NUMBER 13-17-00087-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

GILBERTO PEREZ JR., Appellant,

v.

OZIEL TREVIÑO, Appellee.

On appeal from the 370th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Benavides and Hinojosa
Memorandum Opinion by Justice Benavides

This appeal arises out of a final judgment from an election contest filed by appellant Gilberto Perez, Jr. against appellee Oziel Treviño for the position of Commissioner, Place 5 of the City of Hidalgo, which ordered a new runoff election to be held. By one issue, Perez asserts that the trial court erred by ordering a new election rather than declaring him the outright winner of the election. We reverse and remand in part and affirm in part.

I. BACKGROUND

A. Hidalgo City Commissioner, Place 5 Election

In 2016, Perez and Treviño ran for the Place 5 seat on the Hidalgo City Commission. Both candidates made it through to a runoff election held on June 11, 2016. The final results of the runoff election showed Treviño with 1,460 votes and Perez with 1,454 votes—a difference of six votes.

On June 27, 2016, Perez filed an election contest alleging that the outcome of the runoff was flawed because: (1) votes were illegally cast by individuals who did not reside in Hidalgo; (2) "numerous voters" cast ballots by illegally utilizing an assistant in violation of the Texas Election Code; and (3) numerous unauthorized mail-in ballots were cast and counted. Treviño filed a general denial and a two-day-long bench trial was held in November of 2016.

B. The Contest and Bench Trial

1. In-Person Voters

At trial, several witnesses testified that they voted in-person during the June 11, 2016 runoff election and were assisted in the voting booth by either Marcela Gutierrez or Sara Ornelas. The record shows that Gutierrez and Ornelas both worked on behalf of a slate of candidates that included Treviño in the runoff election. Specifically, Gutierrez testified that she was a paid worker for the Treviño runoff campaign. Gutierrez stated that she was stationed at the polling places to provide assistance to voters if they asked for it. Gutierrez testified that every time she assisted an in-person voter, she undertook an oath and was also "being observed" by the election personnel. Although she is not a United

States citizen and cannot vote, Gutierrez testified that she learned how to use the voting machines from watching videos on the Internet.

First, voter Gloria Garza testified that she voted in the runoff election with Gutierrez's assistance, after Gutierrez offered to assist her at the polling site. Garza stated that she reads and writes in Spanish, but has "a problem with [her] hands," so she needed assistance to vote. According to Garza, no one influenced her vote and she voted for the candidate of her choice, without revealing the candidate's name.

Second, voter Carlos Garza testified that he reads in Spanish and does not have any physical disability that prevents him from marking a ballot. Garza testified that he received assistance to vote, but he could not recall the assistant's name. Garza testified that he voted for Treviño, and no one influenced his vote.

Third, voter Daisy Valencia testified that she received assistance voting from Sylvia Arjona, a Treviño campaign volunteer, after Valencia "asked for [Arjona] . . . because [she] trust[s] her." Valencia testified that she has attention deficit disorder, so she has a hard time focusing while voting. Valencia did not reveal who she voted for, but stated that she voted for the candidate of her choice and no one influenced her vote.

Fourth, voter Guadalupe Rincon testified that despite having no language or physical limitations to vote, she was assisted by Ornelas at the voting booth in order to ensure that she voted for Treviño.

Fifth, voter Oscar Rios testified that Ornelas also assisted him at the voting booth despite having no language or physical limitations to voting. Although Ornelas assisted him, Rios stated that he voted for the candidate of his choice and no one influenced his vote.

Sixth, voter Angie Cavazos testified that she intended to vote for Perez during the runoff election, but did not because Gutierrez, who assisted Cavazos at the voting booth, "came up behind [Cavazos]" and "started punching the [voting] machine," which marked a vote for Treviño. Cavazos testified that she thought she was receiving a tutorial from Gutierrez rather than casting a vote. Cavazos stated that Gutierrez's actions that day "bothers [her] a lot."

Seventh, voter Karla Razo testified that she does not have any language or physical limitations, but was assisted at the voting booth by Gutierrez. According to Razo, Gutierrez pointed at the names of the candidates that Gutierrez wanted her to vote for. Razo stated that she followed Gutierrez's recommendations, but could not recall the specific names of the candidates.

Eighth, voter Ana Razo testified that she does not have any language or physical limitations to vote, but was assisted at the voting booth by Gutierrez. Like Karla, Ana testified that Gutierrez pointed to candidates' names on the ballot, and Ana voted based on Gutierrez's recommendations.

Ninth, voter Miguel Razo also testified that he does not have any language or physical limitations to vote, but was assisted at the voting booth by Gutierrez. Miguel stated that he had voted in previous elections without assistance. Like Karla and Ana, Miguel stated that Gutierrez pointed at names on the ballot, and he followed her recommendations. Miguel testified that he voted for Treviño.

Tenth, voter Alondra Avila testified that she had no language or physical limitations to vote, but was assisted by Gutierrez, who pointed at various names on the ballot while

Avila voted. Avila recalled that she voted for Treviño based on Gutierrez's recommendation.

2. The Campaign Helpers and Mail-In Voters

Campaign helper Teresa Samano Revesz testified that she assisted in Treviño's runoff campaign and personally organized an effort to assist, collect, and mail-out more than forty mail-in ballots from various voters throughout Hidalgo over a two-day period. For the majority of these voters, Revesz testified that she assisted them in filling out the ballot. Some of the ballots, however, were already filled out and sealed in an envelope when she picked them up from the voter to mail it out. According to Revesz, these mail-in voters "voted for the slate" of candidates that included Treviño.

Arjona testified that she assisted the Treviño runoff campaign. Arjona testified that with their permission, she assisted more than fifty voters fill out a mail-in ballot, and also took care of mailing the ballots for them. The record reveals that she assisted a total of sixty mail-in voters.

Voter Teresa Zepeda testified that she voted by mail in the June 11, 2016 runoff election with Arjona's assistance. According to Zepeda, she voted for Treviño and no one forced her to vote for him. Voter Ventura Molano testified that he voted by mail with Arjona's assistance. Molano testified that he never called for Arjona to come to his house, but rather that she showed up uninvited one day and assisted him in filling out his ballot. Molano testified that Arjona told him to vote for Treviño, and he followed her recommendation.

3. Judgment

After the two-day trial, the trial court made the following relevant findings and orders:

> [. . .] Perez has proven by clear and convincing evidence that the final canvass for City of Hidalgo Runoff Election held June 11, 2016 to select the City Commissioner Place 5 of City of Hidalgo, is not the true outcome of the contested election.
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> . . . .
>
> The Court finds by clear and convincing evidence that [Treviño] received votes in violation of the Texas Elections Code Sections 64.001 et al., and 86.001 et al., that may not be counted and are therefore deducted from the total votes received by [Treviño]. After deducting the votes from [Treviño], the court cannot determine by clear and convincing evidence the true outcome of the election.
>
> THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that the election for the contested position of City Commissioner [Place] 5, City of Hidalgo, Texas in the Runoff Election held June 11, 2016 is invalid and declared void. The City of Hidalgo is hereby ORDERED to conduct a new election between [Perez and Treviño] . . . .

Subsequently, Perez filed a motion to modify the trial court's final judgment on grounds that the trial court's finding that Treviño received votes in violation of the Texas Elections Code was "substantially more than the 6 votes" that Treviño received in excess of the total votes received by Perez. As a result, Perez requested that the trial court declare Perez as the true winner of the election. The trial court denied Perez's motion to modify. This appeal followed.

II. Jurisdiction

As a threshold matter, Treviño questions whether this Court has jurisdiction over this election contest.

A. Applicable Law

Appellate jurisdiction is never presumed. *See Brashear v. Victoria Gardens of McKinney, L.L.C.*, 302 S.W.3d 542, 546 (Tex. App.—Dallas 2009, no pet.). Appellate courts are required to review sua sponte issues affecting jurisdiction. *M.O. Dental Lab. v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004) (per curiam).

The timely filing of a notice of appeal vests the court of appeals with jurisdiction over the appeal. *See Sweed v. Nye*, 323 S.W.3d 873, 875 (Tex. 2010). An appeal is perfected when a written notice of appeal is filed with the trial court clerk. TEX. R. APP. P. 25.1(a).

Appellate deadlines begin on the date that the trial court signs the judgment or other appealable order. *See id.* R. 26.1(a)–(c); *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995). The notice of appeal must be filed within a certain number of days after the judgment or order is signed: twenty days for an accelerated appeal whether or not there are post-judgment motions, thirty days for a regular appeal with none of the requisite post judgment motions, ninety days for a regular appeal with specified post judgment motions, or six months for a restricted appeal. *See* TEX. R. APP. P. 26.1.

In a regular appeal—that is, not an accelerated appeal or a restricted appeal—a notice of appeal must be filed within thirty days after the judgment is signed. *Id.* However, a notice of appeal may be filed within ninety days after the judgment is signed if any party timely files either: (1) a motion for new trial; (2) motion to modify the judgment; (3) a motion to reinstate under Texas Rule of Civil Procedure 165a; or (4) a request for findings of fact and conclusions of law if findings and conclusions are required by the rules of civil procedure or if not required, could properly be considered by the appellate court. *See id.*;

see also Lane Bank Equip. Co. v. Smith S. Equip., Inc., 10 S.W.3d 308, 310 (Tex. 2000) (holding that any post-judgment motion, no matter what it is called, will extend plenary power if it seeks a substantive change in the judgment and is filed within the time limits for a motion for new trial).

A motion that extends the appellate deadlines must be filed within thirty days after the judgment or other order complained of is signed. TEX. R. CIV. P. 329b(a) (providing a 30-day deadline to file a motion for new trial); *Padilla v. LaFrance*, 907 S.W.2d 454, 458 (Tex. 1995); *see In re Brookshire Grocery Co.*, 250 S.W.3d 66, 69–70 (Tex. 2008) (orig. proceeding) (holding that an amended or supplemental motion for new trial is timely, and may be filed without leave of court, if it is filed within thirty days of the judgment and the trial court has not overruled the earlier motion for new trial).

B. Discussion

Treviño argues that this Court is without jurisdiction because Perez failed to timely file his notice of appeal in this case.

The following dates in this case are relevant to determine this Court's jurisdiction: (1) on December 5, 2016, the trial court signed the final judgment ordering a new election; (2) on January 4, 2017, Perez filed a motion to modify the trial court's judgment; (3) on February 6, 2017, the trial court denied Perez's motion to modify the trial court's final judgment; and (4) on February 9, 2017, Perez filed an amended written notice of appeal with the trial court clerk.

There are two categories of appeals with regard to when an appeal must be perfected by an appellant in an election contest. In the first category, an appellant who seeks to appeal the contest of a primary election shall file his bond, affidavit, or cash

deposit for costs of appeal not later than the fifth day after the date the district court's judgment in the contest is signed. *See* TEX. ELEC. CODE ANN. § 232.014(b) (West, Westlaw through 2017 R.S.). If the appellant is not required to give security for the costs of appeal, the notice of appeal must be filed by the same deadline. *Id.* In the second category, an appellant in a contest of a general or special election may accelerate the appeal in a manner consistent with the procedures prescribed by section 232.014 of the election code. *See* TEX. ELEC. CODE ANN. § 232.015 (West, Westlaw through 2017 R.S.).

In his brief, Treviño argues that the first category of appellate timetables applies to this case rather than the second. Specifically, Treviño asserts that Perez should have filed his notice of appeal within five days of the trial court's judgment to properly perfect his appeal. We disagree.

The election code defines a "primary election" as an election held by a political party under the election code to select its nominees for public office, and, unless the context indicates otherwise, the term includes a presidential primary election. *See id.* § 1.005(15) (West, Westlaw through 2017 R.S.). A "general election" is defined as an election, other than a primary election, that regularly recurs at fixed dates. *Id.* § 1.005(6); and a "special election" means an election that is not a general election or a primary election. *Id.* § 1.005(18).

With these definitions in mind, we first determine what type of election contest Perez filed. The record shows that the election at issue concerned a nonpartisan municipal runoff election, in which a particular candidate's political party affiliation was not considered. Furthermore, the record shows that this particular election was a runoff election that stemmed from an earlier general election contest, when neither Perez or Treviño received

the requisite majority votes to win in the original general election. Accordingly, this election was neither a general or primary election. *See id.* Therefore, we conclude that this runoff election was classified as a special election. *See id.*

Because this runoff election was a special election, section 232.015 controls the nature of the appeal. Section 232.015 states that a party *may* accelerate the appeal in a manner consistent with the procedures outlined in primary election contests. The Code Construction Act states that a statute's use of the word "may," creates a discretionary authority or grants permission or a power; whereas the use of the word "shall" imposes a duty. *See* TEX. GOV'T CODE ANN. § 311.016 (West, Westlaw through 2017 R.S.). Accordingly, we conclude that Perez retained the discretionary authority to accelerate his special election contest appeal, and section 232.015 did not create a mandatory acceleration of the appeal as outlined in section 232.014 for primary elections. Despite this discretionary authority to accelerate his appeal, Perez elected to not accelerate the appeal. Therefore, because it was not an accelerated appeal, the notice-of-appeal rules as they relate to regular appeals control.[1]

Based on the timeline in this case, Perez successfully extended the appellate timetable by filing his timely motion to modify the trial court's judgment within 30 days of the trial court's signing of the final judgment. As such, this extended Perez's deadline to

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[1] We note that Perez's notice of appeal states the following: "This is an expedited appeal under [section 231.009 of the Texas Election Code]." To the extent that Trevino invites us to construe this language in Perez's notice of appeal as an exercise of his discretionary authority to accelerate the appeal, we decline to do so.

Section 231.009 states that "An election contest has precedence in the appellate courts and shall be disposed of as expeditiously as practicable." *See* TEX. ELEC. CODE ANN. § 231.009 (West, Westlaw through 2017 R.S.). We interpret this statute as an admonishment to appellate courts to expedite handling of all election contests on their dockets due to the time-sensitive nature of elections.

file his notice of appeal to 90 days from December 5, 2017. *See* TEX. R. APP. P. 26.1. Accordingly, we hold that Perez's amended notice of appeal filed on February 9, 2017 was timely, and it properly invoked this Court's jurisdiction over this appeal. *See Sweed*, 323 S.W.3d at 875.

III. ELECTION CONTEST[2]

By his sole issue on appeal, Perez argues that the trial court abused its discretion in this election contest by failing to declare him the winner of the City Commissioner, Place 5 runoff election in the City of Hidalgo.

A. Standard of Review and Applicable Law

We review an appeal from a trial court's judgment in an election contest for an abuse of discretion. *See McCurry v. Lewis*, 259 S.W.3d 369, 372 (Tex. App.—Amarillo 2008, no. pet.) (citing *Tiller v. Martinez*, 974 S.W.2d 769, 772 (Tex. App.—San Antonio 1998, pet. dism'd w.o.j.)); *see also Rivera v. Lopez*, No. 13-14-00581-CV, 2014 WL 8843788 at *3 (Tex. App.—Corpus Christi 2014, no pet.) (mem. op). 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). Thus, we may not reverse the judgment of the trial court, if the trial court acted within its discretion, simply because we might have reached a different result. *Id.* at 242.

To set aside the outcome of an election, the contestant must prove by clear and convincing evidence that a violation of the election code occurred, and it materially

[2] In what he labels as "Appellee's Issue 2," Trevino argues that Perez "failed to assign error in his misstatement of the standard of review." Although Trevino appears to argue that Perez waived any error, we construe this argument more as a critique of Perez's recitation of the appropriate standard of review on appeal. To the extent that Trevino argues that Perez failed to preserve error, that is overruled. To the extent that this argument is a critique of Perez's briefing on the appropriate standard of review, we will state the appropriate standard of review below.

affected the outcome of the election. *See McCurry*, 259 S.W.3d at 372–73. Under the abuse of discretion standard, the sufficiency of evidence supporting the trial court's findings is a factor we consider in determining whether the court abused its discretion. *McCurry*, 259 S.W.3d at 372.

In a non-jury case, when the appellate record includes both findings of fact and conclusions of law and a reporter's record, we review the sufficiency of the evidence under the same standards applied in cases tried by jury. *Id.* 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. *Id.* (citing *In re J.F.C.*, 96 S.W.3d 256, 265–66 (Tex. 2002)). We disregard any contrary evidence if a reasonable trier of fact could do so, but we do not disregard undisputed facts. *Id.*

In reviewing the factual sufficiency of the evidence under a clear and convincing standard, we determine "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the contestant's allegations. *See In re J.F.C.*, 96 S.W.3d at 266. A court of appeals should consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. *Id.* If, in light of the entire record, 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, then the evidence is factually insufficient. *Id.*

The outcome of an election is "materially affected" when a different and correct result would have been reached in the absence of irregularities, or irregularities in the

conduct of the election render it impossible to determine the majority of the voters' true will. *See McCurry*, 259 S.W.3d at 373 (citations omitted).

B. Discussion

Perez argues that the trial court abused its discretion in failing to declare him the outright winner of the runoff election because it found by clear and convincing evidence that: (1) Perez proved that the final canvas of the runoff election was not the true outcome; (2) Treviño received votes in violation of sections 64.001 et seq. and sections 86.001 et seq. of the election code, and those votes should be deducted from Treviño's total vote count; and (3) it could not determine the true outcome of the election. Before delving into the merits of Perez's arguments, we will first discuss the relevant statutes referenced by the trial court in its judgment.

1. Chapter 64, Texas Election Code

Chapter 64 of the election code deals specifically with in-person voting procedures by a voter during an election. *See* TEX. ELEC. CODE ANN. §§ 64.001–.037 (West, Westlaw through 2017 R.S.). Generally, "only one person at a time may occupy a voting station." *See id.* § 64.002. However, certain exceptions to this general rule apply, including: (1) if a voter is physically unable to enter the polling place without personal assistance or likelihood of injuring the voter's health, on the voter's request, an election officer shall deliver a ballot to the voter at the polling place entrance or curb, *see id.* § 64.009; or (2) a voter is eligible to receive assistance in marking the ballot, as provided by the election code, if the voter cannot prepare the ballot because of: (a) a physical disability that renders the voter unable to write or see; or (b) an inability to read the language in which the ballot is written. *See id.* § 64.031.

On the voter's request, the voter may be assisted by any person selected by the voter other than the voter's employer, an agent of the voter's employer, or an officer or agent of a labor union to which the voter belongs. *Id.* § 64.032. A person who assists a voter under the election code may undertake the following conduct: (1) reading the ballot to the voter; (2) directing the voter to read the ballot; (3) marking the voter's ballot; or (4) directing the voter to mark the ballot. *Id.* § 64.0321. A person selected to assist a voter under the election code must take an oath prior to assisting. *See id.* § 64.034. Lastly, a person assisting a voter may commit a Class A misdemeanor of unlawful voter assistance, if the assistant knowingly: (1) provides assistance to a voter who is not eligible for assistance; (2) while assisting a voter prepares the voter's ballot in a way other than the way the voter directs or without direction from the voter; (3) while assisting a voter suggests by word, sign, or gesture how the voter should vote; or (4) provides assistance to a voter who has not requested assistance or selected the person to assist the voter. *Id.* § 64.036. If assistance is provided to a voter who is not eligible for assistance, the voter's ballot may not be counted. *Id.* § 64.037.

2. Chapter 86, Texas Election Code

Chapter 86 of the election code deals specifically with mail-in voting procedures. *See id.* §§ 86.001–.014 (West, Westlaw through 2017 R.S.). Generally, a voter may apply for a mail-in ballot through the early voting clerk, and if the voter meets the qualifications to vote by mail, the early voting clerk shall provide the voter with an official ballot. *See id.* § 86.001. When a voter receives a mail-in ballot, the voter may mark the ballot at any time after receiving it, and after marking the ballot, the voter must place the ballot in the official ballot envelope and then seal the ballot envelope, place the ballot envelope in the official

carrier envelope and then seal the carrier envelope, and sign the certificate on the carrier envelope. *See id.* § 86.005. A person other than the voter who deposits the carrier envelope in the mail or with a common or contract carrier must provide the person's signature, printed name, and residence address on the reverse side of the envelope. *Id.* § 86.0051. A voter who casts a ballot by mail who would be eligible under section 64.031 to receive assistance at a polling place may select a person as provided by section 64.032(c) to assist the voter in preparing the ballot. *Id.* § 86.010(a). Assistance rendered is limited to the conduct authorized by the election code. *Id.* § 86.010(b). If a voter is assisted in violation of sections 86.010(a) or (b), the voter's ballot may not be counted. *Id.* § 86.010(d).

3. Analysis

a. In-Person Votes

With regard to in-person votes, the record reveals the following: ten voters who voted in-person in the runoff election testified at trial. Of those ten, each voter can be divided into the following categories: (1) one voter (Gloria Garza) qualified for assistance under election code section 64.031 because she had physical problems with her hands, but she did not disclose for whom she voted; (2) five voters (Carlos Garza, Guadalupe Rincon, Angie Cavazos, Miguel Razo, and Alondra Avila) did not qualify for assistance under section 64.031 because they did not experience language or physical limitations to vote and voted for Treviño; (3) two voters (Daisy Valencia and Oscar Rios) did not qualify for assistance under section 64.031 because they did not experience language or physical limitations to vote, but they did not specifically disclose for whom they voted; and (4) two voters (Karla Razo and Miguel Razo) did not qualify for assistance under section 64.031

because they did not experience language or physical limitations to vote, but could not recall for whom they voted, despite following Gutierrez's recommendations.

From a legal sufficiency standpoint, after looking at all the evidence, in the light most favorable to the judgment, the trial court could reasonably have formed a firm belief or conviction that nine in-person votes made in the runoff election violated the provisions set forth in chapter 64 of the election code, and of those nine, five voted for Treviño. Furthermore, in light of the entire record, the disputed evidence that the trial court could not have credited in favor of its finding is not so significant that it could not reasonably have formed a firm belief or conviction, to render its finding factually insufficient.

b. Mail-in Votes

The record reveals that Revesz and Arjona assisted in the filling out, collection and submission of slightly more than 100 mail-in ballots. Revesz testified that she served as a campaign volunteer for Treviño and assisted with the collection and filing of 45 mail-in ballots over "two days." When asked by Perez's counsel whether all 45 mail-in voters that she assisted cast a ballot for Treviño, Revesz testified that eight handed her a sealed ballot, so she did not know from whom those particular voters voted. However, over Treviño's counsel's objection, Revesz testified that the remaining 37 mail-in ballots for which she assisted cast their votes for a slate of candidates which included Treviño. Furthermore, the undisputed record shows that Arjona assisted sixty voters cast mail-in ballots.

Perez argues that Revesz's testimony that she collected her mail-in ballots over the course of two days and did not mail any of the mail-in ballots to the voting clerk until after she collected them all was legally and factually sufficient and clear and convincing

evidence to support the trial court's finding that violations of chapter 86 of the election code took place in this runoff election and should not be counted. We agree. Section 86.006(e) of the election code states in relevant part that "carrier envelopes may not be collected and stored at another location for subsequent delivery to the early voting clerk." TEX. ELEC. CODE ANN. § 86.006(e). Additionally, the same section states that any ballot returned in violation of any provision in section 86.006 may not be counted. *Id.* § 86.006(h). The record supports the trial court's clear and convincing finding that an undetermined amount of the mail-in ballots collected by Revesz violated section 86.006(e) and should not have been counted because once she collected them, she did not mail them immediately, but rather kept them in her possession at least over night until she finished collecting the remainder of the mail-in ballots.

Perez further argues, however, that the trial court abused its discretion by failing to find by clear and convincing evidence that at least 37 mail-in ballots assisted by Revesz should be subtracted from Treviño's vote count, thus bringing his total vote count below Perez's. To this extent, we disagree. While Revesz testified that the 37 voters of which she assisted voted for Treviño, or "the slate" of candidates of which Treviño was a member, none of the voters who voted by mail and were assisted by Revesz testified. Accordingly, after looking at all the evidence, in the light most favorable to the judgment, the trial court could reasonably have formed a firm belief or conviction that despite a finding that violations took place under section 86.006(e) for the mail-in ballots assisted by Revesz, it could not form a firm belief or conviction how many voters voted for Treviño. Furthermore, in light of the entire record, the disputed evidence that the

trial court could not have credited in favor of its finding is not so significant that it could not reasonably have formed a firm belief or conviction to render its finding factually insufficient.

With regard to the 65 mail-in ballots in which Arjona assisted, two of those voters testified. The first was Teresa Zepeda. Zepeda stated that Arjona assisted in mailing her ballot, and that she voted for Treviño without assistance. Zepeda testified that "Nobody forced [her] to vote for any—I do it myself." The next voter to testify was Ventura Molano. Molano testified that Arjona assisted him in filling out his mail-in ballot uninvited. Molano testified that Arjona told him to vote for Treviño and he did. After looking at all the evidence, in the light most favorable to the judgment, the trial court could reasonably have formed a firm belief or conviction that Arjona violated sections 64.036 and 86.010 of the election code, by suggesting through her words how Molano should vote. Further, in light of the entire record, the disputed evidence that the trial court could not have credited in favor of its finding is not so significant that it could not reasonably have formed a firm belief or conviction to render its finding that sections 64.036 and 86.010 of the election code regarding Molano's vote factually insufficient.

c. Summary

In summary, we conclude that the trial court did not abuse its discretion in finding by clear and convincing evidence that violations of chapters 64 and 86 took place in this runoff election and those ballots should not be counted. Furthermore, we conclude that the trial court acted within its discretion in finding by clear and convincing evidence that specifically, six votes should be deducted from Treviño's total vote count because clear and convincing evidence showed that those votes counted in Treviño's favor. The deducted voters include: Carlos Garza, Guadalupe Rincon, Angie Cavazos, Miguel Razo,

Alondra Avila, and Ventura Molano. After deducting these six votes, the trial court acted within its discretion by ordering a new trial because the outcome of this election was "materially affected" due to irregularities in the conduct of this election, rendering it impossible to determine the majority of the voters' true will. *See McCurry*, 259 S.W.3d at 373 (citations omitted). We overrule Perez's sole issue on appeal.

IV. Conclusion

The trial court ordered a new runoff election between Perez and Treviño for Place 5 on the Hidalgo City Commission to be held "on or before March 6, 2017." Because this date has since passed, we reverse the trial court's judgment solely as to the date of when to hold the new election and remand for the trial court to select a new date. *See* TEX. ELEC. CODE ANN. § 231.007 (West, Westlaw through 2017 R.S.). We affirm the remainder of the judgment.

GINA M. BENAVIDES,
Justice

Delivered and filed the
22nd day of June, 2017.