NO. 02-18-00138-CR

IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS

CRYSTAL MASON,

APPELLANT

V.

THE STATE OF TEXAS,

APPELLEE

On Appeal from Cause No. 1485710D in the 432nd District Court of Tarrant County, Texas, the Hon. Ruben Gonzalez Presiding

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STATE'S BRIEF ON REMAND

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Oral argument is **NOT** requested.

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STATEMENT OF THE CASE

On March 28, 2018, after a trial before the court, the trial judge convicted Crystal Mason ("Appellant") of illegal voting under Section 64.012(a)(1) of the Texas Election Code, a second-degree felony. CR 33. *See* TEX. ELEC. CODE § 64.012(a)(1) (West 2018). The trial court sentenced Appellant to five years in TDCJ. CR 33. On May 25, 2018, after an evidentiary hearing, the trial court denied Appellant's motion for new trial. *See* Supp. RR 2. The Court issued "findings of fact and conclusions of law." CR 197-211.

On March 19, 2020, this Court affirmed Appellant's conviction. *See Mason v. State*, 598 S.W.3d 755 (Tex. App—Fort Worth 2020). On September 27, 2020, this Court denied Appellant's motion for en banc reconsideration.

On March 31, 2021, the Court of Criminal Appeals granted Appellant's petition for discretionary review. On May 11, 2022, the Court of Criminal Appeals issued an opinion affirming this Court's judgment in part but remanding the case back to this Court for a legal sufficiency review of the record. *Mason v. State*, No. PD-0881-20, 2022 WL 1499513, at *12 (Tex. Crim. App. May 11, 2022).

STATEMENT REGARDING ORAL ARGUMENT

The Court of Criminal Appeals remanded this case to this Court to analyze the legal sufficiency of the evidence to support the trial court's judgment. Because the facts and legal arguments are adequately presented in the briefs and record, and oral argument would not significantly aid the decisional process, the State does not request oral argument. *See* TEX. R. APP. P. 39.1 (c), (d). However, if this Court grants oral argument to Appellant, the State requests the opportunity to also present oral argument.

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. 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 the election judge 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. The election judge then searched the online voter database, but he still was unable to identify Appellant as a registered voter. RR 2:60.

Because Appellant was not listed as a registered voter, the election judge could not allow her to vote in the normal fashion. RR 2:62. He asked if she wanted to vote provisionally, and she responded affirmatively.[1] RR 2:62. Appellant and the election judge 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 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 the election judge 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. The election judge would not have let Appellant affirm to the affidavit if she appeared not to have read it. RR 2:74. Appellant returned to the poll clerk, placed her name on the provisional sign-in sheet, and voted. RR 2:74-75, 102-03; SX 7. Both 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.

election judge and poll clerk believed that Appellant read the entire 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.

Appellant's trial

Appellant testified that the Provisional Voter Affidavit made clear that she was ineligible to vote; however, she maintained that she did not know she was ineligible because she did not read the Provisional Voter Affidavit. RR 2:144-45, 150-51. The Election Judge testified that Appellant appeared to read the affidavit, and the Poll Clerk testified that he saw Appellant read the affidavit. RR 2:71, 102.

SUMMARY OF THE ARGUMENT

The evidence, and reasonable inferences drawn therefrom, when viewed in the light most favorable to the trial court's judgment, is legally sufficient to prove that Appellant not only read the Provisional Voter Affidavit printed on the left-hand side of the provisional voter envelope, but also understood it to mean that a person

under her circumstances is ineligible to vote and would commit a felony by doing so. Therefore, the evidence is legally sufficient to support the trial court's judgment.

Appellant has failed to show that her trial counsel provided ineffective assistance by failing to call certain witnesses to testify at her trial. Further, this Court need not revisit its refusal to find trial counsel ineffective for failing to explore the election judge's alleged bias or its conclusion that Appellant failed to show that trial counsel had an actual conflict of interest.

ARGUMENT AND AUTHORITIES

POINT OF ERROR ONE

I. Contrary to Appellant's assertion, this Court did not make any factual determinations. If it did, this Court should not rely on factual determinations not made by the factfinder.

As a preliminary matter, Appellant invites this Court to find the evidence legally insufficient "based on its prior determination" that "[Appellant] 'was not certain,' 'did not know,' and "may not have known' about her ineligibility to vote[.]" *Appellant's Brief* at 12. However, when these cherry-picked phrases are examined in the correct context, it becomes clear that the complained-of language is used to explain that an appellate court need not consider an appellant's subjective belief regarding the legality of her actions unless the evidence raised a mistake of law defense. *See Mason*, 598 S.W.3d at 770, 779.

By the complained-of statements, this Court was clarifying that Appellant's failure to raise a "mistake of law" defense rendered her subjective belief regarding her voting status irrelevant. *See id.* at 768-69 (footnote omitted) (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'd, improvidently granted*, 520 S.W.3d 616 (Tex. Crim. App. 2017) (per curiam); *Medrano v. State*, 421 S.W.3d 869, 884-85 (Tex. App.—Dallas, 2015, pet. ref'd)). The supporting authority cited by this Court – referring to and consistent with the premise that ignorance of the law is not a viable defense – supports this interpretation. *See id*.

To be clear, when the complained-of language is examined in the context of the sections in which it appears, it demonstrates not factual determinations made by this Court, but rhetorical devices used to illustrate this Court's opinion that whether Appellant realized that she was not eligible to vote was irrelevant because the evidence did not raise a mistake of law defense at trial. Accordingly, this Court should not rely on these "facts," as Appellant requests.

Further, in a legal sufficiency review, an appellate court does not determine the facts of the case; factual determinations are exclusively the domain of the factfinder – in this case the trial court. *See Moreno v. State,* 755 S.W.2d 866, 867 (Tex. Crim. App. 1988) ("Under the *Jackson* standard, the reviewing court is not to position itself as a thirteenth juror in assessing the evidence."). The appellate court's

job is to examine the record to determine if the evidence, when viewed in the light most favorable to the verdict, supports the factfinder's factual determinations. *See id*. (appellate court's role is to ensure the rationality of the factfinder); *see also Marines v. State*, 292 S.W.3d 103, 106 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) ("The scope of a legal sufficiency review is limited to only that evidence before the [factfinder].") (citing *Moff v. State,* 131 S.W.3d 485, 488 (Tex. Crim. App. 2004)). Failing a showing that the "fact[s]" alluded to by Appellant in her brief (*Appellant's Brief* at 12) were determined by the factfinder, this Court should reject Appellant's inappropriate invitation. *See Moreno*, 755 S.W.2d at 867

If this Court did make the factual determinations Appellant alleges, they should be disregarded because an appellate court does not have the authority to determine the facts of a case. *See id*. Further, the factual determinations alleged by Appellant should be disregarded because the record does not show that they were made by the factfinder.

II. Standard of Review

Appellant argues that the evidence is legally insufficient to uphold the trial court's judgment because it does not show that she read the provisional voter affidavit on the left-hand side of the provisional voting envelope. Alternatively, she argues that there is legally insufficient evidence to show that she knew she was ineligible to vote because the evidence does not show that she understood the

affidavit if she read it. She also attacks the credibility of two eyewitnesses who gave testimony favorable to the verdict.

In performing a legal sufficiency review, the appellate court views the record evidence in the light most favorable to the verdict and determines whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Robinson v. State*, 466 S.W.3d 166, 172 (Tex. Crim. App. 2015). This well-known standard accounts for the factfinder's duty "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. The reviewing court may not re-evaluate the weight and credibility of the record evidence and thereby substitute its judgment for that of the factfinder. *Isassi v. State,* 330 S.W.3d 633, 638 (Tex. Crim. App. 2010).

In a legal sufficiency review, circumstantial evidence is as probative as direct evidence in establishing the guilt of the actor, and circumstantial evidence alone may be sufficient to establish guilt. *Id*.; *Carrizales v. State*, 414 S.W.3d 737, 742 (Tex. Crim. App. 2013). This standard applies to jury and bench trials equally. *See Robinson*, 466 S.W.3d at 172.

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)). 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).

III. The hypothetically correct jury charge

A legal sufficiency challenge requires an appellate court to determine "whether, after viewing all the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Herron v. State*, 625 S.W.3d 144, 152 (Tex. Crim. App. 2021) (citing *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Even after a bench trial, the elements of the offense are determined by the hypothetically correct jury charge for the case. *See Malik v. State,* 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)

Under the hypothetically correct jury charge for this case, the State was required to prove that Appellant: (1) knowingly or intentionally voted or attempted to vote in an election, (2) in which she was not eligible to vote, and (3) she knew she was ineligible to vote. *See* TEX. ELEC. CODE § 64.012(a)(1).

The Court of Criminal Appeals remanded this case to this Court to determine one thing: whether the evidence is legally sufficient to show that Appellant realized (knew) she was ineligible to vote when she voted on November 8, 2016. *Mason II*, 2022 WL 1499513, at *12. As the Court of Criminal Appeals recently clarified,

legally sufficient proof of Appellant's knowledge consists of evidence showing that she knew of the circumstances that made her act of voting illegal, *and* that she realized that she was ineligible to vote. *See id*. at *8. Based on a recent legislative amendment to section 64.012 of the Election Code, a signed Provisional Voter Affidavit, standing alone, is not to be considered legally sufficient evidence to show that a defendant knew that she was ineligible to vote; corroborative evidence is necessary. TEX. ELEC. CODE § 64.012(c) (West 2022) ("[a] person may not be convicted solely upon the fact that the person signed a provisional ballot affidavit under Section 63.011 unless corroborated by other evidence that the person knowingly committed the offense.").

IV. Appellant's approach flies in the face of *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) and *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

Appellant argues in part that the evidence is legally insufficient to support the trial court's judgment because: 1) Having not read the provisional voter affidavit, she did not realize (know) that she was ineligible to vote; 2) she would not have voted had she known her voting was illegal; and 3) the testimony of State's two eyewitnesses was speculative and/or not credible. *See generally Appellant's Brief* at 10-25. For Appellant's argument to succeed, this Court would necessarily have to weigh Appellant's self-serving testimony that she did not read the affidavit (unfavorable to the verdict) against that of two disinterested eyewitnesses–one who

testified that Appellant appeared to read the affidavit she signed, and one who testified that he saw her read the affidavit she signed (favorable to the verdict) – then credit Appellant's testimony over that of the eyewitnesses.

Appellant's invitation for this Court to weigh the evidence represents an inappropriate attempt to resurrect the *Clewis* "factual sufficiency" standard of review laid to rest by the Court of Criminal Appeals in *Brooks*. *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (overruling *Clewis v. State*, 922 S.W.2d 126 Tex. Crim. App. (1996)) ("[T]he *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."). Further, Appellant's invitation for this Court to credit evidence which is not favorable to the verdict over that which is favorable to the verdict runs counter to the *Jackson* requirement that the reviewing court view the evidence in the light most favorable to the verdict. *See Jackson*, 443 U.S. at 318-19. This Court should disregard Appellant's inappropriate invitations and should review the evidence only in the light most favorable to the verdict, as required by *Jackson*. *Id.*; *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013); *Brooks*, 323 S.W.3d at 912.

V. The evidence, when viewed in the light most favorable to the verdict, is legally sufficient to show that Appellant read the Provisional Voter Affidavit.

Appellant's primary argument in her first point of error seems to be that the evidence is not sufficient to show that she realized she was ineligible to vote because no witness testified specifically that they saw her read the "left-hand" side (the side containing the Provisional voter Affidavit) of the provisional voter envelope. *Appellant's Brief* at 16. By this argument, Appellant asks this Court to require surgically precise direct evidence to support the trial court's judgment. This runs contrary to the *Jackson* standard for review of the legal sufficiency of evidence and Texas law. *See Jackson*, 443 U.S. at 319 (fact finder may draw reasonable inferences from basic facts to ultimate facts); *see also Carrizales*, 414 S.W.3d at 742 (direct evidence not necessary to convict).

When the correct standard is applied – one that allows for reasonable inferences drawn from circumstantial evidence that is viewed in the light most favorable to the verdict – the evidence is legally sufficient to show that Appellant read the entire envelope, including the Provisional Voter Affidavit on the left-hand side. For example:

- The election judge testified that he asked Appellant to read the affidavit and fill out the right side of the envelope. RR 2:67.

- Though the election judge could not say with certainty that Appellant read the affidavit, he testified, "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. *See Chivers v. State*, 481 S.W.2d 125, 127 (Tex. Crim. App. 1972) (citing witness testimony that defendant appeared to read confession as evidence that he read confession, despite appellant's claim to be semi-literate and unable to read the document); *Wilkins v. State*, 960 S.W.2d 429, 432 (Tex. App.—Eastland 1998, pet. ref'd) (concluding appellant received *Miranda* warning when he "appeared to read" prepared statement on which warning was printed); *see also Gutierrez v. State*, 502 S.W.2d 746, 747 (Tex. Crim. App. 1973) (witness testimony that appellant appeared to read and understand prepared statement before signing among evidence that statement was voluntary).[2]

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

- The election judge testified he would not have let Appellant affirm to the affidavit had she appeared not to have read it because, as an election judge, he wants to make sure provisional voters know they are eligible to vote. RR 2:74, 89.

- The election judge 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.

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[2] *See, e.g.*, *Duran v. State*, No. 07-07-0085-CR, 2008 WL 2116925, at *2 (Tex. App.—Amarillo May 20, 2008, no pet.) (rejecting Appellant's complaint that he did not receive *Miranda* warning when Appellant "appeared to read" warning card, despite appellant's claim that he could not read); *Hill v. State*, No. 14-93-00549-CR, 1995 WL 321191, at *2 (Tex. App.—Houston [14th Dist.] May 25, 1995, no pet.) (witness testimony that Appellant appeared to read prepared statement before signing among evidence showing statement was voluntary).

- Appellant signed the envelope containing the Provisional Voter Affidavit.[3] RR 2:81; SX 9. *See Moore v. Moore,* 383 S.W.3d 190, 196 (Tex. App.—Dallas 2012, pet. denied). ("In the absence of trickery or artifice, parties are presumed to have read and understood the documents they sign.").

The factfinder could rely on the election judge's eyewitness testimony that Appellant appeared to read the affidavit combined with Appellant's signature and the well-accepted legal presumption that a person has read any document she has signed to reasonably infer that Appellant read the Provisional Voter Affidavit on the left-hand side of the provisional voter envelope.

However, the election judge was not the only eyewitness in this case. The poll clerk also witnessed the events that unfolded on November 8, 2016:

- The poll clerk testified that he sat four to five feet away from the election judge and Appellant when they worked on Appellant's provisional ballot. RR 2:102.

- The poll clerk testified that part of his job was to ensure that provisional voters "read the ballot." RR 2:102.

- The poll clerk testified that he saw Appellant read the provisional ballot envelope, tracing her finger over "each line making sure she read it all." RR 2:102.

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[3] While the Court of Criminal Appeals has ruled that a signed Provisional Voter Affidavit is not *proof* of knowledge, it did not disqualify such a document as *evidence* of knowledge. *See Mason v. State*, No. PD-0881-20, 2022 WL 1499513, at *4 (Tex. Crim. App. May 11, 2022).

The testimony of the two eyewitnesses combined with Appellant's signature on the affidavit allowed the factfinder to reasonably infer that Appellant read the Provisional Voter Affidavit.[4]

VI. The evidence is legally sufficient to prove Appellant knew she was ineligible to vote and that doing so constituted an offense.

Alternatively, Appellant argues, "The State has offered no evidence that [Appellant], upon supposedly reading the left-hand statements, understood that they applied to her particular and unique situation and that they meant she was ineligible to vote." *Appellant's Brief* at 18. The State would respectfully point out that this Court's duty is to examine the entire record, rather than limiting its analysis to evidence offered by the State.[5] *See Melton v. State*, 120 S.W.3d 339, 342 (Tex. Crim. App. 2003) (citing *Jackson*, 443 U.S. at 318-19).

Appellant's own words support the reasonable inference that if she read the affidavit, she knew she was ineligible to vote and that doing so constituted an offense. *See Jackson*, 443 U.S. at 319 (fact finder may draw reasonable inferences

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[4] This evidence belies Appellant's assertion that the State's case rested entirely on speculation that she read the left-hand side of the provisional voter affidavit. *Appellant's Brief* at 14.

[5] In support of her argument, Appellant points out, "The State has produced no evidence to show that [Appellant] knew she was ineligible but was behaving covertly in order to submit her provisional ballot. Nor is there any evidence to suggest that [Appellant] had a personal or pecuniary motivation to submit a provisional ballot despite "actually realizing" she was ineligible." *Appellant's Brief* at 19. The State was not required to prove these things. *See* TEX. ELEC. CODE § 64.012(a)(1).

from basic facts to ultimate facts). That is, during direct examination, Appellant read the Provisional Voter Affidavit on the stand, then testified that she clearly understood it to mean that a convicted felon who is on supervised release is not eligible to vote and commits a felony by doing so:

> [Trial Counsel]: [Y]ou would admit that the language within [the Provisional Voter Affidavit], it's clear?
>
> [Appellant]: Yes, sir, it is. It is.
>
> [Trial Counsel]: Okay. It's safe to say that anyone reading this language would know, If I'm a felon or if I'm a felon who has not concluded my sentence being on supervised release –
>
> [Appellant]: Correct.
>
> [Trial Counsel]: -- it's clear I'm not eligible to vote? That's clear –
>
> [Appellant]: Correct.
>
> [Trial Counsel]: -- correct? You -- you would admit that?
>
> [Appellant]: You're absolutely correct.

RR 2:144-45. Appellant also testified that she would not have voted had she read the affidavit, underscoring that she clearly understood the language of the affidavit to mean that *she* was not eligible to vote and would commit a felony by doing so. [6] RR 2:152, 160.

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[6] This testimony negates *every* argument that Appellant could have read the Provisional Voter Affidavit without understanding that it applied to her.

Further, when this evidence is considered in conjunction with Appellant's federal judgment – which contains a section outlining terms of her federal supervised release, entitled "Standard Conditions of Supervision" – Appellant's argument that she could not have understood the term "supervision" to mean federal supervised release to be is shown to be false. SX 1. Finally, Appellant's unsupported assertion that this testimony "cannot be divorced from her testimony that she did not read the statements" (*Appellant's Brief* at 21, n.6) is contradicted by the Court of Criminal Appeals and *every* intermediate Court in Texas.[7]

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[7] *See, e.g., Ex parte Mayhugh*, 512 S.W.3d 285, 298 (Tex. Crim. App. 2016) ("[T]he fact-finder is free to believe all, part, or none of a witness's testimony."); *Stone v. State*, 635 S.W.3d 763, 769 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd) (same); *Prestiano v. State*, 581 S.W.3d 935, 941 (Tex. App.—Houston [1st Dist.] 2019, pet. ref'd) (same); *In re R.A.*, 346 S.W.3d 691, 695 (Tex. App.—El Paso 2009, no pet.) (same); *Arredondo v. State*, 270 S.W.3d 676, 679 (Tex. App.—Eastland 2008, no pet.) (same); *Blocker v. State*, 264 S.W.3d 356, 360 (Tex. App.—Waco 2008, no pet.) (same); *Murphy v. State*, 229 S.W.3d 334, 342 (Tex. App.—Amarillo 2006, pet. ref'd) (same); *Robertson v. State*, 988 S.W.2d 275, 276 (Tex. App.—Texarkana 1999, pet. ref'd) (same); *Revell v. State*, 885 S.W.2d 206, 208 (Tex. App.—Dallas 1994, pet. ref'd) (same); *Peterson v. White*, 877 S.W.2d 62, 63 (Tex. App.—Tyler 1994, no writ) (same); *Arnold v. State*, 793 S.W.2d 305, 308 (Tex. App.—Austin 1990, no writ) (same); *Zepeda v. State*, 773 S.W.2d 730, 731 (Tex. App.—San Antonio 1989, no pet.) (same); *Meza v. State*, No. 13-21-00059-CR, 2022 WL 963273, at *3 (Tex. App.—Corpus Christi–Edinburg Mar. 31, 2022, no pet.) (memo op., not designated for publication) (same); *Thomas v. State*, No. 09-16-00232-CR, 2018 WL 915194, at *5 (Tex. App.—Beaumont Feb. 14, 2018, no pet.) (memo op., not designated for publication) (same); *Ireland v. State*, No. 02-17-00214-CR, 2018 WL 2344660 at *3 (same) (Tex. App.—Fort Worth May 24, 2018, pet. ref'd) (mem. op., not designated for publication) (memo op., not designated for publication) (same).

VII. Appellant's argument that the State's case fails because it is based solely on the affidavit misrepresents the evidence.

Appellant argues, "Because the State's theory requires the Court to infer [Appellant's] knowledge solely from the provisional ballot affidavit, it runs contrary to the Court of Criminal Appeals holding and must be rejected." *Appellant's Brief* at 22. By this argument, Appellant misrepresents the evidence.

The State's evidence that Appellant knew she was ineligible to vote was not limited to the affidavit, as claimed by Appellant. *Appellant's Brief* at 22. The State's evidence of Appellant's knowledge, as outlined above, consisted of 1) the affidavit; 2) Appellant's signature on the affidavit; 3) the corroborating testimony of two eyewitnesses establishing that Appellant read the affidavit; and 4) the corroborating testimony of Appellant establishing that she understood the affidavit to mean that she was ineligible to vote and would commit a felony by doing so.

This evidence is fully in keeping with the rule announced by the Court of Criminal Appeals: "[M]erely signing an affidavit is not, alone, sufficient evidence to secure a conviction for illegal voting; there must be other evidence to corroborate that the defendant knew she was ineligible to vote." *Mason II*, WL 1499513, at *4. This Court should disregard Appellant's argument that relies on a misrepresentation of the evidence.

VIII. Conclusion

The record evidence allowed for the reasonable inference that Appellant read the affidavit that, by Appellant's own words, made clear that a person in her circumstances is not eligible to vote and would commit a felony by doing so. Therefore, the evidence is legally sufficient to show that Appellant, a felon on supervised release, realized she was ineligible to vote when she cast her ballot on November 8, 2016. *See Hart*, 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 credit the testimony of two disinterested eyewitnesses and to reject Appellant's self-serving testimony that she did not know she was legally ineligible to vote because she did not read the provisional voter affidavit. *See Brooks*, 323 S.W.3d at 899; *Bernal v. State*, 483 S.W.3d 266, 270 (Tex. App.—Eastland 2016, pet ref'd). Accordingly, this Court should overrule Appellant's first point of error.

POINT OF ERROR TWO

In a footnote in his concurrence/dissent, Judge Yeary mentions that the Court of Criminal Appeals' opinion is such that this Court might reconsider its position regarding three ineffective-assistance claims Appellant raised on direct appeal: 1) whether trial counsel was ineffective for failing to call additional witnesses to

establish that Appellant lacked knowledge that she was ineligible to vote; 2) whether trial counsel was ineffective for failing to explore potential bias of the election judge; and, 3) whether trial counsel had conflict of interest, resulting in ineffective assistance. *See Mason II*, 2022 WL 1499513, at *13, n.2 (Tex. Crim. App. May 11, 2022) (Yeary, J., concurring in part and dissenting in part).

In her second point of error, Appellant reiterates her claim on direct Appeal that her trial counsel provided ineffective assistance because he failed to call certain witnesses. *Appellants Brief* at 28. She does not raise the other claims. *Id*.

I. Standard of review

To prevail on a claim of ineffective assistance of counsel, the appellant must show counsel's representation fell below an objective standard of reasonableness, and there is a reasonable probability the results of the proceedings would have been different in the absence of counsel's unprofessional errors. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984). There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689; *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). Consequently, support for a claim of ineffective assistance of counsel must be firmly grounded in the record. *See Johnson v. State*, 691 S.W.2d 619, 627 (Tex. Crim. App. 1984).

II. Appellant has not met her burden to showing trial counsel was ineffective for failing to call specific witnesses.

No showing of availability to testify at trial

While the failure to call witnesses may show ineffective assistance of counsel, such a failure is irrelevant absent a showing that the witnesses were available and that their testimony would benefit the defense. *Butler v. State,* 716 S.W.2d 48, 55 (Tex. Crim. App. 1986); *Simms v. State,* 848 S.W.2d 754, 758 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). To meet the availability requirement, proposed witnesses must testify or swear in an affidavit that they were available to testify at the defendant's trial. *See Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007) (denying habeas relief after holding appellant's trial attorney not ineffective for failing to call witness whose alleged statement was "not sworn or signed" and witness did "not state that she was available to testify at [defendant's] trial").

Though Appellant asserts that three proposed witnesses–Appellant's niece, mother, and daughter–were available to testify,[8] she points to no evidence showing that was the case.[9] To be clear, the trial court conducted an evidentiary hearing on Appellant's motion for new trial; however, Appellant did not call any of the

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[8] *Appellant's Brief* at 28.

[9] Appellant does provide a citation for her assertion that her niece was available to testify; however, that citation does not point to any evidence of availability. *Appellant's Brief* at 28.

proposed witnesses to establish their availability to testify at Appellant's trial. *See generally* RR Supp. 2. Further, no witness testified at the hearing that the proposed witnesses were available to testify at Appellant's trial. RR 2:15-47.[10] Consequently, the supplemental reporter's record contains no evidence that the proposed witnesses were available to testify.

Further, though the clerk's record contains affidavits from two of the proposed witnesses – Appellant's niece and mother[11] – neither of the proposed witnesses state in their affidavits that they were available to testify at Appellant's trial. CR 51-53. *See Ramirez*, 280 S.W.3d at 853. In other words, the record is entirely devoid of evidence showing that the proposed witnesses were available to testify at Appellant's trial.

Without evidence establishing that the proposed witnesses were available to testify, trial counsel's failure to call them is irrelevant; therefore, Appellant has failed to show that trial counsel was ineffective for failing to call any of the proposed witnesses to testify. *See id.*; *Butler*, 716 S.W.2d at 55. Accordingly, this Court should overrule Appellant's second point of error.

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[10] At the hearing the only witness was Appellant's trial counsel. *See generally* RR Supp. 2.

[11] The Clerk's Record does not contain an affidavit from Appellant's daughter.

Appellant has not shown that the prospective witness testimony would have benefitted the defense

The trial court, which was the factfinder at trial, issued a finding of facts and conclusions of law containing the following finding relevant to this complaint: "The facts contained in [Appellant's mother's] and [Appellant's niece's] affidavits would not have changed the Court's evaluation of the evidence in finding the Defendant guilty of illegal voting." CR 204. Appellant does not challenge this finding.[12] *See Antrim v. State*, 868 S.W.2d 809, 812 (Tex. App.—Austin 1993, no writ) (unchallenged findings of fact are binding on an appellate court unless there is no evidence to support the findings or if the contrary is established as a matter of law.). According to this finding of fact, whether the proposed witnesses' testimony would not have benefitted the defense is not debatable. *See id*.

Because the finder of fact explicitly stated that the facts in the affidavits would not have had any effect on the outcome of the case, and because Appellant does not show or even assert that the proposed witnesses would have expanded on their affidavits, trial counsel's failure to call the proposed witnesses is irrelevant; therefore, Appellant has failed to show that trial counsel was ineffective for failing

[12] Even if Appellant were to challenge this finding, such a challenge would be unsuccessful due to the nature of the finding.

to call any of the proposed witnesses to testify. *See Ex parte Ramirez*, 280 S.W.3d at 853; *Butler*, 716 S.W.2d at 55.

III. This Court need not revisit its conclusion that trial counsel was not ineffective for failing to explore the election judge's alleged bias.

On direct appeal, Appellant alleged that trial counsel provided ineffective assistance because he failed to explore the election judge's bias, which she claims was evident in his failure to personally admonish her about her potential ineligibility to vote. *See Appellant's Brief on Direct Appeal* at 26-27. Specifically, Appellant claimed, without record citations, that the election judge knew she previously went to prison and that, instead of raising concerns with Appellant about her potential ineligibility to vote, he waited to contact the Criminal District Attorney. *See id*.

The trial court correctly found that evidence regarding the election judge's alleged bias were presented during the election judge's trial testimony. CR 202; RR 2:91-92, 94; Suppl. RR 2:42-43. That is, the election judge testified on direct examination and cross-examination that he did not know or have any reason to suspect that Appellant was a convicted felon who was ineligible to vote. CR 202; RR 2:91-92, 94. The failure to present essentially cumulative evidence does not constitute deficient performance. *See Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007); *Barnes v. United States*, 859 F.2d 607, 608 (8th Cir. 1988) ("Direct- and cross-examination techniques are matters of trial strategy left to the discretion of counsel").

Further, Appellant did not meet her burden of proving that trial counsel's alleged deficient performance prejudiced her defense. That is, Appellant did not call the election judge to testify at the May 25, 2018, motion-for-new-trial hearing, and she did not specify what questions trial counsel should have asked and what the election judge's responses would have been to those questions. CR 202. Without this testimony, Appellant's claim of prejudice under this issue is purely speculative. *See Jackson v. State,* 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) ("[I]neffective assistance claims are not built on retrospective speculation; rather, they must 'be firmly founded in the record.'").

As the trial court correctly found, Appellant presented no evidence that the election judge "ever harbored any type of 'bias' toward [Appellant], much less a 'bias' that contributed to [Appellant] voting illegally." CR 202-03; *see* Suppl. RR 2:4-66. Further, the trial court explicitly found that questioning by trial counsel at trial would have been cumulative and would not have changed the trial court's evaluation of the evidence in finding Appellant guilty of illegal voting.[13] CR 202. No prejudice is shown where, as here, additional evidence would have been cumulative of evidence introduced at trial. *See Parker v. Allen*, 565 F.3d 1258, 1279, 1283 (11th Cir. 2009) (no prejudice where additional testimony cumulative); *Hill v.*

[13] Appellant does not challenge this finding.

Mitchell, 400 F.3d 308, 319 (6th Cir. 2005) (to establish prejudice, new evidence must differ in a substantial way in strength and subject matter from evidence actually presented).

Appellant did not meet her burden of proving by a preponderance of the evidence that trial counsel provided ineffective assistance by failing to explore the election judge's alleged bias in a manner that was not already explored at trial. As such, there is no need for this Court to revisit its prior holding that trial counsel did not provide ineffective assistance by failing to explore the election judge's alleged bias.

IV. This Court need not revisit its conclusion that Appellant failed to show that trial counsel had an actual conflict of interest.

Regarding the question of trial counsel's potential conflict of interest, Judge Yeary states that this Court might revisit it because this Court rejected the claim on the basis that "the only defense it could have raised incorrectly assumed that the State must prove Appellant was aware of her ineligibility to vote." *Mason II*, 2022 WL 1499513, at *13. This statement is only partially true because this Court's rejection of this complaint had two separate bases.

First, this Court rejected the conflict complaint because Appellant did not meet her burden of proving an actual conflict of interest:

> [D]espite [appellant counsel's] best efforts to equate trial counsel's telling [Appellant] in 2012 that she would not be able to vote after her conviction with knowledge that [Appellant] was actually aware *in 2016*

> that she could not vote, [appellate counsel] elicited no evidence that trial counsel knew that [Appellant] actually remembered in 2016 what he had told her in 2012.

Mason, 598 S.W.3d at 788.

This Court then concluded that, had it not rejected the issue on its merits, it would have still rejected the claim on the basis pointed out by Judge Yeary:

> Regardless, trial counsel's knowledge that he had told her in 2012 that she would not be able to vote after being convicted of a felony was not relevant to her defense that in 2016 she did not know that being on supervised release made her ineligible under the law—a defense that was not based on the statute, which as we have explained does not require the State to show a defendant's subjective knowledge of the law absent evidence raising a mistake-of-law affirmative defense.

Id.

Appellant does not provide this Court with any reason to revisit its conclusion that Appellant failed to prove an actual conflict of interest. Accordingly, this Court should not revisit its conclusion that trial counsel did not provide ineffective assistance by having a conflict of interest.

CONCLUSION AND PRAYER

Appellant suffered no reversible error. Therefore, the State prays that the trial court's judgment be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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