

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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No. 1D18-3208

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DEREK CLAYTON SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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On appeal from the Circuit Court for Duval County.  
Steven B. Whittington, Judge.

December 31, 2019

MAKAR, J.

The issue in this case is whether the trial court erred by failing to state that he applied the correct standards of review in denying the defendant's motion for new trial, which required that two standards be considered: (1) a sufficiency of the evidence standard (i.e., was the jury's verdict supported by sufficient evidence) and (2) a weight of the evidence standard by which the trial judge acts as a seventh juror to independently assess whether the jury verdict was contrary to the weight of the evidence. *McCloud v. State*, 150 So. 3d 822, 823 (Fla. 1st DCA 2014) ("Defendants have the right to have the trial judge evaluate and weigh the evidence independently of the jury's findings to determine whether the jury verdict was contrary to the weight of the evidence." (quoting *Kelley v. State*, 16 So.3d 196, 197 (Fla. 1st DCA 2009)) (internal quotation

marks and citation omitted)). Here, the trial judge applied the former standard, stating only that the evidence was “sufficient.” Because the latter standard was not applied, we reverse and remand. “Upon remand, if the trial court concludes that the verdict is against the weight of the evidence, it should grant the motion for new trial. In the event the trial court concludes that the verdict is not against the weight of the evidence, it may again deny the motion and enter a new judgment and sentence accordingly.” *Jordan v. State*, 244 So. 3d 1178, 1179 (Fla. 1st DCA 2018) (citation omitted). As to all other claims, we affirm without further comment.

WOLF, J., concurs with opinion; KELSEY, J., dissents with opinion.

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***Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.***

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WOLF, J., concurring with opinion.

I reluctantly concur. While I believe the reasoning of *Kline v. State*, 274 So. 2d 525 (Fla. 1st DCA 2019), should apply and allow us to affirm the denial of the motion for new trial, I believe binding precedent requires us to remand to assure the trial court did not apply the wrong standard in ruling on the motion.\*

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\* In finding that *Kline* failed to preserve the issue for appeal by objecting or seeking clarification, this court stated that “[t]o remand for clarification now when counsel had the opportunity to ask for clarification but simply failed to do so would constitute a waste of judicial resources. Had the trial court been apprised of the ambiguity in its ruling, it could have easily taken care of the potential problem during the hearing on the motion for new trial.” *Id.* at 526.

The *Kline* opinion explained that although this court has reversed a trial court’s findings that “indicate that the court *may have* applied the sufficiency of the evidence standard instead of the weight of the evidence standard, . . . where it is unclear whether the trial court used the wrong standard, we find the *potential* that the trial court erred does not reach the level of fundamental error.” *Kline*, 274 So. 3d at 526 (emphasis in original) (suggesting that such an error may be fundamental if the trial court expressly refuses to properly weigh the evidence, citing *Velloso v. State*, 117 So. 3d 903, 905-06 (Fla. 4th DCA 2013)).

The fact that the trial court specifically found that the evidence was “*sufficient* to support the verdict that was rendered by the jury” raises a strong possibility rather than just the potential that the wrong standard was used (emphasis added). Where such a strong possibility exists, precedent requires us to remand to the trial court for clarification. *Jordan v. State*, 244 So. 3d 1178 (Fla 1st DCA 2018).

KELSEY, J., dissenting with opinion.

I dissent solely with respect to whether the trial court’s ruling on the motion for new trial expressly or ambiguously referenced the incorrect standard. The motion itself, and defense counsel’s argument on the motion, invoked the correct standard of whether the weight of the evidence supported the jury’s verdict. The applicable standard was expressly recited and undisputed. Interpreting in context the trial court’s statement that the evidence was “sufficient,” it appears that the court ruled that the evidence satisfied the applicable standard. Defense counsel did not object or request clarification. At worst, the court’s word choice created an ambiguity, which is insufficient to establish fundamental error. *See Kline v. State*, 274 So. 3d 525, 526 (Fla. 1st DCA 2019) (finding as insufficient to establish fundamental error the mere potential that trial court applied incorrect standard to resolve claim that verdict was contrary to the weight of the evidence). I would therefore affirm on this issue.

Andy Thomas, Public Defender, and Kevin P. Steiger, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Sharon Traxler, Assistant Attorney General, Tallahassee, for Appellee.