Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-12-00066-CR

EX PARTE Patricia Foster **SKELTON**

From the 38th Judicial District Court, Real County, Texas
Trial Court No. 2011-2993-DC
Honorable Camile G. Dubose, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: July 10, 2013

AFFIRMED

Patricia Skelton appeals from an order denying her relief on her application for a writ of habeas corpus. On appeal, Skelton offers three grounds for granting habeas relief: her constitutional rights were violated because she is actually innocent, she was denied a fair trial due to prosecutorial misconduct, and she received ineffective assistance of counsel. We affirm.

BACKGROUND

Skelton was convicted of forging the will of a deceased client, Ysidro Canales. To convict Skelton, the State had to prove she forged a writing with intent to defraud or harm another. TEX. PENAL CODE ANN. § 32.21(b) (West 2011). The State specifically alleged Skelton committed forgery by altering a writing so it purported to be an actual act of Canales. *Skelton v. State*, No. 04-08-00720-CR, 2010 WL 2298859, at *1 (Tex. App.—San Antonio June 9, 2010, pet. ref'd)

(mem. op., not designated for publication); *see* TEX. PENAL CODE ANN. § 32.21(a)(1)(A)(i) (West 2011).

At trial, the State and Skelton both presented evidence that Skelton had literally cut and pasted the signatures of Canales and two witnesses onto a document, which Skelton claimed was a computer copy of a will executed by Canales. She then photocopied the altered document and filed that copy with the probate court without informing the court that neither Canales nor the witnesses ever signed that particular document.

The State's theory of the case was that Skelton made Canales's alleged will from whole cloth and that Canales had never executed a will. To this end, the State presented evidence that neither Skelton nor Canales could have met in her office in Leakey, Real County, Texas, to sign the will on the date stated on the filed copy. The State presented evidence that Skelton attended a hearing in Kerrville, Kerr County, Texas, that morning and that Canales was on his way to gamble in Louisiana with his sister by that afternoon. Regardless of whether Canales had executed a will, the State argued that Skelton committed forgery because she filed an unsigned copy of the will intending to defraud the court or potential heirs. The State offered expert testimony that different probate procedures would have to be used to probate an unsigned copy of the will. These procedures were not followed because Skelton did not inform the court of what she had done.

Skelton testified the document she created was a copy of a will validly executed by Canales. She testified Canales kept the original will, but it was lost and the signed copy of his will she kept in her office had been severely water damaged by a flood. She further testified she did not know she could probate an unsigned copy of his will. She had cut out signatures from the signed copy of Canales's will and pasted them onto a new copy of the will, and admitted she did not inform the probate court of what she had done. According to her attorney's testimony at the habeas hearing, his trial strategy focused on denying that she acted with the intent to defraud or harm another

because Canales did execute a will and the document Skelton filed was a copy of that will. Because the filed copy represented Canales's intentions, she did not act with the intent to harm or defraud. The record of the trial reflects that the trial court, the prosecution, and the defense agreed Skelton's intent was the main point of contention. *See* TEX. PENAL CODE ANN. § 32.21(b) (West 2011).

Skelton was ultimately convicted of forgery and sentenced to community supervision. She appealed her conviction to this court, and we affirmed the judgment. *Skelton*, 2010 WL 2298859, at *4. The Court of Criminal Appeals refused her petition for discretionary review.

During the State's investigation of Skelton, some of Canales's heirs contested the will offered for probate. The probate court stayed the contest until Skelton's criminal trial was completed. After Skelton's conviction, the probate case resumed and the jury found the filed copy was an accurate copy of Canales's will. One of the jury questions specifically asked if Skelton had forged the will offered for probate. The charge used the Penal Code definition of forgery and other relevant terms. The jury found Skelton did not forge the will.

Skelton then applied for a writ of habeas corpus, and the habeas court denied relief without a hearing. This court abated the appeal and remanded her case to the habeas court to conduct an evidentiary hearing on the ineffective-assistance-of-counsel claim. The hearing was held, and the trial court made findings of fact and conclusions of law. The supplemental record has been filed in this court.

STANDARD OF REVIEW

We review a trial court's order denying relief on a writ of habeas corpus for abuse of discretion. *Ex Parte Klem*, 269 S.W.3d 711, 718 (Tex. App.—Beaumont 2008, pet. ref'd); *see Ex Parte Twine*, 111 S.W.3d 664, 665 (Tex. App.—Fort Worth 2003, pet. ref'd). Under this standard, we view the facts in the light most favorable to the court's ruling. *Ex Parte Klem*, 269 S.W.3d at 718. To this end, we afford almost total deference to the habeas court's determination of historical

facts supported by the record, especially when the factual findings rely on evaluations of witnesses' credibility and demeanor. *Ex Parte Twine*, 111 S.W.3d at 665. The court's application of the law to the facts is accorded the same deference, if its application also turns on points of evidence related to credibility and demeanor. *Id.* Otherwise, we review its application of the law to the facts de novo. *Id*. at 665–66.

PROSECUTORIAL MISCONDUCT

Skelton alleges her trial was rife with instances of prosecutorial misconduct, all of which combined denied her right to due process. Every allegation of misconduct contained in her application rests on facts that were known to her at the time of her direct appeal—yet she failed to raise her prosecutorial-misconduct claim in that forum. *See Skelton*, 2010 WL 2298859. We therefore hold Skelton forfeited her constitutional claim. TEX. CODE CRIM. PROC. ANN. art. 11.072, § 3(a) (West 2005); *Ex Parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004). She cannot resuscitate it now through a writ of habeas corpus. *Ex Parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004) ("We have said countless times that habeas corpus cannot be used as a substitute for appeal, and that it may not be used to bring claims that could have been brought on appeal.").

INEFFECTIVE ASSISTANCE OF COUNSEL[1]

Effective representation is not flawless representation. To be entitled to habeas relief for ineffective assistance of counsel, Skelton must prove by a preponderance of the evidence that her attorney's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a reliable result." *Thompson v. State*, 9 S.W.3d 808, 812–

[1] Skelton initially raised her claim for ineffective assistance of counsel in her direct appeal. We denied her appellate relief because the record was not sufficiently developed. Because she could not obtain relief, her claim has not already been decided adversely toward her. "Unlike other claims rejected on direct appeal, claims of ineffective assistance of counsel rejected due to lack of adequate information may be reconsidered on an application for a writ of habeas corpus." *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011).

13 (Tex. Crim. App. 1999); *see also United States v. Cronic*, 466 U.S. 648, 656–57 (1984). We evaluate her claim under the two-prong *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Ex Parte Nailor*, 149 S.W.3d 125, 129–30 (Tex. Crim. App. 2004). Under this test, we look to the totality of her attorney's representation to analyze all of Skelton's allegations of deficient performance and decide whether her attorney's conduct was constitutionally deficient; if it was deficient, we then consider whether the attorney's deficient acts or omissions, in their totality, prejudiced Skelton's defense. *Ex Parte Nailor*, 149 S.W.3d at 130. Isolated errors of commission or omission ordinarily do not cause counsel to become ineffective. *Ex Parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). Yet sometimes a single egregious error may sufficiently demonstrate that a defendant received ineffective assistance of counsel. *Thompson*, 9 S.W.3d at 813. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id*. "Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Id.*

An attorney's performance is constitutionally deficient if it fell below an objective standard of reasonableness under the facts of the particular case and the prevailing professional norms at the time of the attorney's conduct. *Strickland*, 466 U.S. at 690; *Ex Parte Moore*, 395 S.W.3d 152, 157 (Tex. Crim. App. 2013); *see also Ex Parte Welch*, 981 S.W.2d 183, 184 (Tex. Crim. App. 1998) ("[C]ounsel's performance will be measured against the state of the law in effect during the time of trial and we will not find counsel ineffective where the claimed error is based upon unsettled law."). To avoid the deleterious effects of hindsight, we indulge the strong presumption that her counsel's performance fell within the wide range of reasonable professional assistance. *Thompson*, 9 S.W.3d at 813; *Ex Parte Nailor*, 149 S.W.3d at 130.

Skelton must also affirmatively show she was prejudiced by her counsel's deficient performance. *Thompson*, 9 S.W.3d at 812; *Ex Parte Nailor*, 149 S.W.3d at 130. The alleged prejudice must rise to the level that there is a reasonable probability the result of the trial would have been different but for counsel's unprofessional errors. *Thompson*, 9 S.W.3d at 812. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* An isolated error of counsel often will not show such a probability. *Passmore v. State*, 617 S.W.2d 682, 686 (Tex. Crim. App. [Panel Op.] 1981), *overruled on other grounds by, Reed v. State*, 744 S.W.2d 112, 125 n.10 (Tex. Crim. App. 1988); *McGarity v. State*, 5 S.W.3d 223, 229 (Tex. App.—San Antonio 1999, no pet.).

Skelton's Allegations & the Habeas Court's Findings

Skelton alleges she received ineffective assistance of counsel at five different points at her trial. She claims her attorney acted deficiently when:

1. the State enlarged its theory of the case at trial beyond the indictment without objection;
2. both the State (without objection) and her own attorney repeatedly elicited testimony about her pre-arrest, pre-Miranda silence;
3. the State wrongly presented Texas Ranger Coy Smith as an expert on the law of forgery and Ranger Smith testified she was guilty of forgery without objection;
4. the State used hearsay to wrongly bolster a different witness's credibility without objection; and
5. the State made improper jury arguments by enlarging its theory of the case beyond the indictment and struck at Skelton over the shoulders of her attorney without objection.

After we remanded for an evidentiary hearing, the habeas court made findings of fact and conclusions of law. The court found Skelton's attorney had been practicing law for over thirty years, he was a former District Attorney of Jasper County, and he was a witness of the highest

degree of credibility and truthfulness. The court further found her attorney "explained valid and compelling strategic reasons for all of the acts and omissions that form the basis for the applicant's post-probation writ of habeas corpus" and that "those rationales are valid and within the range of acceptable strategic decisions required of trial counsel." Finally, the court concluded even if any of her attorney's acts or omissions could be considered deficient, Skelton had not demonstrated prejudice.

Deficient Performance

Enlarging the Indictment

Skelton first contends her counsel was ineffective because he allowed the State to enlarge its theory of the case beyond the indictment's charge of forgery by alteration to include forgery by passing.[2] Skelton previously raised in her direct appeal the claim that the State's actions with respect to "enlarging the indictment" were reversible error. *Skelton*, 2010 WL 2298859, at *1–2. We found no error. *Id.* Skelton may not use the writ of habeas corpus to re-litigate an issue that was decided adversely to her on direct appeal. *Ex Parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994). Moreover, her counsel could not have been ineffective for not objecting to the State's actions which we previously held were not error. *See, e.g.*, *Anderson v. State*, No. 10-09-00306-CR, 2010 WL 4140317, at *4 (Tex. App.—Waco Oct. 20, 2010, pet. ref'd) (mem. op., not designated for publication).

*Invocation of Pre-Arrest, Pre-*Miranda *Silence*

Skelton asserts her attorney was ineffective because he allowed, without objection, the State to repeatedly reference her decision not to answer questions posed by the State's lead investigator while a search warrant for her office was executed. Texas Ranger Coy Smith

[2] Forgery may be committed by "altering" a writing or by "passing" a forged writing. TEX. PENAL CODE ANN. §§ 32.21(a)(1)(A), (B).

attempted to interview Skelton while other officers conducted the search of her office. Before he did so, Ranger Smith asked Mrs. Skelton to sign a form advising her that she was not under arrest. The form did not advise Skelton of any of her *Miranda* rights, and a capias for Skelton's arrest was not issued until some time after the search of her office. Viewing the evidence in a light most favorable to the trial court's ruling, these facts do not establish that Skelton's silence was constitutionally protected from being introduced at trial.

The United States Supreme Court recently considered whether or not the Fifth Amendment's protection against compelled self-incrimination bars the admission of evidence about a defendant's pre-arrest, pre-*Miranda* silence as substantive evidence of guilt. *Salinas v. Texas*, 570 U.S. ___, 2013 WL 2922119 (2013) (plurality op.). The three-Justice plurality avoided the broader constitutional issue and narrowly held that, because Salinas did not expressly invoke his Fifth Amendment privilege in his pre-arrest, pre-*Miranda* police interview, his constitutional claim failed. *Id.* at *3–9 ("[B]ecause petitioner did not invoke the privilege during his interview, we find it unnecessary to reach that question."). A pair of Justices would have answered the original question presented and held that Salinas's silence was not constitutionally protected. *Id.* at *9 (Thomas, J., concurring in the judgment). The dissent would have held that Salinas did not need to expressly invoke his right to silence and that the prosecution is barred from introducing the evidence as substantive evidence of guilt. *Id.* at *10–17. (Breyer, J., dissenting).

The Court's fractured opinion aptly illustrates that the law regarding the admissibility of such silence as substantive evidence of guilt is and has been unsettled at the federal level for over thirty years. *See id*. at *4; *Jenkins v. Anderson*, 447 U.S. 231, 236 n.2 (1980) (allowing a defendant's pre-arrest, pre-*Miranda* silence to be used for impeachment, but not considering "whether or under what circumstances prearrest silence may be protected by the Fifth Amendment"); *see also United States v. Ashley*, 664 F.3d 602, 604 (5th Cir. 2011) (detailing the

split among the federal circuit courts regarding the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt); *Salinas v. State*, 368 S.W.3d 550, 558 (Tex. App.—Houston [14th Dist.] 2011, pet. granted) (detailing the split among state courts regarding the use of pre-arrest, pre-*Miranda* silence as substantive evidence of guilt), *aff'd*, 369 S.W.3d 176 (Tex. Crim. App. 2012) (holding pre-arrest, pre-*Miranda* silence not constitutionally protected), *aff'd*, 570 U.S. ___, 2013 WL 2922119 (affirming judgment because defendant never invoked his right to silence). The historical uncertainty and split of federal and state authority over this issue are fatal to this part of Skelton's claim.

Because the state of the law at the time of Skelton's trial was unsettled, Skelton cannot claim that her attorney's failure to object to such evidence fell below the standard of reasonable professional assistance. *Ex Parte Welch*, 981 S.W.2d at 184; s*ee also Strickland*, 466 U.S. at 690 ("Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct*.") (emphasis added). The failure of trial counsel to object to arguably admissible evidence in the face of unsettled law does not constitute ineffective assistance of counsel. *Ex Parte Welch*, 981 S.W.2d at 184; *Saenz v. State*, 103 S.W.3d 541, 546 (Tex. App.—San Antonio 2003, pet. ref'd).

The Texas Ranger's "Expert" Testimony and Opinion as to Guilt

Skelton's third complaint is that her attorney allowed, without objection, Ranger Smith to testify as an expert witness about the requirements of the Penal Code definition of forgery and to offer an opinion as to her ultimate guilt or innocence without objection by counsel.

No witness, expert or lay, is competent to voice an opinion about the guilt or innocence of a defendant. *Boyde v. State*, 513 S.W.2d 588, 590 (Tex. Crim. App. 1974); *see also Morton v. State*, 67 S.W. 115, 117 (Tex. Crim. App. 1902); *Walsh v. State*, 274 S.W. 572, 573 (Tex. Crim. App. 1925); *Spaulding v. State*, 505 S.W.2d 919, 923 (Tex. Crim. App. 1974); *Weathersby v. State*,

627 S.W.2d 729, 730 (Tex. Crim. App. [Panel Op.] 1982); *Fairow v. State*, 943 S.W.2d 895, 899 (Tex. Crim. App. 1997); *Huffman v. State*, 691 S.W.2d 726, 730 (Tex. App.—Austin 1985, no pet.); *Taylor v. State*, 774 S.W.2d 31, 34 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd); *Mowbray v. State*, 788 S.W.2d 658, 668 (Tex. App.—Corpus Christi 1990, pet. ref'd); *DeLeon v. State*, 322 S.W.3d 375, 383 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). The jury alone weighs the guilt or innocence of the accused based upon the instructions in the court's charge and the evidence admitted at trial. *Boyde*, 513 S.W.2d at 590.

Before admitting expert testimony a court must be satisfied (1) that the witness qualifies as an expert by reason of her knowledge, skill, experience, training, or education; (2) that the subject matter of the testimony is appropriate for expert testimony; and (3) that admitting the expert testimony will actually assist the fact finder in deciding the case. *Alvarado v. State*, 912 S.W.2d 199, 215–16 (Tex. Crim. App. 1995). The specialized knowledge qualifying a witness to give an expert opinion may be derived from specialized education, practical experience, a study of technical works, or some combination of thereof. *Dixon v. State*, 244 S.W.3d 472, 479 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (officer qualified to testify as an expert about the behavior of family-violence victims because over his twenty-three year career he had received training relating to family violence, investigated family-violence crimes as a member of the Family Violence Unit, and was involved in over 300 family violence investigations); *see also Alvarado*, 912 S.W.2d at 215–16 (officer qualified as expert on bloodstain pattern interpretation because he explained the methodology, testified it was based on general principles of physics and mathematics, and had received sixty hours of professional training and done personal research); *Banda v. State*, 890 S.W.2d 42, 58–59 (Tex. Crim. App. 1994) (Texas Ranger qualified to testify about whether there was sufficient evidence to charge a different unindicted suspect because he had nineteen years' experience with the Texas Rangers, his main duty was to perform criminal

investigations, and he had 2,000 hours of criminal investigation training); *Barnes v. State*, 634 S.W.2d 25, 27–28 (Tex. App.—Beaumont 1982, no pet.) (officer qualified to testify about whether the amount of methamphetamine possessed by a defendant made him a dealer because he had seven-years' experience as an undercover narcotics agent and made hundreds of buys per year).

Skelton complains about testimony elicited from Ranger Smith by the prosecution. The following colloquy provides the context of the testimony necessary to understand her complaint:

[PROSECUTOR]: Ranger Smith, are you a lawyer?
[RANGER SMITH]: No, ma'am.
[PROSECUTOR]: Have you ever been to law school?
[RANGER SMITH]: No, ma'am.

* * *

[PROSECUTOR]: Everything that you do in your investigations and in your duties and in your line of work has to do with criminal cases?
[RANGER SMITH]: That's correct.
[PROSECUTOR]: Are you familiar with the Penal Code?
[RANGER SMITH]: Yes, ma'am.
[PROSECUTOR]: Did you have to learn and keep informed of the Penal Code in regard to the course of your duties as a Texas Ranger?
[RANGER SMITH]: Yes, ma'am.
[PROSECUTOR]: Tell the jury what the Penal Code is.
[RANGER SMITH]: The Penal Code is basically the bible of Texas. It says what you can and you cannot do, as far as what is legal and what is not legal. It tells you what is legal, like you can't murder someone, you can't steal from another, you can't defraud or do fraudulent things. We refer to it sometimes as Texas' Bible because it has commandments in it about "What thou shalt not do."
[PROSECUTOR]: What did you say there would be a law like what? It is against the law to murder someone?
[RANGER SMITH]: Yes.
[PROSECUTOR]: And in that law it has elements of how you would prove that murder; correct?
[RANGER SMITH]: Well, that's correct, yes, ma'am.
[PROSECUTOR]: Or what a murder is?
[RANGER SMITH]: Yes, ma'am.

[PROSECUTOR]: Is the crime of forgery in the Penal Code?
[RANGER SMITH]: Yes, ma'am.
[PROSECUTOR]: So you are familiar with the crime of forgery?
[RANGER SMITH]: Yes, ma'am.

* * *

[PROSECUTOR]: We are not here to decide who is getting what money from this alleged will?
[RANGER SMITH]: That's correct.
[PROSECUTOR]: And you don't have anything to do with that?
[RANGER SMITH]: No, ma'am.
[PROSECUTOR]: Because you know the Penal Code, and because you know the Penal Code and the statutes under forgery, do you know that the State then does not have to prove that anyone was harmed in this?
[RANGER SMITH]: That's correct, yes, ma'am.
[PROSECUTOR]: Do you know that we don't have to prove that anyone had a loss of money or that anyone gained any money?
[RANGER SMITH]: That's correct.
[PROSECUTOR]: And you know that because you know the Penal Code and you know how to investigate a case, and you have investigated this case for the last, what, four years?
[RANGER SMITH]: Yes, ma'am.
[PROSECUTOR]: Or for a good many years anyway.
[RANGER SMITH]: Yes, ma'am.
[PROSECUTOR]: And you are here to testify today that from your investigation and your training and experience and everything that you found out to be true, from the physical evidence that we have, from the shredded will, from the cell phone records and all of the documents that we have gone over here today, that in your opinion and in your training and experience as a Texas Ranger that the defendant filed a forged document?
[RANGER SMITH]: That's exactly right, yes, ma'am.

Skelton complains about her attorney's failure to object to the prosecutor's final question. She argues Ranger Smith's testimony was inadmissible and objectionable as an opinion of Skelton's guilt and was also subject to an objection about Ranger Smith's qualifications to testify as an expert

about the Penal Code requirements for forgery. Therefore, her attorney performed below an objective level of reasonable representation by not objecting.

Skelton's attorney agreed at the habeas hearing that he did not object to Ranger Smith's testimony and that a law enforcement officer is not entitled to give an opinion as to whether a defendant is guilty. He also testified that if he had objected to the evidence, it probably would have been error for the court to overrule his objection. He testified different lawyers handle such a question in different ways; he chose to undermine Ranger Smith's testimony by showing that he did not look at certain evidence that truly reflected whether the will was in accord with the intent of the testator. On cross-examination, the State's habeas counsel suggested the actual focus of the prosecutor's final question was whether or not the Ranger thought a forged will had been *filed*. Skelton's attorney agreed and said he did not interpret the prosecutor's question as asking the Ranger's opinion of Skelton's guilt.

We cannot agree with that view nor accept it as a reasonable interpretation of the question. The parties agreed Skelton's intent was the crux of the case, and its theory of the case at trial was that Skelton showed her intent to defraud or harm by the very act of filing the forged will with the probate court. To interpret the prosecutor's question as only asking whether Ranger Coy believed Skelton *filed* a forged will, would be to ignore that filing the will was the very act on which the State relied to show Skelton's intent. Moreover, such a cramped reading of the prosecutor's question is not the most natural one. The best interpretation of the long, extended question is that the State asked Ranger Smith whether Skelton was guilty of forgery. This reading accounts for the entirety of the State's question, asking Ranger Smith to judge from his investigation, the evidence, and his experience whether Skelton "*filed* a *forged* will"—which, under the State's theory of the case, constitutes culpable intent and the complete act of forgery. Regardless, under either reading of the question, Ranger Smith gave his opinion about Skelton's guilt. *See Boyde*, 513 S.W.2d at

590 ("[T]he expression of guilt or innocence in this case [is] a conclusion to be reached by the jury based upon the instruction given them in the court's charge, coupled with the evidence admitted by the judge through the course of the trial. Thus, no witness was competent to voice an opinion as to guilt or innocence."); *Spaulding*, 505 S.W.2d at 923 ("When the jurors are as well qualified to speak as the witness, the opinion of the witness on the very issue to be determined by the jury is not permitted.") (internal quotation marks omitted).

The prosecutor's question also asked Ranger Smith to testify about Skelton's guilt as an expert on the Penal Code's definition of forgery. Unlike other cases where officers properly testified as experts, Ranger Smith did not testify that he had any expertise with forgery investigation either by training dealing with fraud or forgery or experience in investigating such crimes. *See Alvarado*, 912 S.W.2d at 215–16; *Banda*, 890 S.W.2d at 58–59; *Dixon*, 244 S.W.3d at 479; *Barnes*, 634 S.W.2d at 27–28. The prosecution did not show Ranger Smith possessed any specialized knowledge of the Penal Code definition of forgery. *See Alvarado*, 912 S.W.2d at 215–16; *Banda*, 890 S.W.2d at 58–59; *Dixon*, 244 S.W.3d at 479; *Barnes*, 634 S.W.2d at 27–28. Moreover, Ranger Smith's testimony was not helpful to the jury because he did nothing more than apply the facts of his investigation to his "expert" knowledge of the law—or in other words, give his opinion of Skelton's guilt. *See Boyde*, 513 S.W.2d at 590; *DeLeon*, 322 S.W.3d at 382 (expert testimony helpful because it identified characteristics displayed by child victims of abuse); *cf. Fairow*, 943 S.W.2d at 900 (discussing "helpfulness" in the context of lay witness testimony). An objection to the State's attempted qualification of Ranger Smith as an expert witness would have been appropriate. But on its own, the lack of objection to Ranger Smith's testimony is not evidence of ineffective assistance of counsel because the record does not disclose whether the State could have properly qualified him as an expert; it may be reasonable trial strategy to not highlight a proffered expert's qualifications and thereby make him more credible. *See Blumenstetter v. State*,

135 S.W.3d 234, 245 (Tex. App.—Texarkana 2004, no pet.). Were we only reviewing whether Skelton's attorney was ineffective for not objecting to Ranger Smith's expert testimony about some aspect of forgery under the Penal Code, we likely would not find deficient performance.

But that is not the case here. Not only was Ranger Smith's opinion of Skelton's guilt clearly inadmissible under any reading of the question, his opinion was more damaging than it would have otherwise been, cloaked as it was in the aura of an "expert" opinion of a Texas Ranger. "'To pass over the admission of prejudicial and arguably inadmissible evidence may be strategic; to pass over the admission of prejudicial and clearly inadmissible evidence, as here, has no strategic value.'" *Ex parte Menchaca*, 854 S.W.2d 128, 132 (Tex. Crim. App. 1993) (quoting *Lyons v. McCotter*, 770 F.2d 529 (5th Cir. 1985)); *cf. Saenz*, 103 S.W.3d at 546 ("Trial counsel's failure to object to admissible evidence does not amount to ineffective assistance."). By not objecting to Ranger Smith's "expert" and clearly inadmissible opinion of Skelton's guilt, Skelton's attorney performed below an objective standard of reasonable representation.

Hearsay & Witness Bolstering

Part of the State's theory that Canales did not execute a will was supported by the testimony of Canales's sister, Irene Canales, who was part of the lawsuit contesting the validity of the probated will. She testified that on the Friday afternoon of the will's alleged execution, Canales was en route to her home in Buda, Texas, so they could travel to Louisiana to gamble that weekend. She testified she spoke to Ranger Smith about casino records that confirmed her belief that on this particular weekend she and Canales gambled in Shreveport; he therefore could not have executed a will on the alleged date because he would have been en route to her home at that time.

Skelton argues Irene's testimony about the casino records was inadmissible hearsay about records that were not properly authenticated and the hearsay was elicited to improperly bolster Irene's credibility. Business records are hearsay and inadmissible unless and until the predicates

of the business-record exception are met. *See* TEX. R. EVID. 802, 803(6). Hearsay by implication occurs when a party attempts to "circumvent the hearsay prohibition through artful questioning designed to elicit hearsay indirectly where there is an inescapable conclusion that a piece of evidence is being offered to prove statements made outside the courtroom." *Schaffer v. State*, 777 S.W.2d 111, 113–14 (Tex. Crim. App. 1989). Bolstering occurs when one party introduces evidence for the purpose of adding credence or weight to earlier, unimpeached evidence offered by that same party. *Rousseau v. State*, 855 S.W.2d 666, 681 (Tex. Crim. App. 1993).

Irene's testimony was inadmissible hearsay by implication. *See Schaffer*, 777 S.W.2d at 113–14. By testifying that the casino records—which were inadmissible without meeting the strictures of Rule 803(6)—confirmed her recollection that she and her brother were gambling that weekend, Irene implicitly testified to the contents of the records. *Id.* However, the testimony was not improper bolstering because it was an attempt to rehabilitate Irene's credibility after it was challenged on cross-examination, partly on the basis of her memory. *See Rousseau*, 855 S.W.2d at 681.

Skelton's attorney did not object to Irene's testimony at that time. However, the next day he asked the judge to strike that part of her testimony. The judge agreed that it should not have been admitted, but stated only that he would not consider it; no instruction to the jury to disregard the testimony appears in the record. At the habeas hearing, Skelton's attorney agreed the records probably were not admissible, but testified that Irene had such poor credibility it did not matter what she said. His opinion about her credibility was based on her status as a plaintiff in the will contest, which was a topic of his cross-examination. He did not remember asking the judge to strike her testimony. In this instance, we are confronted with the dissonance between the attorney's action at trial, moving to strike Irene's testimony after the fact, and his testimony that an objection would have been of low value because Irene's credibility had been impeached. Because Skelton's

attorney had cast doubt upon Irene's credibility and we consider it a reasonable trial strategy to not object to the testimony of a credibility-compromised witness, we will defer to the habeas court's finding that the attorney's performance was not deficient in this respect.

Improper Jury Argument

Lastly, Skelton complains her attorney failed to object to improper jury arguments made by the prosecution. Her first complaint rests on the prosecution's alleged expansion of its theory of the case beyond the indictment into the crime of forgery by passing. As pointed out earlier, we considered this issue on Skelton's direct appeal and we found no error. The prosecutor's references to Skelton's filing of the will with the probate court went to Skelton's intent to defraud or harm and were therefore proper jury argument.

Skelton's second complaint alleges the prosecutor struck at her over the shoulders of her attorney by arguing Skelton was guilty in part by "hiring a criminal defense attorney to run around criticizing and complaining about the way everybody is doing their job."

The State may not strike at a defendant over the shoulders of her counsel or attack the personal integrity of defense counsel. *George v. State,* 117 S.W.3d 285, 288 (Tex. App.—Texarkana 2003, pet. ref'd). The courts should maintain a "'special concern for final arguments that result in uninvited and unsubstantiated accusation of improper conduct directed at a defendant's attorney.'" *Mosley v. State*, 983 S.W.2d 249, 258 (Tex. Crim. App. 1998) (quoting *Orona v. State*, 791 S.W.2d 125, 128 (Tex. Crim. App. 1990); *see also Harnett v. State*, 38 S.W.3d 650, 660 (Tex. App.—San Antonio 2000, pet. ref'd). Egregious examples of such argument include accusing defense attorneys of manufacturing evidence or contrasting the ethical obligations of prosecutors and defense attorneys. *Mosely*, 983 S.W.2d at 258. More mild statements are not necessarily reversible error, and a harm analysis should be conducted. *Id.* at 259 (assuming that statement was error but finding it harmless); *compare Gorman v. State*, 480 S.W.2d

188, 190–91 (Tex. Crim. App. 1972) (holding the prosecutor's argument "[d]on't let [defense attorney] smoke-screen you, he has smoke-screened you enough" was not a personal attack but a response to defense attorney's argument minimizing scope and extent of adverse evidence"), *with Dinkins v. State*, 894 S.W.2d 330, 357 (Tex. Crim. App. 1995) (holding prosecutor's argument "[n]ow, [defense counsel] wants to mislead you a little bit by saying if you find . . ." was error although harmless error). In this case, the prosecutor made only a passing reference to the actions of Skelton's attorney. Skelton's attorney testified at the hearing that he thought the State was overreaching and the jury would see through the improper argument. Skelton's attorney reasonably decided not to object to the slight attack on his character at closing arguments. Therefore, we will not disturb the habeas court's finding that his performance was not deficient in this respect.

After reviewing Skelton's allegations that certain instances demonstrate she received ineffective assistance of counsel, we hold that Skelton's attorney performed below an objective standard of representation in one aspect of his representation. Despite indulging the strong presumption of reasonable representation, we cannot find any strategic value in her attorney's failure to object to Ranger Smith's "expert" opinion of Skelton's guilt.

Prejudice

We must now determine if the preponderance of the evidence indicates that but for unprofessional error of Skelton's attorney, the result of her trial would have been different. *Thompson*, 9 S.W.3d at 812. In this case, we conclude that Skelton's attorney committed only isolated error, and the fundamental fairness of her trial was not undermined.

In *Weathersby*, the Court of Criminal Appeals overturned the conviction for ineffective assistance because two detectives had without objection given their opinions of the defendant's guilt, which were repeated in closing arguments; the conviction of a codefendant was introduced into evidence without objection and repeated in closing arguments, and the defendant was asked

on cross-examination about the criminal character of his friends without objection. 627 S.W.2d at 730–31. The attorney's errors were prejudicial because the defense offered several alibi witnesses, the complainant was not positive about her in-court identification and had not identified the defendant in a lineup, and an earlier description of the suspect more closely resembled a witness who testified for the State. *Id.* The court was "unable to say the matters that were presented to the jury without objection, and particularly the 'expert' opinion of police officers that appellant was guilty, did not influence the jury's verdict of guilty." *Id.* at 731.

However, the Court of Criminal Appeals has also held that isolated error does not require finding ineffective assistance when judged against the totality of an attorney's representation. *Passmore*, 617 S.W.2d at 685. In that case, the defense attorney's sole error was a failure to object to improper jury argument when the prosecutor gave his opinion as to the defendant's guilt. *Id*.; *see also id.* at 689–90 (Clinton, J., concurring) (describing in detail the prosecutor's jury argument). The Court declined to hold the attorney ineffective for failing to object. *Id.* at 685.

The multiple and egregious errors, both of commission and omission, made by the counsel in *Weathersby* stand in stark contrast to the single damaging, but isolated, error in Skelton's case. In this case, Ranger Smith's objectionable "expert" opinion was given in the middle of the first of two days of trial testimony and was a relatively small part of his testimony. The prosecution never emphasized or revisited the inadmissible part of his testimony, either during the rest of its case or in closing arguments. *Cf. Weathersby*, 627 S.W.2d at 730–31. In light of the isolated nature of the attorney's error and the State's lack of reliance on the inadmissible evidence, we cannot say that Skelton proved by a preponderance of the evidence that the outcome would have been different without her attorney's error. *See Ex Parte Welborn*, 785 S.W.2d at 393 ("[The *Strickland*] standard has never been interpreted to mean that the accused is entitled to errorless or perfect counsel."); *Passmore*, 617 S.W.2d at 685; *McGarity*, 5 S.W.3d at 229.

ACTUAL INNOCENCE

Skelton's claim of actual innocence relies on the conflicting verdicts between the criminal and civil trials related to the fabricated will. The criminal jury convicted Skelton of forgery. The civil jury found (1) that Canales executed a valid will, (2) that Skelton did not forge the will she filed with the probate court, and (3) that the probated will was an accurate copy of Canales's will. Skelton points to the conflicting civil verdict as "new evidence" of her innocence and argues "it is more likely than not that no reasonable juror would have convicted her in the light of the later determination of the will's genuineness."

In both her habeas application and her brief, Skelton briefs only a *Schlup*-type claim of actual innocence.[3] *See Schlup v. Delo*, 513 U.S. 298 (1995). Such a claim is not a freestanding ground for relief but is intertwined with allegations of other constitutional error at trial, e.g. *Brady* violations or ineffective assistance of counsel. *Ex Parte Reed*, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008). Because we have found no constitutional error at Skelton's trial, we need not decide whether the conflicting civil verdict is new evidence of actual innocence.[4] We hold Skelton is not entitled to habeas relief on this ground.

[3] Skelton's brief on this point asserts that her "claim of actual innocence is not free-standing, as she additionally raises substantial constitutional grounds of ineffective assistance of counsel, and prosecutorial misconduct. Thus, her burden in habeas is the more lenient one—to show that it is more probable than not the constitutional violations resulted in her conviction, though she is actually innocent."

[4] We also note that, because this is Skelton's first habeas application, it is questionable whether *Schlup* applies to her case. The classic *Schlup* scenario involves an applicant who is procedurally barred from filing a habeas application, usually because she has already been denied relief in a prior application. *See Ex Parte Reed*, 271 S.W.3d at 733. In order to obtain merits review of alleged constitutional error in a successive application, the applicant must make a prima facie showing of actual innocence tied to the alleged constitutional error. *Id.* Because this is Skelton's first habeas application, we would have granted her habeas relief if we had upheld her prosecutorial-misconduct or ineffective-assistance claims—without the need for any showing of actual innocence.

CONCLUSION

The judgment of the habeas court is affirmed.

Luz Elena D. Chapa, Justice

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