IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0881-20

CRYSTAL MASON, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND COURT OF APPEALS TARRANT COUNTY

MCCLURE, J., delivered the opinion of the Court in which KELLER, P.J., and HERVEY, RICHARDSON, NEWELL, KEEL, and WALKER, JJ., joined. YEARY, J., filed a concurring and dissenting opinion. SLAUGHTER, J., filed a dissenting opinion.

O P I N I O N

In 2018, Appellant Crystal Mason was convicted of illegal voting, then a second-degree felony, and sentenced to five years' confinement.[1] The Second Court of Appeals affirmed her conviction. *Mason v. State*, 598 S.W.3d 755, 763 (Tex. App.—Fort Worth

[1] In 2021, the Texas Legislature reclassified this offense as a Class A misdemeanor. Act of Aug. 31, 2021, 87th Leg., 2nd C.S., ch.1, § 9.03, sec. 64.012(b), 2021 Tex. Sess. Law Serv. 3783, 3812 (codified at Tex. Elec. Code Ann. § 64.012(b)).

2020). Appellant filed a petition for discretionary review with this Court, arguing that the court of appeals erred in three ways: first, in holding that her unawareness about her ineligibility to vote "was irrelevant to her prosecution;" second, by interpreting the Illegal Voting statute to criminalize the good faith submission of provisional ballots where individuals turn out to be incorrect about their eligibility to vote (contrary to the federal Help America Vote Act); and third, by holding that Appellant "voted in an election" when she submitted a provisional ballot that was never counted. In a supplemental brief, Appellant argued that Senate Bill 1's retroactive change to the Texas Election Code nullified her conviction. As to grounds two and three, we hold that the Help America Vote Act does not preempt the Illegal Voting statute and that the court of appeals did not err by concluding that Appellant "voted." However, as to ground one, the court below erred by failing to require proof that the Appellant had actual knowledge that it was a crime for her to vote while on supervised release. We remand to that court to evaluate the sufficiency of the evidence under the correct interpretation of the statute.

BACKGROUND

In the 2004 general election, Appellant filled out an Affidavit of Provisional Voter form. The form included the following affirmation: the voter had not been finally convicted of a felony, or if a felon, had completed all punishment including any term of incarceration, parole, supervision, or period of probation, or had been pardoned. The form served as an application for voter registration in Tarrant County from that point forward. Tarrant County

accepted the form and registered Appellant as a voter. Appellant voted in the 2008 elections in Tarrant County.

In 2011, Appellant pled guilty to a felony count of conspiracy to defraud the United States arising out of a phony tax preparation scheme. *United States v. Mason-Hobbs*, Nos. 4:13-CV-078-A, 4:11-CR-151-A-1, 2013 WL 1339195, at *1 (N.D. Tex. Apr. 3, 2013). The federal court sentenced her to five years' imprisonment and three years of supervision after her release and ordered her to pay full restitution to the U.S. government ($4,206,805.49). *Id.* Her conviction became final by 2013. *Id*.

In accordance with requirements of the National Voting Rights Act (NVRA)[2], Tarrant County received a report which included Appellant's felony conviction and sentence. In 2013, the Tarrant County Elections Administration (TCEA) mailed a Notice of Examination to Appellant's listed home address. The notice stated that TCEA was examining her registration based on information about her felony conviction and informing her that if she did not reply within 30 days with adequate information to show her qualification to stay registered, her registration would be cancelled. *See* Tex. Elec. Code Ann. § 16.033.

When the 30-day deadline passed without response, TCEA mailed a notice to the same address stating that Appellant's voter registration had been cancelled and that she

[2] The prosecuting United States Attorney gave written notice of Mason's conviction to the Texas Secretary of State, the "chief State election official" under Section 20507(g)(1) of the National Voting Rights Act ("NVRA"). 52 U.S.C.A. §§ 20507(g)(1), 20509 (West 2015); *see* Tex. Elec. Code Ann. § 31.001(a). In turn, the Texas Secretary of State provided the same information to the Tarrant County Election Administration, the "voter registration officials of the local jurisdiction" in which Mason resides. *Id.* § 20507(g)(5).

was entitled to a hearing and appeal. When both notices were mailed, Appellant was in federal custody serving her sentence, and she testified at trial that she did not receive the notices. Neither notice was returned to TCEA, however. TCEA cancelled Mason's registration.

After finishing her prison term and while on supervised release, Appellant reported to her probation officer that she would resume living at the same address as before. At trial, a supervisor from the probation office testified that no one from that office told Appellant she was ineligible to vote while on supervised release.

On November 8, 2016, Appellant went to her designated polling place for the general election. The election worker checking the registration roll could not find her name, so workers offered to let her complete a provisional ballot, which she agreed to do. She completed the affidavit, just as she had done in 2004, and electronically cast her provisional ballot. The election worker who had checked the registration roll reported a concern about Appellant's provisional ballot to the election judge for Appellant's precinct, who happened to be Mason's neighbor. The election judge then reported the concern to the district attorney's office. Appellant's ballot was not counted in the election.

Appellant was ultimately indicted for voting in an election in which she knew she was not eligible to vote. The indictment alleged that she had not been fully discharged from her sentence for the felony conviction. She waived a jury trial and proceeded to a bench trial. Her defensive theories at trial were that she did not read the admonishments in the

Affidavit of Provisional Voter, the government never told her she could not vote as a convicted felon, and she would not have voted had she known she was ineligible.

After conviction, Appellant filed a motion for new trial, which the trial court denied after holding an evidentiary hearing. The court issued written findings and conclusions, including that any rational factfinder could have found the State proved "the essential elements that the Defendant voted and that she was ineligible to vote," and that she "voted" when she cast her provisional ballot.

DIRECT APPEAL

On direct appeal, Appellant argued five grounds: the evidence was both legally and factually insufficient to support the guilt finding; Texas's Illegal Voting statute was preempted by the part of the Help America Vote Act that grants the right to cast a provisional ballot; her conviction resulted from ineffective assistance of counsel; and the Illegal Voting statute was unconstitutionally vague as applied to her.

The Second Court of Appeals overruled Appellant's grounds and held, relevant to this proceeding, that the evidence was sufficient to support her conviction. *Mason*, 598 S.W.3d at 781, 789. The court below said that the State needed only to prove that Appellant voted while knowing of the existence of the condition that made her ineligible—in this case, that she was on federal supervised release after imprisonment for a final felony conviction. *Id*. at 770. The court below relied on two cases for the proposition that the State does not have to prove that the defendant subjectively knew that voting with that condition made the defendant ineligible to vote or knew that voting while being ineligible was a

crime. In *Thompson v. State*, the defendant, who had a conviction for a felony assault with intent to murder, voted in a local mayoral election. 26 Tex. Ct. App. 94, 97, 9 S.W. 486, 486 (1888). The Texas Court of Appeals[3] upheld the conviction for illegal voting, holding:

> As the defendant knew the fact that he had been convicted of the offense of assault with intent to murder, it must be conclusively presumed that he knew the legal consequences of such conviction; that he knew that the law declared that offense to be a felony, and that the Constitution and the law made one of the consequences of the conviction his disqualification to vote. He can not [sic] be heard to deny such knowledge, and it was not necessary that it should be proved that he had such knowledge, because the presumption of law supplied and dispensed with such proof.

9 S.W. at 486–87.[4]

Recently, the Fifth Court of Appeals relied on *Thompson* when upholding the conviction of a person who was tried as a party to someone else's illegal voting. *Medrano v. State*, 421 S.W.3d 869, 884–85 (Tex. App.—Dallas 2014, pet. ref'd). Medrano had asked several family members, including his niece Veronica, to change their addresses on their voter registration cards so that they could vote for him in the precinct where he was running for justice of the peace. *Id*. at 874–76. On appeal, Medrano argued that the State needed to

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[3] The *Thompson* case predates the State's adoption of article V, section 1 in the Texas Constitution, which created the Court of Criminal Appeals.

[4] This Court has cited *Thompson v. State* only three times, most recently in 1914. In 1937, University of Texas law professor George Wilfred Stumberg criticized the reasoning in *Thompson* as unsound:

> The rule that ignorance of the law does not excuse, as contained by the Penal Code, could hardly have been intended by the framers of the Code to be applicable when the specific crime requires *knowledge* for guilt. . . . When the legislature requires knowledge for guilt, it is only fair to assume that it meant what it said and did not mean *presumed* knowledge when there was no knowledge in fact.

Mistake of Law in Criminal Cases, 15 Tex. L. Rev. 287, 297 n. 34 (1937).

prove that Veronica knew she was ineligible rather than proving she knew the circumstances rendering her ineligible. *Id* at 884. In other words, Medrano argued that "if Veronica did not know what she was doing was illegal, she cannot have voted illegally." *Id*. The *Medrano* court disagreed, holding:

> In *Thompson*, the defendant was charged with voting "knowing" he was not a "qualified voter," and here, Veronica was charged with voting when she knew she was not an eligible voter. Just as the State did not need to prove that Thompson knew the offense was a felony or that he was therefore not qualified to vote (only that he knew he had been convicted of an assault with the intent to commit murder), the State did not need to prove Veronica subjectively knew she was not eligible to vote; it needed only to prove she voted in the March 2010 Dallas County Primary Election when she knew she was not a resident of the precinct for which she was voting. Ignorance of the law is no excuse.

Medrano at 885.

Applying the reasoning in *Thompson*, the *Medrano* court determined that the State provided evidence—namely, that Veronica knew when she registered to vote and when she voted that she was not a resident of the address on her voter registration card and did not intend to reside there—proving "beyond a reasonable doubt that Veronica knew the facts making her ineligible to vote, which is all that was required." *Id*.

Relying on these cases, the Second Court of Appeals held similarly that the State did not need to prove Mason knew she was ineligible to vote but only that Mason voted while knowing she was on federal supervised release after being imprisoned on a felony conviction. *Mason*, 598 S.W.3d at 770.

PETITION FOR DISCRETIONARY REVIEW

Appellant filed for discretionary review, arguing that the court of appeals' holding conflicts with our recent decision in *Delay v. State*, in which we held that when the *mens rea* element of an Election Code offense is "knowingly," the accused must "actually realize" the conduct violated the Election Code. 465 S.W. 3d 232, 251–52 (Tex. Crim. App. 2014). Specifically, this Court held that "knowingly" undertaking an act in violation of the Election Code means the actor must be aware not only of the circumstances that render conduct unlawful but also of the fact that the conduct violates the Election Code. *Id*. at 250. Appellant argues that she explicitly testified she did not know she was ineligible to vote due to being on federal supervised release and that the State's only evidence regarding Appellant's knowledge was based on speculation she had read the provisional ballot affidavit.

During the pendency of this PDR, the Texas Legislature added new language to the Illegal Voting statute via Senate Bill 1 (S.B.1) during a special session, effective December 2, 2021. Act of Aug. 31, 2021, 87th Leg., 2d C.S., § 9.03, sec. 64.012, 2021 Tex. Sess. Law Serv. 3783, 3812 (codified at Tex. Election Code § 64.012). Election Code section 64.012(c) now specifies that 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." *Id.* The amendment clarifies that a provisional ballot affidavit alone is insufficient evidence that the person

knowingly committed the offense. Corroboration by other evidence is required for conviction.

Furthermore, the Legislature included a savings clause in S.B. 1 that applied the legislation to anyone who committed an offense before, on, or after the effective date of the Act, except for final convictions. *Id.* at § 9.04. The law's effective date was December 2, 2021. Appellant's PDR of her criminal conviction for illegal voting was pending at that time, so her conviction was not final.

After S.B. 1 became effective, Appellant filed, with this Court, a supplemental brief arguing that her conviction should be reversed because the amendment to section 64.012 decriminalized her conduct. Appellant states that she was convicted based on her submission of a provisional ballot that was rejected and never counted. Appellant argues that with the enactment of subsection 64.012(c) of the Texas Election Code, her submission of a provisional ballot affidavit is not sufficient to demonstrate that she actually knew she was ineligible to vote. The State disagrees, stating that the new law does not substantively change existing law but clarifies 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. The State argues that the record contains sufficient evidence, beyond Mason's signature on the provisional ballot affidavit, showing that Appellant knew she was ineligible to vote when she cast a provisional ballot.

We agree with the State that the change to the statute alone does not decriminalize Appellant's conduct. This is because the Legislature's use of the word "solely" 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.

ANALYSIS

I.

In Appellant's first ground, she argues that the court of appeals erred by concluding that her knowledge of her ineligibility to vote was irrelevant to her prosecution. We agree that this Court's precedent and the legislative history support the conclusion that actual knowledge of one's ineligibility is an element of the offense of illegal voting.

1. *Applying the Mens Rea of Knowingly*

The Court's decision in *Delay v. State* provides guidance here. 465 S.W. 3d 232. In that case, former Republican Congressman Tom Delay was convicted of money laundering and conspiracy to launder money based on a series of political contributions from corporations that allegedly violated section 253.003(a) of the Election Code. *Id.* at 238–39. This section criminalizes "knowingly mak[ing] a political contribution in violation of [the Election Code]." Tex. Elec. Code. Ann. § 253.003(a). The question in *Delay* was "whether the word 'knowingly' in the statute modified merely the making of a campaign contribution, or whether it also modified the statutory circumstance that the contribution was made 'in violation of' the Election Code." *Delay,* 465 S.W.3d at 250. In other words, we were required to construe "how far down the sentence the word 'knowingly' is intended to travel[.]" *Id*. (citing *Liparota v. United States,* 471 U.S. 419, 424 n.7, (1985)).

In doing so, this Court recognized that when construing a penal provision that appears outside the Penal Code, any ambiguity should be resolved in favor of the accused. *Delay,* 465 S.W.3d at 251 n. 69 (citing *State v. Johnson,* 219 S.W.3d 386, 388 (Tex. Crim. App. 2007) ("We are mindful of the proposition that criminal statutes outside the penal code must be construed strictly, with any doubt resolved in favor of the accused."); *see also State v. Rhine,* 297 S.W.3d 301, 309 (Tex. Crim. App. 2009) ("Although the common-law rule that a penal statute is to be strictly enforced does not apply to the Penal Code [citing Tex. Penal Code § 1.05(a)], criminal statutes outside the penal code must be construed strictly, with any doubt resolved in favor of the accused.") (footnote and internal quotation marks omitted)).

We applied this doctrine, adapted from the Rule of Lenity,[5] to the facts in *Delay.* We held that "knowingly" undertaking an action "in violation of the Election Code" means "that the actor [is] aware, not just of the particular circumstances that render his otherwise-innocuous conduct unlawful, but also of the fact that undertaking the conduct under those circumstances in fact constitutes a 'violation of' the Election Code." *Delay*, 465 S.W.3d at 250. Stated another way, a statutory requirement that an individual "knowingly" commit an offense under the Election Code requires the State to prove both knowledge of

[5] The Rule of Lenity is defined as "The judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment." *Rule of Lenity*, *Black's Law Dictionary* (11th ed. 2019). In 2015, the Rule of Lenity was formally codified to ensure that all criminal laws, if ambiguous, are read in favor of the defendant. *See* Tex. Gov't Code § 311.035.

underlying facts giving rise to a circumstance and an "actual[] realiz[ation]" that the specified circumstance renders the conduct unlawful. *Id.* at 250, 252.

The court of appeals acknowledged *Delay* but held it was distinguishable here because section 64.012(a)(1)'s knowledge requirement clearly applied to the person's knowledge of the conduct, whereas the statute under which Delay was convicted contained an ambiguous knowledge requirement. *Mason*, 598 S.W.3d at 768, n.12. In other words, the court below concluded that the Rule of Lenity does not apply to Appellant because the statute in this instance is not ambiguous. While we agree with the court below that the knowledge requirement is not ambiguous, we disagree that *Delay* is not applicable.

Under canons of statutory construction, a 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).

As discussed above, Delay was convicted of violating section 253.003(a) of the Election Code, which says that a person may not knowingly make a campaign contribution *that the person knows is in violation of the Election Code.* In our analysis, we looked at the

ambiguity in section 253.003(a) and determined that the statute required the person to know the contribution violated the Election Code. *Delay*, 465 S.W.3d at 250.

Turning now to the statute for which Appellant was prosecuted, Texas Election Code section 64.012(a), makes it an offense to "vote[] . . . in an election *in which the person knows the person is not eligible to vote*," where eligibility is established by section 11.001 of the Election Code (emphasis added). To construe the statute to mean that a person can be guilty even if she does *not* "know[] the person is not eligible to vote" is to disregard the words the Legislature intended. It turns the knowledge requirement into a sort of negligence scheme wherein a person can be guilty because she fails to take reasonable care to ensure that she is eligible to vote. A plain reading of the language in section 64.012(a)(1) requires *knowledge* that a defendant herself is ineligible to vote, not simple negligence. The statute does not allow a court to presume knowledge of ineligibility based solely on a provisional ballot affidavit. This reading is consistent not only with *Delay* but also with the Legislature's intent.

i. Consistent with Delay v. State

In *Delay*, we interpreted the phrase "knowingly make a political contribution in violation of this chapter" to mean that an actor must knowingly make a political contribution while also knowing that the contribution violates the Election Code. 465 S.W.3d at 250. Doing the same in this case yields a result in which the phrase "knows the person is not eligible to vote" means that Appellant was guilty if she knew she was ineligible to vote in addition to knowing that she had not completed her sentence.

ii. Consistent with Legislative Intent

The recent amendment to the Illegal Voting statute demonstrates that the court of appeals' strict liability reading of the statute—that, to be found guilty of this offense, an individual need not know that he or she is ineligible to vote or that voting while being ineligible is a crime—"would lead to absurd consequences that the Legislature could not possibly have intended." *See Boykin v. State,* 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (citing *Faulk v. State*, 608 S.W.2d 625, 630 (Tex. Crim. App. 1980)). In summer 2021, the Texas Legislature convened in a special session specifically to address voter fraud.[6] Relevant to the instant proceedings, on August 31, 2021, the Texas House of

[6] For some legislative background, section 64.012(c) was originally included in section 9.03 of Texas S.B. 7 (The Election Integrity Protection Act of 2021) during the Legislature's 87th general session. This omnibus bill did not pass. However, during the committee debates on S.B. 7, there arose a discussion that the purpose of this specific amendment to the voter fraud statute (colloquially known as the "Cain Amendment" since it was raised by Representative Briscoe Cain) was to ensure that those who in good faith cast a provisional ballot but turn out to be mistaken should not be prosecuted. Rep. Cain specifically argued:

> 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

Representatives passed House Resolution 123, directly addressing the interpretation of section 64.012(a)(1).[7] In their remarks about the resolution, representatives specifically discussed Appellant's case, suggesting that there was an error in interpreting section 64.012(a)(1) under a strict liability standard. *Id*. Specifically, the following exchange occurred between Representative Dustin Burrows, the Republican sponsor of the bill, and Representative John Turner:

> J.TURNER: You heard my reference a few moments ago to the case of Crystal Mason. And would you agree with me, Representative, that five years in prison is a serious deprivation of a person's liberty?
>
> BURROWS: I could not imagine.
>
> J. TURNER: And it seems to have been acknowledged that she did not realize that she was ineligible to vote. But her conviction has currently been upheld, although it's still on appeal, because that statute has been interpreted to say that all that was necessary was for her to know that she was on supervised release even though she didn't realize that fact made her ineligible. Have I summarized that matter correctly to your knowledge?
>
> BURROWS: My understanding is the same as yours. And as you said earlier, I would not have known that being on supervised release would have made you ineligible. That is a high bar to impute on somebody to put them away for five years.
>
> J. TURNER: I know her case is now on appeal. And of course, we have separate branches of government and it's not our role here in the legislature to tell any other branch of government what to do or how to rule in a case. But it seems to me that it is appropriate, given the fact that we adopted and then accepted the removal of the Cain amendment, to explain ourselves to some degree and express the sense of the house about the issue it dealt with. Do you agree that that's appropriate here?

[7] The bipartisan resolution passed with a record vote of 119 yeas, 4 nays, and 1 present, not voting. H.J. of Tex., 87th Leg., 2nd C.S. 320–22 (2021), https://journals.house.texas.gov/HJRNL/872/PDF/87C2DAY06FINAL.PDF.

> BURROWS: I think it is, and I think that we are reiterating and restating what is the current law. Obviously, the courts are about to decide what it is, but my interpretation of current law is you have to have a mens rea element. As we said, this is not a strict liability-type of issue. So I believe this resolution actually conforms with what the current law is today, and the Cain amendment was no different, which is why this body has adopted it several times.

Id. at 321–22 (2021).

The remarks about House Resolution 123, along with the retroactive change to section 64.012, are persuasive authority that the court of appeals' interpretation of section 64.012(a)(1)'s *mens rea* requirement was incorrect.

2. Proving Actual Knowledge of Ineligibility

Now that we have recognized that section 64.012 requires individuals to know they are ineligible to vote to be convicted of illegal voting, what does it substantively mean to knowingly violate the Election Code? This Court has consistently affirmed that where an offense criminalizes otherwise innocuous conduct based on particular circumstances, "the culpable mental state of 'knowingly' must apply to those surrounding circumstances." *See McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989) (analyzing Tex. Penal Code § 31.07); *see also Dennis v. State*, 647 S.W.2d 275, 280 (Tex. Crim. App. 1983) (holding that, for the possession-of-stolen-property offense, the word 'knowingly,' when used to describe the defendant's reception of property that has been stolen, requires 'actual subjective knowledge, rather than knowledge that would have indicated to a reasonably prudent man that the property was stolen' because such actual knowledge is what makes unlawful the otherwise innocent conduct of receiving property); *see also State v. Ross*, 573

S.W.3d 817, 826 (Tex. Crim. App. 2019) (analyzing Tex. Penal Code Ann. § 42.01(a)(8)) (holding that, with respect to a statute that prohibits intentionally or knowingly displaying a firearm in a manner calculated to alarm, persuading a jury that the actor's display was objectively alarming would not, by itself, be enough for a conviction); *see also Jackson v. State*, 718 S.W.2d 724, 726 (Tex. Crim. App. 1986) (holding that, for the evading arrest offense, it is essential that a defendant know the peace officer is attempting to arrest him).

Once again turning to *Delay*, we held that the State did not prove a violation of section 253.003(a) because, although the contributing corporations may have known that their contributions would be steered to specific candidates, "nothing in the record shows that anyone associated with the contributing corporations *actually realized* that to make a political contribution under these circumstances would in fact violate . . . the Texas Election Code." *Delay*, 465 S.W.3d at 252 (emphasis added).

Applying this holding in *Delay* to Appellant's alleged offense of illegal voting, the State was required to prove not only that Appellant knew she was on supervised release but also that she "*actually realized*" that "these circumstances . . . in fact" rendered her ineligible to vote. *Id*. (emphasis added).

The Election Code requires actual knowledge of one's ineligibility to vote. Because the court of appeals did not consider the evidence under the proper interpretation of the statute, we vacate that portion of the judgment of the court of appeals and remand the sufficiency ground to that court for further proceedings consistent with this opinion.

II.

In her second ground, Mason alleges the court below erred by adopting an interpretation of the Illegal Voting statute that is preempted by the federal Helping America Vote Act, specifically by interpreting the Illegal Voting statute to criminalize the good faith submission of provisional ballots where individuals turn out to be incorrect about their eligibility to vote.

The Help America Vote Act of 2002 (HAVA) was enacted by Congress in response to the various issues with election administration across the country following the 2000 elections. The purposes of HAVA are:

> To establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes.

Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1666.

Recognizing the cost imposed upon a state to overhaul its election procedures, HAVA provides funds to carry out compliance with the program. *See* 52 U.S.C.A. § 20901. To qualify for federal funds, a state must spend the money in compliance with Title III of the Act. 52 U.S.C.A. § 20901(b)(1)(A). Particular to the instant proceeding, Title III of the Act established new requirements for provisional voting. 52 U.S.C.A. § 21082(a). This section of HAVA requires election officials to permit certain voters, including voters whose names do not appear on the voter rolls, to cast provisional ballots; count provisional

ballots cast by voters who are found to be eligible under state law to vote; and provide voters with specified options for checking the status of their provisional ballots.[8] Therefore, under HAVA, an individual must be permitted to cast a provisional ballot if the individual believes he or she is eligible to vote, is not on the voter rolls, and affirms that he or she is registered and eligible to vote in that jurisdiction in an election for federal office. *See Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (Sixth Cir. 2004); 52 U.S.C.A. § 21082(a). The right to cast a provisional ballot under HAVA is "couched in mandatory, rather than precatory, terms" and is "unambiguous." *Sandusky,* 387 F.3d at 572–73.

Appellant argued on appeal that the State's attempt to impose felony penalties on an individual who believes herself to be eligible, signs a provisional ballot, and is found ineligible to vote conflicts with HAVA. We disagree.

Under the supremacy clause of the U.S. Constitution, only state laws that interfere with or are contrary to federal law are invalid. *See Sabine Consolidated, Inc. v. State,* 806 S.W.2d 553, 555–60 (Tex. Crim. App. 1991) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 82 (1824)). As discussed above, the purpose of HAVA was to improve voting systems and voter access. The prosecution of an election law violation does not conflict with any

[8] HAVA requires State and local election officials to set up a hotline whereby an individual can find out whether her vote was counted and if "the vote was not counted, the reason that the vote was not counted." 52 U.S.C.A. § 21082(a)(5)(B).

provisions of HAVA, primarily because HAVA is an administrative statute, not a penal statute. As the United States Court of Appeals for the Sixth Circuit noted in *Sandusky*:

> HAVA is quintessentially about being able to *cast* a provisional ballot. No one should be "turned away" from the polls, but the ultimate legality of the vote cast provisionally is generally a matter of state law. Any error by the state authorities may be sorted out later, when the provisional ballot is examined, in accordance with subsection (a)(4) of section 15482. But the voter casts a provisional ballot at the peril of not being eligible to vote under state law; if the voter is not eligible, the vote will then not be counted.

Sandusky Cty. Democratic Party, 387 F.3d at 576.

HAVA is unconcerned with whether an individual "believes" she is eligible to vote as long as she is given the opportunity to cast a provisional ballot. HAVA ensures a person has the right to cast a provisional ballot, but it requires the state to count a provisional ballot only if the individual provides written affirmation that she is registered in the jurisdiction and eligible to vote in the election. *See* 52 U.S.C. 21082(a),(c).

In the present case, no party disputes that Appellant cast a provisional ballot, nor does any party argue that the local election officials did not comply with HAVA. The Texas Illegal Voting statute, as discussed above, subjects individuals to criminal penalties if they vote (or attempt to vote) when they know they are not eligible to vote. This statute is not contrary to HAVA, nor does it interfere with HAVA.

The *Sandusky* court was clear that enforcement of voting laws is left to the states. 387 F.3d at 576. Further, while HAVA was enacted to improve and update voting procedures, the purpose of the Act was not to preempt state penal laws for election law

violations. Nothing in HAVA's provisional voting section prohibits a person from facing criminal penalties for violating state election laws.

III.

In Applicant's third ground, we face an issue of first impression: did the court of appeals misinterpret the Illegal Voting statute by holding that submitting a provisional ballot that is rejected constitutes "voting" in an election? The court below recognized that the term "vote" is not defined in the Election Code. However, the Penal Code, in prohibiting the bribery or coercion of a voter, defines the verb "vote" as "to cast a ballot in an election regulated by law." Tex. Penal Code Ann. § 36.01(4). The court below recognized that this is consistent with the *Black's Law Dictionary* definition, which characterizes the verb as casting a ballot or signaling one's choice in deciding an issue. *Vote*, *Black's Law Dictionary* (11th ed. 2019). Finding no definition that conditions the verb "vote" on whether the choice expressed is counted afterwards as part of the poll results, the court concluded that the term can be broadly defined as expressing one's choice via ballot regardless of whether the ballot is counted, and therefore "a vote" includes the casting of a provisional ballot. *Mason*, 598 S.W.3d at 775.

Appellant was charged with violating section (a)(1) of the Illegal Voting statute, which states that a person commits an offense if the person votes or attempts to vote in an election in which the person knows the person is not eligible to vote. *See* Tex. Elec. Code Ann. § 64.012(a)(1). During trial, the following evidence was developed:

- On November 8, 2016, Appellant appeared at the poll, filled out an Affidavit of Provisional Voter listing the requirements for eligibility to vote.
- Applicant submitted her provisional vote electronically.
- Election Judge Karl Dietrich testified that Appellant was then entered into the list of provisional voters in the book of registered voters, and she signed the book.
- Dietrich further testified that all provisional envelopes were placed in a special bag and submitted to the tally station where all other ballots from across the county were collected.

i. The term "vote" is not defined.

The term "vote" is not defined in the Texas Elections Code.[9] Undefined terms in a statute are to be given their plain and ordinary meaning, and we refer to the rules of grammar and common usage to construe the terms. *Watson v. State*, 369 S.W.3d 865, 870 (Tex. Crim. App. 2012); *see also* Tex. Penal Code Ann. § 1.05(b); Tex. Gov't Code Ann. § 311.011(a), (b). Words defined in dictionaries and with meanings so well-known as to be understood by a person of ordinary intelligence are not considered vague and indefinite. Tex. Gov't Code Ann. § 311.011(a) (West 2013) (providing that statutory "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"). We recognize Penal Code Section 36.01(4) defines the verb "vote" as meaning "to cast a ballot in an election regulated by law." Tex. Penal Code Ann. § 36.01(4). However, in keeping with the statutory-construction principle of determining the plain meaning of the word, we will not import the definition from another code.

[9] Relevant to this issue, HAVA includes a provision requiring states to adopt "uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote." *See* 52 U.S.C.A. § 21082(a)(6).

The word "vote" is defined in dictionaries and is so well known as to be understood by a person of ordinary intelligence. In determining the plain meaning of the word, the Second Court of Appeals relied on the definitions found in *Black's Law Dictionary* and *Webster's Third New International Dictionary*:

> Black's Law Dictionary defines the verb "vote" as "[t]he act of voting" and voting as "[t]he casting of votes for the purpose of deciding an issue." *Vote, Voting*, Black's Law Dictionary. It defines "cast" as "[t]o formally deposit (a ballot) or signal one's choice (in a vote)." *Cast, id.* To cast a ballot, then, is to express one's choice, i.e., to vote. Similarly, Webster's Third New International Dictionary defines the verb "vote" as "to express one's views in response to a poll," "to express an opinion," or "to choose or endorse by vote." Webster's Third New Int'l Dictionary 2565 (2002). By comparison, Black's defines the noun "vote" as "[t]he expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication." *Vote*, Black's Law Dictionary.

Mason, 598 S.W.3d at 774.

Appellant argues that "the [Second Court] . . . failed to consider contrary definitions, even ones from the same source" when it defined voting. Yet, Appellant cites no authority requiring a reviewing court to consider a specific number of definitions of a legally undefined term before applying a common definition. We agree with the court below that the above definitions of voting line up with the common general meaning of the verb "vote."

Appellant also attempts to distinguish between the casting of a provisional ballot vote and a "regular" ballot vote, arguing that the casting of a provisional ballot that is later rejected does not constitute the action of voting. However, Applicant fails to cite to any

authority distinguishing the two ballots. The Texas Legislature did not distinguish a "regular" vote from a provisional vote. However, HAVA did.

Section 21082 of HAVA entitled "Provisional voting and voting information requirements" uses the word "vote" to refer to casting a provisional ballot: ". . . any individual who casts a provisional ballot may access [a free system] to discover *whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted*" (emphasis added). 52 U.S.C.A. § 21082(a)(5)(B). HAVA certainly does not suggest that a "vote" requires tallying.

Also relevant is what is *not* in the Texas statute: a defense to prosecution. The illegal voting statute does not provide for a defense if election officials discover a person's ineligibility to vote before counting her ballot. Therefore, a plain reading of the Texas statute does not require the State to prove the provisional ballot was included in the final vote tally to secure a conviction for illegal voting.

Appellant argues the "attempt to vote" language of Election Code section 64.012(a)(1) would be superfluous if a vote need not be counted. Section 64.012(a)(1) creates separate criminal offenses for the conduct of voting and the conduct of attempting to vote. *See* Tex. Elec. Code Ann. § 64.012(a)(1). However, Applicant provides no authority for the argument that voting illegally is an attempted offense until such time as the cast provisional ballot is tallied and counted. The State posits that had Appellant's legal ineligibility to vote been discovered at any point before she handed her completed ballot to the poll worker, she could have been charged with attempted illegal voting. However,

we find it unnecessary to engage in the merits of this particular argument because we hold that the lower court was reasonable in finding no requirement that a person's cast provisional ballot be counted to be considered a vote.

CONCLUSION

The appellate court's judgment is affirmed in part and remanded in part. The court of appeals' sufficiency analysis relied on an erroneous interpretation of the statute, as Appellant stated in ground one. As a remedy, we remand ground one for additional proceedings consistent with this opinion. The court of appeals' judgment as to grounds two and three is affirmed.

Delivered: May 11, 2022

PUBLISH

In the Court of Criminal Appeals of Texas

No. PD-0881-20

CRYSTAL MASON,

Appellant,

v.

THE STATE OF TEXAS

On Appellant's Petition for Discretionary Review
From the Second Court of Appeals
Tarrant County

YEARY, J., filed a concurring and dissenting opinion.

I concur in the Court's disposition to remand this case to the court

of appeals for further consideration, although I take issue with some of the Court's reasoning along the way. Moreover, my remand would embrace more for the court of appeals potentially to reconsider than the Court has prescribed in its opinion today. I write separately to explain where I agree and disagree with the Court and how and why I would expand the scope of the Court's remand.

I. PROOF OF KNOWLEDGE

A. The Statute is Plain

First, I readily agree with the Court's conclusion that the court of appeals in this case misconstrued the plain language of the illegal voting statute, which on its face requires proof that the actor knew she was ineligible to vote, and not just that she was aware of the circumstances that *rendered* her ineligible to vote. Majority Opinion at 13; *see* TEX. ELEC. CODE § 64.012(a)(1) (making it an offense if a person "votes or attempts to vote in an election in which [the person] knows [she] is ineligible to vote"). That said, I also agree with the dissent that, because the language of the statute plainly requires proof of the actor's knowledge that she was ineligible to vote, there is no need to "construe" an ambiguous statute in the way the Court found necessary in *Delay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014). Dissenting Opinion at 4. All the Court needs to do here, it seems to me, is to simply disavow the case that the court of appeals relied upon as authority to ignore the statute's plain import: *Thompson v. State*, 9 W.W. 486, 486–87 (Tex. Ct. App. 1888). *See Mason v. State*, 598 S.W.3d 755, 768–70 (Tex. App.—Fort Worth 2020) (citing *Thompson* for the proposition that "the State does not have to prove that the defendant subjectively knew that voting

[under conditions making her ineligible to vote] made the defendant ineligible to vote under the law").[1]

B. Remand is Appropriate

I also agree with the Court that, having determined that the court of appeals conducted its legal sufficiency analysis under a faulty construction of the applicable Election Code provision, the prudent course is to remand the case to that court for further proceedings rather than for us to conduct the legal sufficiency analysis for the first time under the appropriate construction of the statute. Majority Opinion at 17. That way, we are able to obtain the lower court's perspective on the sufficiency of the evidence under the proper construction of the statute. *Cf. McClintock v. State*, 444 S.W.3d 15, 21 (Tex. Crim. App. 2014) (a remand for the court of appeals to consider as-yet unresolved questions following this Court's disposition of an initial petition for discretionary

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[1] The court of appeals may certainly be forgiven for relying on *Thompson* for what it perceived to be "binding" authority. *Mason*, 598 S.W.3d at 768–69 & n.11. In *Thompson*, our predecessor, the Texas Court of Appeals, was construing a provision of the 1879 Penal Code that just as plainly required knowledge on the part of a would-be voter that he was "not qualified" before he could be convicted of voting illegally. Article 165 of the 1879 Penal Code made it an offense for any person to "vote, or offer to vote," at any election while "knowing himself not to be a qualified voter[.]" Despite this plain language, the Court of Appeals held that evidence that the defendant knew he had been convicted of a felony constituted sufficient proof that he also knew he was "not qualified" to vote, and that it must be presumed he knew that "the law made one of the consequences of the conviction his disqualification to vote." *Thompson*, 9 S.W. at 486. This presumption made proof of actual knowledge of his disqualification under the statute unnecessary, and a jury instruction equating knowledge of his conviction with knowledge of his disqualification as a voter was therefore "correct and unobjectionable." *Id.* We need not overrule *Thompson* since it was construing a different statute. But we should certainly disavow its failure to abide by plain statutory language.

review means that "our resolution of the issue (if any should even be necessary after a remand) would benefit from a carefully wrought decision from the court of appeals").[2]

C. What Knowledge must be Established?

With respect to the Court's holding that knowledge of ineligibility is required, there are three other matters I wish briefly to address in this admittedly omnibus concurring opinion. The first two matters echo criticisms that the dissenting opinion has made of the Court's opinion today that I think bear emphasis. The third relates to the Court's failure to first consider an obvious constitutional question about the Texas Legislature's most recent amendment to the statute at issue before considering that amendment to be applicable in this case.

1. Substantive Statutory Requirements

First, as the dissent points out, the Court's opinion appears to suggest that, to be found guilty of committing an offense a person must

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[2] What is more, a remand would allow the court of appeals to re-evaluate its disposition of some of Appellant's ineffective assistance of counsel claims—claims which it also originally disposed of, at least partly, based on its misconstruction of the statute. *See Mason*, 598 S.W.3d at 785 (rejecting Appellant's claim that trial counsel should have called additional witnesses to establish that she lacked knowledge that she was ineligible to vote on the basis that proof of such knowledge was not necessary for conviction); *id*. at 786–87 (rejecting Appellant's claim that trial counsel should have explored potential bias of the precinct election judge on the basis that it would not have made a difference to her defense, since the State need not prove she knew she was ineligible to vote); *id*. at 788 (rejecting Appellant's claim that trial counsel had an actual conflict of interest because the only defense it could have raised incorrectly assumed that the State must prove Appellant was aware of her ineligibility to vote). This Court's construction of the statute today could cause the court of appeals to want to revisit its initial resolution of these ineffective assistance claims.

first be shown to have known that her conduct specifically violated "the Election Code." *See* Majority Opinion at 16 ("Now that we have recognized that section 64.012 requires individuals to know they are ineligible to vote to be convicted of illegal voting, what does it substantively mean to knowingly violate the *Election Code*?") (emphasis added); Dissenting Opinion at 6 (arguing that "Section 64.012 requires only that the Appellant knew she was ineligible to vote. It does not require her to know that voting while ineligible violates the Election Code."). I agree with the dissent that nothing about the statute specifically demands proof that an accused was even aware of the existence of an Election Code, much less that such a code provides for requirements that must be met before a vote may be cast. The statute only requires proof that the person *knew* that he or she was *ineligible* to vote, whatever may have been the source of that knowledge.[3] To the extent that the Court's opinion seems to increase the State's burden by requiring proof of knowledge of the existence and contents of the "Election Code," it overstates the requirements of the law.

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[3] Imagine a circumstance in which an election judge tells a prospective voter: "Because you are a convicted felon, and because you have not been pardoned or finally released from supervision, you are ineligible to vote." The accused person then says, "Well, I haven't seen such a law myself, but I accept what you have told me, and I am going to vote anyway." And the accused person then casts a ballot in an election. Would this evidence satisfy the State's burden under the statute? Or would the State also be required to prove: (1) that the accused knew that Section 11.002 of the Texas Election Code establishes qualifications for voters; and (2) that the accused knew that she specifically failed to meet those specific statutory qualifications? To the extent the Court seems to require the latter, it requires proof that the statute does not contemplate.

2. Burden of Proof

Moreover, as the dissent further observes, the court also seems to require a heightened burden of proof with regard to knowledge of ineligibility. *See* Majority Opinion at 17 ("[T]he State was required to prove not only that Appellant knew she was on supervised release but also that she "actually realized" that "these circumstances . . . in fact" rendered her ineligible to vote."); Dissenting Opinion at 5 (arguing that "[b]y referring to a person's 'actual' realization that she is ineligible to vote, the Court's opinion implies that a heightened standard of knowledge applies here[.]"). The statute plainly requires proof that Appellant *knew* she was ineligible to vote. That does not mean the State must satisfy anything other than proof beyond a reasonable doubt of that fact, by either direct or circumstantial evidence. I agree with the dissent that, to the extent that this phrase—"actually realized"—may import some meaning beyond mere awareness that the person is ineligible to vote, it overstates the required culpable mental state. *See* TEX. PENAL CODE § 6.03(b) ("A person acts knowingly, or with knowledge, with respect . . . to circumstances surrounding his conduct when he is aware . . . that the circumstances exist.").

3. Retroactive Law?

Finally, I must express some misgivings about the Court's application of this recent statutory corroboration requirement to the present case. I am aware, of course, that the Legislature purported to make this new requirement applicable to any non-final conviction—and, indeed, applicable to this very case, according to the Court's discussion

of legislative history.[4] Majority Opinion at 14–16. I find it disturbing that nobody has yet bothered at least to *inquire* whether such a retroactive application of a corroboration requirement can be squared with the Texas Constitution's prohibition against retroactive laws. *See* TEX. CONST art. I, § 16 ("No . . . retroactive law . . . shall be made.").

II. BUT IS A PROVISIONAL BALLOT REALLY A "VOTE"?

If, pursuant to the Court's remand, the court of appeals were to determine that the evidence is insufficient to establish that Appellant was aware that she was ineligible to vote, that would end the prosecution (subject to further discretionary review in this Court). Should it determine, instead, that the evidence is sufficient, it seems to me that there would be more for the court of appeals to decide before it could uphold a conviction. I say this because I disagree with the Court's conclusion today that "voting" under Section 64.012(a)(1) of the Election Code should be construed to include casting a "provisional ballot."

I am unimpressed with the Court's argument for why casting a *provisional* ballot constitutes the act of voting for purposes of the illegal voting statute. Majority Opinion at 21–25. Noting that this is a question

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[4] As the Court explains, Majority Opinion at 8–9, the most recent Legislature has added Subsection (c) to Election Code Section 64.012, which now provides that "[a] person may not be convicted solely upon the fact that the person signed a provisional ballot affidavit under Section 63.011 [of the Texas Election Code] unless corroborated by other evidence that the person knowingly committed the offense." Acts 2021, 87th Leg., 2nd C.S., ch. 1 (S.B. 1), § 9.03, eff. Dec. 2, 2021. This amendment was expressly made applicable to any non-final offense committed before, on, or after its passage. *See id.* § 9.04 ("The change in law made by this article in adding Section 64.012(c), Election Code, applies to an offense committed before, on, or after the effective date of this Act, except that a final conviction for an offense under that section that exists on the effective date of this Act remains unaffected by this article.").

of first impression, Majority Opinion at 21, the Court's logic consists mainly of simply faulting Appellant for failing to produce any authority for the proposition that casting a provisional ballot does *not* constitute the act of voting. *See e.g.*, *id*. at 22–24 (Appellant "fails to cite" any authority to establish that a "provisional ballot" is any different than a regular ballot). Neither the Penal Code's definition in Title 8 of the verb "to vote," nor any of the various dictionary definitions the Court borrows from the court of appeals' opinion, really sheds light on the question. *See id*. at 22–23 (recognizing, but failing to adopt, the definition of "vote" in TEX. PENAL CODE § 36.01(4), and then alluding to the various dictionary definitions of the verb "to vote" as noted by the court of appeals, quoting *Mason*, 598 S.W.3d at 774).

The Court conspicuously avoids what seems to me to be the most pertinent fact that informs the inquiry; namely, that a provisional ballot is . . . well, *provisional*. That is to say, it is conditional, contingent, inconclusive, not yet (and perhaps never to be) permanent. *See* BLACK'S LAW DICTIONARY 1480 (11th ed. 2019) ("**1.** Provided for the time being to supply a place to be occupied in the end by some more permanent arrangement; temporary or conditional"); WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1171 (5th ed. 2014) ("arranged or established for the time being, pending permanent arrangement or establishment"); NEW OXFORD AMERICAN DICTIONARY 1406 (3rd ed. 2010) ("**1** arranged or existing for the present, possibly to be changed later; put into circulation temporarily, usually owing to the unavailability of the definitive issue"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1827 (2002) ("**1 :** provided for a temporary need : suitable or acceptable in the existing

situation but subject to change or nullification"). While casting a ballot in an election seems plainly to satisfy the statute, whether casting a *provisional* ballot also does seems utterly up for grabs. In that case, the Court has said that, since this is not a Penal Code offense, the rule of lenity should control. *See Delay*, 465 S.W.3d at 251 (observing that, for non-penal code penal provisions, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity").

On the other hand, perhaps a provisional ballot could be said to support a prosecution under the statute for *attempted* illegal voting, in that the actor might pursue it in the hope that what starts out as a "provisional" vote will ultimately be recognized and counted later on. At the time of Appellant's offense, an *attempt* to vote illegally (with the same requisite specific knowledge of ineligibility) was a lesser-included offense of illegal voting—a Class A misdemeanor rather than a third-degree felony.[5] As part of my remand in this case, I would have the court of appeals consider, if necessary, whether it would be appropriate to reform Appellant's judgment to reflect conviction for this lesser-included *attempt* offense. *See Thornton v. State*, 425 S.W.3d 289, 300 (Tex. Crim. App. 2014) (holding that an appellate court may reform a judgment to reflect conviction for a lesser-included offense if the factfinder's conviction for the greater offense necessarily embraced all elements of the lesser-included offense and the evidence, while not supporting the greater offense, did support all elements of the lesser-included offense).

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[5] Under the 2021 amendment, both voting and attempting to vote with knowledge of ineligibility were made Class A misdemeanors. Acts 2021, 87th Leg., 2nd C.S., ch. 1 (S.B. 1), § 9.03, eff. Dec. 2, 2021.

III. CONCLUSION

With these observations, I concur in the Court's decision to remand the case to the court of appeals for further consideration of Appellant's first ground for review. I dissent to the Court's holding that to cast a "provisional ballot" constitutes "voting" under the statute, and to the Court's failure to broaden the scope of the remand to the court of appeals for consideration, if necessary, of whether Appellant might be guilty of, if not the greater offense of *voting* while ineligible, then of the lesser-included offense of *attempting* to vote while ineligible.

FILED: May 11, 2022
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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0881-20

CRYSTAL MASON, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE SECOND COURT OF APPEALS
TARRANT COUNTY

SLAUGHTER, J., filed a dissenting opinion.

DISSENTING OPINION

The Court's opinion readily acknowledges that the statute at issue here, Election Code Section 64.012, is unambiguous. Yet, it then goes on to analyze the "proper interpretation" of the statute's *mens rea*—not by simply applying the statute's plain language as it should, but instead by using extratextual sources, including an inapplicable

opinion from this Court in which we had to analyze an *ambiguous* statute. In doing so, the opinion confuses the issues and lends itself to a potentially improper interpretation and application of the statute. Moreover, the Court chooses to unnecessarily remand this case to the court of appeals for a sufficiency review when the proper outcome is clear. I would instead, in the name of judicial economy, resolve the case here on the largely uncontested record and hold that the evidence is sufficient. Because the Court does not, I respectfully dissent.

I. Analysis

A. Contrary to the language in the Court's opinion suggesting otherwise, the illegal-voting statute merely requires knowledge of ineligibility to vote and allows the fact-finder to reasonably infer the defendant's subjective knowledge based on the evidence.

Under the plain language of Election Code Section 64.012(a)(1), a person is guilty of illegal voting if she "votes or attempts to vote in an election in which the person knows the person is not eligible to vote." TEX. ELEC. CODE § 64.012(a)(1). The statute's culpable mental state requirement is explicit and unambiguous—the State must prove that the defendant subjectively knew that her status as a felon rendered her ineligible to vote.

Because the statute is unambiguous, the Court's analysis of the statute's *mens rea* requirement should end there. When a statute is unambiguous it is unnecessary to look beyond the statutory text for guidance, unless the statute's plain meaning would lead to absurd results. *See Baird v. State*, 398 S.W.3d 220, 228 (Tex. Crim. App. 2013). Rather than apply this legal tenet, the Court instead relies heavily on the reasoning in our *DeLay* opinion to support its statutory interpretation. *See DeLay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014). But *DeLay* is distinguishable and has no application here.

In *DeLay*, this Court had occasion to interpret a different Election Code provision, Section 253.003(a), which provides that a person commits an offense if he "knowingly make[s] a political contribution in violation of this Chapter." TEX. ELEC. CODE § 253.003(a). The Court there reasoned that it was unclear "how far down the sentence the word 'knowingly' is intended to travel." *Delay*, 465 S.W.3d at 250. In resolving this ambiguity, the Court concluded that the Legislature intended that the defendant must have knowledge as to the circumstance that made the conduct illegal and also as to the fact that the conduct was in violation of the Election Code. *Id.* (holding that the State must show that the actor was "aware, not just of the particular circumstances that render his otherwise-innocuous conduct unlawful, but also of the fact that undertaking the conduct under those circumstances in fact constitutes a 'violation of' the Election Code"). This holding was based in part on our precedent in *McQueen v. State*, 781 S.W.2d 600 (Tex. Crim. App. 1989), in which we held that, "in the face of a statute that is ambiguous with respect to the extent of the *mens rea* requirement, we have resolved the ambiguity in favor of applying 'some form of culpability . . . to those conduct elements which make the overall conduct criminal.'" *DeLay*, 465 S.W.3d at 247 (quoting *McQueen*, 781 S.W.2d at 604). *DeLay* was also based on the notion that provisions outside the Penal Code must be interpreted in accordance with the Rule of Lenity, requiring "'that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Id.* at 251 (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)). Thus, our reasoning and interpretation in *DeLay* was rooted in the ambiguity of the statute under consideration.

In contrast, the statute at issue in this case is not ambiguous. As such, the principles we applied to interpret the ambiguous statute in *DeLay* do not apply here.[1] We need not "construe" or "interpret" anything. Therefore, citing *DeLay* in support of the Court's holding suggests that it is proper to go beyond the plain statutory language in interpreting an unambiguous provision. This, in turn, presents the potential for confusion and misinterpretation of our precedent in future cases.

I also note that the Court at times appears to conflate the *mens rea* requirements in *DeLay* with the *mens rea* requirement at issue here. But, there is a key difference between the two statutes. In *DeLay*, this Court held that the State was required to prove that the defendant actually knew the conduct in question violated the Election Code. In this case, however, Section 64.012 requires only that the Appellant knew she was ineligible to vote. It does not require her to know that voting while ineligible violates the Election Code. *Compare DeLay*, 465 S.W.3d at 250 (State must prove awareness "of the fact that undertaking the conduct under those circumstances in fact constitutes a 'violation of' the Election Code"), *with* TEX. ELEC. CODE § 64.012(a)(1) (providing that a person commits an offense if she votes and knows she "is not eligible to vote"). This distinction likely makes little difference in most cases, but I can envision a scenario in which a defendant claims that she knew she was ineligible to vote but did not realize that voting under those circumstances would constitute a criminal-law violation. Therefore, if the Court is going

[1] The *McQueen/DeLay* line of cases applies only where the Court must resolve an ambiguity with respect to how the culpable mental state applies. In cases where a particular circumstance would render otherwise innocent conduct criminal, we have held that a culpable mental state must apply to that circumstance. But here, the statute already expressly requires a culpable mental state (knowing) as to the circumstance that renders the otherwise innocent conduct (voting) criminal—that is, the lack of eligibility. *See* TEX. ELEC. CODE § 64.012(a)(1).

to rely on *DeLay*, then it should at least clarify that the culpable mental state requirement imposed in *DeLay* is not the same as the one at issue here.

Another concern with the Court's analysis is that it suggests the State must present *direct* evidence that Appellant knew she was ineligible to vote. Specifically, the Court's opinion holds that the statute requires proof that Appellant "*actually realized* that these circumstances . . . in fact rendered her ineligible to vote" because the statute "requires actual knowledge of one's ineligibility to vote." *See* Maj. Op. at 17. What does the Court mean by "actual" knowledge or realization in this context? The Penal Code supplies the only definition of knowledge that we should apply here—that is, that "[a] person acts knowingly, or with knowledge, with respect to the nature of [her] conduct or to circumstances surrounding [her] conduct when [s]he is aware of the nature of [her] conduct or that the circumstances exist." TEX. PENAL CODE § 6.03(b). By referring to a person's "actual" realization that she is ineligible to vote, the Court's opinion implies that a heightened standard of knowledge applies here—one that is not rooted in the elements of the offense or the requirements under Penal Code Section 6.03. Such language could be construed as indicating that the State must prove more than a person's simple awareness of the circumstance that she was ineligible to vote. This approach would also conflict with the well-established principle that a person's knowledge may be inferred from the totality of the circumstances. *See, e.g.*, *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) ("Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt."); *Hooper v. State*, 214 S.W.3d 9, 14 (Tex. Crim. App. 2007) (recognizing that "direct evidence of

the elements of the offense is not required" because "[j]uries are permitted to make reasonable inferences from the evidence"). Direct evidence is not required. In short, to the extent that the Court's analysis could be construed as imposing some kind of enhanced knowledge requirement here, I cannot agree with its approach.

B. Remand is unnecessary because the evidence is sufficient to support the verdict.

After correcting the court of appeals' error in its interpretation of the pre-amendment version of Section 64.012, the Court remands the case for a new sufficiency review. The Court's approach in remanding the case is not unreasonable, but I find it unnecessary. Given the circumstances here, I believe that judicial economy considerations weigh in favor of simply resolving the sufficiency question before us in this proceeding. First, the record in this case is not complex, nor are the facts seriously contested. Instead, the question is really one of law in determining how Section 64.012 should apply to these facts. *Lang v. State*, 561 S.W.3d 174, 179 (Tex. Crim. App. 2018) (recognizing that sometimes sufficiency review involves construing the reach of the applicable statute to decide whether the evidence establishes a violation of the law). Moreover, the Court in this proceeding has completed much of the necessary analysis by construing the applicable statutory provision along with the new amendment. Under these circumstances, it is most expedient for this Court to reach the sufficiency merits, which are clear-cut if the appropriate level of deference to the fact-finder is applied. *See, e.g.*, *Gilley v. State*, 418 S.W.3d 114, 119 (Tex. Crim. App. 2014) ("[W]hen the proper disposition of an outstanding issue is clear," we may dispose of it on discretionary review "in the name

of judicial economy."). In view of these considerations, I address the merits of Appellant's sufficiency challenge.

1. Sufficiency standard

A sufficiency-of-the-evidence challenge requires us 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 (1979)). The elements of the offense are determined by the hypothetically-correct jury charge for the case. *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). Additionally, based on the legislative amendment, the statute further provides that "[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." *Id.* § 64.012(c).[2]

2. The evidence is sufficient to support the verdict.

Keeping in mind that we must view the evidence in the light most favorable to the verdict, I will examine the evidence supporting the only element at issue here—whether Appellant knew she was ineligible to vote.

[2] Although this amendment was enacted in 2021, it applies to any Texas Election Code section 64.012 offense committed before, on or after the effective date of the Act other than final convictions. Because Appellant's petition for discretionary review was still pending upon the effective date of the Act, the amendment applies to this case.

i. Appellant's voting experience

The November 2016 election was not the first time Appellant attempted to vote without being registered to do so. In 2004, Appellant was not yet registered to vote but tried to vote anyway. Because she was not registered, she had to fill out an Affidavit of Provisional Voter form. That form included an affirmation that the affiant "had not been finally convicted of a felony; or if a felon, had completed all punishments including any term of incarceration, parole, supervision, or period of probation; or had been pardoned." Maj. Op. at 2. By filling out and signing this form, Appellant learned the requirements for voter eligibility. *See, e.g.*, *Wiley v. State*, 410 S.W.3d 313, 320 (Tex. Crim. App. 2013) (indicating that, "[b]y his signature, the appellant expressly acknowledged having read and understood the conditions of community supervision.").

Appellant's 2004 provisional ballot operated as her voter registration. Thereafter, she voted as a registered voter in the 2008 general election. No provisional ballot was needed. From March 2012 until August 2016, Appellant was incarcerated following a federal felony conviction for conspiring to defraud the United States. During the November 2016 general election, Appellant was on supervised release but she still went to vote at her designated polling location. Precinct workers could not find Appellant's name in their paper records or online database. A precinct volunteer asked Appellant if there was any reason she would not be in their record of registered voters. She responded that she had been living at her same address since 2008. In truth, Appellant lived at the residence until she was incarcerated in March 2012, and then again after she was released from a halfway house in August 2016. The fact-finder could have rationally inferred that Appellant's

voting experience provided her with personal knowledge of voter eligibility and that her statement about living at the same address during the entire preceding eight years was indicative of her intent to hide her status as a felon.

The State also introduced evidence that the local county elections office mailed Appellant two notices concerning her voter ineligibility after her federal conviction. The first notice warned Appellant that the elections office learned of the felony conviction and that her voter registration status would be terminated if she did not provide adequate information establishing her eligibility. This notice was mailed to Appellant's residential address on file in May 2013. The following month, the office mailed a second letter notifying Appellant that her voter registration had been cancelled. Appellant was incarcerated at the time of both notices. Even so, neither notice was returned as undeliverable, and Appellant returned to the same address following her release. Although Appellant did not specify who lived at the residence while she was in prison, she testified that she has three children of her own and cared for her brother's four children as well. Accordingly, the fact-finder could have reasonably inferred that Appellant either received the notices once she returned to the residence in 2016, or that another person living in the home forwarded Appellant's mail to her while she was in prison.

Much of the evidence at trial centered on Appellant's completion of the provisional ballot affidavit. As the Court recognizes, during the pendency of this appeal the Legislature amended the illegal-voting statute to clarify that a defendant "may not be convicted solely upon the fact that the person signed a provisional ballot affidavit . . . unless corroborated by other evidence that the person knowingly committed the offense." TEX. ELEC. CODE §

64.012(c). While the amended statute forbids conviction where the *only* evidence is the completion of a provisional ballot affidavit, it still allows consideration of the affidavit as evidence when the person's knowledge of her ineligibility to vote is *corroborated* by other evidence. As laid out above, such corroboration exists here. Therefore, Appellant's completion of the provisional ballot supports her conviction because it provided additional notice of her ineligibility to vote.

The provisional ballot affidavit includes the following statement that the voter must affirm:

> I . . . have not been finally convicted of a felony, or if a felon, I have completed all of my punishment including any terms of incarceration, parole, supervision, a 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.

Two of the State's witnesses testified that they watched Appellant to make sure she read the affidavit before signing it. The precinct volunteer stated that he observed Appellant's finger trace each line as she read the form. The election judge testified that Appellant paused and appeared to read the form prior to completing it, and that if he had believed she did not read it, he would have read it aloud to her before allowing her to sign it. The election judge also testified that he raised his right hand and asked Appellant to affirm that all the information she provided on the form was accurate. And although she denied reading the affidavit before signing, Appellant admitted at trial that the admonishment on the ballot was "very clear" to anyone reading it. Moreover, by signing the affidavit, Appellant is presumed to have read its contents. Therefore, the evidence regarding the provisional ballot affidavit—while alone insufficient—supports Appellant's

conviction in conjunction with the other corroborating evidence showing she knew she was ineligible to vote.

ii. Appellant's credibility

Part of the fact-finder's responsibility is to assess the credibility of the witnesses. In doing so, the fact finder may believe all, some, or none of a witness's testimony. *Romano v. State*, 610 S.W.3d 30, 34 (Tex. Crim. App. 2020). Applying this concept and in viewing the evidence in the light most favorable to the trial court's verdict, the judge as the trier-of-fact had the evidence needed to support the conviction and clearly did not believe Appellant's self-serving testimony claiming that she did not know she was ineligible to vote.

Appellant's felon status comes from a federal conviction for conspiracy to defraud the United States. The rules of evidence permit the introduction of a prior criminal conviction to attack a witness's character for truthfulness if the offense is a felony or a crime of moral turpitude. TEX. R. EVID. 609(a). Conspiracy to defraud the government is both a felony and a crime of moral turpitude.[3] As a crime of dishonesty, the trial court was authorized to consider Appellant's fraud conviction when assessing her credibility. Further, Appellant's testimony conflicted with the testimony of two State's witnesses. When asked about the differing accounts, she accused both witnesses of lying. Appellant first denied talking with or even seeing the precinct election judge, which contradicted his testimony that he spoke with Appellant about her voter registration status, searched for her name in

[3] *See* 18 U.S.C. § 371; *Freedson v. State*, 600 S.W.2d 349, 350 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.) (citing *Jordan v. De George*, 341 U.S. 223 (1951)) ("Crimes involving fraud have universally been held to involve moral turpitude, and the crime of conspiring to defraud the United States has been held to be a crime involving moral turpitude.").

the paper voter files and online voter database, and helped her with the provisional ballot. Appellant then testified that the precinct volunteer witness lied about observing Appellant's finger trace the words on the ballot form as she read them. In addition, when asked on cross-examination about a newspaper article stating that Appellant admitted to the reporter that she had skimmed the ballot affidavit, Appellant initially denied saying this. She later conceded that she must have said it, but consistently denied making another statement quoted in the article about being targeted for prosecution and suggested that the reporter was untruthful. In all, tasked with the responsibility of making credibility determinations and resolving conflicts in the evidence, the fact-finder could have reasonably concluded that Appellant's fraud conviction negatively impacted her credibility and that it was more likely that Appellant was lying. The fact-finder could have also determined that the other witnesses were credible. As such, it was rational for the fact-finder to disregard Appellant's testimony while accepting the testimony of the other witnesses.

C. Conclusion

While I agree that the court of appeals' interpretation of Texas Election Code section 64.012(a)(1) was wrong, there are also flaws in this Court's analysis. First, despite admitting that Election Code 64.012(a)(1) is unambiguous, the Court improperly relies on extratextual sources and our *DeLay* opinion, which is inapplicable here and serves only to confuse the issues. Second, by referring to a person's "actual" realization that she is ineligible to vote, the Court's analysis seems to suggest that the State must present direct evidence of a defendant's knowledge of her ineligibility. This conflicts with the Penal Code's definition of knowledge and the well-established principle that a person's intent

may be inferred from the totality of the circumstances. Finally, given the circumstances here, I believe that judicial economy considerations weigh in favor of simply resolving the sufficiency question in this proceeding because the proper disposition is clear. Viewing the evidence in the light most favorable to the trial court's verdict, the judge as the trier-of-fact had the evidence needed to rationally support the conviction. The statute authorizes consideration of the provisional ballot affidavit when it is corroborated by other evidence. Appellant's completion of the affidavit was corroborated by her voting history, eyewitness testimony suggesting Appellant actually read the provisional ballot affidavit language, and the two notices informing Appellant that her voter registration was revoked. The trial court was not obligated to believe Appellant's self-serving testimony that she was unaware of her ineligibility to vote. Accordingly, in the interest of judicial economy and because there is sufficient evidence for the trial court to have rationally found that Appellant was aware of her ineligibility to vote, I would resolve this issue here and overrule Appellant's first ground for review. For these reasons, I respectfully dissent.

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