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IN THE TEXAS COURT OF
CRIMINAL APPEALS

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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

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STATE'S RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

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SUMMARY OF THE ARGUMENT

State's Response

The recent statutory change to Election Code 64.012(c) does not invalidate Appellant's conviction. Her interpretation of the statutory change ignores two key aspects in the statute's plain language: the limiting effect of the term "solely" and the provision for corroboration with other evidence.

Appellant was not convicted solely on evidence that she signed a provisional ballot affidavit. There is sufficient inculpatory evidence – direct and circumstantial corroborating that Appellant knew she was ineligible to vote when she signed the affidavit and cast her provisional ballot. Thus, when viewed in the light most favorable to the verdict, the evidence is legally sufficient to show that the Appellant knew she was ineligible to vote.

ARGUMENT

I. Appellant has assigned meaning to Election Code section 64.012(c) without first examining the plain language of the statute.

Appellant asserts that the recent amendment to Texas Election Code § 64.012 necessitates overturning her conviction because, under the amended law, the evidence is legally insufficient to prove that she knew she was ineligible to vote when she cast her provisional ballot. *See* TEX. ELEC. CODE § 64.012(c). Appellant supports her argument by primarily relying on the legislative history of the new law. *Appellant's Supplemental Brief* at 3-4. However, Appellant has skipped the crucial first step of any statutory analysis: examining the actual language of the statute.

Under canons of statutory construction, the reviewing court is to construe a statute according to its plain language, unless the language is ambiguous or the interpretation would lead to absurd results that the Legislature could not have intended. *Williams v. State*, 253 S.W.3d 673, 677 (Tex. Crim. App. 2008). To do so, the reviewing court focuses on the literal text of the statutory language in question, reading it in context and construing it "according to the rules of grammar and common usage." TEX. GOV'T CODE § 311.011(a). "Where the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute." *Coit v. State*, 808 S.W.2d 473, 475 (Tex. Crim. App. 1991). It is only "[w]hen the application of the statute's plain language would lead to absurd consequences that the Legislature

could not possibly have intended," that a court, out of absolute necessity, may stray from applying the literal language and resort to such extra-textual factors as legislative history, intent, or purpose. *State v. Mason*, 980 S.W.2d 635, 638 (Tex. Crim. App. 1998).

The new law, section 64.012(c) of the Election Code, provides, "[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." (emphasis added). This means, unambiguously, 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. *See In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008) (A reviewing court presumes that the Legislature chose a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.). This interpretation is strongly supported by the Legislature's choice of the word "solely"[1] to refer to the type of evidence specified as insufficient (signature on affidavit). *Id*.

[1]*Solely*: *adv.* 1. Alone; singly[.]; 2. Entirely; exclusively[.]. THE AMERICAN HERITAGE DICTIONARY, 1714 (3d ed. 1992).

II. Appellant's approach leads to absurd results.

Appellant argues that the passage, "[a] person may not be convicted solely upon the fact that the person signed a provisional ballot affidavit," encompasses any and all activities associated with filling out a provisional ballot, including reading the affidavit. *Appellant's Supplemental Brief* at 5. That the statute uses the word "solely" in reference to the signature on the affidavit is strong evidence undercutting this argument. *See In re M.N.*, 262 S.W.3d at 802.

Appellant's defense at trial was that she did not know she was ineligible to vote because she did not read the affidavit – which she admitted made clear that a felon on supervised release is ineligible to vote. RR 2:144-45, 150-51. By making this argument and admission, Appellant has conceded that evidence tending to show that she read the affidavit before signing would tend to show her knowledge that she was ineligible to vote. Evidence that Appellant "appeared to read" the affidavit is just such evidence. *See Gutierrez v. State*, 502 S.W.2d 746, 748 (Tex. Crim. App. 1973) (Clerk's testimony that appellant "appeared to read" *Miranda* warnings before waiving them among evidence showing that appellant made intelligent waiver); *see also Wilkins v. State*, 960 S.W.2d 429, 432 (Tex. App.—Eastland 1998, pet. ref'd) (record reflects that defendant received *Miranda* warnings four times, one of them being when detective testified that defendant "appeared to read," and signed statement on which *Miranda* warning was printed.); *see*, *e.g.*, *Garza v. State*, 01-97-

00965-CR, 1999 WL 11727, at *1 (Tex. App.—Houston [1st Dist.] Jan. 14, 1999, no pet.) (finding clear and convincing evidence of consent to search car when defendant, among other factors, "appeared to read," before signing, a written consent which provided that appellant had the right to refuse to consent and that "no promises, threats of force, or physical or mental coercion of any kind whatsoever [were] used against [appellant] to get [appellant] to consent."); *Guerrero v. State*, 01-89-01017-CR, 1990 WL 88567, at *9 (Tex. App.—Houston [1st Dist.] June 28, 1990, no pet.) (officers' testimony that defendant appeared to have read consent form among evidence establishing voluntariness of consent). In other words, sufficient corroboration in this case would necessarily include any evidence tending to show that Appellant read or appeared to read the affidavit she signed.

Appellant suggests that reading the affidavit is necessary to "'fill[ing] out' a provisional ballot[,]" and, as such, evidence that she read the affidavit before signing is insufficient corroborative evidence that she knew she was ineligible to vote. *Appellant's Supplemental Brief* at 5. However, reading the affidavit before signing it is not necessary to fill out a provisional ballot. In fact, Appellant's defense at trial was that she signed the affidavit *without* reading it. RR 2:122 ("I didn't [read the warning on the affidavit.]").

Under Appellant's theory, the State could not secure a conviction under the amended law, even when the evidence establishes to a mathematical certainty that

the defendant read the affidavit, signed it, affirmed the veracity of the information on the ballot, and cast the ballot. *See Appellant's Supplemental Brief* at 4-5. Appellant's approach would lead to the absurd result of requiring a confession to obtain a conviction for illegal voting.

Appellant's approach runs also contrary to the well-accepted legal doctrine that circumstantial evidence can be used as corroboration. *See Reed v. State*, 744 S.W.2d 112, 126 (Tex. Crim. App. 1988) (Corroborative evidence can be either direct or circumstantial.). This is absurd because knowledge is almost exclusively proven by circumstantial evidence. *See Ex parte Storey*, 584 S.W.3d 437, 455 (Tex. Crim. App. 2019), cert. denied sub nom. *Storey v. Tex.*, 140 S. Ct. 2742 (2020) ("We have consistently recognized that proof of a mental state, such as knowledge, 'is of such a nature that it must be inferred from the circumstances.'").

III. This Court should analyze the sufficiency of corroborative evidence in a manner similar to accomplice testimony cases.

The new law is very similar to article 38.14 of the Code of Criminal Procedure, which states, "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed." *Compare* TEX. ELEC. CODE § 64.012(c) *with* TEX. CRIM. PROC. ANN. art. 34.14 (West 2014). "The test as to the sufficiency of the corroboration [of accomplice testimony] is to eliminate from consideration the evidence of the accomplice witness and then to examine the evidence of other

witnesses with the view to ascertain if there be inculpatory evidence, that is evidence of incriminating character which tends to connect the defendant with the commission of the offense." *Edwards v. State*, 427 S.W.2d 629, 632 (Tex. Crim. App. 1968). Furthermore, it is not necessary that the corroboration directly link the accused to the crime or be sufficient in itself to establish guilt. *Id.*; *Reynolds v. State*, 489 S.W.2d 866 (Tex. Crim. App. 1972). Corroborative evidence can be either direct or circumstantial. *Reed*, 744 S.W.2d at 126.

A similar approach should be used in applying section 64.012(c) of the Election Code. That is, to determine the sufficiency of corroboration of Appellant's knowledge that she was ineligible to vote, this Court should eliminate from consideration the evidence of Appellant's mere signature on the provisional ballot affidavit and then examine the other evidence to ascertain if there is inculpatory evidence – direct or circumstantial – which tends to show that Appellant knew she was ineligible to vote when she signed the affidavit and cast her provisional ballot. *See id.*; *Edwards*, 427 S.W.2d at 632.

IV. The evidence (other than Appellant's mere signature on the provisional ballot affidavit) when viewed in the light most favorable to the verdict, is legally sufficient to show that Appellant knew she was ineligible to vote.

The new law, deeming a signature on a provisional ballot affidavit insufficient to prove a voter knew she was ineligible to vote was enacted, not to change existing

law,[2] but to clarify that a good faith mistake made by an ineligible voter who did not know she was ineligible would not result in a conviction based solely on a signed provisional ballot affidavit.[3] However, that was not the case here.

The record evidence supporting that Appellant knew she was ineligible to vote when she voted went well beyond her signature on the provisional ballot affidavit. For example:

- 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. *See Mason v. State*, 598 S.W.3d 755, 770 (Tex. App.—Fort Worth, 2020, pet. granted); *see also*, *Cook v. State*, 884 S.W.2d 485, 487 (Tex. Crim. App. 1994) (citations omitted) (when surrounding circumstances transform normally legal action into an offense, a culpable mental state is required as to those surrounding circumstances); TEX. PENAL CODE § 6.03(b) (a person acts with knowledge of circumstances surrounding her conduct when she is aware that circumstances exist).

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

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[2]*See* H.J. of Tex., 87th Leg., R.S. S210 (2021), https://journals.house.texas.gov/HJRNL/87R/PDF/87RDAY60SUPPLEMENT.PDF ("For the purpose of legislative intent, this [amendment] does not actually change existing law[.]").

[3]*See* H.J. of Tex., 87th Leg., R.S. S210 (2021), https://journals.house.texas.gov/HJRNL/87R/PDF/87RDAY60SUPPLEMENT.PDF ("[This amendment strikes] a balance between allowing the prosecution of people that intentionally vote illegally while ensuring that people who in good faith cast a provisional ballot but turn out to be mistaken cannot and should not be prosecuted.").

- Dietrich gave Appellant the provisional envelope and told her to read and fill out the section entitled "To be completed by the voter." RR 2: 64, 67-68; S-X 9.

- Dietrich could not say with certainty that Appellant actually read the information, 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; *see Gutierrez v. State*, 502 S.W.2d 746, 748 (Tex. Crim. App. 1973) (Clerk's testimony that appellant "appeared to read" *Miranda* warnings before waiving them among evidence showing that appellant made intelligent waiver).

- Appellant orally attested that all of the information she provided was accurate. RR 2:71-72.

- Dietrich testified that he would not have let Appellant affirm to the affidavit had she appeared not to have read it. RR 2: 74, 89; *see Gutierrez*, 502 S.W.2d at 748.

- 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; *see Gutierrez*, 502 S.W.2d at 748.

- Poll clerk Jarrod Streibich, who was four to five feet away from Dietrich and Appellant when they worked on Appellant's provisional ballot, saw Appellant read the provisional ballot affidavit. RR 2:102. He saw "[h]er finger watching each line making sure she read it all. RR 2:102; *see Gutierrez*, 502 S.W.2d at 748.

- 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.[4] RR 2:144-45, 150-51.

This evidence, when viewed in the light most favorable to the verdict, shows that Appellant knew she was ineligible to vote when she read, understood, and signed the affidavit, orally attested to the veracity of the information on the provisional ballot, and cast her provisional ballot. The record evidence that Appellant knew she was ineligible to vote far exceeds a mere signature on a provisional ballot affidavit. As such, the new law does not affect the evidentiary posture of this case, nor does it affect the Second Court's analysis and opinion.

Because the record contains sufficient evidence corroborating that Appellant knew she was not eligible to vote when she voted, and because Appellant's approach leads to absurd results, this Court should affirm the Second Court's opinion, even considering the changes to Election Code section 64.012(c).

[4]This testimony allows the reasonable inference that Appellant understood the affidavit that she read before signing it.

CONCLUSION AND PRAYER

The evidence, when viewed in the light most favorable to the verdict, was sufficient to show that appellant voted, knowing she was legally ineligible to do so. Therefore, the State prays that this Court affirm the Court of Appeals' opinion.

In the alternative, because the Second Court did not have the benefit of section 64.012(c) of the Election Code when it analyzed this case, the case should be remanded to the Second Court to analyze the sufficiency of evidence under the new law. *See* TEX. R. APP. P. 78.1(f). Of course, this should happen only if this Court rejects Appellant's other complaints in her merits brief.

Respectfully submitted,

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