual offender enhancement.

O'Rourke filed a motion for new trial claiming both that the evidence was insufficient and that the "verdict is contrary to the weight of the evidence. . . ." A hearing was held on the motion and the court denied O'Rourke's claim regarding sufficiency of the evidence. His counsel then requested the court address the "contrary to the evidence" claim, noting that it involved a "separate and different standard" than sufficiency of the evidence. The district court responded that it was "unfamiliar with the different standard." Defense counsel noted that "weight of the evidence is different than insufficiency," and the court responded that it was "not able to articulate that difference." Defense counsel stated she did not "have that case with me so I can't explain it any further." The court then stated:

It's my belief that a reasonable jury certainly could have concluded what they concluded that was both sufficient and not contrary to the

evidence, *not knowing actually what the difference is*. But so unless you can be more specific . . . as to what additional finding I would be required to make, I'm unable to make any additional record in this regard.

(Emphasis added.)

The court concluded the discussion by stating that it was “unable to articulate the standard because I don’t know what it is,” although it had “known there is a difference between insufficiency and contrary to the weight.” The court then stated:

But, in any event . . . the court believes that the conclusion of the jury that the defendant is guilty of willful injury resulting in serious injury was not contrary to the evidence[,] was supported by the weight of the evidence, was sufficient, was substantial, and whatever other terms I can think of, the court believes that the jury’s verdict in that regard is not in any way in error.”

Iowa Rule of Criminal Procedure 2.24(2)(b)(6) provides that the court may grant a new trial when the verdict is contrary to law or the evidence. Our supreme court has interpreted “contrary to . . . the evidence” as meaning “contrary to the weight of the evidence.” *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). “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.’” *Id.* at 658 (quoting *Tibbs v. Florida*, 457 U.S. 31, 37-38, 1025 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982)). The court made it clear in *Ellis* that the contrary to the weight of the evidence standard was not the same as the sufficiency of the evidence standard. *Id.* at 659.

Here, the court repeatedly stated that it did not know and could not articulate the difference between the sufficiency of the evidence standard and the

contrary to the weight of the evidence standard. Although the court then went on to find the verdict was not contrary to the weight of the evidence, it is clear from the record the court could not have actually made such a finding. It could not have properly applied a standard that it expressly stated it did not know.

We conclude the part of the trial court's ruling denying the defendant's motion for new trial on the ground the verdict was contrary to the weight of the evidence must be reversed. However, we further conclude it is not necessary to reverse O'Rourke's conviction because the trial court, applying the proper legal standard, could find the verdict is not contrary to the weight of the evidence. We therefore conditionally affirm O'Rourke's conviction, reverse the portion of the trial court's ruling on the motion for new trial that purports to rule on O'Rourke's claim the verdict is contrary to the weight of the evidence, and remand to the district court to determine whether the verdict is contrary to the weight of the evidence. See, e.g., *State v. Rubino*, 602 N.W.2d 558, 566 (Iowa 1999) (conditionally affirming conviction while reversing ruling denying "reverse waiver" to juvenile court because of ineffective assistance, and remanding to trial court for new "reverse waiver" hearing); *State v. Watkins*, 463 N.W.2d 411, 415-16 (Iowa 1990) (conditionally affirming convictions and remanding for hearing on Sixth Amendment issue concerning jury composition where trial court erred in denying a hearing); *State v. Bailey*, 452 N.W.2d 181, 183-84 (Iowa 1990) (conditionally affirming conviction while remanding for reopening of suppression hearing where trial court erroneously rejected evidence offered by the State). The district court shall rule on the issue of whether the verdict is contrary to the

weight of the evidence using the appropriate legal standard and on the basis of the existing record. If it denies O'Rourke's motion, our affirmance of his conviction shall stand. If it does not, it must set O'Rourke's conviction aside and order a new trial. We do not retain jurisdiction.

**CONVICTION CONDITIONALLY AFFIRMED; RULING ON MOTION REVERSED IN PART; REMANDED WITH DIRECTIONS.**