

[Cite as *State v. Thomas*, 2011-Ohio-85.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94443

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

STEPHANIE D. THOMAS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522018

BEFORE: Stewart, J., Rocco, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: January 13, 2011

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MELODY J. STEWART, J.:

{¶ 1} The common pleas court found defendant-appellant, Stephanie D. Thomas, guilty of a single count of aggravated theft of instant lottery games from her employer in violation of R.C. 2913.02(A)(1). In this appeal, Thomas complains that the court's judgment of conviction is supported by neither the sufficiency nor the weight of the evidence. We find no error and affirm.

{¶ 2} Thomas makes no independent argument regarding the weight of the evidence, stating only that her arguments going to the weight of the evidence are the same as those offered under her arguments on the sufficiency of the evidence and should be incorporated by reference. The concepts of sufficiency of the evidence and the weight of the evidence are separate and distinct. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. We have thus held that the kind of incorporation argument made by Thomas does not satisfy an appellant's App.R. 16(A)(7) obligation to give "reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies," nor does it satisfy an appellant's App.R. 12(A)(2) obligation to separately argue each assignment of error. See *State v. Judd*, 8th Dist. No. 89278, 2007-Ohio-6811, ¶46. We therefore limit our review to arguments on the sufficiency of the evidence.

{¶ 3} When reviewing a claim that there is insufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 4} R.C. 2913.02(A)(1) states: “No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: Without the consent of the owner or person authorized to give consent[.]”

{¶ 5} Viewing the evidence most favorably to the state shows that Thomas worked for a gas station/convenience store that sold tickets for various Ohio lottery games. The tickets are printed from a computer terminal that has a central system for recording each lottery transaction by date, time, type of game, and amount played. Most lottery games are based on scheduled drawings, so the players have to wait for the drawing to learn if they have won. Some lottery games, however, are “EZPlay” games that are generated from the computer terminal at the time of purchase (these games differ from instant, preprinted “scratch off” tickets which are not printed from the terminals). EZPlay consists of three different types of games in which the player can pay \$1, \$2, or \$3 per play, with payouts rising in proportion to the amount paid. A winning EZPlay player can immediately redeem the winning ticket with the retailer and collect the prize amount.

{¶ 6} Lottery retailers collect money from customers at the point of sale, but that money is not forwarded directly to the Ohio Lottery Commission. The commission sends a weekly invoice to each retailer based on the amount of tickets sold by each terminal less any prize winnings paid

out by the retailer and the sales commission. Retailers can obtain daily transaction reports directly from the lottery terminal and use them to balance their daily cash receipts.

{¶ 7} The lottery commission makes an automatic withdrawal from its retailers' bank account, so retailers are obligated to absorb any discrepancy between their cash register receipts and the amount shown due and owing to the lottery. At the time the offenses occurred, the employer's cash register procedures made it possible for an employee to print out a lottery ticket from the terminal without registering the sale on the cash register. With no lottery sale rung up on the cash register, it was possible for the cash drawer to balance at the end of the day because a lottery transaction had not been recorded.

{¶ 8} The employer checked lottery receipts against cash receipts only on a monthly basis. In 2008, Thomas's employer noticed discrepancies in the monthly inventories of the lottery sales at the store where Thomas worked. The August 2008 inventory showed a \$2,900 shortage between the amount of lottery sales generated versus the amount of cash taken in for the sales; the September 2008 inventory showed a shortage of \$10,440. The employer sent a different store manager to Thomas's store to conduct an independent audit of the lottery sales. The audit showed an additional shortage of \$5,400 between October 1, 2008 to October 14, 2008. Because the employer's cash

registers contained separate buttons for instant tickets and on-line tickets, the employer was able to determine that Thomas's store location sold a disproportionately large number of EZPlay games compared to the employer's other retail locations. At times, Thomas's store would sell 20 times more EZPlay tickets than other retail locations that had far higher overall lottery sales.

{¶ 9} Using printouts showing the exact time at which EZPlay tickets were printed, the employer was able to determine that an "abnormal" number of those sales were made by Thomas. These sales tended to occur in large numbers when Thomas was the only employee present — when coemployees were present, the number of EZPlay sales dropped significantly. For example, on October 1, 2008, in the five hours before Thomas started her shift, the store made only one EZPlay sale. Thomas and another employee then worked together until 12:23 p.m. From 12:24 p.m. until 4:01 p.m., when a third employee began her shift, Thomas worked alone. Beginning at 12:49 p.m. and continuing to 3:13 p.m., the lottery terminal printed out 126 EZPlay tickets. The last EZPlay transaction on Thomas's solo shift occurred at 3:12 p.m., and the store recorded no other EZPlay sales after Thomas's shift ended. In a one-hour period during the time that Thomas worked alone, there were 58 EZPlay transactions made by the lottery terminal. The store

recorded \$379 in EZPlay sales but had a shortage of \$328 after the cash receipts were tallied.

{¶ 10} The retailer also noticed that a large number of EZPlay games sold during Thomas's solo shifts were sold consecutively, sometimes only seconds apart. This was atypical of the way games were sold in other shifts at the same location.

{¶ 11} The employer decided to question Thomas about the discrepancies between the number of EZPlay tickets printed and the cash receipts taken in for the game. For example, it showed that during Thomas's shift on October 4, 2008, there were \$382 in total online lottery sales, of which \$330 consisted of EZPlay sales. Cash receipts for instant games played that day only totaled \$118.50, leaving a shortfall of \$263.50. All of the EZPlay transactions that day not only occurred during Thomas's shift, but started just minutes after she began her shift and ended shortly before her shift ended.

{¶ 12} When Thomas's shift overlapped with that of other employees, there was a corresponding drop in EZPlay sales. There were occasions during Thomas's shift, however, when the other employee was required to leave the premises and make bank deposits during the workday. Using time-dated bank deposit receipts for September 12, 2008, the employer was able to show that EZPlay sales spiked at the same time that the other

employee had left the store to make a bank deposit. Up until that point, there had been no EZPlay sales. The EZPlay sales then stopped shortly before the other employee was to return from making the bank deposit. EZPlay sales then resumed when the other employee left work for the day. Thomas worked alone for about three hours until the evening shift employee arrived. Starting almost from the time that Thomas was alone at the store and continuing until about 30 minutes before the night shift employee arrived, EZPlay sales spiked dramatically — there were 115 EZPlay tickets issued between 1:18 p.m. and 3:57 p.m. Thomas ended her shift at 4:30 p.m. and there were no other EZPlay sales made. The employer offered evidence to show that there were never more than eight or nine EZPlay sales on days when Thomas did not work.

{¶ 13} The state's evidence consistently showed the same for other days when Thomas worked alone. On these days there would be a significant shortage in the amount of cash receipts compared to the total number of online lottery sales.

{¶ 14} When confronted by the employer about the discrepancy in EZPlay sales during her shifts, Thomas denied culpability, claiming that she recorded every lottery sale. She could not, however, explain why so many EZPlay sales made on her shift went unrecorded and conceded that she was aware of no mechanical malfunction with the lottery terminal that might

account for the number of tickets being printed during her solo work shifts. Thomas was terminated. Evidence showed that in the ten-day period following Thomas's termination, only six EZPlay tickets were purchased.

{¶ 15} Viewing this evidence most favorably to the state, we find that it established the essential elements of aggravated theft: Thomas knowingly printed EZPlay tickets with the intent of not paying for them. The employer's documentation showed that EZPlay sales consistently spiked during Thomas's solo work shifts and that the daily cash receipts did not match the number of games played. The volume of EZPlay tickets printed not only rose precipitously during Thomas's solo shifts at the store, they dropped off to negligible levels when she did not work. Even when she worked with another employee, the employer was able to document a rise in EZPlay transactions when the other employee left the store to make bank deposits, only to see EZPlay transactions drop around the time when the other employee was to return from the bank. When the employer terminated Thomas, EZPlay transactions fell so precipitously that they were at negligible levels compared to when Thomas was working.

{¶ 16} Thomas argued that the state lacked direct evidence to show that she was the person printing out the EZPlay tickets, but the circumstantial evidence against Thomas was so compelling that it allowed for no other rational explanation. The frequency with which the EZPlay tickets were

printed during Thomas's solo shifts ruled out the possibility of another person as the culprit because it would be beyond belief that Thomas would not see someone standing behind the sales counter for an hour at a time, printing out lottery tickets. She was, by process of elimination, the only person who could have printed that many tickets.

{¶ 17} Thomas argues that the state had no direct evidence to show that she printed out the EZPlay tickets without paying for them, noting that videotape surveillance did not show her at the lottery terminal. The videotape surveillance camera was secretly installed by the police in January 2008, before the allegations against Thomas arose, in response to a number of robberies that had occurred in the area. The tapes available to the police had either been erased or were so damaged in storage that they were illegible.

But the lack of video surveillance footage was not compelling. Even had the video been available, it is uncertain whether it would have yielded any evidence. It turns out that Thomas not only knew about the video camera, but she would occasionally replace videotapes from the recorder when her supervisor forgot to do so. The video camera was intended to catch robbers, so if there were no incidents in the store, the videotapes were reused. The police officer who placed the camera testified that Thomas would have known whether the videotapes were erased and could have planned her actions accordingly.

{¶ 18} We therefore conclude that the state presented evidence going to all the elements of aggravated theft. The assigned errors are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR