

**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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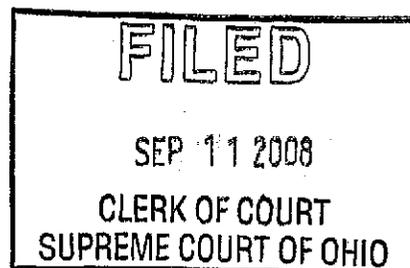


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**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO	:	NO. 2007-0268
Plaintiff-Appellee,	:	
vs.	:	<u>MERIT BRIEF OF</u>
DANIELLE SMITH	:	<u>DEFENDANT-APPELLANT</u>
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 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 2, 2007, this Court accepted Proposition of Law I for plenary consideration. On March 26, 2008, this Court affirmed the First District’s decision.

On April 7, 2008, Appellant filed a Motion for Reconsideration. On the same date, the Ohio Public Defender’s Office and the Cuyahoga Public Defender’s Office jointly filed an Amicus Curiae brief for Reconsideration.

On August 5, 2008, this Court accepted Proposition of Law II for plenary consideration pursuant to its Reconsideration Entry filed on the same date, which was later corrected on August 8, 2008. Appellant’s merit brief now follows.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW: 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.

This Court has determined, in its earlier decision, that Theft is a lesser-included offense of Robbery. However, Appellant now argues that even with that determination, the trial court was not proper in convicting Appellant of felony theft as the essential element of value was not set forth in Appellant's original indictment. Appellant's indictment read as follows:

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 7th 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 involved was \$ 500.00 or more.

There should be no dispute that had Appellant been indicted for felony Theft verses Robbery in this case, value would have been included in the indictment, pursuant to RC 2945.75 (A)(1), as it is an essential element of that offense. According to RC 2945.75 (A)(1), 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." The purpose of this statute is to protect a defendant's constitutional right to know the charge he/she is facing and to have all elements of the offense presented to a grand jury before an indictment is issued. The Ohio Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a grand jury..." "This provision guarantees the accused that the essential facts constituting the offense for which [she] is tried will be found in the indictment of the grand jury. *State v. Headley* (1983), 6 O.St.3d 475, 478-479, 453 N.E.2d 716, 720, *citing, Harris v. State* (1932), 125 O.St. 257, 181 N.E.2d 104, 106. Where one of the vital elements identifying the crime is omitted from the indictment, however, it is defective and cannot be cured by the court as such a procedure would permit the court to convict the accused on a charge essentially different from that found by the grand jury. *Headley*, 6 O.St.3d at 478-479; *see also, State v. Wozniak* (1961), 172 O.St. 517, 520, 178 N.E.2d 800.

A trial court is permitted, though, to convict a defendant of a lesser included offense, so long as that offense is truly a lesser offense of the greater offense set forth in the indictment. According to RC 2945.74, "when the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree charged but

guilty of...a lesser included offense.“ See also, Crim.R. 31 (C). However, nothing in that code section nor criminal rule states that that trial court has the authority to disregard a defendant’s constitutional rights, such as the right to have all essential elements of an offense presented to a grand jury before being charged. In order for a trial court to find that an offense is a lesser included offense of the greater offense, it must make the following determination: (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. Deem* (1988), 40 O.St.3d 205, 533 N.E.2d. 294. If Theft, as alleged in the indictment, is a lesser included offense of Robbery, it stands to reason that the trial court can only find that particular theft offense (as alleged) is a lesser included offense. If value is not set forth in the original indictment, then the trial court cannot amend the indictment to include that essential element just because it finds the defendant guilty of the lesser offense. To do otherwise would violate the defendant’s right to have each and every element presented to the grand jury. Instead, the trial court can only find the defendant guilty of misdemeanor theft because the indictment is “effective to charge only the least degree of the offense.” See, RC 2945.75 (A)(2).

In this case, the State has admitted, in its Memorandum in Response filed on March 2, 2007, that value was never presented to the grand jury because the offense of robbery does not require it. Knowing that to be the case, the trial court cannot effectively

amend the indictment to include value just because it finds that the State failed to prove the greater offense of robbery. As Justice Pfeifer stated in his dissent in the original decision, “had the prosecutor in this case simply indicted the defendant for both theft and robbery,” this Court would not have ever heard this case. *State v. Smith*, 117 Ohio St.3d 447, 455, 2008-Ohio-1260, 884 N.E.2d 595.

Appellant further argues that not only was the indictment defective due to the omission of the value element, but it was also defective due to the fact that the *mens rea* element of Robbery was not present. This Court recently held in *Colon I* that if the indictment did not meet constitutional requirements, ie, did not include all essential elements of the offense charged, then the defendant is not properly informed of the charge so as to put forward his defense. *State v. Colon*, 118 O.St.3d 26, 28, 32, 2008-Ohio-1624, 885 N.E.2d 917. Although this Court later issued *Colon II*, which narrowed the applicability of *Colon I*, Appellant states that *Colon II* does not bar her argument because there were several errors with the indictment and the court proceeding to warrant review. In addition, Appellant did object to the trial court’s finding of felony theft. *See, State v. Colon*, Slip Opinion No. 2008-Ohio-3749.

The State will undoubtedly argue that the indictment was not defective because value is not an essential element of theft. In fact, this Court held, in its earlier decision in this case, that the elements of theft do not include value, “rather, value is a special finding to determine the degree of the offense...” Appellant argues, though, that that statement flies in the face of statutory law as well as previous decisions issued by this

Court. In *State v. Edmondson*, this Court held that since the value of the stolen property elevates the degree of the offense and does not simply enhance the penalty, the value of the property stolen is an essential element of the crime and must be proved by the State. See, *State v. Edmondson*, 92 O.St.3d 393, 398, 2001-Ohio-210, 750 N.E.2d 587, citing, *State v. Henderson* (1979), 58 O.St.2d 171, 173-174, 389 N.E.2d 494, 495 (factor that enhances the degree of theft offense is an element that the state must prove beyond a reasonable doubt). This Court has also held that a circumstance that elevates the crime to a more serious degree is an element that must be found by the jury or the trial court or else it constitutes a finding of the least degree of the offense charged. See, RC 2945.75 (A)(2); *State v. Pelfrey*, 112 O.St.3d 422, 425, 2007-Ohio-256, 860 N.E.2d 735.

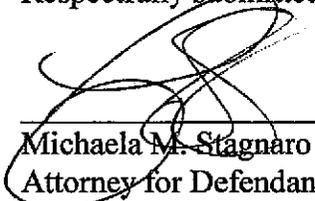
If value is an element of felony theft, then it should be treated as any other element of that offense. This Court's distinction between "element" and "special findings" has opened a door that could potentially violate an accused's right to a trial by jury as guaranteed by the Sixth Amendment. The United States Supreme Court has made clear that the Constitution prohibits acts by the government to "treat as a non-element a fact that by law sets or increases punishment." *Apprendi v. New Jersey* (2000), 530 U.S. 466, 481, 521, 120 S.Ct. 2348. The distinction made here presents a serious risk that lower courts will take this as a signal to revert to a process whereby certain elements that expose a defendant to greater punishment are withdrawn from the consideration of the jury based solely on their label as "special findings."

Even if this Court believes that Appellant was properly convicted of a Theft in this case, Appellant argues that the offense should only have been a misdemeanor offense since there was no allegation of value in the indictment. Value is an essential element of felony theft, and by not alleging value in the indictment, it rendered the indictment defective. Further, the trial court should not be able to improperly amend a defective indictment by finding a defendant guilty of a lesser offense, as it violates the defendant's constitutional right to have all essential elements of the offense presented to a grand jury. Since value was never presented to the grand jury in this case, the trial court could only have convicted Appellant of misdemeanor theft.

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.

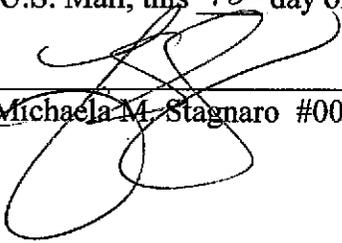
Respectfully submitted,



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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 10th day of September, 2008.



Michaela M. Stagnaro #0059479

APPENDIX

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

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

Ohio Supreme Court Decision.....A12

Reconsideration Entry.....A23

RC 2911.02A24

RC 2945.74A25

RC 2945.75A26

Criminal Rule 31 (C).....A27

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	: NO.	07-0268
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

NOTICE OF APPEAL OF APPELLANT DANIELLE SMITH

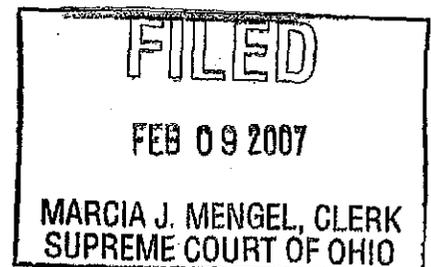
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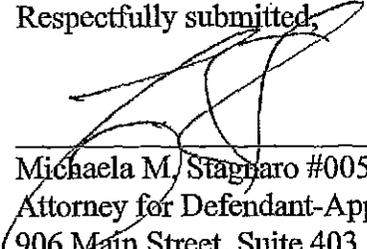


Notice of Appeal of Appellant Danielle Smith

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.

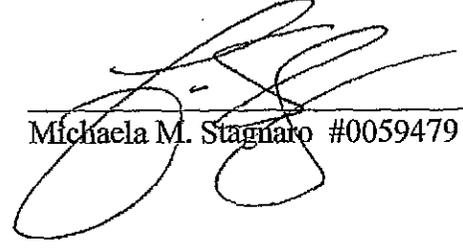
Respectfully submitted,



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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 8th day of February, 2007.



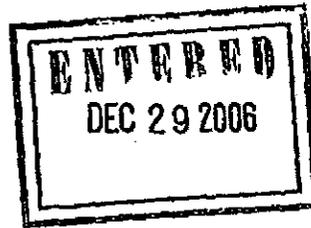
Michaela M. Stagnaro #0059479

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



D71426671

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

OHIO FIRST DISTRICT COURT OF APPEALS

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 MERCHANDISE 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,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

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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.

THE STATE OF OHIO, APPELLEE, v. SMITH, APPELLANT.

[Cite as *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260.]

In determining whether an offense is a lesser included offense of another when a statute sets forth mutually exclusive ways of committing the greater offense, a court is required to apply the second part of the test established in State v. Deem to each alternative method of committing the greater offense — Theft is a lesser included offense of robbery.

(No. 2007-0268 — Submitted November 28, 2007 — Decided March 26, 2008.)

APPEAL from the Court of Appeals for Hamilton County,

No. C-060077, 2006-Ohio-6980.

SYLLABUS OF THE COURT

1. In determining whether an offense is a lesser included offense of another when a statute sets forth mutually exclusive ways of committing the greater offense, a court is required to apply the second part of the test established in *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph three of the syllabus, to each alternative method of committing the greater offense.
2. Theft, as defined in R.C. 2913.02, is a lesser included offense of robbery, as defined in R.C. 2911.02.

O'DONNELL, J.

{¶ 1} The issue presented for consideration in this appeal concerns whether the offense of theft is a lesser included offense of the crime of robbery. Appellate courts have reached different conclusions on this question, prompting us to resolve the issue. We hold that theft is a lesser included offense of robbery.

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{¶ 2} The events giving rise to our current consideration arose on April 7, 2005, when Danielle Smith, Lashay Meadows, and Meadows's children shoplifted merchandise from the Macy's department store located in the Tri-County Mall in Hamilton County. On that day, Rachel Cornett, a Macy's loss-prevention supervisor, saw the group with a shopping cart that had empty Macy's bags in it. Cornett went to the security office to watch Smith and Meadows on the security monitors. Cornett watched as Smith and Meadows removed multiple items from the clothing racks, took them into the fitting rooms, and then returned only some of the items to the clothing rack. During Smith's trial, the court viewed the store's tape of what Cornett had seen on the monitors. The closed-circuit footage corroborated Cornett's observations.

{¶ 3} As the group began to leave the store, Meadows and her children pushed the cart past all the sales counters, with Smith following several feet behind. After Meadows and her children left the store with the cart, Roger Sauerwein, Macy's loss-prevention manager, stopped them. Seeing the confrontation, Smith began looking at clothing on a rack, and at that point, Sauerwein asked that she accompany him to the security office. While walking toward the office, Smith tipped over a display table and began hitting Sauerwein and Cornett with hangers. When they tried to get hold of Smith, she bit them. During this time, Smith told Meadows to take the children and leave.

{¶ 4} The shopping cart contained more than \$1,600 worth of clothing.

{¶ 5} After further investigation, a grand jury indicted Smith for robbery in violation of R.C. 2911.02(A)(3), alleging that "in committing or attempting to commit a theft offense * * * [Smith] used or threatened the immediate use of force against" Sauerwein and Cornett. Smith waived a jury trial, and the case was tried to the court. At the close of evidence, the trial judge found overwhelming evidence that Smith had participated in the theft of the clothing. Specifically, the 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.” The trial court expressed doubt, however, with respect to the robbery charge. It therefore found Smith guilty of fifth-degree felony theft as a lesser included offense of robbery.

{¶ 6} Smith appealed her conviction to the Hamilton County Court of Appeals, arguing that fifth-degree felony theft is not a lesser included offense of robbery, because an offender could commit a robbery without committing a theft. In addition, she urged that fifth-degree felony theft differs from robbery in that it requires the state to prove that “the property or services stolen is five hundred dollars or more and is less than five thousand dollars,” R.C. 2913.02(B)(2), while robbery has no element regarding the value of stolen property. She therefore asserted that petty theft, a first-degree misdemeanor containing no value element, was the greatest offense of which she could have been convicted.

{¶ 7} The appellate court cited *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, in which we modified the test announced in *State v. Kidder* (1987), 32 Ohio St.3d 279, 513 N.E.2d 311, to determine whether an offense was a lesser included offense of another. The court of appeals stated that theft did not appear to be a lesser included offense of robbery, because robbery could be committed by depriving a victim of property valued at less than \$500, while theft involved property valued at \$500 or more. Nonetheless, the court felt constrained by *State v. Davis* (1983), 6 Ohio St.3d 91, 6 OBR 131, 451 N.E.2d 772, in which this court determined that theft by threat is a lesser included offense of robbery, and it therefore affirmed the judgment of the trial court.

{¶ 8} Smith appealed that determination to this court, and we granted discretionary review.

{¶ 9} The three-part test we set forth in *Deem* provides: “An offense may be a lesser included offense of another if (i) the offense carries a lesser

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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.” *Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph three of the syllabus. We have repeatedly stated that “[i]n determining whether an offense is a lesser included offense of the charged offense, “the evidence presented in a particular case is irrelevant to the determination of whether an offense, as statutorily defined, is necessarily included in a greater offense.” ’ ’ *Shaker Hts. v. Mosely*, 113 Ohio St.3d 329, 2007-Ohio-2072, 865 N.E.2d 859, ¶ 11, quoting *State v. Barnes* (2002), 94 Ohio St.3d 21, 26, 759 N.E.2d 1240, quoting *State v. Kidder* (1987), 32 Ohio St.3d 279, 282, 513 N.E.2d 311. See also *State v. Koss* (1990), 49 Ohio St.3d 213, 218-219, 551 N.E.2d 970. *Deem* was intended to require analysis of the statutory elements conducted in the abstract without reference to the specifics of any individual case.

{¶ 10} Because the offense of robbery carries a greater penalty than the offense of theft, and because robbery contains an element that the offense of theft does not, Smith’s contention is with respect to only the second element of the *Deem* test.

{¶ 11} R.C. 2911.02 defines “robbery” and states:

{¶ 12} “(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:

{¶ 13} “ * * *

{¶ 14} “(3) Use or threaten the immediate use of force against another.”

{¶ 15} R.C. 2913.02 defines “theft” and states:

{¶ 16} “(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:

{¶ 17} “(1) Without the consent of the owner or person authorized to give consent;

{¶ 18} “(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

{¶ 19} “(3) By deception;

{¶ 20} “(4) By threat;

{¶ 21} “(5) By intimidation.”

{¶ 22} The troublesome part of the *Deem* test is the second part, which requires that “the greater offense cannot, as statutorily defined, *ever* be committed without the lesser offense, as statutorily defined, also being committed.” (Emphasis added.) *Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph three of the syllabus. The problem occurs because as statutorily defined, robbery contains one element that may be proved alternatively—as theft *or* attempted theft. Since the crime is defined as constituting mutually exclusive alternatives, it is possible for robbery to be committed without committing theft if the robbery is committed by an *attempted* theft.

{¶ 23} Based on this problem with the test, Smith argues that theft is not a lesser included offense of robbery and cites our decision in *State v. Carter* (2000), 89 Ohio St.3d 593, 734 N.E.2d 345, a death-penalty case in which Carter raped his adoptive grandmother and killed her by stabbing her 18 times before taking \$150 in cash from her purse and fleeing. In that case, Carter argued that the court erred by failing to instruct the jury on theft, which he claimed was a lesser included offense of aggravated robbery. *Id.* at 599-601.

{¶ 24} In *Carter*, we applied *Deem* and concluded that theft was not a lesser included offense of aggravated robbery, because the offense of aggravated robbery could be committed in the course of an attempted theft, which does not require the accused to actually exert control over the property of another, while the crime of theft does; hence, according to *Deem*, the greater offense –

aggravated robbery – could be committed without the lesser offense – theft – also being committed.

{¶ 25} *Carter*, however, conflicted with an earlier decision holding to the contrary, *State v. Davis* (1983), 6 Ohio St.3d 91, 95, 6 OBR 131, 451 N.E.2d 772, on which the court of appeals in this case relied. *Davis* held that theft is a lesser included offense of robbery because it is a crime of lesser degree and contains no element that is not also an element of robbery. *Id.* at 95. Although *Davis* was decided before *Deem*, the court asked questions similar to those asked in *Deem*. But rather than determining whether a robbery can be committed without committing a theft, as required by part two of the test, the court in *Davis* determined only that theft does not include any element that is not also an element of robbery, a different inquiry.

{¶ 26} We explain the discrepancy between the outcomes in *Carter* and *Davis* by noting that *Deem*, upon which *Carter* relied, did not analyze an offense of the type here; that is, an offense that by statutory definition included as one of its elements “committing or attempting” to commit another offense. In fact, the court used kidnapping, R.C. 2905.01, as its “pedagogic example.” *Deem*, 40 Ohio St.3d at 209, 533 N.E.2d 294. Kidnapping differs from robbery in that in order to prove kidnapping, the prosecutor is not required to prove as one of the elements that the defendant committed or attempted to commit another crime.

{¶ 27} We therefore modify the analysis required by *Deem* to address statutes like robbery, in which one element of the offense can be satisfied by proving either that the defendant actually committed another offense or attempted to commit it. This analysis looks at each alternative separately, similar to the method set forth by the United States Supreme Court in *Whalen v. United States* (1980), 445 U.S. 684, 694, 100 S.Ct. 1432, 63 L.Ed.2d 715. See also *Pandelli v. United States* (C.A.6, 1980), 635 F.2d 533, 537 (“The theory behind the [*Whalen*] analysis is that a criminal statute written in the alternative creates a separate

offense for each alternative and should therefore be treated for double jeopardy purposes as separate statutes would”). We adopted a similar test in *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542, for analyzing when successive prosecutions are permissible. In that case, we held that when looking at “a statute containing alternative elements, each statutory alternative should be construed as constituting a separate offense and analyzed accordingly.” Id. at ¶ 40.

{¶ 28} Accordingly, when applying the second part of the *Deem* test in cases involving statutes phrased in the alternative, such as the robbery statute, a court must consider each alternative method of committing the greater offense when deciding whether “the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed.” Therefore, in determining whether an offense is a lesser included offense of another when a statute sets forth mutually exclusive ways of committing the greater offense, a court is required to apply the second part of the test established in *Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph three of the syllabus, to each alternative method of committing the greater offense. Because robbery may be committed by either committing a theft *or* attempting to commit a theft, there are two possible ways to commit the offense: robbery by theft *or* robbery by attempted theft. If these two alternatives are essentially treated as separate offenses, then fifth-degree felony theft is a lesser included offense of robbery as statutorily defined in the alternative of robbery by theft, because it would be impossible to ever commit a robbery by theft without also committing a theft.

{¶ 29} Accordingly, theft, as defined in R.C. 2913.02, is a lesser included offense of robbery, as defined in R.C. 2911.02.

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{¶ 30} Thus, based on our holding that theft is a lesser included offense of robbery, the trial court properly convicted Smith of the lesser included offense of theft.

{¶ 31} Smith also argues that theft requires proof of the value of the property stolen, while robbery has no such element. But the elements of theft do *not* include value. Rather, value is a special finding to determine the degree of offense, but is not part of the definition of the crime. Thus, Smith's position is not well taken.

{¶ 32} Accordingly, we clarify our decision in *Deem* and affirm the judgment of the appellate court.

Judgment affirmed.

MOYER, C.J., and LUNDBERG STRATTON, O'CONNOR, LANZINGER, and CUPP, JJ., concur.

PFEIFER, J., dissents.

PFEIFER, J., dissenting.

{¶ 33} This case should have been resolved by a simple entry: "Reversed on the authority of *State v. Carter* (2000), 89 Ohio St.3d 593, 734 N.E.2d 345." In *Carter*, this court was asked, for all intents and purposes, the same question that it faces today — is theft a lesser included offense of robbery? — and answered no:

{¶ 34} "The issue becomes whether aggravated robbery * * * can ever be committed without theft * * * also being committed. We answer that question in the affirmative because aggravated robbery can be committed in the course of an 'attempted theft.' R.C. 2913.02; 2923.02. Theft requires the accused to actually obtain or exert control over the property or services of another; attempted theft does not. Since theft is not a lesser-included offense of aggravated robbery, the

trial court did not err by not providing a lesser-including-offense instruction.” *Carter*, 89 Ohio St.3d at 601, 734 N.E.2d 345.

{¶ 35} In *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, this court established a tripartite test for determining whether one offense is a lesser included offense of another. *Carter* is the only case decided by this court on this issue since the promulgation of the *Deem* test. *Carter* could not be more clear and could not be more clearly applicable to this case. It was my impression that this court accepted jurisdiction in this case because the appellate court simply had overlooked this court’s decision in *Carter* – the case is not even mentioned in the appellate court’s decision. But the *majority* also ignores this court’s decision in *Carter*. Does the majority overrule *Carter*? No – it is more important to the majority to perpetuate the folly of *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, and its almost-always-inapplicable set of factors for overruling precedent than it is to set forth a coherent jurisprudence. Thus, the law in Ohio now says that theft is a lesser included offense of robbery but that theft is *not* a lesser included offense of aggravated robbery. Welcome to Wonderland.

{¶ 36} To get to this point, the majority relies upon a United States Supreme Court case, *Whalen v. United States* (1980), 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715, that this court has rejected on multiple occasions. *Whalen* addresses the issue of allied offenses of similar import in federal criminal statutes; it does not address how to determine whether one offense is a lesser included offense of another. Although *Whalen* is not exactly on point, it could be considered instructive on the issue of lesser included offenses had it not been roundly rejected by this court on multiple occasions, as discussed below.

{¶ 37} In *Whalen*, a felony-murder case, the defendant was convicted and sentenced consecutively for both rape and felony murder. Rape was one of the six lesser offenses that could become an element of a felony-murder charge. The

government argued in *Whalen* that since there were six separate crimes that could satisfy the underlying felony requirement for felony murder, felony murder did not require proof of rape, and a defendant thus could be sentenced for both rape and felony murder. The court, however, held, “In the present case, * * * proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense.” *Whalen*, 445 U.S. at 694, 100 S.Ct. 1432, 63 L.Ed.2d 715.

{¶ 38} This court has repeatedly held the exact opposite regarding Ohio’s aggravated-murder statute, holding that defendants can be convicted of and sentenced for both the underlying element (rape, kidnapping, arson) as well as for aggravated murder. “This court has repeatedly held that aggravated murder and kidnapping are not allied offenses of similar import under R.C. 2941.25. See *State v. Coley* (2001), 93 Ohio St.3d 253, 265, 754 N.E.2d 1129; *State v. Keenan* (1998), 81 Ohio St.3d 133, 154, 689 N.E.2d 929; *State v. Jells* (1990), 53 Ohio St.3d 22, 32-33, 559 N.E.2d 464.” *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 51. See also *State v. Richey* (1992), 64 Ohio St.3d 353, 369, 595 N.E.2d 915, overruled in part, on other grounds, by *State v. McGuire* (1997), 80 Ohio St.3d 390, 686 N.E.2d 1112; *State v. Grant* (1993), 67 Ohio St.3d 465, 474-475, 620 N.E.2d 50; *State v. Hill* (1992), 64 Ohio St.3d 313, 331-332, 595 N.E.2d 884.

{¶ 39} *Whalen* has been specifically repudiated by this court. In *State v. Rance* (1999), 85 Ohio St.3d 632, 636-637, 710 N.E.2d 699, this court adopted Justice Rehnquist’s *dissent* in *Whalen* as the law in Ohio. In *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542, cited by the majority, this court recognized the inapplicability of *Whalen* in Ohio, noting that this “court rejected *Whalen*’s treatment of alternative-element statutes in the context of determining whether two crimes constitute ‘allied offenses of similar import’ for purposes of

cumulative punishments under R.C. 2941.25.” *Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, 806 N.E.2d 542, ¶ 40, fn. 3. *Zima* identified one exception to this court’s blanket rejection of *Whalen* — where a defendant is tried successively for the same act. *Id.* This court made clear that *Whalen* is applicable in Ohio only in those successive prosecution cases.

{¶ 40} The majority, by its own admission, essentially creates two new crimes in Ohio’s criminal code – robbery by theft and robbery by attempted theft. Must prosecutors respond to this court’s decision by indicting defendants for either robbery by theft or robbery by attempted theft? Will they indict for both to cover their bases? If so, that is rather ironic: we would not even be hearing this case had the prosecutor in this case simply indicted the defendant for both theft and robbery. To correct that mistake in this inconsequential case, the majority has had to ignore this court’s own precedent, rely on other, semi-relevant precedent that this court has already rejected, meddle with the *Deem* test, which has been in place for nearly 20 years, and rewrite a criminal statute. The Queen of Hearts would be proud.

Joseph T. Deters, Hamilton County Prosecuting Attorney, and Judith Anton Lapp, Assistant Prosecuting Attorney, for appellee.

Michaela M. Stagnaro, for appellant.

FILED

AUG 08 2008

CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

State of Ohio

v.

Danielle Smith

Case No. 2007-0268

(CORRECTED)

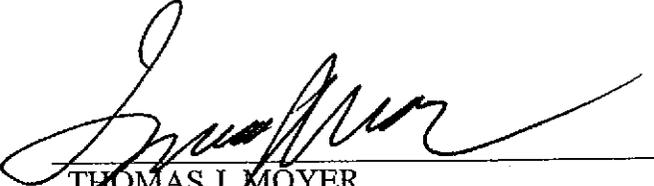
RECONSIDERATION ENTRY

Hamilton County

Upon consideration of the motion for reconsideration,

It is ordered by the Court, sua sponte, that the Court accepts jurisdiction over Proposition of Law No. II. The parties shall brief that issue in accordance with the Rules of Practice of the Supreme Court of Ohio. Being that the record has already been filed, appellant's brief is due 40 days from the date of this corrected entry.

(Hamilton County Court of Appeals; No. C060077)



THOMAS J. MOYER
Chief Justice

2911.02**Statutes and 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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2945.74**Statutes and 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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2945.75**Statutes and Session Law****TITLE [29] XXIX CRIMES -- PROCEDURE****CHAPTER 2945: TRIAL****2945.75 Degree of offense - proof of prior convictions.**

2945.75 Degree of offense - proof of prior convictions.

(A) When the presence of one or more additional elements makes an offense one of more serious degree:

(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

(B)(1) Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

(2) Whenever in any case it is necessary to prove a prior conviction of an offense for which the registrar of motor vehicles maintains a record, a certified copy of the record that shows the name, date of birth, and social security number of the accused is prima-facie evidence of the identity of the accused and prima-facie evidence of all prior convictions shown on the record. The accused may offer evidence to rebut the prima-facie evidence of the accused's identity and the evidence of prior convictions. Proof of a prior conviction of an offense for which the registrar maintains a record may also be proved as provided in division (B)(1) of this section.

Effective Date: 01-01-1974; 04-04-2007

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RULE 31

Ohio Court Rules

RULES OF CRIMINAL PROCEDURE

Current through July 1, 2008

RULE 31 Verdict

RULE 31. Verdict

(A) Return.

The verdict shall be unanimous. It shall be in writing, signed by all jurors concurring therein, and returned by the jury to the judge in open court.

(B) Several defendants.

If there are two or more defendants the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(C) Conviction of lesser offense.

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

(D) Poll of jury.

When a verdict is returned and before it is accepted the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.

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