

AFFIRM; and Opinion Filed April 20, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-00317-CR

**CHRISTIE ZIMMERMAN SHEARER, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 397th Judicial District Court
Grayson County, Texas
Trial Court Cause No. 061833**

MEMORANDUM OPINION

Before Justices Evans, Stoddart, and Boatright
Opinion by Justice Boatright

Appellant pleaded guilty to insurance fraud. Pursuant to appellant's plea agreement, the trial judge deferred adjudication of guilt, placed her on four years' community supervision, and assessed a \$1000 fine. The State later moved to proceed with adjudication of guilt, alleging that she violated the terms of her community supervision by committing a new offense, theft from an elderly person. After a hearing, the court convicted her of insurance fraud, revoked her community supervision, and sentenced her to ten years' imprisonment. Appellant argues the State failed to prove all elements of theft, so the trial judge erred in adjudicating guilt. We affirm.

The testimony at trial shows that appellant's mother-in-law, Judy Kissinger (Judy), discovered that someone had transferred \$2000 from her savings account without permission. Judy called her son Jeff Kissinger (Jeff) to tell him about this. Jeff then called appellant, who

told him she had taken the money from Judy's account, but had hoped to return it before Judy noticed that it was missing. Next, appellant called Judy and told her that there had merely been a banking error discovered by the bank. Appellant then told her husband, J.D. Kissinger (J.D.), that the missing money was a banking error caused (rather than discovered) by the bank, but appellant later admitted to J.D. that she had transferred the money from Judy's account. Appellant then gave J.D. \$2000 in cash and asked him to give it to his mother. He did.

Appellant committed theft if she “unlawfully appropriate[d] property with intent to deprive the owner of property.” TEX. PENAL CODE ANN. § 31.03(a) (West Supp. 2016). Appropriation of property is unlawful if the property is taken without the owner's effective consent. *Id.* § 31.03(b)(1). We review the trial judge's revocation order for an abuse of discretion. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). And we address the sufficiency of the prosecution's evidence under a preponderance-of-the-evidence standard. *Id.*

Appellant contends J.D. “co-owned” the account with his mother. Thus, she argues, as J.D.'s wife, she could have transferred the funds on his behalf. *See* TEX. PENAL CODE ANN. § 31.01(3) (“Effective consent” includes consent by a person legally authorized to act for the owner.). Appellant also suggests that J.D.'s ownership of the account raised a presumption that appellant herself owned and had access to the funds as community property.

But no witness testified that J.D. owned the account, and no evidence was introduced from the bank to indicate J.D. co-owned it. Instead, Judy testified that when J.D. gave her the cash, “[h]e apologized for his wife taking money from my account.” Jeff testified that appellant told him “she took the money from my mother's account.” And although J.D. did not use those words, he repeatedly answered questions couched by counsel and the trial judge in terms of his mother's or his mom's account without objection or correction. Judy testified that she and J.D. were merely “on the account.” And J.D. agreed he “had access to” it, but his mother had never

asked him to move money from the account, and he had never done so. The evidence establishes only that J.D. was a signatory on the account his mother owned. We conclude the prosecution established by a preponderance of the evidence that appellant's transfer of funds was from Judy's account and was made without her effective consent.

Appellant also contends that she intended only to borrow the \$2000, and that the prosecution failed to prove she intended to deprive Judy of the funds. The term "deprive" means "withhold[ing] property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner." *Id.* § 31.01(2)(A). Our analysis of an intent to deprive looks to the accused's intent at the time of the taking. *Wilson v. State*, 663 S.W.2d 834, 836–37 (Tex. Crim. App. 1984). "The fact that the deprivation later became temporary does not automatically mean that there was no intent to deprive permanently or for so long as to satisfy the statutory definition." *Griffin v. State*, 614 S.W.2d 155, 159 (Tex. Crim. App. 1981). We determine appellant's intent to deprive Judy of the transferred funds from appellant's words and actions. *Id.*

The record contains no evidence indicating that appellant intended only to borrow the funds. Instead, the record shows that appellant gave a series of conflicting explanations for what she did, and how she did it. Nor does the record show that appellant made any attempt to return the missing money to Judy before she was confronted about its being missing. The record shows that, at the time appellant made the transfers, she kept the money and did not tell anyone what she had done. The judge could have been persuaded by a preponderance of the evidence that appellant's intention at the time she transferred the funds was to deprive Judy of the money permanently.

We conclude sufficient evidence supports the trial judge's finding that appellant committed theft. Accordingly, the judge did not abuse his discretion in revoking appellant's

community supervision and adjudicating her guilty of the original offense of insurance fraud.
We overrule appellant's single issue and affirm the judgment.

/Jason Boatright/

JASON BOATRIGHT
JUSTICE

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TEX. R. APP. P. 47

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

CHRISTIE ZIMMERMAN SHEARER,
Appellant

No. 05-16-00317-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 397th Judicial District
Court, Grayson County, Texas
Trial Court Cause No. 061833.
Opinion delivered by Justice Boatright.
Justices Evans and Stoddart participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 20th day of April, 2017.