

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO	:	NO. 2007-0268
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

MERIT BRIEF OF DEFENDANT-APPELLANT

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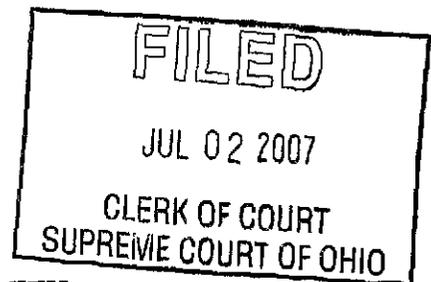


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**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO : NO. 2007-0268
Plaintiff-Appellee, :
vs. : **MERIT BRIEF OF**
 : **DEFENDANT-APPELLANT**
DANIELLE SMITH :
Defendant-Appellant. :
 :

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. (Td. 22)

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 September 29, 2005, Appellant waived her right to a trial by jury which was accepted by the trial court. (Tp. pgs. 22-24)

On November 8, 2005, Appellant's case proceeded to a bench trial. The trial court did ask Appellant whether she still wished to waive her right to a trial by jury, which she responded affirmatively. (Tp. pg. 29) The first witness to testify on behalf of the State was Rachel Cornett, the loss prevention supervisor for Macy's at Tri-County Mall. (Tp. pg. 32) Ms. Cornett testified that on April 7, 2005, she observed Appellant and another woman, with children, pushing a cart containing empty shopping bags. (Tp. pgs. 33, 34) 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. (Tp. pg. 45) 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. (Tp. pgs. 36, 37) 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. (Tp. pg. 51) 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. (Tp. pg. 38) 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." (Tp. pgs. 39-40) Ms. Cornett testified that, at the time, the other woman ran from the store, with the

children, and left the merchandise behind. (Tp. pg. 41) 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. (Tp. pg. 47)

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. (Tp. pg. 61) 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. (Tp. pgs. 61, 69) 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. (Tp. pgs. 62, 66)

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.

(Tp. pgs. 87-88)

After finding Appellant guilty, the trial court and ordered a presentence investigation pending sentence. 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. (Tp. pg. 89)

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. (Tp. pgs. 92-96) The trial court then continued the matter for sentencing.

On January 12, 2006, the trial court held a sentencing hearing. The trial court heard from Appellant's counsel and Appellant. The trial court issued written sentencing findings as well as placing those findings on the record. (Tp. pgs. 106-109) The trial court then imposed an eleven month prison sentence with credit for time served. (Tp. pg. 109) The trial court advised Appellant of post release control sanctions as well as her rights of appeal. (Tp. pgs. 105, 110-112)

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. (Td. 12)

On May 7, 2007, this Court accepted Proposition of Law I for plenary consideration. (Td. 30) Appellant's merit brief now follows.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW: 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. [emphasis added]

At first glance it would appear that the crime of Theft is a lesser included offense of Robbery. However, on closer inspection, Theft is not a lesser included offense of Robbery because it fails to meet the second prong of the test set forth in *Deem*. This Court held that the two offenses must be compared as statutorily defined. In other words, “the evidence in a particular case is irrelevant to the determination of whether an offense...is necessarily included in a greater offense.” *State v. Barnes* (2002), 94

O.St.3d 21, 26, 759 N.E.2d 1240, quoting, *State v. Kidder* (1987) 32 O.St.3d 279, 282, 513 N.E.2d 311; *see also*, *Shaker Hts. v. Mosely*, 113 O.St.3d 329, 335, 2007-Ohio-2072. In comparing the language of the two statutes in this case, it is clear that the offense of Robbery can be committed without committing the crime of Theft. The reason is because 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.” *See*, *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), 1st 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. Although it could be argued that the First District relied upon *Davis* because it was a more specific precedent, that argument must fail. That case is distinguishable from this one because this Court had previously held in *Davis* that only theft by threat, ie, RC 2913.02 (A)(4), was a lesser-included offense to Robbery. In this case, however, 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.

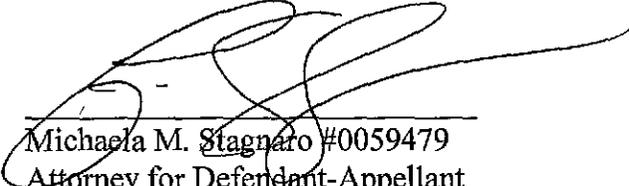
The State of Ohio, in their Brief submitted to the First District Court of Appeals, cited to several cases which held that Theft is a lesser-included offense of Robbery as well as cases which held that it was not. Although many of the cases cited in support of their position pre-dated *Carter*, the Ninth District Court of Appeals has still held that Theft was a lesser-included offense. See, *State v. Johnson* (March 29, 2000), 9th Dist. No. 19692 and *State v. Deimling* (December 20, 2000), 9th Dist. No. 99CA007496. The Eighth District Court of Appeals recently held that Theft was a lesser included offense, which is in contradiction to its prior decisions where it held that Theft was not a lesser included offense, relying upon this Court's decision in *Carter*. See, *State v. Wolf*, 8th Dist. No. 83673, 2004-Ohio-4500 verses *State v. Rogers* (November 16, 2000), 8th Dist. No. 77723 and *State v. Ogletree* (August 2, 2002), 8th Dist. No. 79882, 2002-Ohio-4070. *State v. Delaney*, 10th Dist. No. 04AP-1361, 2005-Ohio-4067. The Tenth District Court of Appeals has also held that Theft is a lesser included offense of Robbery; however, Appellant submits that the Tenth District incorrectly reasoned that a Robbery *cannot* be committed without a theft having been committed in making its decision. See, *State v. Delaney*, 10th Dist. No. 04AP-1361, para. 21, 2005-Ohio-4067.

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

CONCLUSION

For all the above stated reasons, Appellant submits that this Court should reverse the decision of the First District Court of Appeals and vacate Appellant's conviction and sentence rendered by Hamilton County Court of Common Pleas.

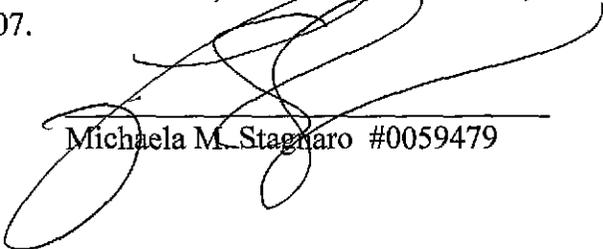
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief 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 28th day of June, 2007.



Michaela M. Stagnaro #0059479

APPENDIX

Notice of Appeal 2007-0268.....A1

First District Court of Appeals' Decision, No. C060077.....A3

RC 2911.02A12

RC 2913.02A13

RC 2923.02A15

RC 2945.74A17

State v. Deimling (December 20, 2000), 9th Dist. No. 99CA007496.....A18

State v. Johnson (March 29, 2000), 9th Dist. No. 19692.....A22

State v. Rogers (November 16, 2000), 8th Dist. No. 77723.....A25

**IN THE
SUPREME COURT OF OHIO**

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

NOTICE OF APPEAL OF APPELLANT DANIELLE SMITH

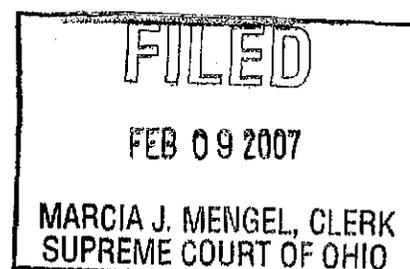
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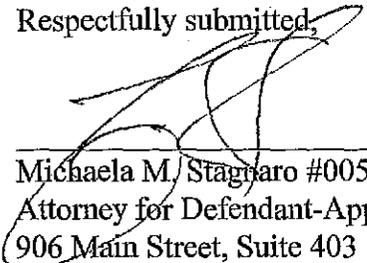


Notice of Appeal of Appellant Danielle Smith

Appellant, Danielle Smith, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case Number C060077 on December 29, 2006.

This is a felony case that raises a substantial constitutional question and is one of public or great interest.

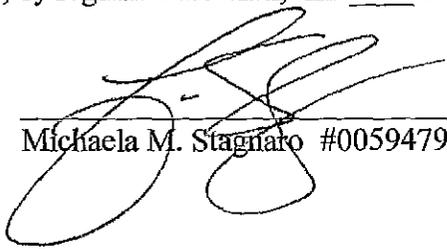
Respectfully submitted,



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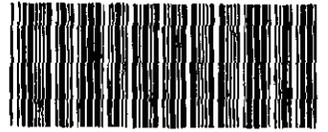
PROOF OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was served upon Joseph T. Deters, Prosecuting Attorney for Hamilton County, Ohio, by and through his Assistant Prosecuting Attorney, Judith Anton Lapp, by regular U.S. Mail, this 3rd day of February, 2007.



Michaela M. Stagiario #0059479

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



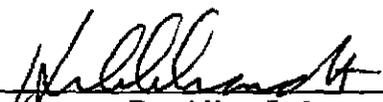
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STATE OF OHIO,	:	APPEAL NO. C-060077
	:	TRIAL NO. B-0503447
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
DANIELLE SMITH,	:	
	:	
Defendant-Appellant.	:	



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: 
 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,	:	
	:	<i>OPINION.</i>
vs.	:	
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

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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,¹ 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

¹The 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.

OHIO FIRST DISTRICT COURT OF APPEALS

{¶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.

§ 2911.02**Statutes & Session Law****TITLE [29] XXIX CRIMES -- PROCEDURE****CHAPTER 2911: ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING****2911.02 Robbery.**

2911.02 Robbery.

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control;
- (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
- (3) Use or threaten the immediate use of force against another.

(B) Whoever violates this section is guilty of robbery. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

(C) As used in this section:

- (1) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.
- (2) "Theft offense" has the same meaning as in section 2913.01 of the Revised Code.

Effective Date: 07-01-1996

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§ 2913.02**Statutes & Session Law****TITLE [29] XXIX CRIMES -- PROCEDURE****CHAPTER 2913: THEFT AND FRAUD****2913.02 Theft.**

2913.02 Theft.

(A) 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:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat;

(5) By intimidation.

(B)(1) Whoever violates this section is guilty of theft.

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is five thousand dollars or more and is less than one hundred thousand dollars, a violation of this section is grand theft, a felony of the fourth degree. If the value of the property or services stolen is one hundred thousand dollars or more and is less than five hundred thousand dollars, a violation of this section is aggravated theft, a felony of the third degree. If the value of the property or services is five hundred thousand dollars or more and is less than one million dollars, a violation of this section is aggravated theft, a felony of the second degree. If the value of the property or services stolen is one million dollars or more, a violation of this section is aggravated theft of one million dollars or more, a felony of the first degree.

(3) Except as otherwise provided in division (B)(4), (5), (6), (7), or (8) of this section, if the victim of the offense is an elderly person or disabled adult, a violation of this section is theft from an elderly person or disabled adult, and division (B)(3) of this section applies. Except as otherwise provided in this division, theft from an elderly person or disabled adult is a felony of the fifth degree. If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars, theft from an elderly person or disabled adult is a felony of the fourth degree. If the value of the property or services stolen is five thousand dollars or more and is less than twenty-five thousand dollars, theft from an elderly person or disabled adult is a felony of the third degree. If the value of the property or services stolen is twenty-five thousand dollars or more and is less than one hundred thousand dollars, theft from an elderly person or disabled adult is a felony of the second degree. If the value of the property or services stolen is one hundred thousand dollars or more, theft from an elderly person or disabled adult is a felony of the first degree.

(4) If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft. Except as otherwise provided in this division, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the third degree, and there is a presumption in favor of the court imposing a prison term for the offense. If the firearm or dangerous ordnance was stolen from a federally licensed firearms dealer, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the first degree. The offender shall serve a prison term imposed for grand theft when the property stolen is a firearm or dangerous ordnance consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(5) If the property stolen is a motor vehicle, a violation of this section is grand theft of a motor vehicle, a felony of the fourth degree.

(6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender previously has been convicted of a felony drug abuse offense, a felony of the third degree.

(7) If the property stolen is a police dog or horse or an assistance dog and the offender knows or should know that the property stolen is a police dog or horse or an assistance dog, a violation of this section is theft of a police dog or horse or an assistance dog, a felony of the third degree.

(8) If the property stolen is anhydrous ammonia, a violation of this section is theft of anhydrous ammonia, a felony of the third degree.

(9) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without the offender making full payment for gasoline that was dispensed into the fuel tank of the motor vehicle or into another container, the court may do one of the following:

(a) Unless division (B)(9)(b) of this section applies, suspend for not more than six months the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege;

(b) If the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege has previously been suspended pursuant to division (B)(9)(a) of this section, impose a class seven suspension of the offender's license, permit, or privilege from the range specified in division (A)(7) of section 4510.02 of the Revised Code, provided that the suspension shall be for at least six months.

(C) The sentencing court that suspends an offender's license, permit, or nonresident operating privilege under division (B)(9) of this section may grant the offender limited driving privileges during the period of the suspension in accordance with Chapter 4510. of the Revised Code.

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§ 2923.02**Statutes & Session Law****TITLE [29] XXIX CRIMES -- PROCEDURE****CHAPTER 2923: CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL; CORRUPT ACTIVITY****2923.02 Attempt to commit an offense.**

2923.02 Attempt to commit an offense.

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of an offense, or of conspiracy to commit an offense shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose.

(E)(1) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder, murder, or an offense for which the maximum penalty is imprisonment for life is a felony of the first degree. An attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense is an offense of the same degree as the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

(2) In addition to any other sanctions imposed pursuant to division (E)(1) of this section for an attempt to commit aggravated murder or murder in violation of division (A) of this section, if the offender used a motor vehicle as the means to attempt to commit the offense, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(3) If a person is convicted of or pleads guilty to attempted rape and also is convicted of or pleads guilty to a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code, the offender shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code.

(F) As used in this section:

(1) "Drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

Effective Date: 03-23-2000; 01-02-2007; 04-04-2007

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§ 2945.74**Statutes & Session Law**

TITLE [29] XXIX CRIMES -- PROCEDURE

CHAPTER 2945: TRIAL

2945.74 Defendant may be convicted of lesser offense.

2945.74 Defendant may be convicted of lesser offense.

The jury may find the defendant not guilty of the offense charged, but guilty of an attempt to commit it if such attempt is an offense at law. When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser included offense.

If the offense charged is murder and the accused is convicted by confession in open court, the court shall examine the witnesses, determine the degree of the crime, and pronounce sentence accordingly.

Effective Date: 10-01-1953

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00-LW-5860 (9th)

STATE OF OHIO, Appellee
v.
JOSEPH DEIMLING, Appellant

C.A. NO. 99CA007496
9th District Court of Appeals of Ohio, Lorain County.

Decided December 20, 2000

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE NO. 99 CR 05 3153

OPINION

BAIRD, Presiding Judge

Defendant, Joseph Deimling, has appealed from his conviction by the Lorain County Court of Common Pleas for robbery. We affirm.

On April 20, 1999, Defendant was indicted on one count of robbery, in violation of R.C. 2911.02(A) (2). Following a jury trial, Defendant was found guilty as charged. Defendant was sentenced to four years imprisonment. Defendant timely appealed and has raised three assignments of error for review. Defendant's second and third assignments of error will be addressed together.

ASSIGNMENT OF ERROR I

The trial court erred in failing to instruct the jury on the lesser included offense of theft.

In his first assignment of error, Defendant has argued that the trial court erred when it denied his request that the jury be instructed on the offense of misdemeanor theft. We disagree.

Instruction on a lesser-included offense is only required in those situations "where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus, certiorari denied (1989), 493 U.S. 826, 107 L. Ed. 2d 54. In making this determination:

The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to defendant.

State v. Wilkins (1980), 64 Ohio St. 2d 382, 388.

An offense may be a lesser included offense of another if: 1) the offense carries a lesser penalty; 2) the greater offense, as statutorily defined, can never be committed without committing the lesser offense as well; and 3) some element of the greater offense is not required to prove the commission of the lesser offense. *State v. Deem* (1988) 40 Ohio St. 3d 205, paragraph three of the syllabus. In determining whether the greater offense can ever be committed without committing the lesser as well, we are to

examine the elements of the crimes in the abstract, and not undertake an analysis of the facts of a particular case until after the Deem test is met. State v. Koss (1990), 49 Ohio St. 3d 213, 218; State v. Nelson, (Jan. 12, 2000), Tuscarawas Appellate No. 1999AP02007, unreported, 2000 Ohio App. LEXIS 229.

Robbery is defined as follows: (A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another. Therefore, a theft must necessarily be committed in the commission of a robbery by way of definition of the offense of robbery. In order to prove that there was a robbery and not just a theft the State must provide proof of the additional element as enunciated in section two of the statute, that Defendant inflicted, attempted to inflict, or threatened to inflict physical harm on another. See R.C. 2911.02(2). If the evidence presented at trial is such that the trier of fact could find that this additional element was not met, the trial court should have instructed upon the lesser-included offense of theft. In the absence of any such evidence, it was not error for the court to decline to instruct the jury on the lesser-included offense of theft.

In this case, there were two witnesses who testified, Brandy McFarland, the victim, and Nancy Shook, a witness to the incident. The victim testified that Defendant grabbed her arm several times and stopped her from going back to work. She further testified that after she had repeatedly refused his requests for money, he forcibly removed the money from her pocket while she struggled to stop him. Ms. Shook testified that she observed the victim being held in a headlock by Defendant and heard the victim screaming. She then observed Defendant remove something from the victim and run from the building. Ms. Shook further testified that following the event the victim was crying and upset and had red marks about her throat and hands.

After weighing the evidence presented in the light most favorable to Defendant, an instruction on theft was not supported by the evidence since there was evidence of actual harm inflicted upon the victim. Additionally, there was not a reasonable probability that Defendant could be acquitted on the greater charge of robbery, but convicted on the lesser-included offense of theft. State v. Thomas, supra. Therefore, the trial court did not err in refusing to give the jury instruction on the lesser-included offense. Defendant's first assignment of error is without merit.

ASSIGNMENT OF ERROR II

The State's evidence presented at trial was legally insufficient to support a verdict of guilty of robbery.

ASSIGNMENT OF ERROR III

The jury verdict finding Defendant guilty of robbery was against the manifest weight of the evidence.

In his second and third assignments of error, Defendant has argued that his conviction was against the manifest weight of the evidence and that there was insufficient evidence as a matter of law. We disagree.

The function of an appellate court on review is to assess the sufficiency of the evidence "to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." State v. Jenks (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. In making this determination, a reviewing court must view the evidence in the light most favorable to the

prosecution. Id.; State v. Feliciano (1996), 115 Ohio App.3d 646, 652.

While the test for sufficiency requires a determination of whether the State has met its burden of production at trial, a manifest weight challenge questions whether the State has met its burden of persuasion. State v. Thompkins (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). In making this determination, we do not view the evidence in the light most favorable to the prosecution. Instead, we must:

review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, 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.

State v. Otten (1986), 33 Ohio App.3d 339, 340. This action is reserved for the exceptional case where the evidence weighs heavily in favor of the defendant. Id. "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." (Emphasis sic) State v. Roberts (Sept. 17, 1997), Lorain App. No. 96CA006462, unreported, at 4.

R.C. 2911.02(A)(2) defines robbery as follows: "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: *** (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another." As stated above, the evidence presented at trial was that Defendant entered the victim's place of employment and repeatedly requested money from her. Defendant gave numerous false reasons to the victim to try to induce her to give him money. Each time she denied his request because of her belief that he was lying about the reason he needed the funds. At least three times the victim attempted to go back to work and Defendant grabbed her by the arm, stopped her, and repeated his requests for money. Following the victim's final denial for money, Defendant placed the victim in a headlock, forcibly removed one hundred and fifty dollars from the victim's pants pocket, and fled the building. Based upon the evidence presented at trial, the conviction for robbery is not against the manifest weight of the evidence and his conviction is sufficient under the law. Defendant's second and third assignments of error are without merit.

Defendant's assignments of error are overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellant.

Exceptions.

SLABY, J., CARR, J. CONCUR

FRANK J. JANIK, III, Attorney at Law, 248 Park Avenue, Amherst, Ohio 44001, for Appellant.

GREGORY A. WHITE, Prosecuting Attorney, and LAURA ANN E. SWANSINGER, Assistant Prosecuting Attorney, 226 Middle Avenue, 4th Floor, Elyria, Ohio 44035, for Appellee.

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00-LW-1270 (9th)

STATE OF OHIO, Appellee
v.
DEREK JOHNSON, Appellant

C.A. NO. 19692
9th District Court of Appeals of Ohio, Summit County.
Decided March 29, 2000

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF
SUMMIT, OHIO CASE NO. CR 99 04 0745

OPINION

SLABY, Judge.

Defendant-appellant, Derek Johnson, appeals his conviction in the Summit County Court of
Common Pleas for robbery. We affirm.

On April 1, 1999, Defendant entered a Holland Oil convenience store located on Eastland Avenue in
Akron, Ohio. Present in the store at that time were Vicki Smallwood, a cashier, and Ken Taylor,
assistant manager. Defendant stepped behind a register counter and removed several cartons of
cigarettes. Ms. Smallwood alerted Mr. Taylor, who asked Defendant to stop. Defendant did not comply.
Mr. Taylor approached Defendant and attempted to wrest the cartons from his grasp. Defendant
continued by removing cartons from the wall inventory. A scuffle ensued, scattering several cigarette
cartons on the floor. Defendant ran from the store with Mr. Taylor in pursuit then fled the scene by
automobile. Mr. Taylor returned to the store and recorded Defendant's license plate number. A warrant
issued for Defendant's arrest.

Defendant was arrested on April 10, 1999, following a traffic stop. He was indicted on one charge of
robbery, a felony of the third degree, in violation of R.C. 2911.02(A)(3).^(fn1) Prior to trial, Defendant
requested a jury instruction on the lesser included offenses of theft and attempted theft. The trial court
declined to offer the instruction. On June 22, 1999, Defendant was convicted of robbery and sentenced
to a two-year term of incarceration. Defendant timely appealed, raising one assignment of error.

ASSIGNMENT OF ERROR I

The trial court erred to the prejudice of [Defendant] by not instructing the jury on lesser included
offenses as requested in writing by [Defendant].

In his assignment of error, Defendant has argued that the trial court was required to instruct the jury
on the lesser included offenses of theft and attempted theft because the evidence at trial supported
acquittal on the robbery charge and a conviction on the lesser included offenses. We disagree.

Instruction on a lesser included offense is only required in those situations "where the evidence
presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon
the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus,
certiorari denied (1989), 496 U.S. 826, 107 L.Ed.2d 54. In making this determination:

The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If

under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to defendant.

State v. Wilkins (1980), 64 Ohio St.2d 382, 388.

Defendant was convicted of robbery, in violation of R.C. 2911.02(A)(3), which 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." R.C. 2913.02(A)(4), which defines theft by force, provides 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."(fn2) Theft, in violation of R.C. 2913.02(A)(4), is a lesser included offense of robbery. State v. Sills (July 5, 1995), Wayne App. No. 95CA0004, unreported, at 3, citing State v. Davis (1983), 6 Ohio St.3d 91, 95. The distinguishing element between the two offenses is the "threatened use of immediate force." State v. Sills, *supra*. Commenting on the distinction between robbery and theft by force, this court has observed:

In order to prove robbery, it is necessary for the state to demonstrate that the use or threatened use of force coincided in time with the intent to commit theft. *** [R]obbery does not require that the intent to steal exist from the outset of a forceful altercation. It only requires the threat or use of force during or while fleeing immediately after the commission or attempt to commit a theft. *** The force necessary to raise a theft offense to the level of robbery is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

(Citations omitted.) (Emphasis added.) State v. Goodson (Sept. 4, 1996), Medina App. No. 2537-M, unreported, at 3-4.

Mr. Taylor testified that he grabbed Defendant in an effort to prevent him from stealing the cigarettes. According to Mr. Taylor's testimony, Defendant pushed him away while grasping several of the cartons. Mr. Taylor characterized Defendant's actions as an effort to push away from him in order to flee with the cigarettes. Ms. Smallwood summarized the altercation as follows:

*** [Mr. Taylor] was trying to get him to leave out from behind the counter and they were tussling over the cigarettes.

Okay. [Mr. Taylor] was trying to get the cigarettes out of his hand. And [Defendant] was, you know, trying to grab more cartons off the counter and [Mr. Taylor] was trying to nudge him out from behind the counter so he couldn't get up in there any further. Then [Defendant] ended up shoving him and almost knocked him down.

Although the witnesses agreed that Defendant did not brandish a weapon or make verbal threats in the commission of the offense, both agreed that Defendant and Mr. Taylor engaged in a scuffle and that Defendant pushed Mr. Taylor as he attempted to flee the store. Defendant attempted to impeach Ms. Smallwood's testimony with the contents of her statement to the police, which allegedly omitted any description of Defendant's physical contact with Mr. Taylor. Nonetheless, Defendant did not offer any evidence that contradicted the witnesses' testimony. In the absence of any evidence tending to show that

this theft was committed without the use of force, it was not error for the court to decline to instruct the jury on the lesser included offenses of theft and attempted theft. See State v. Goodson, *supra*, at 5.

Defendant's assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellant.

Exceptions.

BATCHELDER, P.J., CONCURS. BAIRD, J. CONCURS IN JUDGMENT ONLY

RICHARD S. KASAY, Attorney at Law, 611 West Market Street, #1, Akron, Ohio 44303, for Appellant.

MICHAEL T. CALLAHAN, Prosecuting Attorney, and PAUL MICHAEL MARIC, Assistant Prosecuting Attorney, 53 University Avenue, Akron, Ohio 44308, for Appellee.

Footnotes:

1. He was also indicted on one charge of illegal use or possession of drug paraphernalia, in violation of R.C. 2925.14(C)(1), arising from a separate incident. This charge was dismissed after trial.
2. R.C. 2913.02(A)(4) and R.C. 2923.02 prohibit conduct that, if successful, would result in commission of theft by force.

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00-LW-5214 (8th)

THE STATE OF OHIO, Plaintiff-Appellee

v.

WILLIAM ROGERS, Defendant-Appellant

CASE NO. 77723.

8th District Court of Appeals of Ohio, Cuyahoga County.

Decided on November 16, 2000.

CRIMINAL APPEAL FROM THE CUYAHOGA COUNTY COURT OF COMMON PLEAS, CASE NO. CR-378652.

Plaintiff-Appellee: WILLIAM D. MASON, Cuyahoga County Prosecutor, KRISTINE TRAVAGLINI (0067957), Assistant Pros. Attorney, The Justice Center, 9TH Floor, 1200 Ontario Street, Cleveland, Ohio 44113.

For Defendant-Appellant: PAUL MANCINO, JR. (0015576), 75 Public Square, Suite #1016, Cleveland, Ohio 44113-2098.

OPINION

LEO M. SPELLACY, J.

Defendant-appellant William Rogers appeals from his conviction for aggravated robbery. For the following reasons, we affirm the judgment of the trial court.

On July 26, 1999, the grand jury issued an indictment charging appellant with aggravated robbery in violation of R.C. 2911.01 with firearm specifications. At his arraignment on August 13, 1999, appellant entered a plea of not guilty.

As part of a plea agreement, appellant pled guilty to the amended charge of robbery in violation of R.C. 2911.02 on November 22, 1999. However, appellant retained new counsel and, on January 6, 2000, the trial court granted appellant's motion to withdraw this plea.

On January 14, 2000, appellant filed a motion to suppress. The trial court conducted a suppression hearing on February 7, 2000. The trial court overruled appellant's suppression motion, and the case proceeded to trial.

The testimony at the suppression hearing and trial reflects the following: On May 24, 1999, Arnetta Thomas was robbed at a rapid station. According to Ms. Thomas, her attacker pressed a hard object that felt like a gun into her back and said, Stop, or I'll kill you.

Appellant instructed Ms. Thomas to remove her shoes, shirt and jewelry. Ms. Thomas testified that she was also robbed of \$54 - two twenty-dollar bills, a ten-dollar bill and four one-dollar bills. Ms. Thomas complied with appellant's instruction to place her possessions on the ground. As appellant gathered her personal property, Ms. Thomas had an opportunity to observe him in her peripheral vision. According to Ms. Thomas, she stared at appellant. Ms. Thomas then watched appellant run from the scene.

Ms. Thomas ran to a gas station across the street. A clerk at the gas station called the police. When

the police arrived, Ms. Thomas gave the officers an accurate description of appellant. Ms. Thomas provided the police with the following description:

I said he was between 5'6" and 5'8", I said that he weighed maybe 150 to 180 pounds, he had braids in his hair, goatee, Indians jacket, dark pants and he was dark skinned.

(Tr. 207.)

Patrolman Carlos M. Robles broadcast the description of appellant to his fellow officers. He described appellant as a "black male, average height, 5'8" to 5'9, had an Indians jacket on with braids in his hair." (Tr. 252.)

Officer Joseph R. Sedlak responded to the patrolman's broadcast. As he was touring the area near the scene of the crime, Officer Sedlak observed a man that fit the description of the suspect. Appellant fled the scene when Officer Sedlak opened the door of his police car.

The police pursued appellant, and Patrolman Patrick McLain eventually apprehended appellant in the back yard of a nearby residence. Patrolman Robles arrived a short time later with Ms. Thomas. Ms. Thomas then positively identified appellant. Although it was a rainy night, Officer Timothy Stacho testified that the lighting was not a problem during the cold stand identification.

The officers searched the area and found three bags of marijuana; however, the police did not find a gun. Officer Stacho searched appellant and found two wads of cash and a paring knife. One roll of money contained \$54 in the exact denominations as the money taken from Ms. Thomas.

At the close of the state's case, the trial court dismissed the firearm specifications. After deliberation, the jury found appellant guilty of aggravated robbery. In a journal entry filed on February 29, 2000, the trial court sentenced appellant to a four-year prison term. Therefrom, appellant filed a timely notice of appeal with this court.

I.

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION TO SUPPRESS.

In his first assignment of error, appellant claims that the trial court erred in denying his motion to suppress. Appellant insists that the procedure used to identify him was suggestive and, therefore, violated his constitutional right to due process.

A cold stand or one-on-one show up identification may be suggestive under certain circumstances. Nevertheless, such identification procedure is permissible unless there is a substantial likelihood of misidentification. See *State v. Madison* (1980), 64 Ohio St.2d 322. In *Neil v. Biggers* (1972), 409 U.S. 188, the United States Supreme Court held that the following factors must be considered when making a determination as to the reliability of an identification:

1. The opportunity of the witness to view the criminal at the time of the crime;
2. The witness' degree of attention;
3. The accuracy of the witness' prior description of the criminal;

- 4. The level of certainty demonstrated by the witness;
- 5. The length of time between the crime and the confrontation.

In the instant case, the victim viewed appellant before, during and after the attack. Ms. Thomas first observed appellant when she exited the rapid train. Appellant and another man were sitting on a bench smoking marijuana. Ms. Thomas noticed appellant and the other man because they were the only people at the rapid station. After appellant ordered Ms. Thomas to place her property on the ground, she stared at him as he picked up her belongings. Ms. Thomas then watched as appellant ran from the scene.

The victim's testimony demonstrated a high degree of attention. Ms. Thomas provided the police with an accurate description of appellant prior to the cold stand, including race, height, weight, hair style and clothing. Ms. Thomas testified that she was positive of her identification of appellant. Moreover, the identification was conducted a short time after the robbery.

Under these circumstances, we find that the victim's identification of appellant was reliable. Thus, the trial court did not err in denying appellant's motion to suppress. Appellant's first assignment of error is overruled.

II.

DEFENDANT WAS DENIED A FAIR TRIAL BY REASON OF IMPROPER CROSS-EXAMINATION OF DEFENDANT.

In the second assignment of error, appellant challenges

several statements made by the assistant prosecutor during his cross-examination of appellant. In particular, appellant argues that he was deprived of a fair trial when he was forced to admit his prior theft conviction during cross-examination.

Evid.R. 609(A)(3) provides:

(A) For the purpose of attacking the credibility of a witness:

(3) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance.

Ohio courts have consistently held that theft, robbery and aggravated robbery are crimes of dishonesty and, therefore, a conviction for theft can be used for impeachment. See, e.g., State v. Dunning (Mar. 23, 2000), Cuyahoga App. No. 75869, unreported, citing State v. Tolliver (1986), 33 Ohio App.3d 110, 113; State v. Johnson (1983), 10 Ohio App.3d 14, 16.

Moreover, the trial court immediately instructed the jury as follows:

Ladies and gentlemen, the fact that this witness happens to have a criminal record can be used by you in determining his credibility, his believability in his testimony. It cannot be used by you for any other purpose.

(Tr. 426.) The trial court repeated this instruction in its general charge to the jury. We must presume that the jury followed these instructions. State v. Smith (1997), 80 Ohio St.3d 89, 111.

Finally, we note that an appellate court will not reverse a trial court's evidentiary rulings unless the complaining party demonstrates prejudice. See State v. Hood (Dec. 16, 1999), Cuyahoga App. No. 75210, unreported, citing State v. McCray (1995), 103 Ohio App.3d 109. Based upon the foregoing, we find that no reversible error in this regard. Appellant's second assignment of error is overruled.

III.

DEFENDANT WAS DENIED A FAIR TRIAL BY REASON OF IMPROPER PROSECUTORIAL ARGUMENT.

As for his third assignment of error, appellant challenges comments made by the prosecution during closing arguments. In particular, appellant bemoans the fact that the assistant prosecutor vouched for credibility of the police officers that testified.

"The test regarding prosecutorial misconduct in closing argument is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant. State v. Farmer (Apr. 6, 2000), Cuyahoga App. No. 75869, unreported, citing State v. Smith (1984), 14 Ohio St.3d 13, 14. The trial court must afford both sides wide latitude in closing arguments. State v. Jacks (1989), 63 Ohio App.3d 200, 210. It is within the court's sound discretion to determine if a prosecutor has gone beyond the permitted bounds. State v. Bengel (1996), 75 Ohio St.3d 136.

"A judgment will not be reversed if it is clear beyond a reasonable doubt that, absent the prosecutor's remarks, the jury would have found the defendant guilty." Farmer, supra, citing State v. Loza (1994), 71 Ohio St.3d 61, 78. An appellate court must review closing arguments in their entirety to determine whether the disputed remarks were prejudicial. State v. Mann (1993), 93 Ohio App.3d 301, 312. The touchstone of this analysis is the fairness of the trial, not the culpability of the prosecutor. State v. Landrum (1990), 53 Ohio St.3d 107, 112, citing Smith v. Phillips (1982), 455 U.S. 209, 219.

As a general rule, a prosecutor should not express personal opinions as to the credibility of witnesses. See State v. Smith (1984), 14 Ohio St.3d 13, 15. Nevertheless, upon review of the entire record, we find beyond any reasonable doubt that appellant would have been convicted in the absence of these isolated remarks. Thus, appellant's third assignment of error is overruled.

IV.

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION FOR A NEW TRIAL.

In his fourth assignment of error, appellant contends the trial court abused its discretion by denying appellant's motion for a new trial. Appellant argued in his motion for a new trial that he had newly discovered evidence which law enforcement failed to disclose until after the trial, viz., the list of property taken from appellant when he was booked at the police station.

Crim.R. 33(A)(6) provides that a new trial may be granted due to new evidence which the defendant could not have discovered with reasonable diligence and produced at trial. A motion for a new trial made pursuant to Crim.R. 33 is addressed to the sound discretion of the trial court. That decision will not be disturbed upon appeal absent a showing that the trial court abused its discretion. State v. Hawkins

(1993), 66 Ohio St.3d 339. An abuse of discretion connotes more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, or unconscionable attitude on the part of the trial court. State v. Keenan (1998), 81 Ohio St.3d 133, 137.

"To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong possibility that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." State v. Mack (Oct. 28, 1999), Cuyahoga App. No. 75086, unreported, quoting State v. Petro (1947), 148 Ohio St. 505, syllabus.

The basis of appellant's Crim.R. 32(A)(6) motion was his claim that the police failed to provide his counsel with a copy of the booking sheet until after the underlying trial. We note that appellant was booked on May 26, 1999; notwithstanding, appellant's counsel did not request a copy of the booking sheet until January 7, 2000. As the state notes, the police demonstrated more diligence in this regard than appellant's counsel.

More importantly, the booking sheet merely indicated the property taken from appellant at the station, namely twenty-five cents, laces, belts, keys and a pager. The booking sheet does not refute the fact that the police officers had earlier confiscated approximately \$500 from appellant. We find that there is no possibility that the booking sheet would have changed the outcome of the trial. Therefore, appellant's fourth assignment of error is overruled.

V.

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT REFUSED TO INSTRUCT ON THE LESSER INCLUDED OFFENSE.

In his fifth assignment of error, appellant argues that the trial court erred when it failed to instruct the jury on the elements of theft. Appellant insists that theft is a lesser included offense of aggravated robbery. However, theft is not a lesser-included offense of aggravated robbery. State v. Carter (2000), 89 Ohio St.3d 593, 600. Thus, we summarily overrule the fifth assignment of error.

VI.

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN A JURY QUESTION WAS ANSWERED WITHOUT NOTICE OR PRESENCE OF EITHER DEFENDANT OR COUNSEL.

As for his sixth assignment of error, appellant challenges the trial court's ex parte communication with the jury. As a general rule, a criminal defendant has a fundamental right to be present when a court communicates with the jury after deliberations are under way. State v. Schiebel (1990), 55 Ohio St.3d 71, 90. Any communication with the jury by the trial court outside the presence of the defendant is error which may warrant the ordering of a new trial. Id. at 84.

However, a trial court's ex parte communication with the jury does not mandate reversal if it did not prejudice his right to a fair trial. State v. Wilson (1996), 113 Ohio App.3d 737, 747, citing State v. Abrams (1974), 39 Ohio St.2d 53, paragraph two of the syllabus. When the trial judge merely reiterates the previously given instructions, the defendant's right to a fair trial is not prejudiced by the

communication between the judge and jury. Abrams, at 56.

Examples of prejudicial conduct include giving the jury additional instructions, explaining previously given instructions to the jury, or advising the jury that a verdict one way or another is required. See Bostic v. Connor (1988), 37 Ohio St.3d 144, at fn. 6.

In the instant case, the jury wrote, "Picture introduced as item of evidence." The trial court replied in writing, "Not in evidence as an exhibit." Under the circumstance of this case, we find that the trial court's conduct was harmless beyond a reasonable doubt. Based upon the foregoing, we overrule appellant's sixth assignment of error.

VII.

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION FOR JUDGMENT OF ACQUITTAL AS TO AGGRAVATED ROBBERY.

In his seventh assignment of error, appellant claims that the trial court should have granted his Crim.R. 29 motion for acquittal. Appellant argues that there was insufficient evidence to support his conviction for aggravated robbery.

In State v. Thompkins (1997), 78 Ohio St.3d 380, the Supreme Court of Ohio stated:

With respect to sufficiency of the evidence, "'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." Black's Law Dictionary (6 Ed.1990) 1433. See, also, Crim.R. 29(A) (motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction). In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. State v. Robinson (1955), 162 Ohio St. 486, 55 O.O. 388, 124 N.E.2d 148. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. Tibbs v. Florida (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed.2d 652, 663, citing Jackson v. Virginia (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

Id. at 386-387.

The elements of aggravated robbery are set forth in R.C. 2911.01:

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
- (2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

In the instant case, the victim testified that appellant stuck a hard object into her back when he robbed her. According to the victim, the object felt like a gun. Appellant stresses the fact that the victim never saw a gun. Appellant also notes that he did not have a gun in his possession when the police caught him. However, appellant did have a knife in his possession and, pursuant to R.C. 2923.11, a knife is also a deadly weapon.

The state suggests that appellant stuck the knife in his victim's back and pretended that it was a gun. We note that the knife was the only hard object in appellant's possession. The victim could have easily mistaken the handle of the knife for the barrel of a gun. "[A]n item carried or adapted for use as one type of weapon is still a 'deadly weapon,' even though it is not capable of being the kind of weapon it is disguised as or purported to be." *State v. Powers* (1995), 106 Ohio App.3d 696, 702. In *Powers*, the defendant robbed his victim with a wrench disguised with a pair of black socks. The Ninth Appellate District held:

* * * Appellant carried the wrench as a weapon, for the purpose of committing a crime. The fact that he carried it disguised as a different sort of weapon does not alter this fact.

See also *State v. Hicks* (1984), 14 Ohio App.3d 25, 26 ("The courts have previously found inoperable guns, starter pistols, and inoperative BB and pellet guns 'capable of inflicting death' because of their possible use as bludgeons.").

In the instant case, the state presented sufficient evidence to support its theory that appellant used the knife as a simulated gun during the robbery or, in the alternative, discarded a real gun during his attempted escape. Based upon the foregoing, appellant's seventh assignment of error is overruled.

VIII.

THE VERDICT IN THIS CASE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

In his eighth assignment of error, appellant argues that his conviction for aggravated robbery was against the manifest weight of the evidence. In particular, appellant attacks the reliability of the victim's identification of him.

In *Thompkins, supra*, the Supreme Court of Ohio stated:

Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. *Robinson, supra*, 162 Ohio St. at 487, 55 O.O. at 388-389, 124 N.E.2d at 149. Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis added.) *Black's, supra*, at 1594.

When a court of appeals reverses a judgment of a trial court on the basis that the verdict

is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Tibbs, 457 U.S. at 42, 102 S.Ct. at 2218, 72 L.Ed.2d at 661. See, also, State v. Martin (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 219, 485 N.E.2d 717, 720-721 ("The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.").

Id. at 387.

In the case sub judice, we find that the jury rendered the correct verdict. As discussed above, the victim's identification of appellant was accurate and reliable. Based upon her testimony and collaborating evidence, we find that appellant's conviction for aggravated robbery was not against the manifest weight of the evidence. The eighth assignment of error is overruled.

IX.

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN HE WAS IMMEDIATELY SENTENCED TO A TERM OF IMPRISONMENT BEYOND A MINIMUM SENTENCE.

As for his final assignment of error, appellant challenges his four-year prison sentence for aggravated robbery based upon the guidelines set forth in R.C. 2929.14(B). Appellant asserts that the trial court should have imposed the minimum term of imprisonment for a felony of the first degree, viz., three years. R.C. 2929.14(A)(1).

R.C. 2929.14(B) provides:

Except as provided in division (C), (D)(2), (D)(3), or (G) of this section, in section 2907.02 of the Revised Code, or in Chapter 2925. of the Revised Code, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender and if the offender previously has not served a prison term, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless the court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others. The Supreme Court of Ohio has held that the sentencing court must impose the minimum sentence on a first-time offender unless the record of the sentencing hearing reflects that the court found that either or both of the two statutorily sanctioned reasons for exceeding the minimum term warranted the longer sentence. State v. Edmonson (1999), 86 Ohio St.3d 324, 326.

In the instant case, the court merely stated:

Examining the record with respect to your prior involvement with the law, which is somewhat minimal, frankly, but also examining the seriousness of the offenses that you have been convicted of, as well as the emotional harm that was occasioned to this victim, it's the Court's finding and decision today that you be sentenced to the Lorain Correctional

