

**IN THE EIGHTH DISTRICT COURT OF APPEALS
EL PASO, TEXAS**

No.08-14-00239-CR

STATE OF TEXAS
Plaintiff - Appellee

v.

ELIZABETH VISCAINO
Defendant - Appellant

Appeal from the County Court of Presidio County, Texas

BRIEF FOR ELIZABETH VISCAINO

By : /S/ Jaime Escuder
Jaime Escuder
Texas Bar # 24089102
Escuder Law Office
213 E. Holland Avenue
Alpine, Texas 79830
432-837-9555
432-837-9554 (fax)
jescuder@escuderlaw.com
ATTORNEY FOR APPELLANT

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JURISDICTIONAL STATEMENT

This court has jurisdiction of this matter, a direct appeal from the District Court of Presidio County, Texas, under Texas Rule of Appellate Procedure 25.2, the defense having timely filed a notice of appeal under Texas Rule of Appellate Procedure 26.2(a)(2).

IDENTITY OF PARTIES

Appellant: Elizabeth Viscaino

Trial Counsel: Antonio Rodriguez, P.O. Box 1576, Presidio, TX 79845.

Appellate Counsel: Jaime Escuder, 213 E. Holland Ave., Alpine, TX 79830.

Appellee: Texas through John Fowlkes, P.O. Box 1470, Marfa, TX 79843.

STATEMENT OF THE CASE

The Defendant, Elizabeth Viscaino was charged with theft by way of information filed on September 10, 2012 (CR: Information). This information was amended on March 19, 2014, (CR: First Amended Information), and then amended again on March 27, 2014, (CR: Second Amended Information), the date of trial. The Defendant pled not guilty and the case went to trial on March 27, 2014. At 10:42 p.m., the jury returned a verdict of guilty. The jury then sentenced the Defendant to one year of probation and an \$800 fine (CR: Jury Verdict).

The court imposed sentence on May 22, 2014. (ROA: 5-1). The defense filed a motion for new trial on June 5, 2014 (CR: Motion for New Trial), and a notice of appeal on July 11, 2014 (CR: Notice Of Appeal).

ORAL ARGUMENT REQUESTED

While the issues raised in this appeal are fairly straightforward, counsel for Appellant welcomes the opportunity to assist the Court through oral argument, should the Court determine that such argument is warranted.

STANDARD OF REVIEW

Counsel for appellant suggests a bifurcated standard of review for Part I of this brief. The Court should apply an abuse of discretion standard with regard to the trial court's decision to overrule the defense's objection to the opinion testimony of Ranger Vajdos as discussed in Section IB, *infra*. The Court should conduct a *de*

novo review of the statements of the prosecutor and the conduct of defense counsel, as discussed in sections IA and IC, infra, in order to determine whether they rose to a constitutional violation of the Defendant's due process rights as a matter of law. See Carmouche v. State, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000) (Finding it appropriate to apply a "bifurcated standard of review" in some circumstances).

The standard of review for Part II of this brief is sufficiency of the evidence.

ISSUES PRESENTED

1. Whether improper statements from the prosecution and a key prosecution witness, as well as the outrageous conduct of defense counsel, overwhelmed the jury's ability to objectively decide the case such that the Defendant was denied due process of law.

2. Whether the evidence presented at trial was sufficient to support the finding that the Defendant was guilty of theft beyond a reasonable doubt.

STATEMENT OF FACTS

On July 21, 2011 the Defendant, Elizabeth Viscaino, went to the Presidio County tax office to pay for a title transfer on her vehicle, the cost of which totaled \$557.63 (ROA: 2-121, 13-16; 2-122,13-14). She had two young children with her (ROA: 3-77, 17-18).

At the time that she entered the office, Rosa Morales was the only employee present (ROA: 3-11,15-16). Ms. Viscaino and Ms. Morales knew each other

personally, and so Ms. Viscaino bypassed the window where customers usually stand to transact business and joined Ms. Morales at the back of the office (ROA: 3-7, 17-21; 3-12, 11-12).

Ms. Viscaino paid for the transfer by handing Ms. Morales \$570 cash (ROA: 3-53, 2-4). Ms. Viscaino then obtained a receipt and left. See State's Trial Exhibit 1, "Title Application Receipt."

Shortly after Ms. Viscaino left, the money that she had tendered to Ms. Morales was discovered to be missing. Since it was initially believed that Ms. Morales, a county employee, might have taken the money, Texas Ranger Jeffrey Vajdos was asked to assist with the investigation (ROA: 2-116, 13-16). Due to Ranger Vajdos' schedule, some months passed before he was able to interview any of the witnesses (ROA: 2-117, 18-21). However, Deputy Sheriff Marco Baeza did interview Ms. Viscaino shortly after the theft was discovered (ROA: 2-141, 18-25; 2-142, 1-2). During that meeting, Ms. Viscaino denied committing the crime (ROA: 3-93, 10-24).

In March of 2012, Ranger Vajdos and Presidio County Sheriff Danny Dominguez interviewed the Defendant. During this interview, Ms. Viscaino again denied taking the money. She also provided the Ranger with the receipt that she had been given by Rosa Morales (ROA: 2-117, 19-20; 2-120, 13-18).

Ranger Vajdos and Sheriff Dominguez then interviewed Ms. Morales, who also denied taking the money (ROA: 2-126, 2-3). She also stated that there was a

policy in the tax office that employees would have to pay back losses at the end of the work day (ROA: 2-126, 10-12).

After speaking with Ms. Morales, Ranger Vajdos returned to do a second interview with Ms. Viscaino. He was accompanied by Gus Trevino, a Texas Department of Public Safety officer who speaks Spanish (ROA: 2-133, 11-21). After a period of interrogation, Ms. Viscaino produced a written statement, which included: "I don't remember what happened, if it was in the paperwork by accident and I took the money." (ROA: 2-217, 23-25). At trial, however, Ms. Viscaino testified that this statement was untrue, and that it was the product of coercion (ROA: 3-95, 8-14). She was adamant that she had not, in fact, taken the money (ROA: 3-77, 7-8).

During opening statement, the prosecutor informed the jury of his personal opinion regarding the conduct and truthfulness of the Defendant versus Rosa Morales (ROA: 2-100, 10-13; 2-103, 7-10). Later on in the State's case in chief, Ranger Vajdos was permitted to testify over objection, and though he wasn't an occurrence witness, that he was completely certain of the Defendant's guilt (ROA: 2-137, 7-9).

Finally, defense counsel engaged in repeated bickering with the court and counsel (See, for example, ROA: 2-216; 3-109; 3-110).

SUMMARY OF ARGUMENT

A credibility imbalance that arose from the impermissible injection of personal beliefs into the trial by the prosecution and its witness, as well as from the

outrageous behavior of defense counsel, caused the jury to become unable to objectively decide this case, resulting in a due process violation to the Defendant. Any reasonable, unbiased, jury would have concluded that the evidence was insufficient to convict the Defendant beyond a reasonable doubt.

ARGUMENT

I. DUE PROCESS

Elizabeth Viscaino, like all criminal defendants in Texas, had the right to a fair trial. Specifically, this right stems from her right to due process of law. See Romero v. State, 136 S.W.3d 680, 689 (Tex. Ct. App., Texarkana 2004) (“The guarantee of due process under the Fourteenth Amendment includes the right to a fair trial.”). Ms. Viscaino’s due process rights were violated at various times and by different persons during the trial as will be described below. The cumulative effect of these violations was to overwhelm the jury’s ability to impartially decide the case before it. In short, the record shows that Ms. Viscaino’s trial descended into a popularity contest, which she lost. In reviewing this conviction, this Court must ask whether Ms. Viscaino’s conviction was based on the jury’s feelings toward the actors in the courtroom, rather than on the evidence.

IA. The Jury Was Impermissibly Influenced By the Personal Opinions of Counsel

In his opening statement, the prosecutor made comments that improperly informed the jury of his opinion. Early in his statement, he noted that the

Defendant and Rosa Morales were friends. This, being a factual statement, was proper. However, the prosecutor went on to state that Ms. Morales “was befriended just shortly before by Ms. Viscaino in an attempt that I believe was to -- was to eventually take advantage of her the way she probably does many people.” (ROA: 2-100, 6-13).

This statement was objectionable on several grounds. First, the statement “the way she probably does many people,” at *best* suggested to the jury that the Defendant had engaged in dishonest conduct prior to her trial. It is also quite possible, however, that this statement may have caused some of the jurors to conclude that Defendant had a criminal history which, in fact, she did not (ROA: 3-141, 14-20).

Even though the prosecutor attempted to qualify his statement by saying that the Defendant merely “probably” takes advantage of “many people,” this qualification would have had little impact on the jury. As a duly elected public official, the prosecutor instantly approached the jury with a certain level of moral authority. If he says that he “believes” that the Defendant is “probably” dishonest, it can be assumed to be so. Thus, the fact that defense counsel failed to object to this statement does not preclude it from appellate review since the statement was so prejudicial as to prevent it from being cured by an instruction from the court. See Williams v. State, 916 S.W.2d 53, 57 (Tex. Ct. App., Houston 1996) (“An exception [to the general rule requiring an objection to preserve error] exists when prosecutorial argument is so prejudicial that an instruction to disregard the

argument could not cure the harm. In such an instance, neither a timely objection nor an adverse ruling is required to preserve error for review.”).

Shortly after this statement, the prosecutor told the jury how “very proud” he was of Rosa Morales, his witness, for maintaining her innocence in the face of Ranger Vajdos’ questioning (ROA: 2-103, 9-10). This statement was also improper since it told the jury what to think about one of the State’s key witnesses. The jury must make up its own mind. See Vasquez v. State, 819 S.W.2d 932, 936 (Tex. Ct. App., Corpus Christi 1992) (“It is error to argue that the jury should believe a witness simply because the prosecutor does. Such argument constitutes bolstering of the witness’ credibility through unsworn testimony. Here the prosecutor attempted to bolster the victim’s credibility by vouching for her. The trial court erred by overruling the objection and permitting the prosecutor to continue the argument.”).

The cumulative effect of these misstatements was to deny Ms. Viscaino the ability to have a fair trial from the very outset of the proceedings. By the time the prosecutor concluded his statement, the jury was left with the impression that the Defendant had probably stolen before. In addition, the jury could not return a verdict of not guilty without also undermining the character judgment of the prosecutor, who also happened to be their county attorney (ROA: 2-94, 4-5) (The prosecutor introducing himself to the jury as “County Attorney for the County of Presidio, State of Texas”).

IB. Texas Ranger Vajdos Impermissibly Swayed the Jury By Giving His Opinion as to the Ultimate Issue of the Defendant's Guilt Over Objection

The State's first witness was Texas Ranger Jeffrey Vajdos. After detailing his significant training and experience in law enforcement, Ranger Vajdos described how he got involved in this case. He explained how the Presidio County Sheriff's Office contacted him because they suspected that Ms. Morales, a county employee, might have taken the money, thus giving the case "a public trust/public employee-type angle to the investigation." (ROA: 2-116, 13-16). He explained how, due to his schedule, his investigation had to be delayed for some months and how he eventually spoke to Ms. Viscaino and Ms. Morales, both of whom denied committing the crime. He then described how he had a second meeting with Ms. Viscaino during which she produced a written statement concerning her involvement in the case. Then, at the end of State's direct examination, the following occurred:

Q. Officer Vajdos ... I need you to give me an opinion. I need you to tell me what your opinion is of -- as to who took the money from the Clerk's Office (sic).

MR. RODRIGUEZ: Objection, Judge. Objection to the State eliciting an opinion as to who took -- again, who took the money in this case, whether it's Ms. Viscaino or anyone else. I object again.

THE COURT: Objection overruled.

A. Based on all the evidence we obtained during the course of the investigation and the confession statement from Elizabeth Viscaino, we obtained the arrest warrant because Elizabeth Viscaino stole the money.

Q. How sure are you?

A. I'm positive she stole the money.

Q. One hundred percent?

A. A hundred percent.

(ROA: 2-136, 15-25; 2-137, 1-9.)

Although Texas Rule of Evidence 704 allows a witness to give an opinion on an ultimate issue, the Ranger's statement, entered over objection, that he was one hundred percent positive that Ms. Viscaino took the money was improper. Ranger Vajdos was not an occurrence witness who actually witnessed the crime. Thus, he was factually unable to make such a statement. Rather, what he meant was that he was certain *in his heart* that Ms. Viscaino stole the money, which is not the same thing. See Texas Rule of Evidence 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

Although Texas courts give wide latitude to police officers who call upon their training and experience to offer an opinion about an ultimate issue, see, for example, Ex Parte Nailor, 149 S.W.3d 125, 134-35 (Tex. Crim. App. 2004) (permitting a police officer to opine that the defendant had not been attacked by the victim), appellate counsel has been unable to find any case where a court allowed testimony as extreme as this — where the officer was allowed to state over objection that he absolutely knows for a fact that the defendant is one hundred percent guilty.

Texas Rule of Evidence 701 limits a witness's ability to testify to inferences that are meant to be the exclusive province of the jury. In fact, the Texas Court of Criminal Appeals has expressed discomfort at allowing testimony that threatens the jury's ability to "form its own opinion." Fairow v. State, 943 S.W.2d 895, 901 (Tex. Crim. App. 1997) ("This testimony would support the trial court's exclusion of Middleton's opinion on several grounds. First, it supports the contention that the jury was in a position to form its own opinion, thus rendering Middleton's opinion not helpful.) (citing Steve v. State, 614 S.W.2d 137, 139, which the Court of Criminal Appeals described as "a pre-Rules case holding that because (1) the jury was in possession of the same facts upon which a proffered opinion was based, (2) the jury could fully understand the matter and (3) the jury could draw the proper inferences and conclusions, the witness's opinion testimony was unnecessary and inadmissible.").

Ranger Vajdos' emphatic assertion of Ms. Viscaino's guilt doomed Ms. Viscaino. It set the jury in opposition to one of the most revered members of Texas society: a Texas Ranger. As with the improper comments from the prosecutor that were referenced earlier, the jury could now no longer render a verdict of not guilty without also contradicting the statement of a person of utmost esteem. Clearly, this is something only an extraordinary jury could possibly do.

Whatever due process means, it certainly means that Ms. Viscaino was entitled to have the jury decide her guilt, rather than to simply allow the State to declare her absolutely guilty and then dare the jury to disagree. In fact, if we were

to accept a police officer's opinion on guilt, even when that officer is a Texas Ranger, then we would have no need for juries; we could simply drive people off prison or jail immediately upon arrest. The ability that a jury provides, however, to allow an independent assessment of evidence goes to the very heart of the right to a fair trial.

Ranger Vajdos' statement that he was positive of Ms. Viscaino's guilt overwhelmed the jury's ability to be independent. As a result, Ms. Viscaino was denied due process of law.

**IC. Trial Counsel's Conduct Caused Him to Lose Credibility With the Jury
Such That His Assistance Was Ineffective**

Following the State's direct examination of Ranger Vajdos, its first witness, defense counsel began to cross. Thus began a defense performance that can fairly be described as chaotic, repetitive, and frantic. At times, the defense counsel engaged in behavior that bordered on belligerence.

Indeed, appellate counsel has come into possession of affidavits from persons who were in attendance at the trial. These affidavits describe defense counsel's behavior as "unprofessional," "sarcastic," and "very childish." Exhibit A, affidavit of Dina Losoya, Juvenile Probation Officer, at ¶ 5, attached.

Estevan Marquez, who served as bailiff for the trial, describes defense counsel's behavior as "entirely unprofessional." Exhibit B, affidavit of Estevan Marquez, Presidio County Constable, at ¶ 10, attached. Constable Marquez describes how defense counsel employed insulting language with regard to both the prosecutor and the judge, and how defense counsel "act[ed] out like a child." Id. at

¶¶ 7 and 10. Constable Marquez's assessment is that defense counsel "turned the proceedings into a circus." Id. at 10.

The descriptions of outrageous behavior contained in these affidavits is borne out in the trial record. For example, during a recess, when the court suggested that trial counsel be more "expeditious" with his questioning, trial counsel responded by stating, "Judge, why don't you try the case ... for me?" (ROA: 2-187, 21-23). The prosecutor responded by stating, "[y]ou would think that we all stepped into a courtroom with no rules," and then, apparently, the prosecutor walked away from the bench (ROA: 2-187, 24-25; 2-188, 13-16). When the trial reconvened, the court sustained the State's objection to "repetitive questioning ... bordering on badgering ... and I believe that it's a waste of the Court's time." (ROA: 2-189, 13-17).

As the trial wore on, defense counsel's behavior continued to devolve. During the questioning of Public Safety Officer Gus Trevino, counsel refused to accept the court's ruling regarding the admissibility of the translation of the Defendant's statement, which led to this exchange before the jury:

MR. RODRIGUEZ: The Defense objects to the introduction and the admission of State's Exhibit Number 3 into the record.

THE COURT: Yes, you've objected multiple times.

MR. RODRIGUEZ: And we object again, Judge.

THE COURT: So your objection is overruled again.

(ROA: 2-218, 23-25; 2-219, 1-6.)

And then, at the close of the State's case, defense counsel insisted that the jury be brought back out so that the State could rest in its presence. The following occurred:

MR. FOWLKES: I rest and close.

MR. RODRIGUEZ: It has to be in the presence of the jury, Judge.

MR. FOWLKES: Well, you should have asked for it then.

MR. RODRIGUEZ: This is stupidity.

(ROA: 3-65, 3-8.)

And then:

MR. RODRIGUEZ: Judge, it's not -- Judge, I don't run the trial here. You run the trial, sir.

THE COURT: Counselor, if I hear you say that one more time --

MR. RODRIGUEZ: What's that, sir?

THE COURT: -- I'm going to be --

MR. RODRIGUEZ: I don't -- Judge, please tell me when I'm wrong and I'll be

--

THE COURT: Yes. You do not run this trial.

(ROA: 3-67, 13-23.)

Nonetheless, the court acquiesced, brought the jury back into the courtroom for the express purpose of hearing the State rest, and then sent the jury out again (ROA: 3-68, 23-25; 3-69, 1-10).

In addition to counsel's behavior, Ms. Viscaino suffered ineffective assistance of counsel due to the employment of suspect trial tactics. For example, trial counsel spent a significant portion of his cross examination of Ranger Vajdos, the State's chief investigator for this crime, asking about a written statement from Rosa Morales that the Ranger had not taken and the contents of which would presumably have been barred by Texas Rule of Evidence 802. See, for example, ROA: 2-161, 18-21 (Defense counsel assuming to be true that Rosa Morales went to lunch after learning that the money was missing as described in her statement, and then asking Ranger Vajdos his opinion about it); see also ROA: 2-162, 17-18 (Defense counsel assuming the fact contained in Ms. Morales' statement that she did not call her boss before lunch to be true). Trial Counsel then questioned Ranger Vajdos about a written statement of Norma Arroyo, which suffered from the same evidentiary problems. See ROA: 2-175, 15-22 (Defense counsel offering the fact contained in Norma Arroyo's statement that she instructed Ms. Morales to call Ms. Viscaino as the truth). Trial counsel also asked about statements from Annabel Rodriguez, which, though obtained by Ranger Vajdos, still would have contained inadmissible hearsay. (ROA: 2-184, 3-5) (Defense counsel offering the behaviors of Rosa Morales as described in the statement of Annabel Rodriguez as the truth).

In addition to the questionable strategy of asking Ranger Vajdos about hearsay evidence, the nature of defense counsel's questioning in general reveals no discernible valid strategy. The trial court itself described defense counsel's

questioning as “highly repetitive,” and “the filibuster approach to ... questioning.” (ROA: 2-173,14; 2-177, 6).

Eventually, Defense counsel called Ms. Viscaino to the stand. She denied committing the crime (ROA: 3-77, 7-8). The defense then rested after objecting to the absence of Norma Arroyo from the courthouse even though she had been served with the State’s subpoena (ROA: 3-104,18-24). However, the defense did not inform the court as to why Ms. Arroyo’s testimony was material to its case. See Coleman v. State, 966 S.W.2d 525, 528 (Tex. Crim. App. 1998) (“[Counsel] made no plausible showing to the court that the reporters’ testimony would actually be *material* and *favorable* to either of his defensive theories. Absent such a showing, the Sixth Amendment did not require the District Court to compel the reporters to testify.”). The jury was sent out at 8:40 p.m. (ROA: 3-106, 6).

After the jury left, the court held its charge conference. For close to an hour, defense counsel objected to the court’s proposed jury charge. See ROA: 3-117, 23-25 (“I object to the Court’s charge entirely, Judge, in that the Court did not properly prepare a charge here.”). Counsel’s objections included an argument that the language of the court’s charge, which read “a person commits a class A misdemeanor if she unlawfully appropriates property with intent to deprive the owner of property and the value of the property stolen is \$500 or more but less than \$1,500,” (ROA: 3-124, 12-16), did not adequately track the statutory language of Texas Penal Code § 31.03, which reads, “[a] person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property,” and

section (e)(3) of which, which is the section identified in the information that was originally filed in this case, reads, “an offense under this section is a Class A misdemeanor if the value of the property stolen is \$500 or more but less than \$1,500.”

Also during this conference, defense counsel informed the court: “No, Judge. We need to follow Texas law here. We can’t follow the law according to Mr. Hunt [the trial judge] here. We need to follow Texas law. Okay?” (ROA: 3-112, 7-10).

The jury was called back in at 9:30 p.m. to hear closing arguments (ROA: 3-121, line 19). The jury returned a verdict of guilty at 10:42 p.m. (ROA: 3-138, 1.)

When determining whether a defendant received a fair trial, it is proper for appellate courts to look at the behavior of defense counsel. See Okonkwo v. State, 398 S.W.3d 689, 693 (Tex. Crim. App. 2013) (“[T]he appellate court reviews ‘attorney behavior.’”) (quoting Hardwick v. Crosby, 320 F.3d 1127, 1186 (11th Cir. 2003)). Although the Texas Court of Criminal Appeals has stated that “a case in which the appellant has raised a claim of ineffective assistance of counsel on direct appeal *and* the record is sufficient for us to make a decision on the merits” will be “rare,” this is such a case. Andrews v. State, 159 S.W. 3d 98, 103 (Tex. Crim. App. 2005). This is the unusual case where “the record contains all the information [this court needs] to make a decision” regarding whether defense counsel was ineffective. Id. (“[T]he record supports the conclusion that there is a reasonable probability that [but for defense counsel’s behavior] the result would have been different.”).

For example, defense counsel insisted that the court employ “McClung’s” in crafting the jury charge, which counsel himself did not have available, and then described the court’s effort to craft the charge as “woefully lacking” (ROA: 3-110, 17-19). At the end of the proceedings, defense counsel objected to a procedural matter and then refused to help the court resolve it (ROA: 3-157, 6-8) (“I don’t know how to answer that, Judge. Again, I can’t tell the Court how to run its business.”). At the sentencing hearing, defense counsel was twice threatened with contempt (ROA: 5-33, 9-10; 5-45, 6-10) (“Counselor, just a moment. You were not rudely interrupted. To the contrary, I find plenty of evidence of your rudeness already. I have warned you already about your behavior which will compel me to find you in contempt of court.”); See also (ROA: 5-23, 5-6) (“I’m not going to rule in favor of an objection that is made in ignorance.”). Although these last examples happened after the jury returned its verdict, they are indicative of defense counsel’s conduct throughout the proceedings. See Exhibit A at ¶ 10 (“[Defense counsel’s] demeanor in the courtroom was entirely unprofessional and he turned the proceedings into a circus.”).

II. SUFFICIENCY OF THE EVIDENCE

The evidence presented against Ms. Viscaino at trial was insufficient to support a finding of guilt beyond a reasonable doubt. As Ranger Vajdos stated, “there were only really two people who had the opportunity to commit the theft.” (ROA: 2-127,12-13). However, the evidence that Ms. Viscaino committed the theft, as opposed to Ms. Morales, was slight.

First, Ms. Viscaino obtained a receipt for her payment to the tax office (See ROA: State's Exhibit 1). Clearly, this is strong evidence that Ms. Viscaino actually paid the money that she is accused of having stolen.

Additionally, Ms. Viscaino behaved in a manner consistent with innocence. After she was accused of the crime, she tried to clear things up by speaking directly with Rosa Morales, Norma Arroyo, and Justice of the Peace Juanita Bishop (ROA: 3-88, 7-8; 3-89, 7-8; 3-100, 4-8). She did this the day after she was accused of the theft (ROA: 3-98, 7-10). No one would listen to her (ROA: 3-89, 3-13; 3-91, 19-22).

Ms. Viscaino also willingly spoke with law enforcement. She first met with Deputy Sheriff Baeza, during which time she gave him a statement denying the crime (ROA: 3-91, 10-19). She agreed to meet with the police a second time when Ranger Vajdos and Sheriff Dominguez visited her months later. Ranger Vajdos described Ms. Viscaino's demeanor during that visit as "real cordial" (ROA: 2-120, 9). Again, Ms. Viscaino denied committing the crime.

It wasn't until the third visit by law enforcement, during which Ms. Viscaino claimed that she was treated "horribly" by Officer Trevino, that the "confession" was produced (ROA: 3-94, 19). However, it is important to note that the statement that resulted from that interview was not a confession at all. At best, Ms. Viscaino admits to taking the money "by accident" when she picked up her paperwork (ROA: 2-217, 20-25). However, Ms. Viscaino explained to the jury that she did not mean even that. She explained how she felt compelled to write the statement as a result of the pressure being brought to bear on her by Officer Trevino (ROA: 3-100, 20-23)

(“Those were examples that he gave me. They were not in my mind of anything. I just -- I didn't know what to write. He had given me those examples to write down.”). Significantly, while under oath in front of the jury, Ms. Viscaino once again categorically denied taking the money (ROA: 3-77, 7-8).

Thus, the record shows that the evidence adduced at trial was insufficient to support a finding of guilty.

CONCLUSION

It is clear that this was a long day for everyone. The record reveals that the jury was seated at 10:43 a.m. and that the case did not adjourn until 12:07 a.m. the following morning – over thirteen hours later (ROA: 2-29, 3-4; 3-157, 11-12). At one point, even the interpreter complained of exhaustion (ROA: 3-88, 9-12) (“I’m sorry. I’m starting to really lose it because I’m so tired and I haven’t eaten since lunch.”).

The trial was made even longer by the behavior of defense counsel, who frequently engaged in repetitive questioning and who regularly continued argument well beyond the court’s rulings. As the record shows, much of this happened in the presence of the jury who, as the hours wore on, could not have helped but feel some resentment toward counsel’s client. Through all this, the court and counsel for the State behaved with civility and restraint. The jury could not have helped but notice this, either.

The fact is that the unpopularity of Ms. Viscaino’s counsel, particularly when shown in relief to the measured performance of the State and its witnesses, all of whom maintained their professionalism despite defense counsel’s relentless

conduct, must have resulted in a loss of the defense's credibility. The jury became unable to parse through the chaos and see the facts for what they were — that no one saw Ms. Viscaino take the money, and that she had consistently maintained her innocence.

The record reveals that Ms. Viscaino did not receive a fair trial as was her right pursuant to due process of law.

PRAYER

WHEREFORE, premises considered, the Defendant respectfully requests that this Honorable Court remand this case for a new trial.

CERTIFICATE OF SERVICE

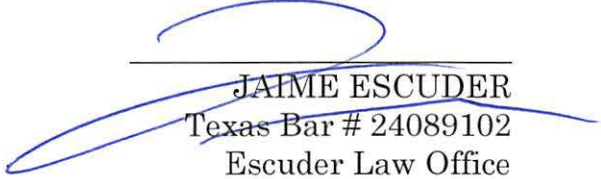
I hereby certify that a true and correct copy of the foregoing Brief of Appellant has been mailed to The State of Texas through John Fowlkes, P.O. Box 1470, Marfa, Tex. 79843 and a copy was sent to Elizabeth Viscaino on this 2nd day of March, 2015.



JAI ME ESCUDER,
Counsel for Appellant

CERTIFICATE OF RULE 9.4 COMPLIANCE

- A. This brief does not exceed thirty pages in length.
- B. This brief contains 5,321 words.



JAIME ESCUDER
Texas Bar # 24089102
Escuder Law Office
213 E. Holland Avenue
Alpine, Texas 79830
432-837-9555
432-837-9554 (fax)
jescuder@escuderlaw.com

STATE OF TEXAS
COUNTY OF _____

AFFIDAVIT OF DINA LOSOYA

BEFORE ME, the undersigned authority, on this day personally appeared Dina Losoya, who swore on oath that the following facts are true:

"My name is Dina Losoya. I am of sound mind, capable of making this affidavit, and fully competent to testify to the matters stated herein, and I have personal knowledge of each of the matters stated herein.

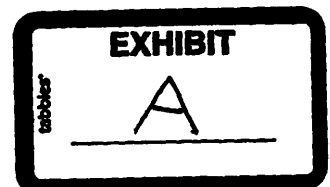
"I am the Juvenile Probation Officer for three counties in Texas, including Presidio County.

"I attended the trial in the case of the *State of Texas v. Elizabeth Viscaino*.

"During the trial, I observed Antonio Rodriguez acting in an unprofessional manner. His body language exhibited a very childish behavior. He was sarcastic and mouthed comments behind the Judge's back. Also, outside the presence of the jury, Antonio made inappropriate hand gestures behind the Judge's back.

"Multiple times during the course of the trial, the Judge had to take Antonio into his office. Through the door, I could hear Antonio raise his voice to the Judge. Although I could not make out the words being spoken, it was a very loud conversation about Antonio's behavior in the courtroom.

"As the juvenile probation officer for the Tri County area, I work with the Presidio County Attorney, John Fowlkes, on a regular basis. I have always found Mr. Fowlkes to operate the County Attorney office in a professional manner.



Dina Losoya
Dina Losoya
Affiant

SIGNED under oath before me on 21st of November, 2014.

Anna Saenz
Notary Public, State of Texas

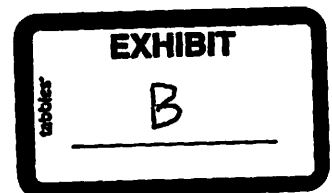


STATE OF TEXAS
COUNTY OF PRESIDIO

Affidavit of Estevan Marquez

Affiant swears that the following statements are true and within the personal knowledge of Affiant:

1. "My name is Estevan Marquez, and I have personal knowledge of the facts stated in this affidavit.
2. "I am the constable for the County of Presidio, and serve as bailiff for the Justice of the Peace Court.
3. "In connection with the case of the *State of Texas v. Elizabeth Viscaino*, I was the bailiff for the Court.
4. "I have served as bailiff for several trials where John Fowlkes has been one of the attorneys presenting the trial. I have always respected Mr. Fowlkes, and he has always conducted himself in a professional manner.
5. "The *State of Texas v. Elizabeth Viscaino* was the first trial where I have served as bailiff and Anthony Rodriguez was one of the attorneys.
6. "During the trial, Mr. Rodriguez would stare at Mr. Fowlkes until he would get his attention and then Mr. Rodriguez would laugh and make faces at Mr. Fowlkes. Throughout the trial, Mr. Rodriguez was turning the trial into a circus and trying to provoke Mr. Fowlkes. But, to his credit, Mr. Fowlkes did not lose his composure, even though the trial lasted until almost midnight, and Mr. Rodriguez taunted him the entire time.
7. "Mister Rodriguez also acted out behind Judge Hunt's back, and made faces and unprofessional remarks. If the Judge ruled against Mr. Rodriguez, he would act out like a child. Judge Hunt had to take Mr. Rodriguez into chambers to scold him several times; Judge Hunt had to yell at him so loudly that we could hear in the courtroom.
8. "I had to tell Mr. Rodriguez to calm down because he was acting so unprofessionally.
9. "On one occasion, I witnessed Mr. Rodriguez talking to Mr. Fowlkes during a break from the trial, I could tell that Mr. Rodriguez was making Mr. Fowlkes uncomfortable, so I approached them. Mister Rodriguez threw up his hands, laughed and walked away.
10. "When Mr. Fowlkes told me that Mr. Rodriguez filed a grievance against him, I felt that it should be the other way around. During the trial, Mr. Rodriguez called Mr. Fowlkes "an asshole" repeatedly, and called the Judge a "dumb ass." His demeanor in the courtroom was entirely unprofessional and he turned the proceedings into a circus.



11. "When the parties came back to the courtroom for the sentencing phase several days after the trial, Mr. Fowlkes cautioned me that Mr. Rodriguez had been harassing him on the telephone for the days preceding the sentencing. Mister Rodriguez immediately upon entering the courtroom, again tried to provoke and intimidate Mr. Fowlkes and was unprofessional toward Judge Hunt. He made a big scene about Mr. Fowlkes secretary Frances Garcia sitting near Mr. Fowlkes even though the Judge told him she is his secretary and it is appropriate for her to sit near him. Mister Rodriguez made such a display that Frances moved.

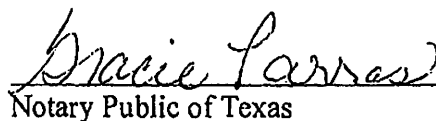
12. "Mister Rodriguez turned the trial into a circus. It was apparent that he was taunting Mr. Fowlkes and trying to get Mr. Fowlkes to lose his composure. After the trial, I told Mr. Fowlkes that I admired his professionalism in not losing his composure in the face of all Mr. Rodriguez's taunts and intimidations.

"Further Affiant sayeth not".



Estevan Marquez

SUBSCRIBED AND SWORN TO before me on October 22, 2014 by Estevan Marquez.



Notary Public of Texas

CAUSE NO. 5810

THE STATE OF TEXAS
VS.
ELIZABETH VISCAINO

§
§
§

IN THE COUNTY COURT
OF
PRESIDIO COUNTY, TEXAS


OFFENSE: THEFT (CLASS "A" MISDEMEANOR)

INFORMATION

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

I, John Fowlkes, County Attorney for the County of Presidio, State of Texas, come in behalf of the State of Texas and in connection with the complaint of JEFF VAJDOS, previously filed herein, and present in and to the County of Presidio, State of Texas, that in said County and State, on or about the 21st day of July, A.D., Two Thousand and Eleven, one **ELIZABETH VISCAINO**, hereinafter styled Defendant, did there and then violate §31.03(e)(3) of the Texas Penal Code by unlawfully appropriating property with intent to deprive the owner; to wit; **PRESIDIO COUNTY**; of property, without their effective consent,

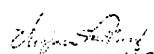
AGAINST THE PEACE AND DIGNITY OF THE STATE.



JOHN FOWLKES
COUNTY ATTORNEY
PRESIDIO COUNTY, TEXAS

FILED FOR RECORD at 8:55 AM

SEP 10 2012


COUNTY CLERK PRESIDIO CO.

CAUSE NO. 5810

THE STATE OF TEXAS
VS.
ELIZABETH VISCAINO

§
§
§

IN THE COUNTY COURT
OF
PRESIDIO COUNTY, TEXAS


OFFENSE: THEFT (CLASS "A" MISDEMEANOR)

FIRST AMENDED INFORMATION

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

I, John Fowlkes, County Attorney for the County of Presidio, State of Texas, come in behalf of the State of Texas and in connection with the complaint of JEFF VAJDOS, previously filed herein, and present in and to the County of Presidio, State of Texas, that in said County and State, on or about the 21st day of July, A.D., Two Thousand and Eleven, one ELIZABETH VISCAINO, hereinafter styled Defendant, did there and then violate §31.03 of the Texas Penal Code by unlawfully appropriating property, to wit: \$582.37, with intent to deprive the owner; to wit; PRESIDIO COUNTY; of property, without their effective consent,

AGAINST THE PEACE AND DIGNITY OF THE STATE.



JOHN FOWLKES
COUNTY ATTORNEY
PRESIDIO COUNTY, TEXAS

FILED FOR RECORD at 3:01 P.M.

MAR 19 2014


COUNTY CLK PRESIDIO CO.

CAUSE NO. 5810

THE STATE OF TEXAS
VS.
ELIZABETH VISCAINO

§
§
§

IN THE COUNTY COURT
OF
PRESIDIO COUNTY, TEXAS

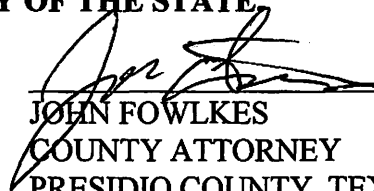
OFFENSE: THEFT (CLASS "A" MISDEMEANOR)

SECOND AMENDED INFORMATION

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

I, John Fowlkes, County Attorney for the County of Presidio, State of Texas, come in behalf of the State of Texas and in connection with the complaint of JEFF VAJDOS, previously filed herein, and present in and to the County of Presidio, State of Texas, that in said County and State, on or about the 21st day of July, A.D., Two Thousand and Eleven, one **ELIZABETH VISCAINO**, hereinafter styled Defendant, did there and then violate §31.03 of the Texas Penal Code by unlawfully appropriating property of more than \$500.00 but less than \$1,500.00 with intent to deprive the owner, to wit; **PRESIDIO COUNTY**, of property.

AGAINST THE PEACE AND DIGNITY OF THE STATE,



JOHN FOWLKES
COUNTY ATTORNEY
PRESIDIO COUNTY, TEXAS

FILED FOR RECORD at 8:33AM

MAR 27 2014


COUNTY CLK PRESIDIO CO.

NO. 5810

STATE OF TEXAS

IN THE COUNTY COURT

VS.

§
§
§
§
§

ELIZABBETH VISCAINO

PRESIDIO COUNTY, TEXAS

JURY VERDICT

We, the Jury in the above entitled cause, having found Elizabeth Viscaino guilty of the offense of theft of more than \$500.00 and less than \$1,500.00 herby assess punishment at:

Confinement in a county jail facility for a period of _____

And/Or

Imposition of a fine in the amount of \$800.00 (*570 to pay back 230 fine)
County

Or

Probation of sentence 1 year

Rosa Mario Martinez
Signature of Presiding Juror

Rosa Mario Martinez
Printed Name of Presiding Juror

FILED FOR RECORD at 12:06 AM

MAR 27 2014

Luigi Lopez
COUNTY CLK PRESIDIO CO.

CAUSE NO. 5810

THE STATE OF TEXAS

§

IN THE COUNTY COURT

§

VS.

§

OF

§

ELIZABETH VISCAINO

§

PRESIDIO COUNTY, TEXAS

NOTICE OF APPEAL

TO THE COUNTY COURT OF PRESIDIO COUNTY, TEXAS:

ELIZABETH VIZCAINO, Defendant in the above-styled and numbered cause, on this 11th day of July, 2014, desiring to appeal the judgment and sentence entered by the Presidio County Court on May 22, 2014, files this Notice of Appeal, of and from said judgment and sentence, to the Court of Appeals for the 8th Judicial District of Texas, sitting at El Paso, Texas.

Respectfully submitted,

ELIZABETH VISCAINO.

Elizabeth Vizcaino
Defendant

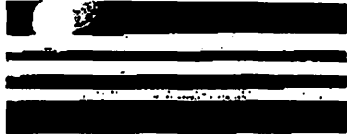
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JUL 11 2014

Virginia Lopez
COUNTY CLK PRESIDIO CO.



TITLE APPLICATION RECEIPT



COUNTY: PRESIDIO TAC NAME: NORMA E. ARROYO
PLATE NO: 5RE023 DATE: 07/31/2011 EFFECTIVE DATE: 07/21/2011
DOCUMENT NO: 18900140743120458 TIME: 12:08PM EXPIRATION DATE: 6/2012
PREV DOC NO: 29700040569123944 P EMPLOYEE ID: 2293204 TRANSACTION ID: 18900140743120458

OWNER NAME AND ADDRESS
SAMUEL A VISCALINO
PO BOX 3318
PRESIDIO, TX 79845-3318

VEHICLE LOCATION ADDRESS
1406 SANTA FE
PRESIDIO, TX 79845

REGISTRATION CLASS: TRAVEL TRAILER
PLATE TYPE: TRAVEL TRLR PLT
ORGANIZATION:
STICKER TYPE: US

VEHICLE IDENTIFICATION NO: 4X4TSVC274L030158 VEHICLE CLASSIFICATION: TRLR
YR/MAKE: 2004/SURV MODEL: BODY STYLE: CT UNIT NO:
EMPTY WT: 5000 CARRYING CAPACITY: 100 GROSS WT: 5100 TONNAGE: 0.00 TRAILER TYPE:
BODY VEHICLE IDENTIFICATION NO: TRAVEL TRLR LRG/WDTH: 25
PREV OWNER NAME: YONKIRO SALVAGE PREV CITY/STATE: EL PASO, TX

INVENTORY ITEM(S) YR
TRAVEL TRLR PLT 2012
PLATE STICKER

VEHICLE RECORD NOTATIONS
REBUILT SALVAGE - DAMAGED
PAPER TITLE
MAJOR COLOR: WHITE

Table with 2 columns: Fee Name and Amount. Includes FEE ASSESSED, TITLE APPLICATION FEE, TEXAS MOBILITY FUND FEE, SALES TAX FEE, SALES TAX PENALTY FEE, PLATE STICKER, REFLECTORIZATION FEE, CNTY ROAD BRIDGE ADD-ON FEE, and TOTAL.

ODOMETER READING: BRAND:
OWNERSHIP EVIDENCE: TEXAS SALVAGE CERTIFICATE
1ST LIEN

SALES TAX CATEGORY: SALES/USE

Table with 2 columns: Description and Amount. Includes Date of Assignment/Sales Tax Date, Sales Price, Less Trade In Allowance, Taxable Amount, Sales Tax Paid, Less Other State Tax Paid, Tax Penalty, and TOTAL TAX PAID.

2ND LIEN

3RD LIEN

THIS RECEIPT TO BE CARRIED IN ALL COMMERCIAL VEHICLES.

THIS RECEIPT IS YOUR PROOF OF APPLICATION FOR CERTIFICATE OF TITLE AND REGISTRATION.

FILED FOR RECORD at 12:54 PM

MAR 17 2014

VOID
DO NOT USE/
NO USE

County Clerk PRESIDIO CO.

4L030158

06 12

PRESIDIO

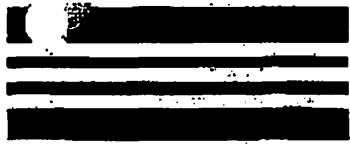
5RE023





RTS.POS.2301

ADDITIONAL COLLECTIONS REPORT
PRESIDIO
PRESIDIO SUBSTATION



WORKSTATION ID : 1
REQUESTED BY : 2293204

TRANSID: 18900140743120739

ACCOUNT	ITEM CODE	DESCRIPTION	QUANTITY	ITEM PRICE
	REBUILT FEE		1	\$ 65.00
TOTAL:				\$ 65.00

REASON: 4X4TSVC274L030158

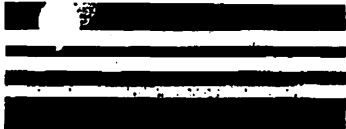
RUNDATE 07/21/2011
RUNTIME 12:07:39

. . . END OF REPORT . . .

PAGE 1



CASH REGISTER RECEIPT



COUNTY: PRESIDIO

TAC NAME: NORMA E. ARROYO
DATE: 07/21/2011
TIME: 12:09PM
EMPLOYEE ID: 2293204

TRANSACTION IDS

18900140743120458 18900140743120739

TOTAL	\$	557.63
METHOD OF PAYMENT AND PAYMENT AMOUNT:		
CASH	\$	570.00
TOTAL AMOUNT PAID	\$	570.00
CHANGE DUE	\$	12.37