



In The

**Fourteenth Court of Appeals**

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**NO. 14-10-00374-CR**

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**RUSSELL SIMIEN, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 351st District Court  
Harris County, Texas  
Trial Court Cause No. 1243038**

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**M E M O R A N D U M    O P I N I O N**

Appellant Russell Simien was convicted of theft—third offense and sentenced to three years in the Institutional Division of the Texas Department of Criminal Justice. On appeal he challenges the sufficiency of the evidence to support his conviction. We affirm.

**Background**

Appellant was in the Marshall's store in the Galleria area of Houston when his behavior attracted the attention of the store detective Phillip McDuell. McDuell testified

that he noticed appellant was wandering the store and looking at the ceiling. He stated this was suspicious because the store's video cameras are on the ceiling and thieves often look for them to avoid detection. McDuell observed appellant on the store's video camera, and saw him select several pairs of men's boxer shorts, remove them from the hangers, fold them, and put them down the front of his pants. McDuell asked his supervisor to continue watching appellant on camera while he walked to the floor of the store and watched him. McDuell observed appellant walk past the cash registers and out of the store with the boxer shorts in his pants. Outside the store McDuell approached appellant and asked him to return to the store's security office. In the security office, McDuell asked appellant if he knew "what this was all about." Appellant responded that he did and gave McDuell the boxer shorts. Appellant's activity was recorded on the store's security system and the recording was played for the jury.

James Dalrymple, a Harris County crime scene investigator testified that appellant had previously been convicted twice of theft—third offense.

Appellant testified in his own behalf. He testified that he had the boxer shorts in his pants when he left the store. He further testified that he had been convicted of theft in 1999, 2004, and 2006. He also admitted that he previously had been found guilty of theft—third offense on May 18, 2008 and June 12, 2009. The jury found appellant guilty, found the enhancement paragraphs true, and assessed punishment at three years in prison.

### **Sufficiency of the Evidence**

In two issues, appellant contends the evidence is legally and factually insufficient to support the conviction for theft—third offense. Specifically, appellant asserts that the State failed to show that appellant committed this offense.

In evaluating the legal sufficiency of the evidence to support a criminal conviction, we view all of the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The jury is the exclusive judge of the credibility of the witnesses and of the weight to be given their testimony, and it is the exclusive province of the jury to reconcile conflicts in the evidence. *Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998). Hence, we do not reevaluate the weight and credibility of all the evidence or substitute our judgment for the fact finder's. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000).

With regard to the factual sufficiency of the evidence, a majority of the judges of the Court of Criminal Appeals recently determined that “the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt.” *Brooks v. State*, 323 S.W.3d 893, 894 (Tex. Crim. App. 2010) (plurality op.)(Hervey, J., joined by Keller, P.J., Keasler, and Cochran, J.J.); *id.* at 912 (Cochran, J., concurring, joined by Womack, J.) (same conclusion as plurality). Therefore, we will review the evidence under the standard set out in *Jackson v. Virginia*.

A person commits the offense of theft if he unlawfully appropriates property with the intent to deprive the owner of property. Tex. Penal Code Ann. § 31.03(a). A person commits the offense of theft—third offense, a state jail felony, if the value of the property stolen is less than \$1,500 and the defendant has been previously convicted two or more times of any grade of theft. Tex. Penal Code Ann. § 31.03(e)(4)(D).

If it is shown at the trial of a state jail felony that the defendant previously has been finally convicted of two state jail felonies, on conviction the defendant shall be punished for a third-degree felony. Tex. Penal Code Ann. § 12.42(a)(1). The range of punishment for an individual adjudged guilty of a third-degree felony is imprisonment for 2 to 10 years in the Texas Department of Criminal Justice. Tex. Penal Code Ann. § 12.34(a).

The record reflects that McDuell, the store detective, observed appellant steal the boxer shorts from the store. The theft was recorded on a security camera and the

recording was shown to the jury. A crime scene investigator testified that appellant's fingerprints matched those of the individual who had twice been convicted of theft—third offense. Finally, appellant admitted that he stole the boxer shorts from Marshall's and admitted he previously had been convicted of theft—third offense. Viewing the evidence in the light most favorable to the verdict, we conclude a rational trier of fact could have found the essential elements of theft—third offense beyond a reasonable doubt. Appellant's two issues are overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Panel consists of Chief Justice Hedges and Justices Frost and Christopher.

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