

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

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No. 08-14-00239-CR

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STATE OF TEXAS

Plaintiff - Appellee

v.

ELIZABETH VISCAINO

Defendant - Appellant

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Appeal from the County Court of Presidio County, Texas

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REPLY BRIEF FOR ELIZABETH VISCAINO

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## ARGUMENTS IN REPLY

### I. DUE PROCESS

#### **A. Prosecutor's Improper Statement to the Jury**

In his opening statement, the prosecutor told the jury that the Appellant took advantage of an employee of the Presidio County tax office “the way she probably does many people.” (ROA: 2-100, 6-13). The State dismisses this statement as “an outline of what [the prosecutor] believed the evidence would show.” Response at 6, bottom. This statement was much more than a mere comment on the evidence, however. It was a suggestion to the jury that the prosecutor personally suspected other bad dealings by the Appellant. It is even likely that this statement caused the jury to conclude that the Appellant had a prior criminal history, which she did not. (ROA: 3-141, 14-20). Furthermore, the statement appears to have been calculated to inflame the minds of the jurors against the Appellant. The resultant harm could not have been cured by a limiting instruction. See Rodriguez v. State, 646 S.W.2d 539, 542-43 (Tex. Ct. App. Houston, 1<sup>st</sup> Dist. 1982) (“An instruction to disregard will cure error except in extreme cases where it appears that an argument is clearly calculated to inflame the minds of the jurors and is of such character as to suggest the impossibility of withdrawing the impression produced on the juror’s minds.”).

The State also denies that the prosecutor’s statement regarding how “very proud” he was of his witness was an attempt to bolster her credibility. (ROA: 2-103, 9-10; Response at 6, bottom). Again, this was not a comment on the evidence.

Rather, the purpose of this statement was for the prosecutor, whose opinion “would

carry undue weight with the jury in light of [his] experience,” to inform the jury of his personal feelings concerning his witness. Menefee v. State, 614 S.W.2d 167, 168 (Tex. Ct. Crim. App. 1981). As such, it was improper. See id (“This expression of the prosecutor’s opinion was not a deduction from the evidence, but was, instead, an effort to bolster Hayes’ credibility by unsworn testimony.”).

### **B. Improper Opinion Testimony**

At trial, Texas Ranger Jeffrey Vajdos was allowed to testify that he was one hundred percent certain of the Appellant’s guilt. (ROA: 2-137, 1-9). The State’s response mischaracterizes the Appellant’s argument on this issue. Appellant does not contend that her counsel was ineffective for failing to object to this testimony. Response at 8, bottom. In fact, defense counsel *did* object. (ROA: 2-136, 15-25). Rather, the Appellant contends that the Ranger’s statement was so prejudicial that it overwhelmed the jury’s ability to be impartial. See Texas Rule of Evidence 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”)

Although the State characterizes Ranger Vajdos as a “lay witness,” Response at 8, bottom, it is doubtful that the jury perceived him that way. Rangers are experts at investigating and solving crimes, see Texas Department of Public Safety website, (identifying the Texas Rangers Division as “the primary criminal investigative branch of the Texas Department of Public Safety”) (available at

<https://www.txdps.state.tx.us/TexasRangers/rangerresponsibilities.htm>), and every Texan knows it. Hearing such testimony from a Ranger must have had a tremendous impact on the jury, overwhelming its ability to be independent. This was a violation of due process. The Appellant had a right to have the jury make up its own mind. See Dunnington v. State, 740 S.W.2d 896, 899 (Tex. Ct. App., El Paso 1987) (“Expert testimony is not justified by ... the prosecutor’s need to preclude the jury from making up its own mind.”)

### **C. Ineffective Assistance of Counsel**

The State concedes that defense counsel’s behavior at trial was “unusual.” Response at 9, top. It was more than that. Appellant’s brief highlights several instances of ineffective assistance, the cumulative effect of which was clearly sufficient to bring counsel’s performance below that which is required by Strickland. The affidavits attached to Appellant’s brief merely give credence to that which is already contained in the record. On the issue of counsel’s performance and whether it affected the outcome of the trial, Appellant reasserts the arguments in her initial brief and maintains that the record speaks for itself.

## **II. SUFFICIENCY OF THE EVIDENCE**

The evidence of the Appellant’s guilt in this case was hardly overwhelming. Indeed, at the case’s inception, even law enforcement suspected that county employee Rosa Morales, rather than the Appellant, had committed the crime. (ROA:

2-116, 13-14) (Ranger Vajdos stating that “there was a public trust/public employee-type angle to the investigation.”). The only real evidence against the Appellant was the written statement that she produced after repeated visits from law enforcement, and which she stated was coerced. Even so, the statement was hardly an admission. It merely states that the Appellant may have taken the money by accident when she picked up her other paperwork. Furthermore, as is explained in her initial brief, the Appellant showed consciousness of innocence by trying to speak to the parties at the courthouse immediately after she learned that she was being accused of wrongdoing. (ROA: 3-88 – 3-89).

**PRAYER**

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

/s/ Jaime Escuder  
JAIME ESCUDER,  
Counsel for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant has been emailed to The State of Texas through John Fowlkes’s office at [crystalfunke@co.presidio.tx.us](mailto:crystalfunke@co.presidio.tx.us) on this 20th day of April, 2015 and that a copy has been placed in the mail for Elizabeth Viscaino.

/s/ Jaime Escuder  
JAIME ESCUDER,  
Counsel for Appellant

**CERTIFICATE OF RULE 9.4 COMPLIANCE**

This brief was prepared on Microsoft Word, which has assessed the total word count of this document at 1,136 words.

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