NO. 08-14-00239-CR

IN THE COURT OF APPEALS FOR THE
EIGHTH JUDICIAL DISTRICT OF TEXAS
AT EL PASO

ELIZABETH VISCAINO, Appellant

VS.

THE STATE OF TEXAS, Appellee

On Appeal from the
County Court of Presidio County, Texas
Under Cause No. 5810
The Honorable Paul Hunt Presiding

THE STATE OF TEXAS APPELLEE'S BRIEF

Respectfully submitted by:

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TO THE HONORABLE EIGHTH COURT:

The State of Texas presents this Appellee's Brief, and respectfully shows:

RESPONSE ISSUES PRESENTED

Response Issue One

No Reversible Error Occurred to Deny Appellant a Fair Trial

A. The Prosecutor's Opening Statement Was Not Erroneous

B. The Texas Ranger Based His Opinion on Knowledge Gained in His Investigation

C. Appellant's Defense Counsel's Conduct Does Not Meet the Standard for Ineffective Assistance

Response Issue Two

The Evidence Against Appellant Was Sufficient to Support the Jury's Finding of Guilt

STATEMENT OF FACTS

The State does not dispute the Statement of Facts as recited by Appellant. However, the State disputes the misapplication of the facts to the standard of review,

and the misuse of the facts outside the appellate record as applied to issues raised on appeal.

SUMMARY OF ARGUMENT

Appellant was afforded a fair trial. None of the issues raised by Appellant constitute reversible error, either singularly or collectively.

It was undisputed that only one of two people had the opportunity to steal the money: Rosa Morales and Appellant. Throughout the investigation, both denied having taken the money. Rosa Morales never wavered in her denial. Appellant, however, made a written confession of taking the money, and agreed to repay the money. The evidence presented against Appellant is sufficient to support the jury's verdict.

The judgment should be affirmed.

ARGUMENT AND AUTHORITIES

Response Issue One (Restated)

No Reversible Error Occurred to Deny Appellant a Fair Trial

Appellant presents three sub-issues in asserting a violation of her due process rights. The individual complaints fail on the merits, and there is no accumulation of errors necessitating reversal.

A. The Prosecutor's Opening Statement Was Not Erroneous

The proper method of preserving error for review in cases of prosecutorial misconduct is to object on specific grounds, request an instruction that the jury disregard the comment, and move for a mistrial. *Cook v. State,* 858 S.W.2d 467, 473 (Tex.Cr.App. 1993). An exception exists when prosecutorial argument is so prejudicial that an instruction to disregard the argument could not cure the harm. *Harris v. State,* 784 S.W.2d 5, 12 (Tex.Cr.App. 1989). To qualify as an exception, the objectionable statement must be clearly calculated to inflame the minds of the jurors and of such character as to suggest the impossibility of withdrawing the impression produced on the juror's mind. *Rodriguez v. State,* 646 S.W.2d 539, 543 (Tex.App.—Houston [1st Dist.] 1982, no pet.).

In this case, appellant did not object to the prosecutor's opening statements concerning his assessment of the case. Assuming, *arguendo,* that the statements now complained of were erroneous, the prosecutor's comments did not rise to a level that any prejudice could not have been cured by a trial court's instruction to disregard.

Here, the Prosecutor did not imply that the jury should believe Morales simply because he believed her, and did not bolster her credibility. Rather, he provided an outline of what he believed the evidence would show.

Moreover, the trial court instructed the jury to "listen to and consider the evidence and to determine fact issues. (RR Vol. 2 P. 34) The trial court further instructed the jury that:

> The opening statement is not evidence but is merely to aid you in obtaining a general understanding of the nature of the case and the significance of the evidence as perceived by the State. (RR Vol. 2 P. 37)

Because the trial court properly instructed the jury, and the complained of statement was not clearly calculated to inflame the minds of the jurors, appellant's failure to object to the prosecutor's argument waives any right to complain of these matters on appeal. *Williams v. State*, 916 S.W.2d 53, 57 (Tex.App.—Houston [1st Dist.] 1996, no writ).

B. The Texas Ranger Based His Opinion on Knowledge Gained in His Investigation

Appellant complains of Texas Ranger Jeff Vajdos's statement that, after his investigation, he formed the opinion that Appellant was guilty. The Ranger's statement was qualified as being based upon his personal investigation and the evidence obtained in the investigation.

Ranger Vajdos testified that he went into the investigation without any opinion of the suspects (RR Vol. 2 P. 119) He was stern in his questioning of Rosa Morales, yet she remained "consistent" regarding the way the theft occurred.

(RR Vol. 2 P. 124 and RR Vol. 3 P. 13) Rosa Morales never changed her story. (RR Vol. 2 P. 125 and P. 202) By contrast, Appellant made a written statement of her guilt. (RR Vol. 2 P. 133)

Rosa Morales had no motive to steal the money, because she was required by the policy to come up with the difference at the end of the day. (RR Vol. 2 P. 126-127) Conversely, Appellant made a written confession. Based upon Ranger Vajdos's investigation, Appellant was arrested for the theft. (RR Vol. 2 P. 135 and 137)

Based upon his investigation, Ranger Vajdos concluded that Appellant had taken the money, and testified accordingly.

Under Texas Rule of Evidence, testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Rule of Evidence 701 permits a lay witness to offer opinion testimony if that opinion is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Tex. R. Evid. 701.

Because a lay witness may offer an opinion on an ultimate issue, Appellant's contention that her trial counsel fell below an objective standard of reasonable competence for failing to object to the Ranger's testimony regarding an ultimate issue is without merit. *Ex parte Nailor*, 149 S.W.3d 125, 134-35 (Tex.Cr.App. 2004).

C. Appellant's Defense Counsel's Conduct Does Not Meet the Standard for Ineffective Assistance

The State does not dispute that Appellant's trial counsel's conduct was unusual. However, the conduct does not rebut the presumption of reasonable trial strategy.

There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *Jackson v. State,* 877 S.W.2d 768, 771 (Tex. Cr. App.1994); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Cr. App. 1999).

In *Hernandez v. State,* the Court of Criminal Appeals adopted the two-prong test articulated by the United States Supreme Court in *Strickland v. Washington, supra,* for analyzing ineffective assistance of counsel claims. *Hernandez v. State,* 726 S.W.2d 53, 56–57 (Tex.Cr.App.1986). This standard requires that in order to reverse a conviction for ineffective assistance of counsel, this Court must find that an Appellant has shown: (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Derrick v. State*, 773 S.W.2d 271, 272-73 (Tex. Cr. App. 1989).

Here, the assertion of ineffectiveness is not firmly founded in the appellate record. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Id.*

The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record. Tex. R. App. 34.1. It is elementary that, with limited exceptions not material here, an appellate court may not consider matters outside the appellate record. *Sabine Offshore Service v. City of Port Arthur,* 595 S.W.2d 840 (Tex. 1979); *Perry v. Kroger Stores,* 741 S.W.2d 533 (Tex.App.—Dallas 1987, no writ).

Resultantly, Appellant may not rely upon the affidavits attached to her Appellant's Brief to support her contention of ineffective assistance of counsel. Even so, the affidavits are not from jurors and do not support her contention that she was convicted simply because they did not like her trial counsel.

Appellant asserts that the jury may not have liked her trial counsel, or perhaps they preferred the Prosecutor, and only an "extraordinary" jury could have overcome such opinions. However, the jury was admonished that:

> You must not concern yourself with the objections or the Court's reasons for these rulings. These are purely matters of law. You must not consider any evidence to which I sustain an objection, which I order stricken from the record, or which I order you to disregards.

No statement, ruling, or remark that I make during the entire time this case is no trial is intended in any way to indicate my opinion of the facts. The Court has no right to indicate an opinion as to the facts.

You are to decide the facts in the case. In this determination, you alone must determine the believability of the evidence and its weight and value. (RR Vol. 2 P. 39)

Nothing in this appellate record shows that counsel did not provide Appellant reasonable professional assistance. While his actions may have been unorthodox, he fully and thoroughly cross examined witnesses, and made a valid defense that it was possible that Rosa Morales stole the money rather than Appellant. Moreover, he presented Appellant's testimony that her written confession was not voluntary. Trial counsel's trial strategy was present, and Appellant was afforded reasonable professional assistance.

Absent a showing in the appellate record that the representation was ineffective as that term is defined by the Court of Criminal Appeals, this appellate court cannot conclude the conviction resulted from a breakdown in the adversarial process that renders the result unreliable.

Response Issue Two (Restated)

The Evidence Against Defendant Was Sufficient to Support the Jury's Finding of Guilt

In assessing challenges to the sufficiency of the evidence, this court is charged with determining whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). This standard of review is applicable in both direct evidence and circumstantial evidence cases. *Geesa v. State,* 820 S.W.2d 154 (Tex.Cr.App.1991).

In addition to the testimony of the Texas Ranger, Officer Gus Trevino testified that Appellant made a written confession. (RR Vol. 2 P. 212) That written confession was introduced as evidence, and was translated into English for the jury as:

> I don't know what happened. The only thing I can say is, I'm sorry. I'm willing to pay the money and clear up this issue. By accident – as an accident of the money, I don't remember what happened, if it was in the paperwork by accident and I took the money. The amount was $570. It was from the office of Rosa Morales.

Despite this statement, Appellant did not pay the money back. (RR Vol. 2 P. 219)

In her testimony before the jury, Appellant testified that the written statement was a lie and was coerced.

During deliberations, the jury specifically requested the opportunity to review the written confession. (RR Vol. 3 P. 136)

The jury is the exclusive judge of the facts proved, and of the weight to be given to the testimony. Tex. Crim. Proc. Code § art. 38.04. The jury was entitled to believe that the written statement was voluntary and true.

PRAYER

For all the foregoing reasons, The State of Texas respectfully prays that this Honorable Court will overrule the Appellant's Issues and affirm the judgment of the trial court. In all things, Appellee prays it be awarded all relief to which it is justly entitled at equity or in law.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was served on the identified parties by the methods indicated on April 1, 2015.

/s John Fowlkes

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CERTIFICATE OF COMPLIANCE

This certifies that the foregoing document was produced on a computer using Microsoft Word and contains 2,439 words; 12,671 characters with no spaces; and 15,057 characters without spaces, as determined by the computer software's word-count function, excluding any sections exempt by Texas Rule of Appellate Procedure 9.

/s John Fowlkes