IN THE COURT OF APPEALS OF IOWA

No. 8-876 / 08-0056
Filed November 26, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL ORVILLE SWIGART,
Defendant-Appellant.

Appeal from the Iowa District Court for Fremont County, G.C. Abel, Judge.

Defendant appeals from judgment entered upon his conviction for theft by misappropriation. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, and Margaret Askew Johnson, County Attorney, for appellee.

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

MAHAN, J.

Daniel Swigart appeals from judgment entered upon his conviction for second-degree theft by misappropriation. He contends the evidence does not support his conviction. We disagree.

The theft charge arose when Swigart took the furnishings from a house he was renting. Swigart testified he did take items from the house he had rented and that the value of the items taken was $2000. He testified he believed he had a right to the items removed from the house: he believed the rental agreement, which contained an option to purchase, allowed him to purchase the personal property contained within the house separately from the purchase of the house. Evidence was presented that contradicted Swigart's belief.

The jury was instructed, in part, "a person who takes property is not guilty of Theft if he reasonably believes he has a right, privilege, or permission to do so." "[T]he very function of the jury is to sort out the evidence and place credibility where it belongs." *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) (internal quotation and citation omitted). The jury returned a guilty verdict. Implicit in that verdict is a finding that Swigart's belief was not reasonable. Substantial evidence supports the verdict, and we must therefore affirm. *Id.*

AFFIRMED.

Vogel, P.J., concurs; Miller, J., concurs specially.

MILLER, J. (concurring specially)

Daniel Swigart contends on appeal his post-trial motion should be considered a motion for a new trial that claimed "the verdict was contrary to the 'weight of the evidence,'" and that the trial court erred in (1) overruling such a motion, and (2) applying an incorrect standard in overruling such a motion. The motion was, however, titled a "Motion in Arrest of Judgment." It requested "that the Court enter an order arresting judgment . . . on the ground that no legal judgment can be pronounced based on the whole record," language quoted from a portion of our rule concerning arrest of judgment, Iowa Rule of Criminal Procedure 2.24(3). The State resisted the motion as a motion in arrest of judgment. The trial court addressed and ruled on the motion as a motion in arrest of judgment. I believe the State is correct in its assertion that Swigart has not preserved error on the issues he now raises on appeal. I therefore concur in the result.