IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
JAMES V. BILELLO,)
Defendant-Appellant.)

8-623
88-244

Appeal from the Iowa District Court for Audubon County (45609), Glen M. McGee and Keith E. Burgett, Judges.

Defendant appeals his conviction and sentence, following a bench trial, for theft in the third degree. **AFFIRMED AND REMANDED FOR RESENTENCING.**

Raymond E. Rogers, Acting Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General; Julie A. Halligan, Assistant Attorney General; and Francine O'Brien Anderson, County Attorney, for the plaintiff-appellee.

Considered by Schlegel, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

We address defendant-appellant's challenge to his conviction and the resulting sentence for theft in the third degree following his alleged failure to return two video tapes to a rental outlet. We affirm.

Martha Renftle, who, with her husband, John Renftle, was co-owner of the Rose Video Mart in Audubon, Iowa, testified on August 7, 1988, James Bilello rented two videotapes from the store to be returned the following day. Ronda Rugaard, who worked in the store on the following day, testified Bilello did not return the tapes. She also testified Bilello was back in the store about a week later asking whether the tapes had turned up and stating that "he had been out looking for them and he couldn't find them."

Post office employee Terri Kutneck testified on August 13, 1987, she found the tapes in a postal service drop box and returned them to the post office. Her supervisor, Darell England, stated on that date or shortly afterward the postmaster contacted Renftle telling him the tapes had been found. The tapes were then turned over to the police.

John Renftle testified an employee called Bilello two or three days after the tapes were due and was told the tapes had been returned on time. Renftle later spoke to Bilello's mother who echoed Bilello's response. Renftle admitted to having had disputes with the Bilello family prior to the incident.

Bilello testified there were ten or fifteen people in the Rose Video Mart when he returned the tapes on August 18, 1987, so he left them on the counter and walked out. He related a history of problems with Renftle, specifically having received a letter from Renftle stating Bilello owed $20 for videotapes which were rented in Bilello's name during a period the defendant was serving in the military in Korea. Renftle denied the allegation.

I.

Defendant contends there was insufficient evidence to support his conviction. When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Hall, 371 N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational

trier of fact that the defendants are guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). The weight of the evidence and the credibility of witnesses are for the fact finder to determine. State v. Robinson, 288 N.W.2d 337, 341 (Iowa 1980).

Iowa Code section 714.1(2) provides a person commits theft when the person:

> Misappropriated property which the person has in trust, or property of another which the person has in his or her possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such property to his or her own use, when the owner of such property is known to him or her. Failure by a bailee or lessee of personal property to return the property within seventy-two hours after a time specified in written agreement of lease or bailment shall be evidence of misappropriation. (Emphasis added.)

Defendant contends although a fact finder might determine defendant had not returned the video tapes within seventy-two hours of the specified time, no rational court could find he misappropriated them. Theft by misappropriation is a general intent crime. Eggman v. Scurr, 311 N.W.2d 77, 79 (Iowa 1981). The State must prove the following essential elements beyond a reasonable doubt: (1) Defendant had possession of the tapes owned by the Video Mart, and (2) Defendant misappropriated the tapes by using them in a manner inconsistent with the owner's

rights (i.e., defendant failed to return the tapes seventy-two hours after the time specified in the rental agreement). State v. Bugely, 408 N.W.2d 394, 396 (Iowa App. 1987).

The fact finder may infer misappropriation from failure to return the property within seventy-two hours of the rental agreement deadline. State v. Gates, 306 N.W.2d 720, 725 (Iowa 1981); State v. Bugely, 408 N.W.2d at 396. Such evidence is a permissive presumption of misappropriation and a rational reference "supported by common sense and experience." Id.

II.

Defendant contends the district court failed to state reasons for the sentence given. Because the court had discretion as to the sentence to be imposed, the court must "state on the record its reasons for selecting the particular sentence." Iowa R. Crim. P. 22(3)(d); see State v. Luedtke, 279 N.W.2d 7, 8-9 (Iowa 1979). A statement of a reason or reasons is necessary to allow a reviewing court to determine whether an abuse of discretion occurred in the sentencing of the defendant. State v. Washington, 356 N.W.2d 192 (Iowa 1984).

At sentencing the court offered the following reason for the sentence:

> THE COURT; Well, Mr. Bilello, you were found guilty by the Court beyond a reasonable doubt of taking two VCR tapes, and in Iowa, based on the value of those tapes, that is a serious matter. . . .

A trial court's terse and succinct statement of reasons for a sentence, to the effect the particular sentence imposed was due to the "nature and seriousness of the offense," was sufficient to satisfy the requirement of Rule 22(3)(d). State v. Victor, 310 N.W.2d 201, 205 (Iowa 1981). The trial court's reason this "is a serious matter" is not sufficient to meet the requirement of Iowa R. Crim. P. 22(3)(d).

We affirm the conviction and remand for resentencing.

AFFIRMED AND REMANDED FOR RESENTENCING.

Schlegel, P.J., concurs; Habhab, J., concurs in part and dissents in part.

HABHAB, J. (concurring in part and dissenting in part)

I would affirm the conviction and sentence.