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NO. 02-18-00138-CR

**IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS
AT FORT WORTH**

CRYSTAL MASON,

Appellant,

V.

STATE OF TEXAS,

Appellee.

**On appeal from 432nd District Court
of Tarrant County, Texas
In Cause No. 148710D
The Honorable Ruben Gonzalez, Jr. Presiding**

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Introduction

The State has offered no evidence to show that Ms. Mason knew she was ineligible to vote in 2016 when she submitted her provisional ballot. The State's response brief ignores the Court of Criminal Appeals' holding that it is not enough to show that Ms. Mason **could have** or even **should have** known she was ineligible. CCA.Op.8. The State must show that Ms. Mason "**actually realized**" she was ineligible to vote. The evidence is not legally sufficient to meet that burden.

The State's response confirms that its sole theory for Ms. Mason's guilt is that when she was at the polling place, she read the left-hand side of the provisional ballot affidavit; that upon reading the left-hand side's statements—which are not explicitly labeled as setting forth eligibility requirements and do not mention federal supervised release—she realized in that moment that she was ineligible to vote; and that, having made that realization, and with no personal or pecuniary interest in the election, Ms. Mason nonetheless correctly filled out all her identifying information and submitted her provisional ballot anyways.

No rational factfinder could find beyond a reasonable doubt that Ms. Mason actually realized she was ineligible to vote based on the State's irrational theory that is supported only by uncertain and speculative evidence. But this Court need not wade into a full evaluation of the trial evidence for two reasons.

First, the evidence cannot show Ms. Mason "actually realized" she was ineligible to vote at the time of the offense. In 2016, there was no decisional authority establishing that the condition of being on federal supervised release rendered an individual ineligible to vote under Texas law. The State does not contest this point. The State also does not contest that *Delay v. State* established that a defendant cannot be charged with knowledge of a legal proposition that lacked decisional law or authority at the time of the alleged conduct. 465 S.W.3d 232, 247-48 (Tex. Crim. App. 2014). Accordingly, under controlling precedent from the Court of Criminal Appeals, Ms. Mason could not have actually realized being on federal supervised release rendered her ineligible to vote.

Second, this Court has already reviewed the evidence and determined that Ms. Mason "voted . . . despite **the fact that she was not certain** and may not have read the warnings on the affidavit form." CoA.Op.779-80 (emphasis added). This quotation is not, as the State asserts, "cherry picked"; rather, it accurately sets forth the Court's prior Opinion after ample briefing regarding the sufficiency of the evidence. Together, this Court's prior Opinion and the clarified *mens rea* standard from the Court of Criminal Appeals independently justifies Ms. Mason's acquittal.

Further, even if this Court is inclined to conduct another review of the evidence, it is clear that the State's evidence is not legally sufficient.

First, the State's evidence is insufficient to show that Ms. Mason actually read the left-hand side of the affidavit—the linchpin of the State's theory. The State's response confirms that the only record evidence about the left-hand side of the affidavit is testimony that is uncertain about whether she read that side. No rational trier of fact could find that such explicitly uncertain testimony established this crucial fact beyond a reasonable doubt.

Second, there is zero evidence in the record showing that, upon supposedly reading the left-hand side, Ms. Mason then "actually realized" she was ineligible to vote when she submitted her provisional ballot. The State points to Ms. Mason's 2018 understanding of the left-hand statements, after being charged, but that testimony does not show that Ms. Mason possessed the requisite *mens rea* in 2016, at the time of the alleged offense.

Third, the State's evidence solely concerns Ms. Mason's provisional ballot affidavit, but the Court of Criminal Appeals has held that 64.012(a)(1) "does not allow a court to presume knowledge of ineligibility based solely on a provisional ballot affidavit." CCA.Op.6. As such, the State's evidence is insufficient.

Finally, Ms. Mason received ineffective assistance of counsel. The State does not contest that Ms. Mason's family members would have given testimony going directly to whether Ms. Mason knew she was ineligible to vote; nor does it refute that when a conviction hinges on competing testimony regarding a crucial element

of the offense, courts have found the failure to call witnesses other than the defendant to be ineffective assistance of counsel. Instead, the State argues for the first time that Ms. Mason failed to show the availability of these family witnesses. However, there is evidence on the record from which this Court should conclude that Ms. Mason's family was available to testify. The State also argues that the trial court's conclusion that these witnesses would not have changed its verdict neutralizes Ms. Mason's arguments, but the trial court's determination is legal error subject to review by this Court.

I. The evidence is insufficient to show Ms. Mason "actually realized" she was ineligible to vote when she submitted her provisional ballot.

A. As a matter of law, Ms. Mason could not have "actually realized" she was ineligible to vote in 2016.

The State entirely fails to respond to Ms. Mason's argument that she could not have "actually realized" she was ineligible to vote in 2016 because there was no decisional authority at the time establishing that, pursuant to Texas law, the condition of being on federal supervised release rendered an individual ineligible to vote. Mason Brief 22-26.

Under controlling precedent from the Court of Criminal Appeals, a defendant cannot be charged with actual knowledge of a legal proposition that lacked decisional authority at the time the alleged offense was committed. Mason Brief 22-

23. In *Delay v. State*, the Court of Criminal Appeals held that the evidence was insufficient to sustain a conviction which required the defendant to be aware that the transaction involved proceeds of criminal activity because there was no decisional authority holding that the underlying activity was illegal. The Court wrote: "[i]n the absence of some decisional law or other authority in Texas at that time that had construed the Election Code so as to render [conduct in question] illegal under the Election Code, it cannot be reasonably concluded that the appellant was, or even could have been, aware that [defendant's conduct] involved the proceeds of criminal activity." *Delay*, 465 S.W.3d at 247-48.

The State further does not contest that in 2016, when Ms. Mason submitted her provisional ballot, there was no decisional authority holding that being on "federal supervised release" renders an individual ineligible to vote under Texas law. There was no case law to that effect; no one in a position of authority informed Ms. Mason of such; the term supervision is undefined in the Texas Election Code; and Texas criminal law uses the term "supervision" differently. Mason Brief 24-25. This Court's previous opinion in 2020 was the first decisional authority to hold that "'Supervision' in Section 11.002(a)(4)(A) includes post-imprisonment supervised release imposed as part of a federal sentence." CoA.Op.771; Mason Brief 24-25.

Of course, Ms. Mason did not have the benefit of this Court's opinion in 2016, and therefore could not have "actually realized" she was ineligible to vote. The Court

of Criminal Appeals' holding in *Delay* controls here and independently justifies acquittal.

B. This Court's previous Opinion confirms that Ms. Mason did not actually realize she was ineligible to vote.

This Court previously determined that (1) the evidence did not show Ms. Mason was subjectively aware that she was ineligible but (2) the statute did not require such subjective awareness. CoA.Op.770; Mason Brief 10-11. On remand, it is now clear that Section 64.012(a)(1) requires such subjective awareness. Accordingly, this Court's prior Opinion confirms that Ms. Mason should be acquitted.

The State incorrectly asserts that Ms. Mason has "cherry picked" phrases from this Court's opinion. State's Brief on Remand ("State's Brief") 14. Not so. On initial appeal to this Court, the parties briefed whether the uncertain and speculative testimony the State relied on was legally sufficient to demonstrate Ms. Mason's knowledge. *Compare* Mason Original Brief 9-15, *with* State's Original Brief 24-27.

This Court sided with Ms. Mason that the evidence did not show that Ms. Mason was subjectively aware that she was ineligible to vote but held that such subjective awareness was irrelevant. The Court wrote:

> **The evidence does not show that she voted for any fraudulent purpose.** But the State did not need to prove any motive for her actions. And as we have explained, not knowing the law is no excuse for the conduct prohibited under Election Code Section 64.012(a)(1).

> **Although Mason may not have known with certainty that being on supervised release as part of her federal conviction made her ineligible to vote under Texas law or that so voting is a crime**—and although she testified that if she had known she would not have voted—she voted anyway, signing a form affirming her eligibility in the process **despite the fact that she was not certain and may not have read the warnings on the affidavit form**. Under the plain language of the current law as promulgated by the Texas Legislature, this evidence is sufficient to prove that she committed the offense of illegal voting.

CoA.Op.779-80 (citations omitted) (emphasis added).[1] Far from a "cherry-picked" phrase, this marks a substantial conclusion from the Court on a thoroughly briefed issue.[2]

The State also claims that the Court's discussion is merely a rhetorical device used in discussing "Appellant's failure to raise a 'mistake of law' defense." State's Brief 15. But while this Court discussed "mistake of law" defenses in the following part of its opinion, that is not the relevant part Ms. Mason relies on here. CoA.Op.780. Further, nothing about the language in the Court's Opinion signals that it was using a "rhetorical device" to entertain a hypothetical argument, which this

[1] *See also* CoA.Op.770 ("[C]ontrary to Mason's assertion, the fact that she did not know she was legally ineligible was irrelevant to her prosecution under Section 64.012(a)(1).").

[2] And the Court's conclusion tracks with the trial court's findings that "Defendant testified extensively at trial that **she did not know she was ineligible to vote on November 8, 2016**, and that she did not read the admonishments about voting eligibility…" and that her "trial testimony **was the best evidence of her alleged knowledge and intent when she signed the provisional affidavit and cast her vote**." CR.203 (internal citation omitted) (emphasis added). The trial court concluded only that "Defendant voted and that she was ineligible was ineligible to vote" and came to no conclusion about her knowledge that she was ineligible to vote. CR.210. *See also* CCA.Op.10-11 (listing evidence developed during trial, not including any evidence or finding that Ms. Mason knew her ineligibility).

Court clearly knows how to do. *See, e.g.*, *Ephraim v. State*, No. 02-19-00076-CR, 2020 WL 938175, at *2 (Tex. App.—Fort Worth Feb. 27, 2020, no pet.) ("**[E]ven assuming that** an illegal sentence might render a conviction void . . . "); *Ex parte Darnell*, No. 02-19-00390-CR, 2020 WL 5949928, at *1 (Tex. App.—Fort Worth 2020, pet. ref'd) (mem. op.) ("[E]ven assuming jurisdiction arguendo . . . .").

Finally, the State suggests it would have been improper for this Court to rule on what the evidence showed in its prior Opinion. State's Brief 16. But both parties had fully briefed the sufficiency of the evidence, and therefore it was entirely proper for the Court to conduct a review of that evidence and find that it failed to show Ms. Mason knew she was ineligible to vote.

C. Evaluation of the State's theory and evidence demonstrates it is insufficient to sustain Ms. Mason's conviction.

The above two arguments are each independently sufficient to mandate Ms. Mason's acquittal. However, even if this Court were to review (again) the evidence set forth at trial, it is clear it is not sufficient to sustain Ms. Mason's conviction.

i. Legal sufficiency review is not a blank check.

The State is incorrect that Ms. Mason's sufficiency arguments run afoul of the legal sufficiency review standard. Ms. Mason is not asking this Court to re-weigh the evidence. State's Brief 19-20. Rather, even considering the evidence in a light most favorable to the verdict, no rational trier of fact could find beyond a reasonable doubt that Ms. Mason actually realized she was ineligible to vote based on the State's

illogical theory, which is supported by scant evidence that is (a) explicitly uncertain; (b) not specific to the issues at question; (c) speculative at best; and (d) in any event, contrary to Court of Criminal Appeals precedent.

The Court of Criminal Appeals has made clear that the legal sufficiency review standard is not a blank check to uphold any verdict no matter how unreasonable or speculative. Although the standard shows deference to the fact-finder, that deference is balanced "with [the court's] duty to ensure the evidence 'actually supports a conclusion that the defendant committed the crime that was charged.'" *Spillman v. State*, Nos. PD-0695-20, 2022 WL 946347, at *2 (Tex. Crim. App. Mar. 30, 2022) (citing *Williams v. State*, 235 S.W.3d 742, 750) (Tex. Crim. App. 2007)). Even "a strong suspicion of guilt does not equate with legally sufficient evidence of guilt." *Winfrey v. State*, 393 S.W.3d 763, 769 (Tex. Crim. App. 2013); *Hacker v. State*, 389 S.W.3d 860, 873-74 (Tex. Crim. App. 2013) (rejecting sufficiency of the evidence where it was merely "suspicion linked to other suspicion") (internal citation omitted).

Relying on circumstantial evidence does not remove the State's burden to show guilt beyond a reasonable doubt. The fact finder is "not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions," *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007), "because doing so is not sufficiently based on facts or evidence to support a finding beyond a

reasonable doubt." *Merritt v. State*, 368 S.W.3d 516, 525–26 (Tex. Crim. App. 2012).[3]

The cases the State cites demonstrate that inferences drawn from circumstantial evidence must still be reasonable and support a finding of guilt beyond a reasonable doubt. In *Isassi v. State*, 330 S.W.3d 633 (Tex. Crim. App. 2010), the defendant was charged with attempting to use his position to influence his aunt's criminal proceedings. *Id.* at 643-44. In calls to various officials, the defendant failed to inform them that he was related to his aunt and misinformed them about her case's status. *Id.* at 643-644. The Court found that based on the evidence presented, including particularly the undisclosed familial relationship between the defendant and his aunt, the jury could draw "reasonable inferences" that the defendant had an "intent to improperly influence the outcome of his aunt's criminal case on a basis not authorized by law." *Id.* at 645.

Similarly, in *Carrizales v. State*, 414 S.W.3d 737, 744-46 (Tex. Crim. App. 2013), the Court held that a reasonable jury could conclude that the defendant had a criminal intent when he, on multiple occasions, put a particular type of roofing screw

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[3] *See also Winfrey*, 393 S.W.3d at 771–73 (finding evidence legally insufficient where "circumstantial evidence" was "more speculative than inferential as to appellant's guilt"); *Riles v. State*, No. 02-19-00421-CR, 2021 WL 4319600, at *7 (Tex. App.—Fort Worth Sept. 23, 2021) (mem. op.) (a reviewing court "cannot defer to facts that weren't proved nor to inferences that aren't reasonable"); *Stobaugh v. State*, 421 S.W.3d 787, 867 (Tex. App—Fort Worth 2014) (overturning a conviction where *mens rea* could be proven "only through theorizing or guessing as to the meaning" of the evidence, because "speculation will not support a finding beyond reasonable doubt").

in the road, giving his neighbor a flat tire. There was evidence of mounting tensions between the defendant and his neighbor, and the defendant admitted previously to obstructing the roadway at the same spot the screws were found. Based on this evidence, it was reasonable to conclude "that the tire damage in this case was caused by appellant's intentional act rather than by an inadvertent accident." *Id.* at 745.

In contrast to these cases, the inferences the State requests here are unreasonable. The State has no evidence that Ms. Mason had any personal or pecuniary interest in the election which would have motivated her to vote even when she knew she was ineligible.[4] Indeed, the only evidence at trial was that Ms. Mason had every reason to avoid having the life she had strived so hard to rebuild taken away from her. RR2.126:3-8. Nor has the State offered any evidence that Ms. Mason was behaving covertly or deceptively in order to accomplish such an inexplicable objective. Again, the evidence is to the contrary; Ms. Mason provided her correct personal information on her provisional ballot affidavit. RR2.71:9-11. Instead, the State's theory is that Ms. Mason actually realized she was ineligible to vote at the very moment she was filling out her provisional ballot, but that she went ahead and filled out her correct information regardless, and then submitted her provisional

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[4] The lack of a personal interest in the outcome of the election and the fact that Ms. Mason gave her correct personal information also distinguishes this case from other Illegal Voting cases. *See e.g., Medrano v. State*, 421 S.W.3d 869, 874-75 (Tex. App.—Dallas 2014, pet. ref'd) (defendant lied about her residence to vote for her uncle); *Jenkins v. State*, 468 S.W.3d 656, 661 (Tex. App.—Houston [14th Dist.] 2015, pet. granted) (defendant lied about his residence to vote on an issue of interest to him).

ballot. Such a scenario is far afield from the reasonable inference cases the State cites.

ii. The State's theory rests entirely on explicitly uncertain testimony.

The State does not contest that its theory rests entirely on proving that Ms. Mason read the left-hand side of the affidavit; it is only that side that contains the information the State contends made Ms. Mason aware she was ineligible to vote. Mason Brief 14. Instead, the State complains that Ms. Mason is requiring "surgical precis[ion]" from the testimony. State's Brief 21. But here, where the undisputed evidence from both sides shows that Ms. Mason read and filled out the right-hand side of the affidavit, and the State's theory depends entirely on her reading the left-hand side, the State's evidence must actually establish that fact beyond a reasonable doubt. It cannot do so.

In its response, the State relies overwhelmingly on the testimony of Karl Dietrich. State's Brief 21-22. Most of that testimony is irrelevant to whether Ms. Mason read the left-hand side of the ballot. For instance, the State notes that Dietrich "asked if Appellant affirmed that all of the information she provided was accurate, and she responded 'in the affirmative.'" State's Brief 22 (citing RR2.71:23-72:2). But the information Ms. Mason provided was on the right side of the ballot and no one disputes that the information she provided was correct. *See* RR2.71:9-11

(Dietrich testimony: "And she certainly read the right part, and she filled it out since she put the right information in the boxes.").

The remainder of the State's evidence consists of different iterations of Dietrich's statement that he thought Ms. Mason read the left-hand side. But when asked directly whether he was certain, Dietrich admitted that he was not:

> [Trial Counsel]: You cannot tell District Judge Gonzalez that **she, in fact, read the left-hand side of this ballot**. You can't say that, can you?
>
> [Dietrich]: **No**.

RR2.86:24-87:2 (emphasis added); *see also* RR2.71:7 ("I cannot say with certainty that she read it"); *compare with* RR2.71:9-10 ("And **she certainly read the right part** . . . ") (emphasis added). As it must, the State has repeatedly conceded that Dietrich was not certain of this crucial fact, and concedes as much here again. State's Brief 21; State's Original Brief to CoA 25; State's Brief to CCA 28.

Explicitly uncertain testimony cannot sustain a finding beyond a reasonable doubt—even where the witness "believes" the fact to be true. For instance, in *Redwine v. State*, 305 S.W.3d 360, 361-2 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd), the court evaluated the legal sufficiency of an officer's testimony that he turned on his overhead lights. The officer testified "To my recollection, **I believe** I hit my overhead lights as I turned on the drive. I am not for sure on that, but I believe

I did, yes, sir." *Id.* at 364 (emphasis added). The court considered "whether any rational trier of fact, considering only this equivocal testimony, could have found appellant guilty beyond a reasonable doubt." *Id*. at 366. In finding the evidence legally insufficient, the court noted that the witness himself was unsure, and that a rational trier of fact "could not translate [the witness's] uncertainty into belief beyond a reasonable doubt." *Id.* at 368.

The Court of Criminal Appeals has reached a similar conclusion. In *Flores v. State*, 142 Tex. Crim. 589, 591–92 (1941), the Court examined the sufficiency of evidence to sustain a charge of theft of a sheep. There, when asked if a sheep was his, the witness stated, "I feel like it was" and noted that the sheep returned to him was the same type of sheep he had lost. The Court of Criminal Appeals rejected the sufficiency of this testimony because the evidence made it "obvious . . . that he was uncertain as to whether or not the sheep in question really belonged to him," noting that because there was no other evidence supporting the finding that he was the sheep's owner, "we admit that we are at a loss to understand how the jury could find beyond any reasonable doubt that the animal in question belonged to Mr. Williams, the alleged owner." *Id.*[5]

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[5] *See also United States v. Johnson*, 427 F.2d 957, 961 (5th Cir. 1970)*; Roberts v. State*, 377 S.W.2d 656, 658 (Tex. Crim. App. 1964).

The cases the State cites are not to the contrary. Critically, none of these cases concern a situation where the witness testifying is explicitly uncertain about whether the defendant read the document in question. Further, in each case cited, the defendant **had the information read out loud to him**. *Chivers v. State*, 481 S.W.2d 125, 127 (Tex. Crim. App. 1972) (officer testified that he read the statement to the defendant, and witness testified about seeing the officer read it); *Wilkins v. State*, 960 S.W.2d 429, 432 (Tex. App.—Eastland 1998, pet. ref'd) (defendant was given Miranda warning four times, including the officer orally informing the defendant); *Gutierrez v. State,* 502 S.W.2d 746, 747 (Tex. Crim. App. 1973) (officer testified that he read the Miranda warnings to the defendant twice); *Duran v. State*, No. 07-07-0085-CR, 2008 WL 2116925, at *1-2 (Tex. App.—Amarillo May 20, 2008, no pet.) (defendant dictated statement to detective, which detective wrote down and read back to defendant, including Miranda warnings); *Hill v. State*, No. 14-93-00549-CR, 1995 WL 321191, at *2 (Tex. App.—Houston [14th Dist.] May 25, 1995, no pet.) (defendant was read Miranda warnings multiple times and verbally indicated understanding them).

The State points to two other pieces of evidence to purportedly show that Ms. Mason read the left-hand side of the ballot, but neither have anything to do with the left-hand side. First, the State notes that Ms. Mason signed the provisional ballot affidavit. State's Brief 12. But that signature line is disconnected from the left-hand

side at issue—it is on the far right-hand corner of the right-hand side of the affidavit and appears underneath all the personal information that Ms. Mason correctly filled out. *See* RR3.Ex.8; RR2:71:9-11. There is no signature on the left-hand side of the ballot. RR3.Ex.8. Nor is there any language connecting the signature line to the left-hand side statements. *Id.*

The State also misquotes *Moore v. Moore*, which is specific to civil theories of contract interpretation and irrelevant here. State's Brief 23; 383 S.W.3d 190,196-97 (Tex. App.—Dallas 2012, pet. denied) (the actual citation reads: "Unless prevented by trick or artifice, **one who signs a contract** . . . ") (emphasis added). Regardless, as discussed below, the Court of Criminal Appeals has held that Ms. Mason's knowledge cannot be presumed from the affidavit. *See infra* Section I.C.iv.

Second, the State points to testimony from Streibich, the election clerk, but does not contest that Streibich's testimony is silent as to whether Ms. Mason read the left-hand side of the affidavit, which is the crucial fact in this case.[6] Given the undisputed evidence from both Dietrich and Ms. Mason that she read and filled out the right-hand side of the affidavit, general testimony that Ms. Mason was reading the affidavit cannot be used to show that Ms. Mason read the left-hand statements.

[6] Nor does the State contest that Dietrich's testimony fundamentally contradicts Streibich's testimony—including as to whether Ms. Mason was even in a location where Streibich could observe her. Mason Brief 16 n.3. Indeed, the State concedes Ms. Mason was moved away from Dietrich, who was working the voting lines. State's Brief 12 ("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.").

See, e.g., *Winfrey*, 393 S.W.3d at 772 (Tex. 2013) (finding testimony "much less significant" where defendant's "unchallenged testimony" provided non-criminal explanation).

iii. The State's speculation that Ms. Mason read the left-hand statements is not sufficient to show that she "actually realized" her ineligibility.

Even if the State's evidence were sufficient to show that Ms. Mason had read the left-hand side of the affidavit, the State was still required to show that upon reading the statements, Ms. Mason actually realized **in that moment** that those statements applied to her and meant that she was ineligible to vote. Mason Brief 21. There is zero evidence of that realization.

The State ignores that, as Ms. Mason previously set forth, in *Delay*, the sophisticated corporations had access to information, including literature, that could have informed them of a "substantial and unjustifiable risk" that their actions would violate the Texas Election Code. *Delay*, 465 S.W.3d at 252; Mason Brief 18-19. Even those circumstances, though, were not sufficient to demonstrate that they **actually realized** their actions violated the Election Code. The Court concluded that "neither recklessness nor negligence" was sufficient to demonstrate "knowledge of actual unlawfulness." *Delay*, 465 S.W.3d at 252. The Court further pointed to the corporations' testimony that they did not know their actions were unlawful and the distinct absence of any circumstantial evidence that the corporations behaved in a

way to indicate that they believed their actions were unlawful, such as "covert dealings." *Id*.

Rather than grappling with *Delay*'s implication, the State asserts in a footnote that it was not required to prove covert dealings. State's Brief 24 n.5. While it may be correct that *Delay* did not set forth an exclusive list of evidence that could demonstrate an actual realization that a defendant is violating the Election Code, the Court's analysis demonstrates the kind of contemporary circumstantial evidence that must be used to meet the State's burden. No such evidence exists here.

If anything, the lack of evidence is starker than in *Delay*. The State does not contest that there is no evidence that Ms. Mason had a personal or pecuniary motivation to cast an illegal ballot. "The evidence does not show that she voted for any fraudulent purpose." CoA.Op.779. Nor was Ms. Mason a sophisticated party with access to in-house counsel, as in *Delay*. And rather than showing covert dealings, the evidence shows that Ms. Mason correctly filled out her personal information on the provisional ballot affidavit at the exact moment that the State contends that she realized that she was ineligible to vote. RR2.71:9-11. Because there is no evidence that Ms. Mason "actually realized" at the time she cast her provisional ballot that she was ineligible to vote, Ms. Mason must be acquitted.

Lacking evidence that Ms. Mason actually realized she was ineligible to vote **at the time** she submitted her provisional ballot, the State instead points to Ms.

Mason's testimony in 2018 about her understanding of the left-hand statements and that she would not have risked voting had she read the left-hand statements. State's Brief 25. But this testimony does not show Ms. Mason's understanding of the affidavit at the time of the alleged offense. At best, this evidence shows Ms. Mason's understanding in 2018—a year and a half after the offense in question, after having been charged with violating the illegal voting statute, and after sitting through considerable testimony concerning those left-hand statements. It does not and cannot establish her contemporary understanding at the time of the offense: *i.e.*, that at the time of the alleged offense she actually read those left-hand statements, and in that moment, she immediately understood their precise meaning and their application to her individual situation, and then she submitted a provisional ballot anyway for an election in which she had no particular interest.[7] It is a bedrock principle of law that the State must show the requisite *mens rea* at the time of the offense. *Cook v. State*, 884 S.W.2d 485, 487 (Tex. Crim. App. 1994) (noting the "basic and fundamental concept of criminal law, that in order to constitute a crime, the act or *actus reus* must be accompanied by a criminal mind or *mens rea*"); *Hawkins v. State*, 115 Tex. Crim. 163, 165, 29 S.W.2d 384, 385 (1930) ("The evidence may abundantly show that appellant abandoned an intent to kill, if any he ever had, but the real question is

[7] Nor does the State contest that the left-hand statements do not reference "federal supervised release," do not precisely track voter eligibility requirements under Texas law, and are not labeled as setting forth such requirements. Mason Brief 20-21.

whether or not he had such intent at the time he was making the alleged assault.”); *McCann v. State*, No. 02-19-00397-CR, 2020 WL 6326148, at *4 (Tex. App.—Fort Worth Oct. 29, 2020, no pet.) (crime of solicitation occurs if requisite intent exists at the time of solicitation even if the specific intent is lost thereafter).

Further, this testimony cannot be decoupled from Ms. Mason’s testimony that she did not read the left-hand statements. The State asserts that the fact finder is free to believe parts of testimony and reject other parts, State’s Brief 26 n.7; be that as it may, the fact finder cannot take testimony completely out of context and then draw irrational inferences therefrom. As the Texas Supreme Court has explained:

> More generally, evidence cannot be taken out of context in a way that makes it seem to support a verdict when in fact it never did. If a witness’s statement “I did not do that” is contrary to the jury’s verdict, a reviewing court may need to disregard the whole statement, but cannot rewrite it by disregarding the middle word alone.

City of Keller v. Wilson, 168 S.W.3d 802, 812 (Tex. 2005); *see Brooks v. State*, 323 S.W.3d 893, 921-22 (Tex. Crim. App. 2010) (citing with approval *City of Keller*’s discussion of legal sufficiency). No rational trier of fact could understand Ms. Mason’s 2018 testimony that she didn’t read the left-hand side statements but, if she had, she never would have submitted her provisional ballot, to mean that, in 2016, she did read in fact read the left-hand statements and understood them to mean she was ineligible but submitted her provisional ballot anyways.

Finally, the State argues that Ms. Mason should have connected the term "supervision" used in the text of her federal judgment to the term "supervision" used on the left-hand side of the affidavit, and from that understood she was ineligible to vote. State's Brief 26. But in so arguing, the State asks this Court to apply a negligence standard, which the Court of Criminal Appeals rejected. As that Court has made clear, the *mens rea* standard is not a "negligence scheme." CCA.Op.6. Even a "substantial and unjustifiable risk" that one's "actions would violate the Texas Election Code," *Delay*, 465 S.W.3d at 252, is not sufficient to show that Ms. Mason "actually realized" that she was ineligible to vote. What's more, the State does not contest that the terms of Ms. Mason's supervised release do not set forth her ineligibility to vote, and that the term "supervision" is used differently in Texas criminal law than it is used with respect to federal supervised release. Mason Brief 3, 24; RR3.Ex.1.

Clear Court of Criminal Appeals precedent demonstrates that evidence that Ms. Mason should have or could have understood the left-hand side of the affidavit to mean she was ineligible to vote is not sufficient to meet the State's burden. There is zero evidence on the record to show that **at the time of the alleged offense** Ms. Mason **actually realized** that, according to the left-hand side of the provisional ballot affidavit, she was ineligible to vote and submitted her provisional ballot anyways. Accordingly, Ms. Mason must be acquitted.

iv. The State's evidence impermissibly relies solely on the provisional ballot affidavit.

The Court of Criminal Appeals held that Section 64.012(a)(1) "does not allow a court to presume knowledge of ineligibility based solely on a provisional ballot affidavit," noting that "[t]his reading is consistent not only with *Delay* but also with the Legislature's intent." CCA.Op.6; Mason Brief 21-22.

The State does not contest the applicability of this rule here; instead, it claims that its evidence is not so limited. State's Brief 27. But to support that assertion, the State cites: "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." *Id.* (emphasis added). All of this evidence (which is legally insufficient for the reasons above) concerns solely the provisional ballot affidavit, precisely the evidence the Court of Criminal Appeals held was insufficient on its own.

Nevertheless, the State asserts that its evidence complies with a different section of the Court of Criminal Appeals Opinion, where the Court noted that "merely 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." CCA.Op.4. But, as Ms. Mason made clear in her

Brief on Remand, this statement comes from a different section of the Court of Criminal Appeals' Opinion, discussing a different part of the statute, Section 64.012(c). *See* Mason Brief 22 n.7.[8]

Instead, Ms. Mason relies on the *mens rea* part of the Court of Criminal Appeals' Opinion. CCA.Op.5-6. In that section, the Court clarified that Section 64.012(a)(1) "does not allow a court to presume knowledge of ineligibility based solely on a provisional ballot affidavit." *Id*. The State ignores this broader

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[8] Even with respect to Section 64.012(c), it is not clear whether the Court of Criminal Appeals has adopted such a narrow reading of that statute that would limit it to evidence about the signature on the provisional ballot affidavit rather than the act of filling out the affidavit. The Court quotes the statute directly without weighing in on what sort of other evidence would be permissible. The legislative history of the statute strongly indicates that it is meant to apply to the entire act of filling out the affidavit:

> Subsection (c) was intentionally and specifically added to clarify what some courts and local prosecutors have gotten wrong. The crime of illegal voting is intended to target those individuals who intentionally try to commit fraud in our elections by voting when they know they are not eligible to vote. **It is not intended to target people who make innocent mistakes about their eligibility and that are facilitated solely by being provided a provisional ballot by a judge**, since federal law requires judges to give someone who isn't registered and requests to vote a ballot. **To this end, this provision in the conference committee report says that filling out a provisional ballot affidavit is not enough to show that a person knew they were ineligible to vote**. For the purpose of legislative intent, this does not actually change existing law, but rather it makes crystal clear that under current law, when an individual fills out a provisional ballot like tens of thousands of Texans do every year, **the mere fact that they filled out and signed a provisional ballot affidavit is not enough to show that an ineligible voter knew they were ineligible to vote** or that their signature on it is enough. That has always been the case. Again, no one should be prosecuted solely on the basis of filling out a provisional ballot affidavit.

H.J. of Tex., 87th Leg., R.S. S210 (2021), https://journals.house.texas.gov/HJRNL/87R/PDF/87RDAY60SUPPLEMENT.PDF (emphasis added).

pronouncement from the Court of Criminal Appeals, and its reliance on this provisional ballot evidence alone is insufficient under the Court's ruling.

II. Ms. Mason has established that she received ineffective assistance of counsel.

Ms. Mason has established that her trial counsel's performance fell below an objective standard of professional competence because her trial counsel failed to call three crucial witnesses—her mother, niece, and daughter—all of whom would have provided vital testimony addressing whether Ms. Mason "actually realized" that she was ineligible to vote. Mason Brief 28-29. As Ms. Mason discussed previously, courts have found counsel to be ineffective where, as here, the core issue at trial hinges on disputed testimony, and defense counsel fails to call corroborating witnesses, relying solely or primarily on the interested defendant instead. *Id.* at 29-30 (citing *inter alia State v. Thomas*, 768 S.W.2d at 335, 336–37 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (upholding trial court's finding of ineffective assistance of counsel where witnesses who would have corroborated defendant's testimony were not called in case where defendant's credibility and version of events was central issue); *Butler v. State*, 716 S.W.2d 48, 54–56 (Tex. Crim. App. 1986) (en banc) (finding ineffective assistance of counsel where trial counsel failed to call witnesses to corroborate defendant's testimony and relied only on testimony from the defendant and one witness).

The State does not refute either of these arguments. Instead, it argues that Ms. Mason hasn't shown the availability of these uncalled witnesses, but the State's authority is distinguishable. The State relies primarily on *Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007), where the Court rejected the use of an unsworn affidavit from a witness as insufficient to establish ineffective assistance of counsel. The Court noted that the affidavit was unsworn, failed to establish the availability of the witness, and "more importantly" was too vague to speak to the critical issue in the case. *Id*. *Ex parte Ramirez* established only that a witness's availability cannot be established solely through an unsworn affidavit silent to that fact; it does not purport to set forth any test for establishing availability.

This case differs both on an evidentiary and procedural level. Unlike the defendant in *Ex parte Ramirez*, who had only an unsworn affidavit from one of his desired witnesses, two of Ms. Mason's proposed witnesses, her mother and her niece, signed sworn, notarized affidavits for the purpose of indicating that if called they would have testified that Ms. Mason did not realize she was ineligible to vote.[9] CR.53 (McGraedy Affidavit); CR.51-52 (Jones Affidavit). In addition, unlike *Ex Parte Ramirez*, there is evidence on the record to suggest that Ms. Mason's mother,

[9] The identification of specific witnesses who would have been called, coupled with affidavits from those witnesses, distinguishes this case from *Simms v. State*, 848 S.W.2d 754, 758 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd), where the defendant argued that it was ineffective assistance to not call witnesses for the defense but failed to identify who those witnesses would be.

daughter, and niece were available at trial. The record explicitly notes Ms. Mason's family's presence at her one-day trial. Ms. Mason's counsel at trial noted on the record that, "[Ms. Mason's] family is here today. **They've been here supporting her the entire trial**, so - - I'm not going to spend a lot of time, Judge. I think you'll make the correct decision." RR2.171:15-18 (emphasis added). What's more, Ms. Mason's trial counsel interviewed both her mother and daughter before the trial, and when asked why he did not call them to testify, did not point to any potential issue with their availability; instead, he testified that he simply believed they were "not necessary witnesses." CR.174.

The availability of Ms. Mason's family to testify on her behalf was also clear to the State and the trial court. In arguing against Ms. Mason's motion for new trial and when briefing the issue to this Court for the first time, the State never suggested that they would have been unavailable. *See* Supplemental RR2.55:13-58:11 (State's statements at hearing on motion for new trial); State's Original Brief to CoA 42-44; CR.174-175 (State's Proposed Findings of Fact). That's because the State was also in the trial court room, where they were present. Similarly, in denying Ms. Mason's motion for new trial, the trial judge did not question whether those witnesses would have been available. CR.203-204.

Accordingly, there is sufficient evidence on the record to show the availability of Ms. Mason's family to testify, and this Court should reject the State's attempt to, for the first time at the eleventh hour, question these witnesses' availability.

Second, the State contends that Ms. Mason did not challenge the trial court "finding of fact" that "[t]he facts contained in [the affidavits from proposed witnesses] would not have changed the Court's evaluation of the evidence in finding the Defendant guilty of illegal voting," and thus, "whether the proposed witnesses' testimony would not have benefitted the defense is not debatable." CR.204; State's Brief 32.

But the trial court's statement is not a "finding of fact." No matter how labeled, it is clearly an erroneous conclusion of law subject to this Court's review. "[R]egardless of how a trial court labels its findings of fact and conclusions of law, an appellate court must examine the substance of the findings and conclusions and treat them by their substance rather than by their label." *State v. Ambrose*, 487 S.W.3d 587, 597 (Tex. Crim. App. 2016). Nothing in the trial court's ruling indicates that its determination was based on a credibility assessment of Ms. Mason's proposed witnesses. Instead, the trial court based its determination on its legally erroneous view that because Ms. Mason testified, these witnesses were not "necessary." CR 203. However, as previously established, this is incorrect as a matter of law. Mason Brief 29-30.

Further, the trial court based its erroneous conclusion on the faulty premise that the proposed testimony did not reflect any personal knowledge relevant to the question of whether Ms. Mason believed she was eligible to vote. CR.203-204. Again, as a matter of law, that is incorrect. Ms. Mason's niece would have testified to her personal knowledge that when Ms. Mason got back in the car after submitting her provisional ballot, Ms. Mason expressed no concerns about her eligibility. This is personal knowledge that directly contradicts the State's theory that Ms. Mason realized her ineligibility while in the polling place. Ms. Mason's mother would have testified to her personal knowledge that she was the one encouraging Ms. Mason to go vote, demonstrating that Ms. Mason had not hatched a scheme to submit a ballot despite knowing she was ineligible.

"An appellate court owes no deference to a trial court's determinations when they are actually determinations as to questions of law or mixed questions of law and fact that do not turn on an evaluation of credibility or demeanor." *Ambrose*, 487 S.W.3d at 596; *see also Martinez v. State*, 348 S.W.3d 919, 923 (Tex. Crim. App. 2011) (holding that a *de novo* standard of review applies to "mixed questions that do not depend on credibility determinations").

The affidavits from Ms. Mason's niece and mother directly address the central issue in Ms. Mason's case under the proper application of the illegal voting statute of whether she had actual knowledge that she was ineligible to vote. This Court is

not bound by the trial court's legally erroneous conclusion that the affidavits were not relevant to determining whether the State had met its *mens rea* burden.

Ms. Mason's counsel's unprofessional failure to call available and beneficial witnesses in her defense regarding the core issue of whether or not she had actual knowledge that she was ineligible to vote clearly impacted the result of her trial, "undermin[ing] confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Accordingly, this Court should hold that Ms. Mason received ineffective assistance of counsel, and order a judgment of acquittal. Alternatively, this Court should remand Ms. Mason's case back to the trial court for a new trial.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), the undersigned counsel certifies that the total number of words in Appellant's Reply Brief on Remand, exclusive of the matters designated for omission, is 7,458 words as counted by Microsoft Word Software.

/s/ Savannah Kumar
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CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of this Reply has been served on counsel of record and the State Prosecuting Attorney via e-service on February 10, 2023.

/s/ Savannah Kumar
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