

IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 2007-0268  
Plaintiff-Appellee : On Appeal from the Hamilton County  
Court of Appeals, First Appellate  
vs. : District  
DANIELLE SMITH : Court of Appeals  
Case Number C-060077  
Defendant-Appellant :

**PLAINTIFF-APPELLEE'S SUPPLEMENTAL MERIT BRIEF**

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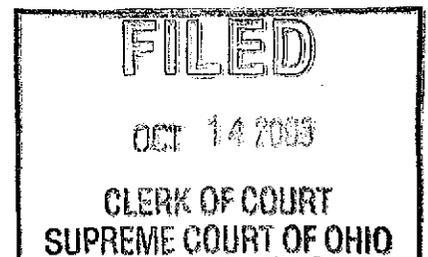


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DANIELLE SMITH : PLAINTIFF-APPELLEE'S  
 : SUPPLEMENTAL MERIT BRIEF  
Defendant-Appellant :

STATEMENT OF THE CASE AND FACTS

a) **Procedural Posture:**

Smith was indicted on one count of Robbery on April 15, 2005. A hearing on a Motion to Suppress was held on September 29, 2005. The motion was overruled, and on the same date, Smith's case was tried to the bench. The court found her guilty of a reduced charge of Theft, a fifth degree felony. Smith was sentenced to serve eleven months with the Ohio Department of Corrections. (T.d. 32) She filed a direct appeal with the First District Court of Appeals. (See T.d. 1) Her conviction was affirmed on December 29, 2006. (T.d. 22) She filed a Memorandum in Support of Jurisdiction, and this Court accepted the appeal on the First Proposition of Law on May 7, 2007. (T.d. 30) In an opinion dated March 26, 2008, this Court held that theft is a lesser included offense of robbery.<sup>1</sup>

Defendant-appellant filed a Motion for Reconsideration on April 7, 2008. The court granted this motion on August 5, 2008, and ordered the parties to brief the defendant-appellant's Second Proposition of Law.

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<sup>1</sup> *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, 884 N.E.2d 595.

**b) Facts:**

Rachel Cornett was a loss prevention supervisor for Macy's at the Tri-County Mall. (T.p. 32) She had held this position for four-and-a-half years. On April 7, 2005, Ms. Cornett was walking out of the employee break room when she noticed two women with several children and a shopping cart. (T.p. 34) She immediately noticed that there were empty shopping bags in the cart. (T.p. 34) Ms. Cornett went into a room set up with closed-circuit cameras and watched the women. She said that they were "double-selecting" items of clothing. When a customer double-selects, the person chooses two of the same blouse, for example, which are on hangers. When both are picked up simultaneously, it appears that the customer only took one item off the rack. (T.p. 35, 36) Customarily, the person goes into the fitting room with both items but exits with only one, which is placed back on the rack. (T.p. 36)

Ms. Cornett observed both women, one of whom she identified as Smith, taking multiple items into the boys' fitting room. They also took the shopping cart with the empty bags into the fitting room. (T.p. 36) Smith exited the room with only two or three items. She pulled the shopping cart behind her and handed it off to a small boy. (T.p. 27) At this point, a trained sales associate called Ms. Cornett to make a report. (T.p. 36) When the fitting room was checked, employees found empty hangers left behind. (T.p. 37)

The group of women and children started to leave the store. The children walked in front, pushing the shopping cart themselves. The other woman followed and Smith walked about five feet behind her. (T.p. 38) The children and woman "proceeded past all points of sale." (T.p. 38) The children had walked out of the store with the woman following when a security guard, referred to as Roger, stopped the group. (T.p. 38) This all occurred in Ms. Cornett's presence. The guard saw

Smith watching this. Smith turned around and "tried to enter her way back into the department." (T.p. 38) The guard stopped her and identified himself. All individuals were to be escorted back to the store office to be processed. (T.p. 38) The group began to walk through the store toward the office. Partway there, Smith asked Ms. Cornett to show her some identification. Ms. Cornett had run out of the camera room so quickly to respond to the shoplifting in progress that she did not take her identification card with her. She told Smith this, but stated that she had her store radio and handcuffs with her. (T.p. 38) She told Smith that "all I wanted to do was go fill out some paperwork and, you know, we would proceed from there." (T.p. 39)

"That is when she pushed me and told the other female to take the children and go. My manager then turned around, seen what was going on. \* \* \* She then picked up hangers, proceeded to hit Roger and myself with the hangers, attempted to pick up manikins, was throwing them all over the department.

There was a table of gowns that were folded. She tipped that over. We tried to restrain her. Every time we would try to restrain her, she would fight back. She bit me on my left arm." (T.p. 39, 40)

Ms. Cornett said the security tried to calm Smith and get her back to the office. She continued to "cuss and carry on" and knock over merchandise tables. (T.p. 40) Ms. Cornett said that the security guard tried to hold Smith so that Ms. Cornett could place handcuffs on her. He grabbed Smith from behind, and she bit him, also. (T.p. 40)

Smith's yelling during the commotion could be heard by a management team that was meeting in executive offices nearby. A member of the team, a corporate safety auditor, came out and approached. At that time, Smith became more cooperative. (T.p. 40, 41) During the time the employees were dealing with Smith, the other woman left the store. (T.p. 41)

The state presented a surveillance videotape filmed by Ms. Cornett that depicts Smith and another woman as they selected clothes from the racks and filled the shopping cart. (T.p. 42; State's Exhibit 3) Smith can be seen going in and out of the fitting room, taking more clothes with her each time. (T.p. 42) The shopping bags that were observed in the cart - previously empty - were now filled with clothes. The total amount of the clothes was \$1,674.95. One bag held a cookware set that had been purchased by Smith. She had a receipt for this. (T.p. 47)

Smith testified that on April 7, 2005, she went to a friend's house. (T.p. 75) She was picking up her friend's children and going to the Newport Aquarium. She was going to meet her boyfriend there. (T.p. 76) She said that another friend, Lashay Meadows, was also at the friend's house. (T.p. 76) Smith testified that Meadows had a Macy's gift card worth \$400, given to her by her mother. (T.p. 60, 65) Meadows, who was unemployed, was trying to sell the card for cash. (T.p. 60, 74-76) Meadows also told Smith she was going to the mall. Smith said she needed to buy some things and decided to go with her. (T.p. 75) They agreed that Meadows would pay for Smith's purchases with the gift card, and that Smith would reimburse her with cash. (T.p. 61) She said Meadows told her that "she would give me a good deal on, you know, going to get some clothes." (T.p. 59, 60) She explained:

"Well, actually, she came with the card, saying she had the card, she was trying to sell it. Of course, you know, I was like, yeah, I wanted to buy it because, regardless, I was going to have to buy some things, so it was better to get a discount than to pay, you know, full, and because she was going to sell her card, regardless." (T.p. 75, 76)

Smith rode with Meadows and Meadows' children to the Tri-County Mall. She admitted that she accompanied them into the dressing room. (T.p. 69) She said she left the dressing room to find

the clothes she wanted to buy and then hung them on the cart they had taken into the fitting area. (T.p. 62, 69) She had picked out about seven outfits for herself. (T.p. 62)

On the surveillance tape, Meadows can next be seen pushing the shopping cart and walking towards the exit. Smith said she didn't know what Meadows was doing and assumed she would come back to a counter where Smith was standing. (T.p. 62) Smith admitted that she saw that her clothes were not hanging on the cart "in plain view" anymore. (T.p. 70) She said she went to look for Meadows by walking down another aisle. She saw a man bringing Meadows back into the store. She testified that when she saw this, she began putting it all together. "Then when I see these security people, that's when it all registered to me what was going on \* \* \* ." (T.p. 73) Smith said the security guard told her to accompany them to an office.

Smith testified that she asked "Why am I going back there? I didn't do anything, and I wasn't stealing anything." (T.p. 63) She said Ms. Cornett became very rude and threatened to handcuff her if she did not cooperate. Smith said the security guard walked by Meadows and Ms. Cornett walked closer to her. She said she "cussed a little tiny bit" at Ms. Cornett because she was "just on my back, looking like I was trying to run off or something." (T.p. 64) Smith said that at one point when they were walking to the office, she didn't know whether they were turning right or left. At that time, according to Smith, Ms. Cornett said to her "Oh, it's robbery now." (T.p. 64)

Smith said she did not feel that she was resisting in any way. She said that Ms. Cornett did not try to understand "that it was a simple mistake that, you know, I didn't know which way we were going. I mean, she jumped on my back. That's how her thumb ended up in my mouth." (T.p. 65) Smith said she did not intentionally bite Ms. Cornett, but that because she was taller than Ms. Cornett, "she couldn't, I guess, estimate which way it went, or whatever." (T.p. 65)

Smith wrote out two statements for the police. (State's Exhibits 1 and 2) In one, she wrote "Lashay was on her way to the mall. I asked could I ride with her because I was about to go to the Dayton Mall." (T.p. 77; State's Exhibit 2) At trial, she said this statement was not correct, but that she "just wrote something so I could be able to go home." (T.p. 78) She also wrote: "When we got down to the clothes, she says just pick what I want and give it to her." (T.p. 80)

Smith acknowledged her prior convictions: two for theft, one for attempted theft and one for falsification, all in 2000, and a series of felony forgery convictions in 2002. (T.p. 66, 68)

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### SECOND PROPOSITION OF LAW: A ROBBERY INDICTMENT NEED NOT CONTAIN THE ELEMENTS OF THE UNDERLYING THEFT OFFENSE.

Smith argues that the trial court did not have the authority to find her guilty of the lesser included offense of felony theft because the robbery indictment did not specify the value of goods stolen. Based upon *State v. Colon*, she argues that the indictment was defective in charging a felony theft because the grand jury was never presented with the essential element of value.<sup>2</sup> Value is not an element of robbery and it need not be included in an indictment for that crime.<sup>3</sup> When a defendant is convicted of the lesser included offense of theft, the judge or the jury must make a finding of value based upon the evidence at trial to determine the degree of the offense. This Court's characterization of value as a "special finding" rather than an "element" did not change the state's burden of proof required to prove the degree of the offense or take the determination of value away from the jury. Nor did it change the fact that a defendant is put on notice that he must defend against a theft charge when he is indicted for robbery.

#### *Argument*

This Court has conclusively held that value is not an element of theft, but is a special finding that must be made by either a judge or a jury to determine the degree of the offense charged.<sup>4</sup> Therefore, it need not be included in an indictment. This holding complies with both the Ohio Constitution and prior case law enunciated by this Court.

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<sup>2</sup> *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917; *State v. Colon II*, 2008-Ohio-3749.

<sup>3</sup> See R.C. 2911.02.

<sup>4</sup> *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, ¶31, 884 N.E.2d 595.

The Ohio Constitution provides that “ no person shall be held to answer for a \* \* \* crime, unless on presentment or indictment of a grand jury.”<sup>5</sup> This has been held to include a requirement that the indictment must contain the elements which identify the crime charged.<sup>6</sup> Crim. R. 7(B) states, however, that there is no requirement that an indictment contain “allegations not essential to be proved.”<sup>7</sup> This Court has also iterated the situations in which the elements of a crime need not be included in an indictment.<sup>8</sup> In *State v. Buehner*, for example, the court stated that an indictment that names or identifies an underlying offense, without spelling out its elements, is “sufficient to provide the appellee with adequate notice of the charge against him.”<sup>9</sup> Applying this doctrine, many appellate courts have held that it is proper to instruct a jury on the elements of an underlying offense that was not indicted separately. Put another way, an indictment for the predicate offense is sufficient without stating the elements of the underlying offense.<sup>10</sup>

In *State v. Childs*, this Court held that in an indictment for conspiracy, only the elements of the conspiracy must be stated in the indictment. The court stated that in a conspiracy case, the elements of the crime which the defendant has conspired to commit do not need to be included in

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<sup>5</sup> Article I of the Ohio Constitution, §10.

<sup>6</sup> *State v. Headley* (1983), 6 Ohio St.3d 475, 6 OBR 526, 453 N.E.2d 716.

<sup>7</sup> Crim. R. 7(B).

<sup>8</sup> See *State v. Childs*, 88 Ohio St.3d 558, 2000-Ohio-425, 728 N.E.2d 379, and *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162, *infra*.

<sup>9</sup> *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, ¶12, 853 N.E.2d 1162.

<sup>10</sup> *State v. Davis*, 6<sup>th</sup> Dist. No. WD-07-031, 2008-Ohio-3574, and *State v. Dickess*, 2008-Ohio-39, 174 Ohio App.3d 658, 884 N.E.2d 92.

the conspiracy indictment. Citing to *Commonwealth v. Cantres*, the court stated that “[t]he object crime, while important, is secondary, and need not be described’ with particularity.”<sup>11</sup>

Again, in *State v. Buehner*, this Court upheld the sufficiency of an indictment that did not include the elements of a predicate offense necessary to prove ethnic intimidation.<sup>12</sup> An element of ethnic intimidation is the violation of one of the offenses listed in the statute, for example, aggravated menacing, R.C. 2903.21, menacing, R.C. 2903.22, or criminal damaging, R.C. 2909.06. The court held that an indictment that does not spell out the elements of the predicate offense “in no way prevents the accused from receiving adequate notice of the charges against him.”<sup>13</sup>

Appellate courts have consistently followed this line of cases. In *State v. Dickess*, the defendant claimed that the theft indictment against him did not give notice that the offense was a fourth degree felony because it did not specify the value of the property involved.<sup>14</sup> The court stated:

“The indictment explicitly stated that it was a fourth-degree felony. Thus, Dickess needed only to consult R.C. 2913.02(B)(1) to ascertain the elements of a fourth-degree felony theft offense. \* \* \* Consequently, Dickess’s assertions that he was surprised that he had to defend against a fourth-degree felony charge and that the jury’s finding ‘jacked up’ the degree of the offense are meritless.”<sup>15</sup>

The court did not require that the value of the property be included in the indictment as an element. *Dickess* applies long-existing Ohio law on the sufficiency of indictments to conclude this.

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<sup>11</sup> *Id.* at 556, 386.

<sup>12</sup> *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162; R.C. 2927.12(A).

<sup>13</sup> *Id.* at ¶11.

<sup>14</sup> *State v. Dickess*, 2008-Ohio-39, 174 Ohio App.3d 658, 884 N.E.2d 92.

<sup>15</sup> *Id.* at ¶48.

In *State v. Davis*, the defendant argued on appeal that he was prejudiced by a jury instruction that included the definition of felony theft in his trial for receiving stolen property and possession of criminal tools.<sup>16</sup> The indictment contained a specification that the tools were intended for use in the commission of a felony. Davis claimed, in essence, that he was convicted of the unindicted offense of theft. The court held that the jury instruction was proper. Although the specification raised the degree of the offense from a misdemeanor to a felony, the elements of theft were not required in the indictment.

Another line of related cases concern an amendment to an indictment that increases the degree of the crime. When courts have ruled that the amended indictment prejudiced the defendant, it is because of the lack of notice to the defendant and a violation of the “right of presentment of the charges to the grand jury.”<sup>17</sup> In the present case, Smith at all times had notice that she was being charged with the felony of robbery during the commission of a theft offense. The Grand Jury was presented with evidence that she stole over \$1,600 worth of merchandise. She cannot claim that the Grand Jury did not hear the evidence against her or that she was “‘surprised’ by (the) charge.”<sup>18</sup>

All of the above comports with R. C. 2945.74, which addresses convictions on lesser included offense. It states in pertinent part:

“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.”

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<sup>16</sup> *State v. Davis*, 6<sup>th</sup> Dist. No. WD-07-031, 2008-Ohio-3574.

<sup>17</sup> *State v. Davis*, 4<sup>th</sup> Dist. No. 06CA26, 2007-Ohio-2249, ¶1.

<sup>18</sup> See *State v. Dickess*, 2008-Ohio-39, 174 Ohio App.3d 658, 884 N.E.2d 92.

Based on this statute and the above-stated case law, an indictment that names a lesser included offense need not include the elements of the lesser offense.

***Danielle Smith***

The robbery indictment in this case is silent as to the value of the merchandise taken because value is not an element of robbery, which is the greater offense charged. When the indictment is silent as to value in a case such as this, the trial court may consider the value proven at trial in determining whether the lesser included offense of theft is a felony or misdemeanor. It was uncontested that the value of the merchandise taken from Macy's was over \$1,600, which unquestioningly describes a felony theft. This Court specifically ruled on the issue of value and found that it is not an element of theft, but a special finding to determine the degree of a theft offense. The court stated:

“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.”<sup>19</sup>

The concept of value as a special finding is not a new or novel one in Ohio law. Jury findings of value can be found in a myriad of cases involving theft or theft-related offenses.<sup>20</sup> In most situations, there is no challenge to this; the issues on appeal concern other areas of law. And in the

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<sup>19</sup> *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, ¶31, 884 N.E.2d 595.

<sup>20</sup> See, for example, *State v. Walton*, 9 Dist.No. 3206-M, 2002-Ohio-1999, where special finding of value was required when jury found defendant guilty of theft, rather than robbery; *State v. Williams* (October 25, 1984), 8<sup>th</sup> Dist. No. 47853, citing to *State v. Jenkins*, (Feb. 24, 1984), 8<sup>th</sup> Dist. No. 45231, for the proposition that “special findings are statutorily required to determine the value of property subjected to arson, vandalism, or theft.”

majority of these cases, it is evident that value was not included in the indictment. In fact, in many cases, the special finding is mentioned in the context of a jury instruction on theft requested by the defense in robbery prosecutions.<sup>21</sup>

Smith cites to this Court's decision in *State v. Edmundson* to argue that value must be included in the indictment.<sup>22</sup> In *Edmundson*, the defendant was indicted for theft by deception of welfare benefits valued at over \$5,000. The only issue on appeal was the manner of computing the value of benefits stolen. The sufficiency of the indictment was not at issue. That case cited to *State v. Henderson*, which stated that a factor that enhances the degree of a theft offense is an element that must be proven by the state beyond a reasonable doubt.<sup>23</sup> But *Henderson* involved proof of a prior conviction, which is not analogous to a discussion of the special finding of value.

In his dissenting opinion, Justice Pfeifer stated that Smith's case would not have even come before the court had the prosecutor "simply indicted the defendant for both theft and robbery."<sup>24</sup> This begs the question, however, because it should not be incumbent upon the state to prepare indictments with an eye toward lesser included offenses that *might* come into play. And it would be unnecessarily burdensome to require the state to indict on both robbery and theft each time a robbery indictment is prepared. The Grand Jury was presented with evidence of force; this is *why* the crime was indicted as robbery rather than theft. Had the Grand Jury not found the element of force, the case would never have been indicted as a robbery.

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<sup>21</sup> See *State v. Walton, id.*

<sup>22</sup> *State v. Edmundson*, 92 Ohio St.3d 393, 2001-Ohio-210, 750 N.E.2d 587.

<sup>23</sup> *State v. Henderson* (1979), 58 Ohio St.2d 171, 389 N.E.2d 494.

<sup>24</sup> *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, ¶40, 884 N.E.2d 595.

It is the goal of prosecutors to keep indictments as streamlined and accurate as possible; judges are loathe to proceed on cases that they feel are overindicted. To require the state to tack extra charges onto an indictment on the mere possibility of a later finding of a lesser included offense would be to open the floodgates to problems such as those that arose from between the date of the decision in *State v. Colon* and the date of the reconsideration in *Colon II*.<sup>25</sup> Indictment issues that were never even contemplated as error prior to or during trial are now being filed at an alarming rate in the courts below.

In the event of a ruling that a lesser included crime was committed, as in the present case, the trier of fact is in the position to make a finding as to value. This does not impinge on a defendant's right to have all essential elements presented to a grand jury, the concern enunciated by Smith, because the grand jury was indeed presented with all of the essential elements of robbery.<sup>26</sup> Similarly, it does not take away the right of a jury to make a special finding as to value in a theft case or when a jury finds guilt on the lesser included offense of theft.

#### *Apprendi v. New Jersey*

Smith has raised *Apprendi v. New Jersey* to argue that because value can increase the punishment for theft, it may not be treated as a non-element.<sup>27</sup> She cites the risk of exposing defendants to greater punishment through special findings not determined by a jury. But that is not

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<sup>25</sup> In fact Smith cites to *Colon I* - three years after she was convicted - to assert that there "were several errors with the indictment and the court proceeding." She did not elaborate. No error in the indictment was ever raised before or at trial.

<sup>26</sup> This was also a central concern stated in the amicus brief submitted in support of the Motion for Reconsideration.

<sup>27</sup> (2000), 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435.

what has occurred. The trier of fact is making a special finding as to value, based upon the trial record, whether it be the judge or the jury. Further, value does not always increase the penalty of the offense; it is a static concept that is used to *determine* the degree of the offense.

In *Apprendi v. New Jersey*, the United States Supreme Court ruled that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>28</sup> The state has never argued anything but that the special finding of value is to be determined by the trier of fact. In the crime of robbery, value does not increase a defendant’s punishment. It is not an element of the crime. In theft, value must be alleged, and it may determine the degree of the offense, but it is not an element of the crime. Accordingly, *Apprendi* does not conflict with this Court’s statement in *State v. Smith* that “[t]he 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.”<sup>29</sup>

#### *Trier of Fact to Determine Value as a Special Finding*

The Court’s statement that value is a special finding, rather than an element, appears to have caused concerns that facts constituting “special findings” will be withdrawn from consideration by the jury. These fears are unfounded. The theft statute is divided into two subdivisions. The first, (A), defines theft. Value is not an element in the definition. Subsection (B) then describes the degree of the offense, which is dependent on the value of the property in question. As stated previously, that value has always been treated as a special finding is evidenced by a myriad of cases in which the jury is required to make a specific finding as to value. Theft of property or services is the crime; value

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<sup>28</sup> *Id.* at 490.

<sup>29</sup> *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, ¶31, 884 N.E.2d 595.

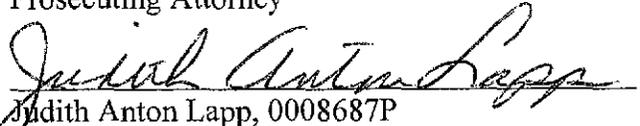
determines its degree. The state is required to prove the value of the property or services stolen beyond a reasonable doubt, and it is included in the indictment to put the defendant on notice of the degree of the crime. This does not change by characterizing value as a special finding, rather than an element.

**CONCLUSION**

Danielle Smith was put on notice to defend against the felony charge of robbery. The Grand Jury was presented with evidence that she used force during the commission of a theft offense, and that the amount of goods stolen was over \$1,600. Neither the Ohio Constitution, the Criminal Rules of Procedure, nor established case law required that the elements of theft be spelled out in a robbery indictment. For these reasons, the state respectfully requests that the conviction be affirmed.

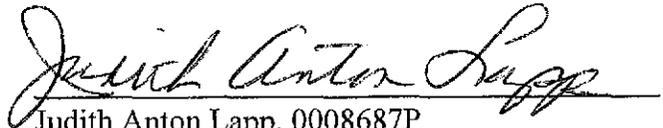
Respectfully,

Joseph T. Deters, 0012084P  
Prosecuting Attorney

  
Judith Anton Lapp, 0008687P  
Assistant Prosecuting Attorney  
Attorneys for Plaintiff-Appellee

**CERTIFICATE OF SERVICE**

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Michaela M. Stagnaro, 906 Main Street, Suite 403, Cincinnati, Ohio 45202, counsel of record, this 13<sup>th</sup> day of October, 2008.

  
Judith Anton Lapp, 0008687P  
Assistant Prosecuting Attorney