Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00309-CV

Leticia Garza **GALVAN** and Martie Garcia Vela,
Appellants

v.

Eloy **VERA** and Baldemar Garza,
Appellees

From the 229th Judicial District Court, Starr County, Texas
Trial Court No. DC-18-186
The Honorable Joel B. Johnson, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Irene Rios, Justice

Delivered and Filed: August 29, 2018

AFFIRMED

This is an appeal from a judgment in an election contest. In the underlying lawsuit, Leticia Garza Galvan and Martie Garcia Vela filed the contest challenging the outcome of the March 2018 Starr County Democratic primary election as it related to the nominees for Starr County Judge and Judge of the 229th Judicial District Court. After a bench trial,[1] the trial court found the final canvass of the vote in both races was the true outcome of the election. Galvan and Vela present

[1] Jury trials are not allowed in an election contest. *See* TEX. ELEC. CODE ANN. § 231.005 (West 2010) ("The district judge shall decide the issues of fact in an election contest without a jury.").

seven issues on appeal challenging the trial court's findings as they relate to: (1) voter assistance at the polls; (2) ballot box security; (3) the early voting ballot board; and (4) mail-in ballots. We affirm the trial court's judgment.

BACKGROUND

In the March 2018 Starr County Democratic primary, Galvan challenged incumbent Eloy Vera for the nomination for Starr County Judge, and Vela challenged Baldemar Garza for the nomination to the open seat for Judge of the 229th Judicial District Court. After a recount, Galvan lost by 159 votes, and Vela lost by 106 votes.

Galvan and Vela filed the underlying lawsuit on April 6, 2018. Pertinent to the issues raised on appeal, Galvan and Vela alleged: (1) election officers did not enter the name and address of people providing assistance to voters at the polls on the poll lists beside the voters' names and the people providing assistance suggested how the voters should vote; (2) the ballot boxes were not properly sealed and some of the ballots were not signed by the presiding judge and were in sequential order; (3) ineligible people served on the early voting ballot board and the board did not decide whether to accept or reject ballots as a group; and (4) one person who assisted voters with mail-in ballots did not provide the person's signature, printed name, and residence address on the carrier envelope.

After a five-day bench trial, the trial court entered findings of fact and conclusions of law. The trial court noted the evidence included "basically all records of the election" and testimony from "[e]lection judges, poll watchers, candidates, voters, election administrators and volunteers for the candidates."

With regard to assistance at the polls, the trial court found Starr County has a procedure which allows voters to travel to the polls in a vehicle and then request assistance with voting. The voter may request the assistance of a person other than the election official and that person must

take an oath before assisting the voter. The trial court also found no record was made of which voters were assisted or the name of the person who provided the assistance; however, a record is made of the number of signatures on the oath sheets. The total number of signatures on the oath sheets was about 1200. The trial court concluded the Starr County election officials did not follow every protocol specified in the Texas Election Code regarding the provision of assistance to voters at the polls; however, those failures did not invalidate the ballots.

With regard to the ballot boxes, the trial court found the ballot boxes were secured with locks and seals, and the voting machines were secured with seals. Although the Texas Election Code requires the authority responsible for distributing election supplies to record the serial numbers of the seals used on the ballot boxes, the trial court found the election officials relied on poll watchers to record the seal numbers placed on the ballot boxes when they were first sealed, and no record of those first seal numbers were recorded by the election officials at the beginning of voting. The trial court further found Galvan and Vela presented "no direct evidence that any of these machine topped voting box seals were tampered with or replaced." Although the trial court found there were ballot irregularities inside the ballot boxes, including the absence of the signatures of the election judges on multiple ballots and some ballots being in sequential order, the trial court concluded the "[c]ontestants' claim of lack of ballot box security and actual ballot box stuffing is simply not supported by the great weight of evidence presented in this case," and "[t]he recount verified the original total number of votes." Finally, the trial court concluded, "[t]he election while not perfect was conducted within a zone of reasonable certainty."

With regard to the composition of the early voting ballot board, the trial court found no objection was made to the board's composition until after the election. Therefore, the trial court concluded any complaint regarding its composition was waived. The trial court also found the

contestants raised a challenge to the procedure used by the board and stated, "A higher Court may consider the issue, this Court declines."

Finally, with regard to the mail-in ballots, the trial court found "not all mail in ballots have the name of the person who assisted a voter" but concluded the "assister's" failure to sign the ballot did not invalidate the vote. Instead, the trial court concluded that failure subjects the "assister" to criminal sanctions.

After addressing each of the alleged improprieties, the trial court generally concluded, "While many steps could be taken by the local Democratic Party and the County's Election Department to better comply with the protocols of the election code, no clear evidence of systemic fraud or error producing protocols was shown." Therefore, "[t]he election should be declared valid." The trial court's judgment declares Vera and Garza the "true winners" of their respective races for the March 2018 Democratic primary nomination. Galvan and Vela appeal.

SCOPE OF INQUIRY AND STANDARD OF REVIEW

In an election contest, the trial court must "attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome." TEX. ELEC. CODE ANN. § 221.003(a) (West 2010). "An election contestant's burden is a heavy one, and the declared results will be upheld in all cases except when there is clear and convincing evidence of an erroneous result." *Flores v. Cuellar*, 269 S.W.3d 657, 660 (Tex. App.—San Antonio 2008, no pet.). "To overturn an election, the contestant must prove by clear and convincing evidence that voting irregularities materially affected the election results." *Id.* A contestant can establish the outcome was materially affected by showing: (1) illegal votes were counted or an election official failed to count legal votes or engaged in other fraud, illegal conduct, or mistake; and (2) a different result would have been reached. *Id.*; TEX. ELEC. CODE ANN. § 221.003(a).

In reviewing a judgment in an election contest, we must determine if the trial court abused its discretion. *Flores*, 269 S.W.3d at 660. A trial court abuses its discretion when it acts "without reference to any guiding rules and principles." *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). "The sufficiency of evidence supporting a trial court's finding of fact may be a relevant factor in determining whether the court abused its discretion." *Jones v. Morales*, 318 S.W.3d 419, 423 (Tex. App.—Amarillo 2010, pet. denied).

In reviewing the legal sufficiency of the evidence under a clear and convincing standard, we look at all the evidence, in the light most favorable to the judgment, to determine if the trier of fact could reasonably have formed a firm belief or conviction that its finding was true. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). We presume that the trier of fact resolved disputed facts in favor of its findings if a reasonable trier of fact could do so. *Id.* We disregard any contrary evidence if a reasonable trier of fact could do so, but we do not disregard undisputed facts. *Id.*

In conducting a factual sufficiency review under a clear and convincing standard, we "must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing." *Id.* The evidence is only factually insufficient if "the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction." *Id.*

"[D]espite the heightened [clear and convincing] standard of review," we "must nevertheless still provide due deference to the decisions of the factfinder, who, having full opportunity to observe witness testimony first-hand, is the sole arbiter when assessing the credibility and demeanor of the witnesses." *In re A.B.*, 437 S.W.3d 498, 503 (Tex. 2014). We are required to detail the evidence in reversing a judgment for insufficient evidence but not when we affirm. *Id.*

ASSISTING VOTERS AT POLLS

In their first two issues, Galvan and Vela contend the trial court erred in failing to find the final canvass was not the true outcome of the election based on the evidence presented regarding the assistance provided to voters at the polls and the failure to record the names and addresses of the people providing assistance beside the voter's names.

A. Failure to Record Name and Address of People Providing Assistance

Section 64.032 of the Texas Election Code allows a voter to be assisted by any person selected by the voter with a few exceptions that are not relevant to this case. TEX. ELEC. CODE ANN. § 64.032 (West 2010). "If assistance is provided by a person of the voter's choice, an election officer shall enter the person's name and address on the poll list beside the voter's name." *Id.* § 64.032(d).

It is undisputed that voters were assisted at the polls in the Starr County Democratic primary, but the names and addresses of the people providing assistance were not entered on the poll list beside the names of the voters who were assisted. The trial court, however, concluded that the failure to follow this protocol did not invalidate the ballots of the voters who were assisted.

In addressing this issue, the trial court found "[n]o evidence was presented establishing any particular voter who was not eligible for assistance was in fact assisted in voting." The Texas Legislature has addressed when a voter's ballot may not be counted in this context. Section 64.037 of the Texas Election Code provides, "If assistance is provided to a voter who is not eligible for assistance, the voter's ballot may not be counted." *Id.* § 64.037. The Texas Legislature did not, however, provide that a voter's ballot may not be counted if the name and address of the person assisting the voter is not entered beside the voter's name on the poll list. Therefore, "[t]he legislature expressly has provided that some actions require a voter's ballot to be excluded." *Jones v. Morales*, 318 S.W.3d 419, 426 (Tex. App.—Amarillo 2010, pet. denied). Because the

legislature does not require a ballot not be counted for the failure to enter the name and address of the person providing assistance on the poll list, we "decline to add to the legislature's expressed list."[2] *Id.*

B. Nature of Assistance Provided

Galvan and Vela also assert the evidence established that people assisting voters at the polls completed ballots without direction from the voter or suggested how the voter should vote. Vera and Garza respond that the trial court could have disbelieved the testimony supporting such a finding. For example, one of the poll watchers who testified assistants were completing the ballots for the voters admitted she did not examine those voters' ballots and could not, as a poll watcher, speak to the voter or be present when the voter was voting. Accordingly, she had no personal knowledge of the manner in which any particular ballot was completed. Another poll watcher testified voters were being assisted in their vehicles but admitted she could not see inside the vehicles. Vera and Garza further respond the trial court could have believed the witnesses who

[2] Although this court has addressed whether mail-in ballots should be counted if the person providing assistance fails to sign the carrier envelope, mail-in ballots, which are not completed in the presence of an election official, are distinguishable from ballots completed with assistance at the polls because they are completed in the presence of an election official. *Tiller v. Martinez*, 974 S.W.2d 769 (Tex. App.—San Antonio 1998, pet. dism'd w.o.j.). In addition, none of the sections of the Election Code cited in *Tiller* provided that a ballot could not be counted if the person assisting the voter failed to sign the carrier envelope. *Id.* at 775; Act of May 26, 1997, 75th Leg., ch. 1381, § 16, 1997 Tex. Gen. Laws 5179, 5182; Act of May 24, 1991, 72nd Leg., ch. 554, § 1, 1991 Tex. Gen. Laws 1927, 1943. Furthermore, section 86.010 of the Election Code, which governs mail-in ballots, was amended in 2017 to broadly provide, "If a voter is assisted in violation of this section, the voter's ballot may not be counted," and a subsection was added to section 86.010 requiring the person assisting a voter with a mail-in ballot to sign and print their name and include their address on the carrier envelope. TEX. ELEC. CODE ANN. §§ 86.010(d), 86.010(e) (West Supp. 2017). Therefore, the Texas Legislature has now provided that the failure of a person assisting a voter with a mail-in ballot to sign and print their name and address on the carrier envelope precludes the voter's ballot from being counted. No similar amendment was made with regard to assistance provided at the polls. Finally, prior to the 2017 amendments, the Amarillo court noted its disagreement with this court's holding in *Tiller*, asserting:

> After review of the cited sections of the Election Code, including the 2003 amendments to those sections, we find ourselves in disagreement on this point with our sister court. Neither in the cited sections nor elsewhere in the Election Code can we see a legislative determination that a failure of a voter's assistant to complete the required information on the carrier envelope requires rejection of the voter's ballot. As noted, [the] statute expressly provides that the ballot of a voter who is assisted in violation of subsections (a) or (b) of § 86.010 may not be counted, but the legislature has not disqualified the ballot of a person whose assistant fails to sign the oath, or provide his name and address, on the carrier envelope.

Jones, 318 S.W.3d at 426.

testified they did not observe any irregularities. These witnesses included another poll watcher and one of the presiding judges at a precinct. Because we defer to the trial court's assessment of the credibility of the witnesses, we hold the trial court did not abuse its discretion in implicitly finding improper assistance was not provided.

MAIL-IN BALLOTS

In their final issue, Galvan and Vela contend the trial court erred in failing to find the ballots returned by Francisca Mendoza, who assisted voters with mail-in ballots, were invalid because she failed to provide her information as the assistant on the carrier envelopes. As previously noted, section 86.010(d) of the Election Code was amended in 2017 to provide, "If a voter is assisted in violation of this section, the voter's ballot may not be counted," and a subsection was added to section 86.010(e) requiring a person assisting a voter with a mail-in ballot to sign and print their name and include their address on the carrier envelope. TEX. ELEC. CODE ANN. § 86.010(d)-(e). Therefore, the trial court erred in concluding Mendoza's failure to record the requisite information on the carrier envelopes did not invalidate the votes. *Id*.

As previously noted, however, Galvan and Vela are required to establish by clear and convincing evidence that a different result would have been reached if the invalid votes had not been counted. *Flores*, 269 S.W.3d at 660; TEX. ELEC. CODE ANN. § 221.003(a). The evidence established Mendoza only assisted fifty voters. Because Vera and Garza won their elections by 159 and 106 votes, respectively, Galvan and Vela could not establish the fifty invalid votes materially affected the outcome of the election. *Flores*, 269 S.W.3d at 660; TEX. ELEC. CODE ANN. § 221.003(a).

BALLOT BOXES

In their third issue, Galvan and Vela contend the trial court erred in failing to find fraud with respect to the precinct counters and ballot boxes "as evidenced by the undisputed facts related

to the unsigned, sequentially ordered ballots 'stuck together' in various boxes." In their brief, Galvan and Vela also make reference to the ballot boxes not being properly sealed.

Section 62.008 of the Election Code requires the presiding judge's signature to be placed on the back of each ballot to be used at the polling place and provides that an unsigned ballot may not be made available for selection by the voters. TEX. ELEC. CODE ANN. § 62.008 (West 2010). Section 62.009 also requires an election officer to "disarrange a supply of the ballots so that they are in random numerical order." *Id*. § 62.009. Although Galvan and Vela refer to "various boxes" containing unsigned, sequentially ordered ballots, the evidence established only 23 ballots that were unsigned and sequentially ordered. Because Vera and Garza won their elections by 159 and 106 votes, respectively, even if we assumed those ballots and the 50 mail-in ballots of the voters assisted by Mendoza should not have been counted, Galvan and Vela could not establish those ballots materially affected the outcome by showing a different result would have been reached. *Flores*, 269 S.W.3d at 660; TEX. ELEC. CODE ANN. § 221.003(a).

In their brief, Galvan and Vela generally complain about the seals on the voting machines and specifically complain about the failure to record the serial number of the seals at the time the ballot boxes were initially locked and sealed. Section 127.064 of the Election Code does require the authority responsible for distributing election supplies to the polling places to prepare a record of the serial numbers of the seals and preserve the record. TEX. ELEC. CODE ANN. § 127.064(c) (West 2010). Although the evidence established and the trial court found no record of the first seal numbers was made, such a mistake would not invalidate an election unless the evidence showed how the mistake affected the true outcome of the election. TEX. ELEC. CODE ANN. § 221.003(a). In this case, the evidence did not establish that the failure to record the seal numbers affected the outcome. In addition, the elections administrator testified to the procedures used to secure the ballot boxes and testified none of the boxes were tampered with or manipulated.

Therefore, Galvan and Vela did not meet their heavy burden to establish an erroneous result by clear and convincing evidence. *Flores*, 269 S.W.3d at 660.

EARLY VOTING BALLOT BOARD

In their fourth, fifth, and sixth issues, Galvan and Vela contend the trial court erred in concluding they waived their challenge to the composition of the early voting ballot board because the majority of the board was statutorily disqualified. They also contend the board's rejection of a ballot based on a single board member's review of the ballot, as opposed to a review by all members of the board, invalidates those decisions.

With regard to the composition of the board, this court has held that allowing an ineligible person to serve on an election board does not vitiate the entire election where no complaint is made until after the election is held and the evidence does not establish the election was not fairly held. *Stafford v. Stegle*, 271 S.W.2d 833, 835 (Tex. Civ. App.—San Antonio 1954, no writ). In this case, it is undisputed that no complaint regarding the composition of the board was made until after the election. Accordingly, the trial court did not abuse its discretion in concluding the complaint regarding the composition of the board was waived.

Finally, Galvan and Vela contend the trial court erred in failing to find the early voting ballot board's failure to review the ballots as a board invalidates their decisions. Section 87.041(a) of the Election Code provides, "The early voting ballot board shall open each jacket envelope for an early voting ballot voted by mail and determine whether to accept the voter's ballot." TEX. ELEC. CODE ANN. § 87.041(a) (Supp. 2017). Section 87.041(b) lists the seven requirements that must be met in order to accept a ballot, and section 87.041(d) provides a ballot must be rejected if any requirement prescribed by subsection (b) is not satisfied. *Id.* §§ 87.041(b), 87.041(d). Nothing in the statute, however, dictates the procedures the board is required to follow in making its determination. In this case, individual board members reviewed the ballots for compliance with

the requirements and consulted other board members with questions. Because the statute does not dictate a procedure the board must follow in making its decision to accept or reject a ballot, we hold the procedure used by the board did not invalidate the board's decisions.

GLOBAL CHALLENGE

In their seventh issue, Galvan and Vela assert "[t]he trial court erred in failing to find that, even if no particular violation identified at trial would alone require a new election, when all taken together in the same election, the failure to follow basic provisions protecting the dignity of assisted voters, security of the ballot boxes and election media, and Early Voting Ballot Board composition and processes are so pervasive and so compromise public confidence in the election process and results, that the court cannot let the election stand." We disagree. As this court has stated, "While those charged with conducting elections should use every precaution possible to see that elections are conducted strictly in accordance with the provisions of the Election Code, nevertheless, after an election has been held and it appears that it has been fairly conducted and the result correctly declared, and there were no charges of fraud, misconduct or illegality, the entire election will not be set aside for irregularities in the manner of conducting the election, unless the statutes governing such matters state that the election must be vitiated." *Stafford*, 271 S.W.2d at 835.

CONCLUSION

The trial court's judgment is affirmed.

Sandee Bryan Marion, Chief Justice