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COURT OF CRIMINAL APPEALS
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No. PD-0881-20

IN THE TEXAS COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

CRYSTAL MASON,

APPELLANT

v.

THE STATE OF TEXAS,

APPELLEE

On Discretionary Review from the Second Court of Appeals of Texas, No. 02-18-00138-CR, Appeal in Cause No. 1485710D in the 432nd District Court of Tarrant County, Texas, the Honorable Ruben Gonzalez, Presiding

STATE'S BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

The State agrees with Appellant's "Identity of Parties and Counsel." *Appellant's Brief* at 3. However, the State adds the following appellate counsel:

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STATEMENT OF THE CASE

The trial court found Crystal Mason (Appellant) guilty of illegal voting as charged in the indictment. CR 1:7, 33; RR 2:169. The trial court sentenced Appellant to confinement in the Institutional Division of the Texas Department of Criminal Justice for five years. CR 1:33; RR 2:177-78.

On Appeal, Appellant argued: (1) the evidence was legally and factually insufficient to support the guilt finding; (2) Texas' illegal-voting statute is preempted by the part of the Help America Vote Act (HAVA) that grants the right to cast a provisional ballot, 52 U.S.C.A. § 21082(a); (3) her conviction resulted from ineffective assistance of counsel; and (4) the illegal-voting statute is unconstitutionally vague as applied to her. *Mason v. State*, 598 S.W.3d 755, 762–63 (Tex. App.—Fort Worth 2020, pet. granted). The Second Court of Appeals affirmed the trial court's judgment. *See id*.

STATEMENT OF FACTS

Appellant's Prior Federal Conviction

On November 23, 2011, Appellant pleaded guilty in federal district court to the offense of conspiracy to defraud the United States. RR 2:17-18, 108; SX 1. On March 16, 2012, the court sentenced her to a sixty-month term of confinement in federal prison, followed by three years on supervised release, and ordered her to pay $4,206,085.49 in restitution. RR 2:17-18, 108; SX 1.

Cancellation of Appellant's Voter Registration

On May 22, 2013, after receiving notice of Appellant's federal felony conviction, the Tarrant County Elections Administration mailed a Notice of Examination to Appellant's home address. RR 2:30-33, 45; SX 6. The notice informed Appellant that her registration status was being examined due to her felony conviction and gave her thirty days to establish her qualifications to remain registered. RR 2:32; SX 6. Appellant failed to respond. SX 6. On June 25, 2013, the Elections Administration notified Appellant that her voter registration in Tarrant County had been cancelled. RR 2:31, 33-34, 47; SX 6.

Appellant votes in the 2016 general election after her release from confinement

On August 5, 2016, Appellant was released from prison, met with her probation officer, and began her three-year period of supervised release. RR 2:18-

20. Appellant understood her supervision conditions. RR 2:19-20. Thereafter, Appellant attended scheduled meetings with her probation officer. RR 2:20.

A few months after her release from prison, on November 8, 2016, Appellant picked up her niece Joanna Jones to go vote in the general election. RR 2:116. Jones was in the wrong precinct, so she returned to the car to wait for Appellant. RR 2:118-19. Meanwhile, neither poll clerk Jarrod Streibich nor election judge Karl Dietrich could find Appellant's name in the book of registered voters. RR 2:59-60, 99, 119, 131. Appellant told Dietrich that she knew of no reason that she would not be on the registered voters' list, that someone in her household had voted earlier in the day, and that she obviously should be allowed to vote. RR 2:60. Dietrich then searched the online voter database, but he still was unable to identify Appellant as a registered voter. RR 2:60.

Dietrich could not allow Appellant to vote normally because she was not listed as a registered voter. RR 2:62. He asked if she wanted to vote provisionally, and she responded affirmatively.[1] RR 2:62. Appellant and Dietrich then sat at a table away from the voting line and booths to read the information on the provisional envelope. RR 2:67, 73, 100-02. Appellant filled out the appropriate section of the envelope and signed the Affidavit of Provisional Voter, which stated the

[1]At the time, Dietrich, who happened to be Appellant's neighbor, did not know that Appellant was a convicted felon or that she was on supervised release. RR 2:54-56, 91-92, 94.

requirements for eligibility to vote. RR 2:44, 47, 50, 65-66, 68-71; SX 8, 9. The affidavit included the following admonishments: "*I . . . have not been finally convicted of a felony or if a felon, I have completed all of my punishment including any term of incarceration, parole, supervision, period of probation, or I have been pardoned. . . . I understand that it is a felony of the 2nd degree to vote in an election for which I know I am not eligible.*" SX 8, 9. When Dietrich raised his right hand and asked if Appellant affirmed that the information in the signed affidavit was accurate, Appellant responded affirmatively. RR 2:71-72. Dietrich would not have let Appellant affirm to the affidavit if she appeared not to have read it. RR 2:74. Appellant then returned to Streibich, placed her name on the provisional sign-in sheet, and voted. RR 2:74-75, 102-03; SX 7. Both Dietrich and Streibich believed that Appellant read the provisional ballot envelope. RR 2:71, 75-76, 85-86, 89, 102.

When the polls closed, the provisional ballots were placed in a special bag and submitted with all other ballots to the tally station where ballots across the county were collected. RR 2:77-78. On December 1, 2016, the Elections Administration notified Appellant that her provisional ballot was rejected and not counted because she either was not a registered voter or her registration was not effective in time for the election. RR 2:38; SX 6.

SUMMARY OF THE ARGUMENT

State's Response to Appellant's First Issue

The Second Court correctly interpreted the Texas illegal voting statute and did not err in affirming Appellant's conviction. Alternatively, if the Second Court's committed error in its analysis, that error was harmless.

State's Response to Appellant's Second Issue

The Second Court's interpretation of the Texas illegal voting statute is not in conflict with the federal Help America Vote Act (HAVA).

State's Response to Appellant's Third Issue

The Second Court correctly determined that Appellant "voted" when she cast her provisional ballot.

ARGUMENT

I. The Second Court correctly interpreted the Texas illegal voting statute and did not err in affirming Appellant's conviction.

The Second Court correctly determined that Appellant's subjective knowledge regarding the Texas Election Code is irrelevant to a sufficiency analysis under the facts of this case; the Second Court correctly determined that the evidence did not raise a mistake-of-fact or a mistake-of-law defense; the Second Court's analysis was sound under the hypothetically correct jury charge; and, Appellant's cited authorities either support the Second Court's analysis or are inapposite to Appellant's position.

Alternatively, if the Second Court's analysis was flawed, the error was harmless because the evidence, when examined in the light most favorable to the verdict, allowed the finder of fact to reasonably infer that Appellant knew that she was ineligible to vote.

A. Appellant's complaint

In affirming the legal sufficiency of the evidence of illegal voting, the Second Court stated:

> [T]he fact that [Appellant] did not know she was legally ineligible to vote was irrelevant to her prosecution under Section 64.012(a)(1); instead, the State needed only to prove that she voted while knowing of the existence of the conditions that made her legally ineligible, in this case—as alleged by the State—that she was on federal supervised

> release after being released from imprisonment after a final felony conviction.

Mason, 598 S.W.3d at 769.[2]

In Issue No. 1, Appellant seizes on this this statement in isolation, and concludes that the Second court erred by "contradicting" the *mens rea* requirement of the Texas illegal voting statute. *Appellant's Brief* at 17. Appellant goes on to assert that the State not only had to prove the particular circumstances that rendered her voting illegal, but also that she "actually realized" that her actions constituted an offense. *Appellant's Brief at* 21, 23, 31.

B. Appellant was not eligible to vote as a matter of law

In order to uphold a conviction for illegal voting, the evidence must show that the actor knew she was not eligible to vote. *See* TEX. ELEC. CODE § 64.012(a). Voter eligibility is a legal determination based on facts such as age, citizenship, mental fitness, criminal record, residency, and registration status. *See* TEX. ELEC. CODE 11.002. The facts establishing that Appellant was legally ineligible to vote were: 1) she was convicted of a felony, and 2) she had not completed her period of supervised release. *See id*. Appellant does not challenge these facts.

[2]When viewed in context of the entire opinion, it is apparent that the court meant, "[Whether] Appellant did not know she was legally ineligible to vote was irrelevant to her prosecution under Section 64.012(a)(1) . . .". Regardless, either sentence is a correct statement of the law. *See Thompson v. State*, 9 S.W. 486, 486–87 (Tex. Ct. App. 1888); *Jenkins v. State*, 468 S.W.3d 656, 672–73 (Tex. App.—Houston [14th Dist.] 2015, pet. dism.); *Medrano v. State*, 421 S.W.3d 869, 885 (Tex. App.—Dallas 2014, pet. ref'd).

C. The Second Court correctly determined that Appellant's subjective knowledge of Texas Election law was irrelevant under the facts of this case.

By examining on-point precedent dating back more than one hundred years, the Second Court correctly determined that under the plain language of election code section 64.012, "the State does not have to prove that the defendant subjectively knew that voting [as a felon on supervised release] made the defendant ineligible to vote under the law or that to vote while having that ineligibility is a crime." *Mason*, 598 S.W.3d at 768 (citing *Thompson v. State*, 9 S.W. 486, 486–87 (Tex. Ct. App. 1888); *Jenkins v. State*, 468 S.W.3d 656, 672–73 (Tex. App.—Houston [14th Dist.] 2015, pet. dism.); *Medrano v. State*, 421 S.W.3d 869, 885 (Tex. App.—Dallas 2014, pet. ref'd); *Crain v. State*, 69 Tex. Crim. 55, 153 S.W. 155, 156 (1913); *Heath v. State*, No. 14-14-00532-CR, 2016 WL 2743192, at *6 (Tex. App.—Houston [14th Dist.] May 10, 2016, pet. ref'd) (mem. op., not designated for publication) (citing *Medrano*)). The Second Court acknowledged that a defendant's subjective belief about the law can become relevant if she raises a mistake-of-law or a mistake-of-fact defense. *See Mason*, 598 S.W.3d at 770; *see also* TEX. PENAL CODE §§ 8.02 (mistake-of-fact); 8.03(b) (mistake-of-law). However, the Second Court determined that the evidence in this case did not raise either of these defenses; thus, according to the Second Court, Appellant's subjective knowledge of election law was not

relevant to a legal sufficiency review. *See Mason v. State*, 598 S.W.3d 755, 770 (Tex. App.—Fort Worth 2020, pet. granted).

D. The Second Court correctly determined that the evidence did not raise either a mistake of fact or mistake of law defense.

Mistake-of-fact

To raise a mistake of fact defense, there must be evidence that the defendant mistakenly "formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense." TEX. PENAL CODE § 8.02(a). To raise a mistake-of-fact defense in this case, the evidence would have to show that Appellant formed a mistaken belief about a fact, and that mistake negated her "knowledge" that she was legally ineligible to vote.[3] *See* TEX. PENAL CODE § 8.02(a); TEX. ELEC. CODE § 11.002.

In addressing why the evidence did not raise a mistake-of-fact defense, the Second Court explained, "[Appellant's] claimed lack of knowledge that being on supervised release made her ineligible—as opposed to an argument that she mistakenly did not know she was on supervised release—could not have raised a mistake-of-fact defense because a belief that a proscribed action is not unlawful is not a mistake of fact." *Mason v. State*, 598 S.W.3d 755, 780 (Tex. App.—Fort Worth 2020, pet. granted) (citing *Vitiello v. State*, 848 S.W.2d 885, 887 (Tex. App.—

[3]E.g., she thought her crime was not a felony, or she thought she had fully discharged her sentence, including her period of supervised release – assuming those beliefs were found to be reasonable.

Houston [14th Dist.] 1993, pet. ref'd); TEX. PENAL CODE § 8.02(a) (providing that defense is available if mistake negates culpable mental state for offense)).

Appellant does not claim that she had any mistaken beliefs regarding the facts that rendered her legally ineligible to vote (that she was on supervised release following a felony conviction). *See* TEX. ELEC. CODE § 11.002. Because the evidence did not show that Appellant formed a mistaken belief about a matter of fact that negated her knowledge that she was ineligible to vote, the Second Court correctly determined that the evidence did not raise a mistake-of-fact defense. *Mason*, 598 S.W.3d at 780; s*ee* TEX. PENAL CODE § 8.02(a); TEX. ELEC. CODE § 11.002.

Mistake-of-law

To raise a mistake of law defense, there must be evidence that the defendant believed the conduct charged did not constitute a crime, and that she acted in reasonable reliance upon an official statement or interpretation of the law by a statutorily prescribed source. TEX. PENAL CODE § 8.03. In order to raise a mistake-of-law defense in this case, the evidence would have to show that, due to a reasonable reliance upon an official statement or interpretation of the law by a statutorily prescribed source, Appellant mistakenly believed her voting was not a crime. *See id*.

In addressing why the evidence did not raise a mistake-of-law defense, the Second Court explained, "[Appellant] expressly disclaimed relying on the warning language in the provisional-ballot affidavit, and she has not argued at trial or on appeal that she relied on an official statement of the law that led her to reasonably believe that she *was* eligible to vote." *Mason*, 598 S.W.3d at 780. The Second Court correctly determined that the evidence did not raise a mistake of law defense. *See* TEX. PENAL CODE § 8.03.

Because the evidence did not raise mistake-of-fact or mistake-of-law, the Second Court correctly declined including either defense in its hypothetically correct jury charge (HCJC).[4] *Mason*, 598 S.W.3d at 780; s*ee Osborne v. State*, No. 07-13-00156-CR, 2015 WL 3463047, at *3 (Tex. App.—Amarillo May 29, 2015, pet. ref'd) (HCJC contains defenses relevant to a case).

E. The Second Court's sufficiency analysis was sound under the hypothetically correct jury charge.

An appellate court measures the legal sufficiency of the evidence by the elements of the offense as defined by the hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The HCJC "sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden

[4]The Second Court also noted that Appellant did not urge on direct appeal that the evidence raised either defense or that the trial court's implicit rejection of either defensive issue was not supported by the evidence. *See Mason*, 598 S.W.3d at 780.

of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.* The law as authorized by the indictment means the statutory elements of the charged offense as modified by the factual details and legal theories contained in the charging instrument. *See Curry v. State*, 30 S.W.3d 394, 404–05 (Tex. Crim. App. 2000). When the surrounding circumstances transform a normally legal action into an offense, a culpable mental state is required as to those surrounding circumstances. *Cook v. State*, 884 S.W.2d 485, 487 (Tex. Crim. App. 1994) (citations omitted). A person acts with knowledge of the circumstances surrounding her conduct when she is aware that the circumstances exist. TEX. PENAL CODE § 6.03(b).

A person commits the offense of illegal voting if the person votes or attempts to vote in an election in which the person knows she is not eligible to vote. TEX. ELEC. CODE § 64.012(a)(1). Appellant's indictment charged that she:

> Vote[d] in an election in which she knew he was not eligible to vote, to-wit: the 2016 General Election, after being finally convicted of the felony of Conspiracy to Defraud the United States, in the United States District Court of the Northern District of Texas, Fort Worth Division, on March 16, 2012, in case number 4:11-CR-151-A(01), and Defendant had not been fully discharged from her sentence for the felony including any court ordered term of parole, supervision and probation.

CR 6.

Therefore, the State was required to prove that Appellant voted in the 2016 General Election, knowing the circumstances that transformed the normally legal act of voting into an offense, namely: (1) that she had been finally convicted of the felony of Conspiracy to Defraud the United States, in the United States District Court of the Northern District of Texas, Fort Worth Division, on March 16, 2012, in case number 4:11-CR-151-A-(01), and (2) that she had not been fully discharged from her sentence for the felony including any court ordered term of parole, supervision and probation. *See e.g.*, *Jenkins v. State*, 468 S.W.3d 656, 673 (Tex. App.—Houston [14th Dist.] 2015, pet. dism.) (prosecution under TEX. ELEC. CODE § 64.012: "Jenkins's indictment charged that he 'did then and there vote in an election in which the Defendant knew he was not eligible to vote, to-wit: Defendant voted in the May 8, 2010 Woodlands Road Utility District Board of Directors election, when he knew he did not reside in the precinct in which he voted.' Therefore, the State was required to prove that Jenkins (1) voted in an election (2) knowing he did not reside in a precinct in the territory covered by the RUD election of May 8, 2010."). Whether the evidence proved these things was the exact analysis undertaken by the Second Court. *Compare* CR 6 *with Mason*, 598 S.W.3d 755, 770.

Because the Second Court's sufficiency analysis required the State to prove all of the elements of the hypothetically correct jury charge, its analysis was legally

sound. *See Malik*, 953 S.W.2d 2 at 240. Accordingly, this Court should overrule Appellant's first issue.

F. Appellant's cited authorities either support the Second Court's analysis or they are inapposite to Appellant's position.

In addressing Appellant's legal sufficiency complaint, the Second Court went through a lengthy and detailed analysis, citing Texas illegal voting cases as authority in support. *Mason*, 598 S.W.3d at 768-71. Appellant attempts to impeach this analysis by pointing to a mix of Texas and federal cases, none of which deal with illegal voting. *Appellant's Brief* at 17-35.

Delay and Dennis are inapposite

Appellant asserts that *Delay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014), abrogated the *Thompson* line of cases – authority heavily relied on by the Second Court on this issue. *Appellant's Brief* at 29. Because of the *Delay* opinion, Appellant argues, the State was required to prove that Appellant *actually realized* that her conduct violated the Election Code. *Appellant's Brief* at 21.

First, the *Delay* opinion makes no mention of *Thompson* or any of the other cases the Second Court cited in support of its determination that Appellant's subjective knowledge regarding her legal status as a voter was not relevant to a legal sufficiency analysis under section 64.012 of the election code. *See generally Delay*, 465 S.W.3d 232. The State can find no authority overturning, abrogating, or recognizing any abrogation of any of the authority relied on by the Second Court.

In other words, Appellant's contention that *Delay* abrogated the *Thompson* line of cases is unsupported. *See* TEX. R. APP. P. 38.1.

Further, the Second Court correctly determined that the *Delay* opinion does not apply to this case because *Delay* turned on the Court's resolution of an ambiguity in the language of a *specific* statute – section 253.003(a) of the Election Code – an ambiguity that does not appear in section 64.012(a)(1), the controlling statute in this issue. *See Mason*, 598 S.W.3d at 769 n.12. Appellant points to nothing in the *Delay* opinion indicating that this Court intended its holding to apply beyond the facts of that case.

Appellant also cites *Dennis v. State*, 647 S.W.2d 275 (Tex. Crim. App. 1983). Like the *Delay* Court, the *Dennis* Court explicitly applied its holding to a specific statute (theft by receiving stolen goods) that is not at issue in this case. *Dennis v. State*, 647 S.W.2d 275, 280 (Tex. Crim. App. 1983) ("The word "knowingly," ***as used in the context that a defendant knowingly receives property that has been stolen***, requires actual subjective knowledge, rather than knowledge that would have indicated to a reasonably prudent man that the property was stolen.") (emphasis added); *see* TEX. PENAL CODE § 31.03(b)(2).

Because the holdings of *Delay* and *Dennis* are specific to statutes that are not at issue here, they do not apply here, and they do not require this Court to depart from the *Thompson* line of cases.

Appellant cites authority supporting the Second Court's holding.

When an otherwise innocent action becomes criminal because of the circumstances under which it is performed, a culpable mental state is required as to those surrounding circumstances. *Cook*, 884 S.W.2d at 487. A person acts with knowledge of circumstances surrounding her conduct when she is aware that the circumstances exist. TEX. PENAL CODE § 6.03(b).

On pages 24-25 of her brief, Appellant mistakenly relies on a series of cases that undermine her position. *Appellant's Brief* at 24-25. To be clear, Appellant cites cases that support the Second Court's determination that the State only had to prove that Appellant voted while aware of the circumstances that criminalized her conduct, not that she was aware that her conduct was illegal. *See McQueen v. State*, 781 S.W.2d 600, 604 (Tex. Crim. App. 1989) (unauthorized use of a motor vehicle: evidence must establish that actor knows that he is driving vehicle "without the owners effective consent" – the element that makes the otherwise legal act of driving an offense); *Jackson v. State*, 718 S.W.2d 724, 726 (Tex. Crim. App. 1986) (evading arrest: defendant must know she ran from an officer (legal act) trying to arrest her (circumstance making legal act illegal)); *State v. Ross*, 573 S.W.3d 817, 824-25 (Tex. Crim. App. 2019) (disorderly conduct: evidence must show that actor carried gun (legal act) in a way calculated to cause alarm (circumstance making legal act illegal)).

In each of these cases, the court concluded that a person who engages in normally legal conduct made illegal by certain circumstances must be aware of the circumstances that make that conduct illegal. *McQueen*, 781 S.W.2d at 604; *Jackson*, 718 S.W.2d at 726; *Ross*, 573 S.W.3d at 824-25. Importantly, none of these cases holds that a defendant must actually realize that his actions constitute an offense in order to be convicted. *See McQueen*, 781 S.W.2d at 604; *Jackson*, 718 S.W.2d 724; *Ross*, 573 S.W.3d 817.

The above-cited cases are consistent with the Second Court's holding that evidence showing that Appellant voted (normally legal act) with the knowledge that she was a convicted felon on supervised release (circumstance making legal act illegal) is sufficient to prove that she committed the offense of illegal voting. *Mason v. State*, 598 S.W.3d 755, 780 (Tex. App.—Fort Worth 2020, pet. granted). Further, Appellant points to nothing in these opinions' interpretations of the placement of "knows" or "knowingly" – especially in statutory provisions that have nothing to do with illegal voting and have different grammatical constructions than section 64.012(a)(1) – that would merit this Court failing to follow or attempting to distinguish the on-point precedent of *Thompson*, *Jenkins*, and *Medrano*.

Appellant's federal cases are inapposite

Appellant also relies on two federal cases that do not apply here. *Appellant's Brief* at 25-27 (citing *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019); *Liparota*

v. United States, 471 U.S. 419, 420–21, 105 S. Ct. 2084, 2085–86 (1985)). In both of these cases, the U.S. Supreme Court explicitly limited its analysis to the federal statutes at issue. *See Rehaif*, 139 S. Ct. at 2195 ("We granted certiorari to consider whether, in prosecutions under § 922(g) and § 924(a)(2), the Government must prove that a defendant knows of his status as a person barred from possessing a firearm."); *Liparota*, 471 U.S. at 420–21, 105 S. Ct. 2084, 2085–86 ("The question presented is whether in a prosecution under [7 U.S.C. § 2024(b)(1)] the Government must prove that the defendant knew that he was acting in a manner not authorized by statute or regulations."). Further, in disposing of these cases, the Court did not announce any rule of a constitutional dimension that would have any effect on the prosecution of state voting offenses; rather, the Court simply clarified specific federal statutes – none of which have anything to do with illegal voting. *See Rehaif*, 139 S. Ct. at 2200 ("We conclude that in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm."); *Liparota*, 471 U.S. at 433 ("We hold that in a prosecution for violation of § 2024(b)(1) [food stamp fraud], the Government must prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations."). Though Appellant refers to these cases as "precedent,"

he has failed to establish their precedential value to this case. *Appellant's Brief* at 27.

Because Appellant does not allege a violation of the U.S. Constitution, and because Appellant makes no effort to explain how federal opinions clarifying federal laws that have nothing to do with voting have any precedential value in an illegal voting prosecution under Texas law, Appellant has failed to show the applicability of his cited federal cases. Appellant's inapposite federal authority does not require this Court to depart from the *Thompson* line of cases.

G. Alternatively, if the Second Court's analysis was flawed, the error was harmless because the evidence supported the reasonable inference that Appellant was aware that she was legally ineligible to vote.

Standard of Review

When determining whether the evidence is sufficient to support a criminal conviction, the only standard an appellate court should apply is the *Jackson v. Virginia* test for legal sufficiency. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.). Under that standard, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any 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, 99 S.Ct. 2781 (1979).

The Evidence supported an inference of Appellant's knowledge.

Knowledge is almost always proven through circumstantial evidence. *Herrera v. State*, 526 S.W.3d 800, 809 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). Knowledge may be inferred from any facts tending to prove its existence, including the accused's acts, words, and conduct. *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) (citing *Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999)). A person acts knowingly with respect to the nature of her conduct or to circumstances surrounding her conduct when she is aware of the nature of her conduct or that the circumstances exist or if she is aware that her conduct is reasonably certain to cause the result. TEX. PENAL CODE § 6.03(b).

The record contains the following evidence of Appellant's knowledge regarding her legal voting status:

- Appellant knew that she was a convicted felon on supervised release when she voted on November 8, 2016. RR 2:19-21, 108, 110, 113.

- Dietrich and Appellant sat at a table and actually read through each part of the provisional envelope. RR 2:67.

- Dietrich gave Appellant the envelope and told her to read and fill out the section entitled "To be completed by the voter." RR 2:67-68.

- Dietrich could not say with certainty that Appellant actually read it, but "she certainly paused and took some number of seconds to look over what was on the left. And

she certainly read the right part, and she filled it out since she put the right information in the boxes." RR 2:71.

- Dietrich held up his right hand and asked if Appellant affirmed that all the information she provided was accurate, and she responded "in the affirmative." RR 2:71-72.

- Dietrich testified he would not have let Appellant affirm to the affidavit had she appeared not to have read it. RR 2:74, 89.

- Dietrich did not believe it was possible that Appellant did not review the affidavit's language; he saw her distinctly pause while reading or appearing to read the form. RR 2:75-76, 86, 89.

- Streibich sat four to five feet away from Dietrich and Appellant when they worked on Appellant's provisional ballot. RR 2:102.

- Streibich saw Appellant read the provisional ballot affidavit. RR 2:102.

- Streibich testified that he saw "[Appellant's] finger watching each line making sure she read it all." RR 2:102.

- On cross-examination, Appellant agreed that the Affidavit of Provisional Voter that she completed and executed on November 8, 2016, makes it clear that a felon who is on supervised release is not eligible to vote and that it is a second-degree felony to vote in an election in which a person knows she is not eligible. RR 2:144-45, 150-51.

- Appellant signed the affidavit. RR 2:81; SX 9.

- Appellant testified that she would not have voted had she read the affidavit. RR 2:160.

This evidence allowed the finder of fact to infer that Appellant read the affidavit that, according to Appellant, made clear that a felon on supervised release is not eligible to vote, and that voting while ineligible is an offense; therefore, she knew that she, as a felon on supervised release, was legally ineligible to vote, and that if she voted, her voting would be an offense. *See Hart v. State*, 89 S.W.3d at 64 (knowledge may be inferred from any facts tending to prove its existence). Further, as the sole judge of witness credibility and the weight to be given any testimony, the trial court was entitled to reject Appellant's self-serving testimony that she did not know she was legally ineligible to vote because she did not read the Affidavit of Provisional Voter. *See Brooks*, 323 S.W.3d at 899; *Bernal v. State*, 483 S.W.3d 266, 270 (Tex. App.—Eastland 2016, pet ref'd).

H. Conclusion

The Second Court's holding that a conviction for illegal voting in this case required proof beyond a reasonable doubt that Appellant voted while knowing of the circumstances that made her legally ineligible to vote is sound under the hypothetically correct jury charge, and it is supported by the unambiguous plain language of section 64.012(a)(1) of the Texas Election Code, sections 6.03(b) and 8.03(a) of the Texas Penal Code, and by long-standing case law directly on point.

See Thompson, 9 S.W. at 486–87; *Jenkins*, 468 S.W.3d at 672–73; *Medrano*, 421 S.W.3d at 885.

Alternatively, if the Second Court erred in its sufficiency analysis, that error was harmless because the record supports the reasonable inference that Appellant knew she was legally ineligible to vote. Accordingly, this court should overrule Appellant's first issue.

II. The Second Court's interpretation of the Texas illegal voting statute is not in conflict with the federal Help America Vote Act (HAVA).

A. HAVA does not preempt the states from criminalizing the submission of a provisional ballot by a person who is legally ineligible to vote.

According to Appellant, the Second Court's interpretation of section 64.012(a)(1), criminalizing her conduct of casting an uncounted provisional ballot, is in conflict with the provisional voting section of HAVA; and in such a case, the federal law supersedes the state law. *Appellant's Brief* at 35. Therefore, according to Appellant, HAVA preempts the Second Court's interpretation of section 64.012(a)(1). *Appellant's Brief* at 35. She argues that HAVA permits people "who believe they are eligible to vote to cast a provisional ballot, even when their belief turns out to be incorrect."[5] *Appellant's Brief* at 35.

[5]It should be pointed out that Appellant was permitted to cast a provisional ballot in accordance with the HAVA provisional voting section. *See* 52 U.S.C.A § 21082.

HAVA

The Constitution grants Congress the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence [sic] and general Welfare of the United States." U.S. Const. Art. I, § 8, cl. 1. Congress's spending power is broad and "is not limited by the direct grants of legislative power found in the Constitution." *United States v. Butler,* 297 U.S. 1, 66, 56 S.Ct. 312, 80 (1936). In other words, Congress may tax and spend to enhance the national welfare generally, not merely to carry out the specific powers assigned to it in Article I of the Constitution. Incident to its spending power, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota v. Dole,* 483 U.S. 203, 206, 107 S.Ct. 2793 (1987).

In 2002, the U.S. Congress enacted HAVA in response to perceived voting irregularities during the November 2000 presidential election. *See Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1076–77 (N.D. Fla. 2004) (citing 148 Cong. Rec. S10488–02 (2002) (discussing the "flaws and failures of our election machinery" as showcased in the 2000 election)). Under HAVA, a spending program, federal payments to the states who opt into the program are conditioned on compliance with certain election procedures. *See* 52 U.S.C.A § 20901.

One of the requirements for federal payments under HAVA is that the money must be spent in compliance with Subchapter III. 52 U.S.C.A § 20901(b)(1)(A). Contained within subchapter III is section 21082, the statute at issue here. *See* 52 U.S.C.A § 21082. This section describes general procedures for casting and reviewing provisional ballots, and ensures that that a person whose name is not on the voter roll or cannot provide proper identification can cast a provisional ballot if she provides a written attestation that she is registered in and eligible to vote in that voting district. *See* 52 U.S.C.A. § 21082(a).

HAVA, a federal spending program, has no applicability to this illegal voting case.

Throughout her arguments regarding HAVA conflict and preemption, Appellant refers to individuals casting provisional ballots when they *believe* they are eligible to vote, are *mistaken* about their eligibility, or *do not know* they are ineligible to vote. *Appellant's Brief* at 35-43. However, section 21082 does not contemplate a voter's state of mind. *See* 52 U.S.C.A. § 21082(a). This is because section 21082 is not a penal statute; it is an administrative statute, outlining some of the requirements for membership in a federal spending program. *See id*. As such, it does not consider any *mens rea*. *See id.; County Democratic Party v. Blackwell*, 387 F.3d 565, 576 (6th Cir. 2004) ("HAVA is quintessentially about being [allowed] to *cast* a provisional ballot.) (original emphasis).

Appellant also seems to argue that because section 21082 provides the "remedy" of "simply not count[ing] the ballot[,]" if it was cast by a legally ineligible voter, any punishment under state law would be in conflict with HAVA. *Appellant's Brief* at 37-39. What Appellant classifies as a remedy is actually part of a condition of HAVA, wherein, in order to receive federal payments, the State is required to count a voter's provisional ballot if the State confirms the voter's eligibility; however, if the State cannot confirm the voter's eligibility, it can disregard the provisional ballot. 52 U.S.C.A. § 21082(a)(4). Because 21082 is an administrative statute, outlining requirements for membership in a spending program, it has no provisions establishing any remedy for the casting of a provisional ballot by a legally ineligible voter, or any other crime. *See* 52 U.S.C.A. § 21082.

Finally, section 21082 has no provisions preventing the states from criminalizing the casting of a provisional ballot by an ineligible voter. *See* 52 U.S.C.A. § 21082. Appellant cites *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004), throughout her brief, but ignores that the *Sandusky* court clarified that, though the enactment of HAVA affects the administration of elections, it leaves the enforcement of voting laws to the states. *Sandusky*, 387 F.3d at 576 ("HAVA merely ensures the right to cast a provisional ballot; however, the legality of the vote cast provisionally is generally a matter of state law."). In other words a State can punish an ineligible voter who cast a provisional ballot without

running afoul of HAVA. *See Id*. Appellant has failed to show any conflict between HAVA and the Second Court's application of section 64.012 of the Texas Election Code.

B. Conclusion

Section 21082 lists some of the conditions and procedures to which a State must comply in order to receive federal funding under HAVA. *See generally* 52 U.S.C.A. § 21082. Section 21082, an administrative statute for a federal spending program, has no provisions for a person's state of mind or remedies for violations of State voting laws. *See id*. Further, nothing in HAVA's provisional voting section exempts from criminal liability persons, like Appellant, who falsely affirm their eligibility to vote. *See Id.* Therefore, the Second Court's application of section 64.012 of the Texas Election Code does not conflict with the provisional voting section of HAVA. Accordingly, this court should overrule Appellant's second complaint and affirm the opinion of the Second Court.

III. The Second Court correctly determined that Appellant "voted" when she cast her provisional ballot.

A. Appellant voted.

Appellant challenges the Second Court's definition of the verb "vote" in section 64.012(a)(1) to include casting a rejected provisional ballot.[6] *Appellant's Brief* at 43-46; *see also Mason*, 598 S.W.3d at 774-75. She alleges that the Second Court's opinion: (1) failed to acknowledge ambiguity in the verb "vote" that must be resolved in her favor; (2) adopted a definition of the verb "vote" that leads to illogical results; and (3) rendered superfluous the "attempt to vote" language of section 64.012(a)(1). *Appellant's Brief* at 43-50.

The Second Court appropriately defined the verb "vote" in accordance with its common meaning

In defining the verb "vote," the Second Court reviewed a number of common definitions from various sources before deciding that "to cast or deposit a ballot — to vote — can be broadly defined as expressing one's choice, regardless of whether the vote actually is counted." *Mason*, 598 S.W.3d at 775 (footnote omitted). In other

[6]Appellant asserts that the rule of lenity required the Second Court to define the verb "vote" to exclude uncounted provisional ballots if the individual *mistakenly* believed she was eligible to vote. *Appellant's Brief* at 44-46. But even Appellant's interpretation of the verb "vote" does not excuse her conduct because the State proved, and the trial court found, beyond a reasonable doubt that she *did know* she was ineligible to vote but did so anyway as proscribed by section 64.012(a)(1).

words, the Second Court decided that the finder of fact applied a definition which is acceptable in common parlance to the verb "vote" in section 64.012(a)(1). *See id*.

The Second Court's definition of voting is in keeping with the well-established statutory-construction principle that words not particularly defined by statute are to be given the meaning found in their "common usage." TEX. GOV'T CODE § 311.00. It is also consistent with *Clinton v. State*, wherein this Court explained that a finder of fact may "freely read statutory language to have any meaning which is acceptable in common parlance."[7] 354 S.W.3d 795, 800 (Tex. Crim. App. 2011) (quoting *Vernon v. State*, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992)

However, Appellant argues that "the [Second Court] . . . failed to consider contrary definitions, even ones from the same source" when it defined voting. *Appellant Brief* at 45. Appellant cites no authority requiring an appellate court to consider any specific number of definitions of a legally-undefined term before applying a common definition. TEX. R. APP. P. 38.1.

Appellant also asserts that the Second Court erroneously equated "vote" with "cast" a provisional ballot. *Appellant's Brief* at 44-46. She points to Election Code

[7]The opinion actually refers to "jurors" rather than a "finder of fact." Although Appellant elected a bench trial, there is no reason not to allow the trial court, as finder of fact, to ascribe "any meaning which is acceptable in common parlance" to the verb "vote" in section 64.012(a)(1), as the Second Court did.

sections using the verb "cast" in referring to provisional ballots as dictating a conclusion that an uncounted provisional ballot like the one she cast is not a vote. *Appellant's Brief* at 44-46 (citing TEX. ELEC. CODE §§ 63.011 (establishing requirements for when a person "may cast a provisional ballot"), 65.059 (titled "Notice to Provisional *Voter*" and requiring system for "a person who casts a provisional ballot" to determine if ballot counted (emphasis added))). However, these provisions contain no language requiring the verb "vote" in section 64.012(a)(1) to include only tallied ballots. *See* TEX. ELEC. CODE §§ 63.011, 65.059.[8]

Appellant argues that, because the Texas Legislature used "vote" in one part of the Election Code and "cast a ballot" in other sections, this Court must presume that different meanings were intended. *Appellant's Brief* at 44-45. She cites *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 564 (Tex. 2016) in support. *Appellant's Brief* at 45.

In *Ineos*, The Texas Supreme Court was tasked with sorting out whether Chapter 95 of the Texas Civil Practice & Remedies Code protects an employee of the property owner from premises liability and negligence claims. *Ineos USA, LLC*

[8]Interestingly, section 21082 of HAVA is entitled "***Provisional voting*** and voting requirements" and the statute uses the word "vote" to refer to casting a provisional ballot: ". . . any individual who casts a provisional ballot may access to discover ***whether the vote of that individual was counted*, and, *if the vote was not counted, the reason that the vote was not counted***" (emphasis added)). 52 U.S.C.A. § 21082(a)(5)(B).

v. Elmgren, 505 S.W.3d 555, 564 (Tex. 2016) (citation omitted). Noting that "when the legislature uses certain language in one part of the statute and different language in another, we presume different meanings were intended," the Court held that an employee is not protected because the controlling statute expressly refers to employees among those who might assert a claim that Chapter 95 covers, but does not refer to employees among those against whom such a claim might be asserted. *Id*.

By the express language of *Ineos*, the presumption Appellant invites this Court to apply arises only when different terms are used *in the same statute*. *Id.* However, Appellant compares various statutes from the election code to section 64.012, noting that some of them refer to "voting" while others refer to "casting a ballot." *Appellant's Brief* 44-45.

Appellant attempts to broaden a holding that expressly applies to different terms contained within a single statute into one that would apply to any difference of language in any number of different statutes. And, she does so without regard to when the statutes were written or amended, and regardless of the various legislatures' varied goals in enacting the various statutes. This Court should decline Appellant's invitation to broaden *Ineos* beyond its express language.

Appellant further argues that sections 2.002(a) and 2.001 of the Election Code, which use the noun "vote" in the context of determining an election's winner

or the need for a runoff, mandate interpreting the verb "vote" in section 64.012(a)(1) to include only counted provisional ballots. *Appellant's Brief* at 44 (citing TEX. ELEC. CODE §§ 2.001 (to be elected to public office, candidate must receive more votes than any other candidate), 2.002(a) (if two or more candidates tie for number of votes, second election to fill office shall be held). Nothing in these sections supports that casting a provisional ballot that is later rejected does not constitute the action of voting, and Appellant does not point to any authority that does. *See* TEX. R. APP. P. 38.1. Further, section 2.001 explicitly (and section 2.002 by implication) refers to votes *received* by a candidate. *See* TEX. ELEC. CODE §§ 2.001, 2.002(a). A ballot – provisional or a regular – that is rejected for any reason, would not be *received* by a candidate.

Use of the noun "vote" in the cited sections dealing with procedures in a timeframe after votes have been received does not prevent interpreting the verb "vote" in section 64.012(a)(1) to cover timeframes preceding the counting of votes.

Appellant's construction leads to illogical results.

Appellant's construction allows someone who casts a provisional ballot when she *knows* she is ineligible to vote to escape criminal consequence if voting officials discover her ineligibility in time to prevent her vote from being tallied. Surely this is an absurd result not intended by the Legislature. *See Ex parte White*, 400 S.W.3d 92, 93 (Tex. Crim. App. 2013) (courts construe statutory words in accordance with

plain meaning unless construction leads to absurd results Legislature could not have intended).

Moreover, if the casting of a provisional ballot by a person who knows she is ineligible to vote is not to be punished, there would be no point in requiring a warning for provisional ballots, a warning that Appellant admitted at trial was clear about her own ineligibility to vote. RR 2:144-45, 150-51; *see* 52 U.S.C.A. § 21082(a)(2)(A), (B) (individual permitted to cast provisional ballot upon execution of written affirmation before election official stating she is registered voter in the jurisdiction and "eligible to vote in that election"); TEX. ELEC. CODE §§ 63.011(b-1) (secretary of state shall provide form of affidavit for provisional ballots), 124.006 (secretary of state shall prescribe form of provisional ballot and necessary procedures to implement casting provisional ballot as described by § 63.011); *see also* SX 8, 9 (containing warnings about eligibility to vote and criminal consequences for illegally voting as prescribed by secretary of state pursuant to § 63.001).

The opinion does not render the "attempt to vote" language of section 64.012(a)(1) superfluous.

Appellant asserts that this Court's opinion renders the "attempt to vote" language of section 64.012(a)(1) superfluous if a vote need not be counted. *Appellant's Brief* at 47. Section 64.012(a)(1) creates separate criminal offenses for conduct amounting to voting and conduct amounting to attempting to vote. *See* TEX.

ELEC. CODE § 64.012(a)(1). Appellant cites no authority, and the State has found none, to require a holding that voting illegally is an attempted offense until such time as the cast provisional ballot is tallied. TEX. R. APP. P. 38.1.

Appellant went beyond an attempt and actually voted when she completed every step necessary on her part to cast her provisional ballot:

- She filled out the provisional ballot; she signed the provisional ballot.
- She orally confirmed that the information contained on the ballot was correct.
- She accepted a PIN that allowed her to go into a voting booth and to vote for the candidates on the ballot in that precinct.
- She entered the PIN into the voting machine.
- She expressed her preferences in the election on November 8, 2016.
- She returned her completed provisional ballot to the poll worker.
- Her provisional ballot was placed in a special bag and submitted to the tally station where all other ballots from the county were collected.

RR 2:77-78, 81, 87.

Had Appellant's legal ineligibility to vote been discovered at any point before she handed her completed ballot to the poll worker, she could have been charged with attempted illegal voting. *See* TEX. ELEC. CODE § 64.012(a)(1); TEX. PENAL CODE § 15.01. As such, Appellant has failed to show that the Second Court's

construction of section 64.012 renders the "attempt to vote" language of section 64.012(a)(1) superfluous.

B. Conclusion

The language of section 64.012(a)(1) does not require the State to prove that Appellant's provisional ballot was included in the final vote tally in order to convict her of illegal voting. *See* TEX. ELEC. CODE § 64.012(a)(1); *see also Lebo v. State*, 90 S.W.3d 324 (Tex. Crim. App. 2002) (statutory interpretation begins with statute's plain language). Appellant voted by expressing her candidate preferences when she received a PIN, used an electronic voting machine to choose her preferred candidates, and expressed her preferences by submitting a completed ballot to the poll worker. *See* BLACK'S LAW DICT. (10th ed. 2014) (defining "vote" as "[t]he expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication"). The Election Code provides no defense to a prosecution for illegal voting if election officials discover a person's ineligibility to vote before counting her ballot. *See* TEX. ELEC. CODE § 64.012. And, other Election Code sections using the noun "vote" to discuss procedures occurring after tallying do not mandate interpreting the verb "vote" in section 64.012(a)(1) to include only ballots that are ultimately counted.

CONCLUSION AND PRAYER

Appellant suffered no reversible error. Therefore, the State prays that this Court affirm the Court of Appeals' opinion.

Respectfully submitted,

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