

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-10-00169-CR**

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**LESTER HOWIE LEVI, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 410th District Court  
Montgomery County, Texas  
Trial Cause No. 09-09-08785-CR**

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**MEMORANDUM OPINION**

Appellant, Lester Howie Levi, was convicted by a jury of the offense of robbery and sentenced to ten years confinement. Levi appeals the conviction arguing the evidence was insufficient to support the jury's verdict. We affirm the judgment of the trial court.

**BACKGROUND**

On July 15, 2009, Laura Rivera, the loss prevention manager at Macy's Department Store, observed a female on the store's security camera whom she believed may have been

shoplifting. The female was observed with a large shopping bag carrying men's clothing in the lingerie department. Rivera testified that based on her fifteen years of experience, a person carrying a large shopping bag and with out-of-department merchandise can be a sign of shoplifting. Rivera observed the woman quickly select two bras and enter a fitting room. Rivera left a fellow employee in the camera room and went to the area near the fitting room. When the woman exited the fitting room, Rivera noticed that she was not carrying all of the items she brought into the fitting room. Specifically, Rivera noticed the woman was no longer carrying the men's shirt and shorts and she only brought out one of the bras she had previously selected. Rivera went into the fitting room and checked each stall to see if the woman had left the merchandise behind. None of the merchandise was left in the fitting room. Rivera believed the woman concealed the merchandise in the shopping bag.

Rivera followed the woman to another department within the store. The woman was still carrying two items of men's clothing. Rivera observed the woman select a woman's dress and t-shirt and again, enter a fitting room. Rivera went into the fitting room and determined which stall the woman was in and then waited for her to come out. Rivera testified that when the woman exited the fitting room she was not carrying the woman's t-shirt. Rivera immediately checked the women's fitting room stall and found no merchandise left in the stall. Rivera stated that the woman walked toward the door, hung the three remaining items in her hand on a rack near the door, then exited Macy's.

Rivera explained that she followed the woman out of the store and then ran past her to get in front of her. Rivera testified that she identified herself as Macy's security and stated that she needed to speak with the woman about the merchandise she had. Rivera stated that the woman said she did not have anything and stepped back "like she was going to flee." Rivera reached out and grabbed the woman by the arm and a struggle ensued during which the woman tried to pull away and started yelling for help. Observing other customers in the parking lot, Rivera yelled that the woman was a shoplifter and asked someone to call 9-1-1.

Rivera testified that after the woman began yelling, "[S]he's got me, she's got me," a man exited the driver's side of a maroon Mazda parked nearby and came to her aid. In a photo lineup, Rivera identified appellant, Levi, as the man who came to the shoplifter's aid. Rivera also identified the female shoplifter, Diana Hineman. Rivera stated that it appeared that Levi and Hineman knew each other. Rivera testified that she told Levi "to back up[,] [t]his woman is a shiplifter[, and] I'm with Macy's security." Rivera stated that Levi hesitated for a second and then tried to pull the two women apart. Rivera explained that Levi was trying to get her to let go of Hineman. Rivera further testified that Levi pulled his fist up and said, "[I]f you don't let her go, I'm going to punch you in the face." Rivera explained that she held on to Hineman and "braced" herself, however, Levi did not punch her. Instead, Levi shoved her really hard and she and Hineman fell to the ground.

Rivera explained that when they fell to the ground Hineman “was getting away” so Rivera grabbed hold of Hineman’s hair. Rivera told the jury that Levi then grabbed Rivera by the hair and forced her head forward down to the ground. Rivera held on to Hineman until she could not breathe and thought she might pass out, at which point she let go. Rivera explained that Hineman got up and grabbed her purse and tried to grab the shopping bag; however, Rivera got to the shopping bag first. Rivera stated that Hineman and Levi “started running to the car.” According to Rivera, Levi got into the driver’s side of the car and they drove off “fast.” Rivera took the merchandise back to the loss prevention office and completed a report.

Rachel Maxey, a customer in Macy’s parking lot, also testified at trial. Maxey’s testimony corroborated the testimony of Rivera. Maxey testified that she observed a female exit Macy’s department store and saw another female, Rivera, exit the store and confront her. Maxey further testified that the two women began “tugging back and forth” and that Rivera yelled “shoplifter,” which prompted Maxey to call 9-1-1. Maxey testified the two women eventually fell to the ground. Maxey further testified that she saw someone get out of the driver’s seat of a maroon Mazda that was parked in one of the first two or three spaces in the parking lot. Maxey identified Levi as the person who exited the car and came to the aid of the alleged shoplifter. Maxey testified that she could not hear everything that was being said, but she heard the man say, “[L]et her go.” Maxey told the jury that when Rivera would not let go of the alleged shoplifter, Levi pushed her, raised

his fist, and eventually “pushed her head down between her legs.” According to Maxey, when Rivera lost her grip on the shoplifter, Levi and the shoplifter both ran to the car and “drove off very fast.”

Levi was charged by indictment for the offense of robbery. Levi pleaded not guilty. A jury found Levi guilty of the charged offense and the trial court assessed punishment at ten years confinement. On appeal, Levi argues that the evidence introduced at trial is insufficient to establish: (1) the underlying theft, (2) that he acted with the requisite intent, and (3) that he was a party to the underlying theft.

#### STANDARD

In *Brooks v. State*, the Court of Criminal Appeals concluded that there is no meaningful distinction between a legal and factual sufficiency review. 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). The Court held that “the *Jackson v. Virginia* 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.” *Id.* at 912. Therefore, in determining whether there is sufficient evidence to support the jury verdict, we must review all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

## ANALYSIS

A person commits the offense of robbery if, in the course of committing theft as defined in Chapter 31, and with intent to obtain or maintain control of the property, he intentionally, knowingly, or recklessly causes bodily injury to another. Tex. Penal Code Ann. § 29.02(a)(1) (West 2003). ““In the course of committing a theft”” is defined as “conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.” *Id.* § 29.01(1). A person commits theft if he “unlawfully appropriates property with intent to deprive the owner of property.” *Id.* § 31.03(a) (West Supp. 2010). “Appropriation of property is unlawful if . . . it is without the owner’s effective consent[.]” *Id.* § 31.03(b)(1).

“A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.” Tex. Penal Code. Ann. § 7.01(a) (West 2003). “A person is criminally responsible for an offense committed by the conduct of another if . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense[.]” *Id.* § 7.02(a)(2). The jury was charged under the law of parties.

In his first issue, Levi argues that the evidence is insufficient to establish the existence of an underlying theft that would support his conviction of robbery under section 29.02(a)(1) of the Penal Code. Specifically, Levi argues that Rivera never testified that

Hineman took the merchandise from Macy's without Macy's consent or that Hineman failed to pay for the merchandise. The evidence established that Rivera observed Hineman enter two fitting rooms carrying a large bag and various items of clothing and exit each fitting room with various items of clothing concealed in the bag. The shopping bag in which the clothing was concealed was a "Fossil" bag, not a Macy's bag. Rivera confirmed her suspicion that Hineman concealed the merchandise in the shopping bag by checking the fitting rooms to ensure the items of clothing had not been left in the fitting rooms. Though Rivera did not specifically testify that she did not see Hineman pay for any items of clothing, her testimony is clear that she observed Hineman exit the store after she emerged from the fitting rooms with clothing that had been concealed in the "Fossil" bag. When Rivera confronted Hineman, she denied having any merchandise and resisted Rivera's attempt to speak with her and detain her. When Rivera eventually lost her grip on Hineman, Hineman and Levi ran to their car and drove off quickly. Rivera testified that she recovered the shopping bag that Rivera was carrying during the offense. Following the offense, Rivera did a report and inventoried the merchandise that was found in the bag. At trial, the State introduced photo exhibits depicting the stolen items, and Rivera specifically identified the pieces of merchandise from the bag that she had observed Hineman conceal while in the store.

"The *Jackson* standard of review gives full play to the jury's responsibility to fairly resolve conflicts in the evidence, to weigh the evidence, and to draw reasonable inferences

from the evidence.” *Williams v. State*, 301 S.W.3d 675, 684 (Tex. Crim. App. 2009), *cert. denied*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 3411, 177 L.Ed.2d 326 (2010). Based on Rivera’s testimony regarding her observations in the store and Hineman’s reaction when Rivera confronted her, the jury could reasonably conclude that Hineman did not pay for the merchandise or otherwise have Macy’s consent to maintain possession of the property. Based on this record, we find the evidence sufficient to establish the underlying theft. We overrule issue one.

In his second issue, Levi argues that the evidence is insufficient to support his conviction because there is no evidence to establish beyond a reasonable doubt that he acted with intent to “obtain or maintain control of the property” as required under section 29.02(a)(1) of the Penal Code. *See* Tex. Penal Code Ann. § 29.02(a)(1). Levi does not deny that he pulled Rivera’s hair or pushed her as alleged in the indictment, however, he argues that that he did not do so with any intent to aid a theft or obtain or maintain control of property. In his third issue, Levi argues there is no evidence to support a finding that he was a party to the underlying theft pursuant to sections 7.01(a) and 7.02(a)(2) of the Penal Code. *See id.* §§ 7.01(a), 7.02(a)(2).

The evidence established that Levi was in the driver’s seat of a car parked in one of the first parking spaces outside the Macy’s store exit. When Hineman began yelling, “[S]he’s got me, she’s got me,” Levi came to her aid. It was clear to Rivera that Levi and Hineman knew each other. Rivera testified that she told Levi that she was with



Macy's security and Hineman was a shoplifter. Levi did not ask any questions or yell for anyone to call the police. Instead, Levi tried to pull Rivera off Hineman. Levi threatened to punch Rivera in the face if she did not let Hineman go and ultimately pushed Rivera to the ground. Levi got Rivera to release her grip on Hineman by using further physical force. When Rivera let go of Hineman, Levi and Hineman both ran to the car Levi had been sitting in. Levi got into the driver's seat and drove off "[v]ery fast." Some of the stolen merchandise was men's clothing. Based on this evidence, the jury could reasonably conclude that Levi knew Hineman was committing theft and was acting to aid her when he assaulted Rivera. The evidence is sufficient to establish beyond a reasonable doubt that Levi acted as a party with the requisite intent. We overrule issues two and three.

AFFIRMED.

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CHARLES KREGER  
Justice

Submitted on March 30, 2011  
Opinion Delivered June 15, 2011  
Do not publish

Before Gaultney, Kreger, and Horton, JJ.