

**IN THE  
SUPREME COURT OF OHIO**

STATE OF OHIO	: NO.	<b>07-0268</b>
Plaintiff-Appellee,	:	
vs.	:	On Appeal from the Hamilton County Court of Appeals, First Appellate
DANIELLE SMITH	:	District
Defendant-Appellant.	:	Court of Appeals
	:	Case Number C060077

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**MEMORANDUM IN SUPPORT OF JURISDICTION**

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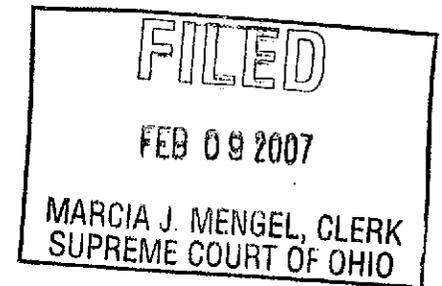
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**TABLE OF CONTENTS**

	<u>Page #</u>
<u>EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES INVOLVE INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION</u> .....	1

Authorities:

<i>State v. Carter</i> (2000), 89 O.St.3d 593, <u>2000-Ohio-172</u> .....	1
<i>State v. Deem</i> (1988), 40 O.St.3d 205, 533 N.E.2d. 294 .....	1
<i>State v. Davis</i> , 6 Ohio St.3d 91, 451 N.E.2d 772 .....	1
<i>State v. Stone</i> (January 31, 1996), 1 <sup>st</sup> Dist. No. C950185.....	2
<i>State v. Wolf</i> , 8 <sup>th</sup> Dist. No. 83673, <u>2004-Ohio-4500</u> .....	2
<i>State v. Johnson</i> (March 29, 2000), 9 <sup>th</sup> Dist. No. 19692 .....	2
<i>State v. Deimling</i> (December 20, 2000), 9 <sup>th</sup> Dist. No. 99CA007496 ...	2
<i>State v. Oviedo</i> (July 30, 1999), 6 <sup>th</sup> Dist. No. WD-98-061 .....	2
<i>State v. Delaney</i> , 10 <sup>th</sup> Dist. No. 04AP-1361, <u>2005-Ohio-4067</u> .....	2
<i>State v. Rogers</i> (November 16, 2000), 8 <sup>th</sup> Dist. No. 77723 .....	2
<i>State v. Jefferson</i> , 2 <sup>nd</sup> Dist. No. 20698, <u>2005-Ohio-4201</u> .....	2
<i>State v. Woods</i> , 2 <sup>nd</sup> Dist. No. 19005, <u>2002-Ohio-2367</u> .....	2

<u>STATEMENT OF THE CASE AND FACTS</u> .....	3
--	---

Procedural Posture .....	3
--------------------------	---

Statement of the Facts .....	3
------------------------------	---

<u>ARGUMENT IN SUPPORT OF PROPOSITION OF LAW</u> .....	6
--	---

<b><u>PROPOSITION OF LAW I: Theft is not a lesser-included offense of Robbery</u></b> .....	6
---	---

Authorities:

RC 2945.74.....	6
<i>State v. Carter</i> (2000), 89 O.St.3d 593, <u>2000-Ohio-172</u> .....	6,7,8
<i>State v. Deem</i> (1988), 40 O.St.3d 205, 533 N.E.2d. 294 .....	6
RC 2913.02 .....	6

RC 2923.02 .....6  
*State v. Davis*, 6 Ohio St.3d 91, 451 N.E.2d 772 .....7  
*State v. Smith* (December 29, 2006), 1<sup>st</sup> Dist. No. C060077, para. 17..7  
RC 2913.02 (A)(4) .....7  
RC 2913.02 (A)(1).....7  
*State v. Wolf*, 8<sup>th</sup> Dist. No. 83673, 2004-Ohio-4500 .....7  
*State v. Johnson* (March 29, 2000), 9<sup>th</sup> Dist. No. 19692.....7  
*State v. Deimling* (December 20, 2000), 9<sup>th</sup> Dist. No. 99CA007496...7  
*State v. Delaney*, 10<sup>th</sup> Dist. No. 04AP-1361, 2005-Ohio-4067.....7  
*State v. Rogers* (November 16, 2000), 8<sup>th</sup> Dist. No. 77723.....7

**PROPOSITION OF LAW II: If this Court does hold that theft is a lesser-included offense of Robbery, Appellant could not be convicted of felony theft as the indictment failed to state the degree of Theft for which Appellant was charged.....8**

Authorities:

RC 2945.75.....8

CONCLUSION .....9

PROOF OF SERVICE .....10

**IN THE  
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STATE OF OHIO : NO.  
Plaintiff-Appellee, :  
vs. : **MEMORANDUM IN SUPPORT**  
 : **OF JURISDICTION**  
DANIELLE SMITH :  
Defendant-Appellant. :  
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**EXPLANATION OF WHY THIS CASE INVOLVES A  
SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS  
A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

The trial court found the Defendant-Appellant, Danielle Smith (“Appellant”), guilty of Theft, in violation of RC 2913.02 (A)(1), a fifth degree felony. The First District Court of Appeals for Hamilton County, Ohio (“First District”) affirmed the judgment of the trial court.

Appellant believes this case involves a substantial constitutional question in that there is an issue whether the trial court had the authority to convict Appellant of Theft when Appellant was originally charged with Robbery. There appears to be a conflict of authority from this Court as to that issue, specifically, the cases of *State v. Carter* (2000), 89 O.St.3d 593, 2000-Ohio-172, *State v. Deem* (1988), 40 O.St.3d 205, 533 N.E.2d. 294 and *State v. Davis* (1983), 6 O.St.3d 91, 456 N.E.2d 772.

Appellant further believes that this case involves great general interest since this issue has faced many trial courts in the State of Ohio with differing results. Examples of cases where Theft was found to be a lesser included offense are as follows: *State v. Stone* (January 31, 1996), 1<sup>st</sup> Dist. No. C950185, *State v. Wolf*, 8<sup>th</sup> Dist. No. 83673, 2004-Ohio-4500, *State v. Johnson* (March 29, 2000), 9<sup>th</sup> Dist. No. 19692, *State v. Deimling* (December 20, 2000), 9<sup>th</sup> Dist. No. 99CA007496, *State v. Oviedo* (July 30, 1999), 6<sup>th</sup> Dist. No. WD-98-061 and *State v. Delaney*, 10<sup>th</sup> Dist. No. 04AP-1361, 2005-Ohio-4067. Examples of cases where Theft was not found to be a lesser included offense are as follows: *State v. Rogers* (November 16, 2000), 8<sup>th</sup> Dist. No. 77723, *State v. Jefferson*, 2<sup>nd</sup> Dist. No. 20698, 2005-Ohio-4201, *State v. Woods*, 2<sup>nd</sup> Dist. No. 19005, 2002-Ohio-2367.

### **STATEMENT OF THE CASE AND FACTS**

**a) Procedural Posture:**

On November 8, 2005, Appellant was convicted of Theft, in violation of RC 2913.02 (A)(1), a fifth degree felony. On December 29, 2006, the First District Court of Appeals for Hamilton County, Ohio affirmed the judgment of the trial court upholding Appellant's conviction.

**b) Statement of the Facts:**

On April 15, 2005, Appellant was indicted by a Hamilton County grand jury in one count for violation of RC 2911.02 (A)(3), Robbery, a second degree felony.

On November 8, 2005, Appellant's case proceeded to a bench trial after she waived her right to a trial by jury. The first witness to testify on behalf of the State was Rachel Cornett, the loss prevention supervisor for Macy's at Tri-County Mall. Ms. Cornett testified that on April 7, 2005, she observed Appellant and another woman, with children, pushing a cart containing empty shopping bags. Ms. Cornett testified that she observed Appellant selecting merchandise, then entering the boys' fitting room with the children and with the cart. However, later in her testimony, Ms. Cornett stated that Appellant was passing merchandise to a child who took them into the fitting room. Ms. Cornett further testified that she observed Appellant exit the fitting room carrying two or three pieces of merchandise and was pulling the cart behind her. Ms. Cornett testified that Appellant gave the cart to one of the children, and the children and the other woman left the store with the cart. Appellant then continued to shop inside the store. Ms. Cornett testified that the woman and children were stopped outside the store and were escorted back into the store by security. Ms. Cornett testified that she then escorted Appellant towards the store's office. After proceeding through the store, Appellant turned to Ms. Cornett and asked her for ID. When Ms. Cornett could not produce any, Appellant pushed her and began to "cuss and carry on." Ms. Cornett testified that, at the time, the other woman ran from the store, with the children, and left the merchandise behind. According to Ms. Cornett, the value of the items left behind was \$ 1,674.95.

There was another item that had been purchased by Appellant, a cookware set, and that money was refunded to Appellant because she had a receipt for the item.

Appellant then testified on her own behalf. Appellant testified that she went to the Macy's store to shop. Appellant further testified that she rode with the other woman and her children to the store that day. Appellant testified that the other woman had a gift card, from her mother, and that the woman was to use that card to pay for the merchandise she selected. Appellant testified that she had no intention of stealing any items from the store nor did she have any idea that the other woman was not going to pay for the items.

At the close of all the evidence and arguments of counsel, the trial court issued its decision. The trial court found that Appellant was acting in concert with the other woman. The trial court stated:

There is no question in once [sic] instance [Appellant] actually picked up some clothing and handed it to one of the children, who then took it back toward the dressing room. And the question was asked of the witness, what happened to the clothing, and the witness testified she passed it off to the child. So [Appellant] was involved in a theft offense.

I'm not convinced with regard to the robbery at this point in time. And, therefore, I find [Appellant] guilty of a felony of the fifth degree theft.

Appellant objected to the guilty finding stating that the indictment did not allege a dollar amount, therefore, the trial court did not have the ability to find Appellant guilty of more than a misdemeanor theft offense.

On December 14, 2005, Appellant was before the trial court for a sentencing hearing. However, the trial court heard additional arguments from Appellant concerning the issue of whether the trial court appropriately convicted Appellant of a felony theft offense verses a misdemeanor theft offense. The trial court overruled what it considered a Criminal Rule 29 Motion for Acquittal.

On January 12, 2006, the trial court held a sentencing hearing. The trial court imposed an eleven month prison sentence with credit for time served.

A timely notice of appeal was filed by appointed appellate counsel to the First District Court of Appeals on January 23, 2006. In her brief, Appellant cited as errors the following: 1) "The trial court erred as a Matter of Law by Convicting Appellant of the Reduced Charge of Felony Theft." The first issue presented was that the trial court did not have the legal authority to convict Appellant of Theft as Theft is not a lesser included offense of Robbery. The second issue presented was that the trial court could not convict Appellant of felony Theft as the indictment failed to state the degree of Theft for which Appellant was charged. 2) "The evidence was insufficient as a matter of law and/or against the manifest weight of the evidence to sustain Appellant's conviction for the reduced charge of theft." On December 29, 2006, the First District issued a decision affirming Appellant's conviction on the basis of this Court's holding in *State v. Davis* (1983), 6 O.St.3d 91, 456 N.E.2d 772.

**ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

**PROPOSITION OF LAW I: Theft is not a lesser-included offense of Robbery.**

Pursuant to RC 2945.74, when the indictment charges an offense, a jury or trier of fact may find the defendant not guilty of the degree of offense charged in the indictment, but find the defendant guilty of an inferior degree thereof or a lesser-included offense. In order to determine whether one offense constitutes a lesser-included offense of another, this Court has held that the following analysis shall be used:

- An offense may be a lesser included offense of another if
- (i) the offense carries a lesser penalty than the other;
  - (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and
  - (iii) some element of the greater offense is not required to prove the commission of the lesser offense.

*State v. Carter* (2000), 89 O.St.3d 593, 600, 2000-Ohio-172, citing, *State v. Deem* (1988), 40 O.St.3d 205, 533 N.E.2d. 294.

At first glance it would appear that the crime of Theft is a lesser included offense of Robbery. However, this Court held, in *Carter*, that it was not because it failed to meet the second prong of the test set forth in *Deem*. This Court reasoned that the crime of Robbery can be committed without committing the crime of Theft, ie, Robbery can be committed in the course of an “attempted theft.” Whereas Theft “requires the accused to actually obtain or exert control over the property or services of another, attempted theft does not.” *Carter*, 89 O.St.3d at 601; see also, RC 2913.02, RC 2923.02.

In the present case, the First District upheld Appellant's conviction for Theft stating that "as a subordinate court we are constrained from sustaining [Appellant's] first assignment of error by the Ohio Supreme Court's decision in *State v. Davis*, 6 Ohio St.3d at 95, 451 N.E.2d 772." See, *State v. Smith* (December 29, 2006), 1<sup>st</sup> Dist. No. C060077, para. 17. The First District further cited to cases issued from its Court in support of this contention. However, each of those cases cited pre-date this Court's ruling in *State v. Carter*, *supra*, as does *State v. Davis*. Why the First District did not focus on this Court's decision in *Carter*, which is a more recent case, is unknown to Appellant. In addition, this Court held in *Davis* that only theft by threat, ie, RC 2913.02 (A)(4), was a lesser-included offense to Robbery; however, in this case, Appellant was convicted under subsection (A)(1), which involved a situation where Appellant allegedly exerted control over the items without the consent of the owner of the store.

In their Brief, the State of Ohio cited to several cases which held that Theft is a lesser-included offense of Robbery as well as cases which held that it was not. Although many of the cases cited in support of their position pre-dated *Carter*, the Eighth, Ninth and Tenth District Courts of Appeals have still held that Theft was a lesser-included offense. See, *State v. Wolf*, 8<sup>th</sup> Dist. No. 83673, 2004-Ohio-4500, *State v. Johnson* (March 29, 2000), 9<sup>th</sup> Dist. No. 19692, *State v. Deimling* (December 20, 2000), 9<sup>th</sup> Dist. No. 99CA007496 and *State v. Delaney*, 10<sup>th</sup> Dist. No. 04AP-1361, 2005-Ohio-4067. However, the Eighth District had previously held, based upon *Carter*, that theft was *not* a lesser-included offense. See, *State v. Rogers* (November 16, 2000), 8<sup>th</sup> Dist. No. 77723.

Appellant submits that there is not only conflict out of the First District as to which case should be applied, but there is conflict in the other appellate districts in Ohio as well. According to this Court's decision in *Carter*, Appellant submits that Theft is not a lesser-included offense of Robbery, and as such, Appellant's conviction for the same should be vacated.

**PROPOSITION OF LAW II: If this Court does hold that theft is a lesser-included offense of Robbery, Appellant could not be convicted of felony theft as the indictment failed to state the degree of Theft for which Appellant was charged.**

According to RC 2945.75, when the presence of one or more additional elements makes an offense one of more serious degree, the indictment shall state the degree of the offense which the accused is alleged to have committed. "Otherwise such...indictment...is effective to charge only the least degree of the offense."

In the present case, Appellant was originally charged with Robbery. The indictment specifically read:

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths do find and present that Danielle Smith, on or about the 7<sup>th</sup> day of April in the year Two Thousand and Five at the County of Hamilton and State of Ohio aforesaid, in committing or attempting to commit a theft offense, to wit: THEFT OF RETAIL MERCHANDISE FROM MACY'S, or in fleeing immediately thereafter, used or threatened the immediate use of force against ROGER SAUERWEIN AND RACHEL CORNETT, in violation of Section 2911.02 (A)(3) of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

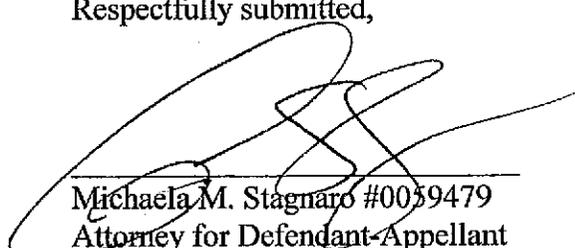
There was no allegation, in the indictment, that the theft offense was a felony theft offense, ie, that the value of the merchandise was \$ 500.00 or more.

Even if this Court believes that Appellant was properly convicted of a Theft, Appellant submits that the offense should only have been a misdemeanor offense since there was no allegation of value in the indictment.

### **CONCLUSION**

Appellant believes this case involves a substantial constitutional question because the trial court had no legal authority to convict Appellant of Theft as Theft is not a lesser included offense of Robbery. Appellant further believes that this case involves great general interest since there is conflict in the Courts of this State as to whether Theft is a lesser-included offense of Robbery. As a result, Appellant respectfully requests that this Court accept jurisdiction to hear this matter.

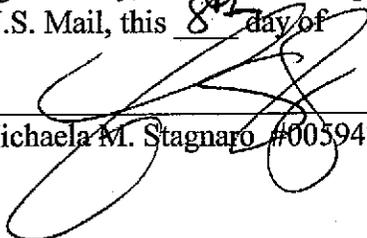
Respectfully submitted,



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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served upon Joseph T. Deters, Prosecuting Attorney for Hamilton County, Ohio, by and through his Assistant Prosecuting Attorney, Judith Anton Lapp, 230 East Ninth Street, Cincinnati, OH 45202, by regular U.S. Mail, this 8<sup>th</sup> day of February, 2007.

  
\_\_\_\_\_  
Michaela M. Stagnaro #0059479

APPENDIX

IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO



D71426699

STATE OF OHIO,

Plaintiff-Appellee,

vs.

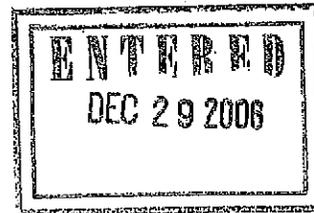
DANIELLE SMITH,

Defendant-Appellant.

APPEAL NO. C-060077

TRIAL NO. B-0503447 ✓

JUDGMENT ENTRY.



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on December 29, 2006 per Order of the Court.

By: William H. ...  
Presiding Judge

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-060077
	:	TRIAL NO. B-0503447
Plaintiff-Appellee,	:	
vs.	:	<i>OPINION.</i>
DANIELLE SMITH,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 29, 2006

*Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*,  
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

*Michaela M. Stagnaro*, for Defendant-Appellant.

We have sua sponte removed this cause from the accelerated calendar.

**GORMAN, Presiding Judge.**

{¶1} Following a bench trial, defendant-appellant Danielle Smith appeals from the trial court's judgment convicting her of theft, in violation of R.C. 2913.02. Because theft is a lesser-included offense of the charged offense of robbery, and because Smith's conviction was amply supported by the evidence, we affirm the judgment of the trial court.

{¶2} Smith was arrested after an altercation at the Macy's department store in Tri-County Mall. Rachel Cornet, a loss-prevention supervisor for Macy's, observed Smith, Lashay Meadows, and Meadows's young children, walking around the store and pushing a shopping cart containing empty shopping bags. Cornet and another Macy's employee observed the group enter fitting rooms with multiple items of merchandise and leave with fewer items in their hands. A security camera also videotaped the group's activities and was offered as evidence.

{¶3} Smith and Meadows headed for an exit with the Meadows children pushing the shopping cart. Their previously empty shopping bags were now filled with over \$1,674 of clothing. Smith walked about five feet behind the cart. As they passed the last point of sale, store security stopped Meadows. Smith turned to re-enter the department store. Cornet and a security officer stopped her and asked her to accompany them to the store's office.

{¶4} After returning to the store with Cornet, Smith began to resist. She pushed Cornet, struck the guard with hangers, tipped over display tables, and ultimately attempted to bite the security guard. When store supervisors arrived, Smith became more

cooperative. She denied that she knew of Meadows's intention to shoplift, and claimed that she struggled with Cornet and the security guard only because they had accused her of theft.

{¶5} The Hamilton County Grand Jury returned an indictment charging Smith with robbery, in violation of R.C. 2911.02(A)(3), and alleging that "in committing or attempting to commit a theft offense, to wit: THEFT OF RETAIL MERCHANIDISE FROM MACY'S, or in fleeing immediately thereafter, [she had] used or threatened the immediate use of force against" Cornet and the security guard. Smith waived a jury trial. Her defense was that she did not know that Meadows had intended to steal from Macy's.

{¶6} The trial court stated, "Having sat through this trial, I find the testimony of the defendant with regard to not knowing that she was involved in a theft offense—I find that to be incredible. I viewed the videotape; there is no question she was acting in concert [with Meadows]. \* \* \* So [Smith] was involved in a theft offense.

{¶7} "I'm not convinced with regard to the robbery at this point in time. And, therefore, I find her guilty of a felony of the fifth degree theft" as a lesser-included offense of robbery.

{¶8} Conceding that petty theft, punishable as a first-degree misdemeanor, is a lesser-included offense of robbery, Smith objected on grounds that fifth-degree felony theft was not because the value of the stolen property was an element of that crime—an element missing from the charged, greater offense of robbery. The trial court nonetheless found Smith guilty of fifth-degree theft and imposed an 11-month prison term.

{¶9} In her first assignment of error, Smith contends that fifth-degree theft is not a lesser-included offense of robbery, and thus that the trial court was without authority to convict her of any crime more severe than petty theft.

{¶10} A trial court may enter a judgment of conviction on an offense that is a lesser-included offense, an offense of an inferior degree, or an attempt to commit the greater charged offense. See R.C. 2945.74; see, e.g., *State v. Deem* (1988), 40 Ohio St. 3d 205, 533 N.E.2d 294, paragraph one of the syllabus. “[A] criminal offense may be a lesser included offense of another if (1) the offense carries a lesser penalty than the other; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to prove the commission of the lesser offense.” *State v. Barnes*, 94 Ohio St.3d 21, 25-26, 2002-Ohio-68, 759 N.E.2d 1240, citing *State v. Deem*, paragraph three of the syllabus. The second prong of the test requires the offenses at issue to be examined “*as statutorily defined* and not with reference to specific factual scenarios.” *State v. Barnes*, 94 Ohio St.3d at 26, 2002-Ohio-68, 759 N.E.2d 1240 (emphasis in the original).

{¶11} The test for a lesser-included offense is “grounded primarily in the need for clarity in meeting the constitutional requirement that an accused have notice of the offenses charged against him. Sixth Amendment to the United States Constitution; Section 10, Article I of the Ohio Constitution.” *State v. Deem*, 40 Ohio St.3d at 210, 533 N.E.2d 294.

{¶12} The indictment in this case charged Smith with robbery. R.C. 2911.02(A)(3) provides that “[n]o person, in attempting or committing a theft offense or

in fleeing immediately after the attempt or offense, shall \* \* \* [u]se or threaten the immediate use of force against another.” The value of the property obtained or attempted to be obtained in the theft offense is not an element of robbery as statutorily defined.

{¶13} R.C. 2913.02(A)(4), which proscribes theft by threat,<sup>1</sup> states that “[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services \* \* \* [b]y threat.”

{¶14} The degree of the theft offense is determined by the value of the stolen property. Pursuant to R.C. 2913.02(B)(2), petty theft is punishable as a misdemeanor of the first degree. But “if the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars \* \* \*, a violation of this section is theft, a felony of the fifth degree.” R.C. 2913.02(B)(2). As the value of the stolen property elevates the degree of the offense and does not simply enhance the penalty, the value of the property or service stolen is an essential element of the crime of theft, but not petty theft, and must be proved by the state. See *State v. Edmondson*, 92 Ohio St.3d 393, 398, 2001-Ohio-210, 750 N.E.2d 587, citing *State v. Henderson* (1979), 58 Ohio St.2d 171, 173-174, 389 N.E.2d 494.

{¶15} The first prong of the *Deem* test for whether theft is a lesser-included

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<sup>1</sup>The trial court did not specify which subsection of R.C. 2913.02(A) Smith had violated. From the allegations in the indictment and the evidence introduced at trial, we presume that the trial court believed that Smith had committed theft by threat under R.C. 2913.02(A)(4). There was no evidence that would have supported convictions under the other subsections of R.C. 2913.02. Smith’s arguments at trial and on appeal accept this conclusion.

offense of robbery was satisfied in this case. Robbery is punishable as a third-degree felony. Fifth-degree theft carries a lesser penalty. The third prong was also met. “[T]heft by threat consists entirely of some, but not all, of the elements of robbery. The use of force or the threatened use of immediate force are elements of robbery which are not required to constitute the offense of theft by threat.” *State v. Davis* (1983), 6 Ohio St.3d 91, 95, 451 N.E.2d 772; see, also, *State v. Stone* (Jan. 31, 1996), 1st Dist. No. C-950185.

{¶16} But our analysis under the second prong of *Deem* is more problematic. As one can commit robbery, for example, with a handgun by depriving the victim of property valued at less than \$500, robbery *can* be committed without the lesser offense of theft, which requires proof of a loss of \$500 or more, also being committed. Therefore, theft would appear not to be a lesser-included offense of robbery. See *State v. Deem*, paragraph three of the syllabus.

{¶17} But as a subordinate court we are constrained from sustaining Smith’s first assignment of error by the Ohio Supreme Court’s decision in *State v. Davis*, 6 Ohio St.3d at 95, 451 N.E.2d 772. In *Davis*, the supreme court was required to determine whether grand theft by threat, then punishable as a fourth-degree felony upon proof that the property or services stolen were valued at \$150 or more, was a lesser-included offense of robbery. See 6 Ohio St.3d 91, 451 N.E.2d 772, fn. 1. In its decision, which predated *State v. Deem*, the supreme court applied an earlier, lesser-included-offense test, found in *State v. Wilkins* (1980), 64 Ohio St.2d 382, 415 N.E.2d 303, that lacked the admonition that the offenses were to be examined “as statutorily defined.” Although it recognized that value was an element of grand theft, the supreme court did not discuss the omission of value from the indictment. Nonetheless, in resolving the issue posed by the second

*Deem* prong, the court held that “theft by threat contains no element which is not also an element of robbery; therefore, one cannot commit a robbery without committing theft by threat.” 6 Ohio St.3d at 95, 451 N.E.2d 772. As Smith’s appeal raises the identical issue resolved in *State v. Davis*, we continue to adhere to the supreme court’s decision as we have previously, see, e.g., *State v. Stone*; *State v. Williams* (June 26, 1996), 1st Dist. No. C-950571; *State v. Pratt* (Sept. 9, 1987), 1st Dist. No. C-860436, and overrule the first assignment of error.

{¶18} Smith’s second assignment of error, in which she challenges the weight and the sufficiency of the evidence to support her conviction, is overruled. Our review of the record fails to persuade us that the trial court, sitting as the trier of fact, clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. See *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211; see, also, *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. The trial court was entitled to reject Smith’s defense that she had not acted in concert with Meadows. As the weight to be given the evidence and the credibility of the witnesses were primarily for the trier of fact to determine, see *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus, the trial court, in resolving conflicts in the testimony, could properly have found Smith guilty of the lesser-included offense and thus did not lose its way.

{¶19} There was substantial, credible evidence from which the trial court could have reasonably concluded that the state had proved all elements of the lesser-included offense of theft by threat beyond a reasonable doubt. See *State v. Waddy* (1991), 63 Ohio St.3d 424, 588 N.E.2d 819, certiorari denied (1992), 506 U.S. 921, 113 S.Ct. 338.

{¶20} Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

SUNDERMANN and HENDON, JJ., concur.

*Please Note:*

The court has placed of record its own entry in this case on the date of the release of this Opinion.