No. _____

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

ABEL DIAZ RODRIGUEZ,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent

On Petition for Discretionary Review from the 1ST Court of Appeals in Nos. 01-17-00906-CR, No. 01-17-00907-CR and No. 01-17-00908-CR affirming the conviction in Cause Nos. 15-CR-3058, 15-CR-3059 and 15-CR-3060 From the Galveston County 212th Judicial District Court

PETITION FOR DISCRETIONARY REVIEW

IDENTITY OF THE PARTIES AND COUNSEL

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STATEMENT OF THE CASE

This petition arises on direct criminal appeal of Petitioner's judgment and conviction and sentence for sexual assault of a child, in violation of Tex. Penal Code §22.011. Appellant was indicted in cause numbers 15-CR-3058, 15-CR-3059, and 15-CR-3060 with the felony offense of sexual assault of a child. 1 CR058 8[1], 1 CR059 7, 1 CR060 7. The cases were consolidated for trial. 1 CR058 48, 1 CR059 38 1 CR 060 37. At trial, the jury charge included the elements of the offense of sexual assault of a child, but also required, in both the abstract and application paragraphs, language tracking the prohibitions contained in §25.01 of the Texas Penal Code. 1 CR058 128-35; 1 CR059 95-102; 1 CR060 96-103; *see* Tex. Penal Code §22.011(f). The inclusion of the language found in §25.01 of the Penal Code elevated the punishment range for the charged offenses from a second-degree felony to a first-degree felony. *see* Tex. Penal Code §22.011(f). On October 26, 2017, Appellant was convicted of all three counts. 1 CR058 149, 1 CR059 115, 1 CR060 117. That same day, the jury assessed his punishment at Life in the Institutional Division of the Texas Department of Criminal Justice in each case. Id. The trial court granted the State's motion to cumulate all three sentences. 7 RR 6.

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[1] The Clerk's record in cause number 15-CR-3058 will be cited to herein as 1 CR058 followed by the applicable page reference. The Clerk's record in cause number 15-CR-3059 will be cited to herein as 1 CR059 followed by the applicable page reference. The Clerk's record in cause number 15-CR-3060 will be cited to herein as 1 CR060 followed by the applicable page reference.

STATEMENT OF PROCEDURAL HISTORY

On appeal, Petitioner challenged the sufficiency of the evidence to elevate his punishment from a second-degree felony to a first-degree felony under Section 22.011(f) of the Texas Penal Code. The First Court of Appeals overruled his complaint and affirmed the convictions in cause numbers 01-17-00906-CR, 01-17-00907-CR, and 01-17-00907-CR in a published opinion issued on December 4, 2018. *see* Abel Diaz Rodriguez v. The State of Texas, 2018 Tex. App. LEXIS 9905 (Tex. App.—Houston [1st Dist.] December 4, 2018) (Appendix).

STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests oral argument in this case as it is critical to a proper and final resolution of the issue in this case.

GROUND FOR REVIEW

> Did the court of appeals err in concluding that the enhanced penalty provision for sexual assault under Section 22.011(f) does not require proof of bigamous conduct and can be triggered solely by evidence that Petitioner was married at the time the offense was committed?

ARGUMENT

Introduction

The jury found Petitioner guilty of sexual assault of a child as proscribed by §22.011(f) of the Texas Penal Code. The evidence at trial showed Petitioner engaged in prohibited sexual contact with his biological minor child. Rodriguez, Tex. App. LEXIS 9905 at *2.

Without more, sexual assault of a child is a second-degree felony. Tex. Penal Code §22.011(f). However, invocation of the prohibition contained in Section 22.011(f) elevates the punishment range for the offense from a second-degree to a first-degree felony. Id. In this case, "the jury charge included the elements of the offense of sexual assault of a child, but also required, in both the abstract and application paragraphs, that the jury find that the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01 of the Penal Code." Rodriguez, Tex. App. LEXIS 9905 at *3 (internal quotations omitted). The State sought to satisfy the portion of the jury charge that tracked the language from Section 25.01 of the Penal Code with evidence of Petitioner's common law marriage to Ericka Rodriguez. *see* State's Ex. 13; 4 RR 178. There was no proof of bigamy.

On appeal, in a sole issue, Petitioner challenged the sufficiency of the

evidence to elevate his punishment from a second-degree felony to a first-degree felony under Section 22.011(f) of the Penal Code. App. Brief at *10. Specifically, Petitioner contended the evidence was insufficient because the State failed to present proof that Petitioner "*actually* engaged in bigamy." Rodriguez, *4.

The court of appeals below rejected Petitioner's claim and said "the State is not required to introduce evidence to "prove the accused engaged in [bigamy]," as alleged by" Petitioner. Rodriguez, Tex. App. LEXIS 9905 at *13. Instead, the court of appeals below held "the State was not required to show actual bigamy, but merely facts showing that the bigamy statute *would* prohibit [Petitioner] from marrying his victim, which the State proved by showing that that [*sic.*] [Petitioner] was already married." Id. at *15.

I. The courts of appeals are divided on whether Section 22.011(f) requires proof of bigamous conduct to invoke the enhanced penalty for sexual assault.

In a published opinion, the court of appeals below found that the enhanced penalty provision under Section 22.011(f) does not require proof of bigamous conduct. Rodriguez, Tex. App. LEXIS 9905 at *13. It premised its holding on a footnote in the Arteaga opinion. Id. at *14; Arteaga v. State, 521 S.W.3d 329, fn.9 (Tex. Crim. App. 2017). The footnote in Arteaga stated the following:

> When we discuss "facts that *would* constitute bigamy," we do not mean that the State has to prove that the defendant committed the offenses of sexual assault and bigamy. What we mean is that, to elevate second-degree felony sexual assault to first-degree felony assault under Section 22.011(f), the

> State must prove that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, he *would* be guilty of bigamy.

Id. at 335 n.9. However, the *stated* holding in Arteaga held that "[t]he legislature intended for the State to prove facts constituting bigamy whenever it alleges that the defendant committed sexual assault, *and* the State invokes Section 22.011(f)." Id. at 336. Various courts of appeals have found the substance of what was stated in footnote 9 to be irreconcilable with the stated holding in Arteaga. *see* Rodriguez v. State, Tex. App. LEXIS 9905 at *13-14; Senn v. State, 2018 Tex. App. LEXIS 8722, *11-12 (Tex. App.—Fort Worth, October 25, 2018); Lopez v. State, 2018 Tex. App. LEXIS 9519, *4-10 (Tex. App.—Amarillo, November 20, 2018, unpub.). In its analysis in this case, the lower court sought to "harmonize footnote 9 and the text of the [Arteaga] opinion by considering footnote 9 as a clarification of the standard that must be met by the State to apply the enhancement." Rodriguez, Tex. App. LEXIS 9905 at *14. Unfortunately, the court's purported harmonization results in an interpretation that is directly at odds with the holdings of other Texas courts of appeals. *see* Arteaga v. State, 521 S.W.3d 329, 336 (Tex. Crim. App. 2017) ("We...conclude that the State is required to prove facts constituting bigamy..."); Senn v. State, 2018 Tex. App. LEXIS 8722, *12 (Tex. App.—Fort Worth, October 25, 2018) ("...we decline the State's request on rehearing urging us to apply the "would constitute bigamy" language in our

sufficiency analysis."); Lopez v. State, 2018 Tex. App. LEXIS 9519, *9 (Tex. App.—Amarillo, November 20, 2018, unpub.) ("Section 22.011(f) obligates the State to prove facts constituting bigamy, as that term appears in §25.01. Merely proving that the accused was married when the assault happened is not enough."); Torres v. State, 2017 Tex. App. LEXIS 6814, *13 (Tex. App.—Austin, July 21, 2017, unpub.) (following the holding in Arteaga); *see also* TEX. R. APP. P. 66.3(a) (when reviewing PDR, Court will consider "whether a court of appeals' decision conflicts with another court of appeals on the same issue"); TEX. R. APP. P. 66.3(e) ("whether the justices of a court of appeals have disagreed on a material question of law necessary to the court's decision.").

In Senn, the Fort Worth court of appeals issued a published opinion that stands in direct opposition to the holding reached in the lower court below. Senn v. State, 2018 Tex. App. LEXIS 8722 (Tex. App.—Fort Worth, October 25, 2018). Like the case at bar, Senn sexually assaulted his biological daughter while he was married. Id. at *2. Like Senn, the government sought to elevate his punishment from a second-degree felony to a first-degree felony using the language contained at Section 22.011(f) of the Penal Code. Id. Both the Senn court and the court in the case at bar confronted the exact same question: "whether the State was required to present some proof that [Petitioner] actually engaged in bigamy, or whether it was sufficient to show that he was married, so that he would have committed bigamy if

he attempted to marry the victim." Rodriguez, Tex. App. 9905 at *5; *see also* Senn, Tex. App. LEXIS 8722 at *5-6. In the case at bar, the court of appeals relied heavily on its own interpretation of footnote 9 in the Arteaga opinion and claimed it could harmonize the stated holding in that case with the language set forth in the footnote. Rodriguez, Tex. App. LEXIS 9905 at *13. In Senn, the court said that "[a]fter arduous study, we are unable to reconcile footnote 9's articulation of the evidence the State is required to produce to trigger enhancement under section 22.011(f)—facts that would constitute bigamy—with the Arteaga opinion's articulation of the evidence the State is required to produce to trigger enhancement under section 22.011(f)—facts constituting bigamy." Senn, Tex. App. LEXIS 8722 at *9. Clearly, the Texas courts of appeal to address this issue have failed to achieve a uniformity of interpretation.

In the case at bar, the lower court also based its holding on the Estes case. Estes v. State, 546 S.W.3d 691, 699 (Tex. Crim. App. 2018). Specifically, the lower court found support for its holding based on the fact that this Court "quoted from footnote 9 of Arteaga, not from the body of the case" in summarizing its holding in that case. Rodriguez, Tex. App. LEXIS 9905 at *8. By contrast, the Senn court properly noted that Estes was inapposite because the issue addressed in that case "was an as-applied challenge to section 22.011(f), not a challenge to the sufficiency of the evidence produced to support enhancement of a conviction under

section 22.011(f)." Senn, Tex. App. LEXIS 8722 at *6 n.5. In the case at bar the lower court claimed it could not "simply disregard footnote 9 of the Arteaga opinion" and that it was "not free to disregard pronouncements from the higher courts." Rodriguez, Tex. App. LEXIS 9905 at *13. Addressing the exact same issue raised in dissent, the court in Senn properly observed that the "court of criminal appeals has previously instructed that footnotes and concurring opinions are not precedential." Senn. Tex. App. LEXIS 8722 at *11 (*citing* Gonzales v. State, 435 S.W.3d 801, 813 n.11 (Tex. Crim. App. 2014); Young v. State, 826 S.W.2d 141, 144 n.5 (Tex. Crim. App. 1991); Unkart v. State, 400 S.W.3d 94, 101 (Tex. Crim. App. 2013); Schultz v. State, 923 S.W.2d 1, 3 n.2 (Tex. Crim. App. 1996). In other words, the Senn court correctly noted that the language contained in footnote 9 of this Court's opinion in Arteaga is not a "pronouncement" that rises above the actual stated holding in an opinion. Ultimately, the Senn court did not disregard footnote 9. Instead, that court correctly found that Arteaga's pronouncement that the State must prove facts constituting bigamy whenever is invokes section 22.011(f) "does not mean that the State was required to indict Senn for bigamy, nor does it require the State to obtain a predicate finding of bigamy in order to trigger the enhancement under section 22.011(f)." Senn, Tex. App. LEXIS 8722 at *14. Rather, "the State was required to prove facts constituting a sexual assault and facts constituting one of the six bigamy prohibitions listed in section

25.01." Id.

In the case at bar, the lower court has incorrectly interpreted the enhancement provision contained in Section 22.011(f). Put simply, its holding ignores the forest for the trees. In this case the lower court clearly sought to resolve the apparent conflict it believed existed between the stated holding in Arteaga and footnote 9 of the same opinion. Rodriguez, Tex. App. LEXIS 9905 at * 5-8. Ultimately, what they were left with in this case is a holding that stands for the proposition that the State can trigger the enhancement contained in section 22.011(f) by proving that the accused was married at the time of the commission of the offense and that he, *theoretically*, could have committed an act prohibited by section 25.01. In reaching that holding, what the lower court ignored entirely are the extra-textual factors courts can consider when interpreting an ambiguous statute. *see* Arteaga, 521 S.W.3d at 334 (*citing* Boykin v. State, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). Specifically, the extra-textual factors reviewing courts can consider in interpreting an ambiguous statute "include (1) the object sought to be attained by the legislature; (2) the circumstances under which the statute was enacted; (3) the legislative history; (4) the common law or former statutory provisions, including laws on the same or similar subjects; (5) the consequences of a particular construction; (6) the administrative construction of the statute; and (7) the title or caption, preamble, and any emergency provision."

Id. Of particular note in the Arteaga opinion was its reference to and reliance on the legislative history of the "house bill authored by Representative Hilderbran" that contained the substance of the amendment to section 22.011(f) regarding bigamy. Arteaga, 521 S.W.3d at 337. Representative Hilderbran "testified that his bill was directed at bigamy, polygamy, and the problems associated with those practices." Id. In the case at bar, the lower court's "harmonization" of Arteaga's holding with footnote 9 and the resulting opinion does not focus its aim on "bigamy, polygamy, and the problems associated with those practices." Instead, the lower court's interpretation results in a punishment enhancement whose aim is directed at married persons who would become bigamists, or polygamists, *theoretically*. Indeed, the very first line of the opinion in the Estes case—relied upon by the lower court in this case—says, "[i]n enacting the current form of Penal Code Section 22.011(f), the Legislature apparently wished to provide higher penalties for *polygamists* who sexually assault their purported spouses." Estes v. State, 546 S.W.3d 691, 694 (Tex. Crim. App. 2018) (internal quotations omitted) (emphasis added). The clear legislative intent of the bill that lead to the enhancement language in section 22.011(f) was aimed at those already identified as bigamists or polygamists, not those who merely had the opportunity to become that, theoretically.

The opinion of the First Court of Appeals conflicts in principle with

established precedent of the Texas Court of Criminal Appeals. Texas courts of appeals have issued published opinions whose holdings are in direct and irreconcilable conflict. Justices within various Texas appellate courts have reached opposite conclusions in their interpretations of the holding in Arteaga. This Honorable Court should grant Petitioner's petition for discretionary review, vacate the sentences assessed in all three sexual assault cases, reform the judgments in all three sexual assault counts to second-degree felonies, and remand them to the trial court for a new punishment hearing. Alternatively, this Honorable Court should grant the petition on the issue stated herein and reverse the decision of the court of appeals below.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Court will grant his petition for discretionary review, vacate the sentences, reform the judgment on all three sexual assault counts to second-degree felonies, and remand for a new punishment hearing. Alternatively, he requests that the Court vacate the judgment of the court of appeals, and remand to that court for reconsideration in light of the Court's decision in this case. Finally, he requests that the Court grant Petitioner any such other and further relief to which it finds him justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I served a copy of this document on Rebecca Klaren, assistant district attorney for Galveston County, 600 59th Street, Galveston, Texas 77551; and on Lisa McMinn, State Prosecuting Attorney, P.O. Box 12405, Capitol Station, Austin, Texas 78711, by United States Mail, postage prepaid, on January 3, 2019.

RICK OLIVER

CERTIFICATE OF COMPLIANCE

The word count of the countable portions of this computer-generated document specified by Rule of Appellate Procedure 9.4(i), as shown by the representation provided by the word-processing program that was used to create the document, is 2,236 words. This document complies with the typeface requirements of Rule 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in 12-point typeface.

RICK OLIVER

APPENDIX A

Opinion of the First Court of Appeals

Opinion issued December 4, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00906-CR
NO. 01-17-00907-CR
NO. 01-17-00908-CR

ABEL DIAZ RODRIGUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Case Nos. 15CR3058, 15CR3059, 15CR3060

O P I N I O N

A jury convicted appellant, Abel Diaz Rodriguez, of three charges of sexual assault of a child, a person he was "prohibited from marrying,"[1] and assessed punishment at confinement for life and a $10,000 fine on each charge, which the trial court ordered to run consecutively. In his sole issue on appeal, appellant contends that "[t]he evidence is insufficient to trigger the statutory enhancement provision under [Penal Code section 22.011(f)] because there was no evidence that Appellant was engaged in a bigamous relationship admitted at trial." We affirm.

BACKGROUND

There is no need to detail the facts of this case. Suffice it to say that, beginning when his daughter, E.R., was fourteen years old, appellant compelled her to "agree" to trade sexual favors in lieu of physical punishment whenever he perceived that she had "messed up." This "agreement" led to appellant performing oral sex on E.R. about 10 times, E.R. performing oral sex on appellant about 15 to 20 times, and sexual intercourse between the two approximately 5 or 6 times. At the time of these offenses, appellant was married to Erika, E.R.'s mother.

At trial, the jury charge included the elements of the offense of sexual assault of a child, but also required, in both the abstract and application paragraphs, that the jury find that "the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from

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1 *See* TEX. PENAL CODE ANN. § 22.011(a)(2), (f).

living under the appearance of being married under Section 25.01 of the Texas Penal Code." The jury charge also included the following language from Section 25.01 of the Penal Code:

> (a) An individual commits an offense if:
> (1) he is legally married and he:
> (A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign county, under circumstances that would, but for the actor's prior marriage, constitute a marriage; or
> (B) lives with a person other than his spouse in this state under the appearance of being married; or
> (2) he knows that a married person other than his spouse is married and he:
> (A) purports to marry or does marry that person in this state, or any other state or foreign county, under circumstances that would, but for the person's prior marriage, constitute a marriage; or
> (B) lives with that person in this state under the appearance of being married.
> (b) For purposes of this section, "under the appearance of being married" means holding out that the parties are married with cohabitation and an intent to be married by either party.

See TEX. PENAL CODE ANN. § 25.01 [hereafter, "the bigamy statute"].

The jury found appellant guilty, necessarily concluding that appellant had not only committed the offense of sexual assault of a child, but that the victim, E.R., was "a person whom [he] was prohibited from marrying" under the bigamy statue.

This appeal followed.

SUFFICIENCY OF THE EVIDENCE

Appellant does not challenge the sufficiency of the evidence to prove the offense of sexual assault of a child. He contends only that the evidence is insufficient to elevate his punishment from a second-degree felony to a first-degree felony under Section 22.011(f) of the Penal Code, which provides:

> An offense under [the sexual assault statute] is a felony of the second degree, except that an offense under this section is a felony of the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under [the bigamy statute].

TEX. PENAL CODE ANN. § 22.011(f).

Sexual assault of a child is ordinarily a second-degree felony; however, it is a first-degree felony "if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under [the bigamy statute]." *See* TEX. PENAL CODE ANN. § 22.011(f), *Torres v. State*, No. 01-14-00712-CR, 2017 WL 3124238, at *3 (Tex. App.—Austin July 21, 2017, no pet.).

Appellant contends that the evidence is insufficient because the State had to present proof that appellant "*actually* engaged in [bigamy]," while the State argues that it only had to prove that appellant *would have* committed bigamy if he were to marry the victim.

Standard of Review

We review evidence sufficiency under the standard from *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). We examine all the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 318–19. "In some cases, however, a sufficiency-of-the-evidence issue turns on the meaning of the statute under which the defendant has been prosecuted." *Liverman v. State*, 470 S.W.3d 831, 835–36 (Tex. Crim. App. 2015) (citing *Moore v. State*, 371 S.W.3d 221, 227 (Tex. Crim. App. 2012)). "This is because an appellate court must determine what the evidence must show before that court can assess whether the evidence is sufficient to show it.") *Moore*, 371 S.W.3d at 227.

Here, we must decide whether the State was required to present some proof that appellant actually engaged in bigamy, or whether it was sufficient to show that he was married, so that he would have committed bigamy if he attempted to marry the victim.

Arteaga v. State and Estes v. State

Appellant bases his argument on the holding of the Texas Court of Criminal Appeals in *Arteaga v. State*, 521 S.W.3d 329 (Tex. Crim. App. 2017). In *Arteaga*,

the defendant was charged with committing multiple counts of the offense of sexual assault of a child whom he was "prohibited from marrying," specifically his biological daughter. *Id.* at 331. In the abstract portion of the jury charge, the trial court included the language of Section 6.201 of the Family Code, the consanguinity statute, which specifies that a marriage is "void" if, among other circumstances, one party to the marriage is related to the other as a "descendant, by blood or adoption." *Id.* at 332. The abstract portion of the charge included no reference to the bigamy statute, nor did the application paragraph, which instructed the jury that it could convict the defendant "only under the circumstances alleged in the indictment (i.e., that the defendant was 'prohibited from marrying' his daughter)." *Id.* The question of whether Arteaga was prohibited from marrying his daughter was submitted to the jury as a special issue, which the jury answered in the affirmative for each count of the indictment. *Id.* Based on that finding, the jury convicted the defendant of multiple first-degree-felony offenses, and the trial court sentenced the defendant accordingly. *Id.* The defendant appealed, arguing that section 22.011(f) referenced only the bigamy statute, not the prohibition against consanguinity, and that the State could prove that he was "prohibited from marrying his daughter," only under the bigamy statute, not the consanguinity statute. *Id.* The Court of Criminal Appeals agreed with the defendant, holding that "the State is required to prove facts constituting bigamy under all three provisions

of 22.011(f), that is, when the defendant was prohibited from (1) marrying the victim or (2) claiming to marry the victim, and when the defendant was prohibited from (3) living with the victim under the appearance of being married." *Id.* at 335. In a footnote immediately following the holding, the court clarified, stating,

> When we discuss "facts that *would* constitute bigamy," we do not mean that the State has to prove that the defendant committed the offenses of sexual assault and bigamy. What we mean is that, to elevate second-degree felony sexual assault to first-degree felony sexual assault under Section 22.011(f), the State must prove that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he *would* be guilty of bigamy.

Id. at 335 n.9.

The court concluded that the bigamy statute was "law applicable to the case" and should have been included in the charge. *Id.* at 337. The court further concluded that the charge error caused egregious harm because the State improperly conveyed to the jury that it could use the consanguinity statute to determine whether the defendant was "prohibited from marrying" his daughter under section 22.011(f). In so holding, the court noted that the State could not prove that the defendant was prohibited from marrying his daughter under the bigamy statute because "Arteaga was not married during the period of abuse, and Doe could not have been married as a matter of law." *Id.* at 339.

In a concurring opinion, Judge Yeary stated, "I cannot agree that this provision ever requires the State to 'prove facts that would constitute bigamy.'"

He then noted the apparent discrepancy between the court's holding and the clarification in footnote 9. *Id.* at 341. Judge Yeary concluded by stating:

> I am convinced that Section 22.011(f) requires the State merely to prove that, if the actor were to actually marry or purport to marry his victim, or if he were to live with his victim under the appearance of being married, then he would commit the offense of bigamy under the provisions of Section 25.01. On its face, the provision plainly requires no more. Though to my mind some of the language in the text of the Court's opinion remains ambiguous, the Court's clarification in footnote 9 satisfies me that the Court's understanding is the same as my own.
>
> *Id.* at 343.

In *Estes v. State*, 546 S.W.3d 691, 699 (Tex. Crim. App. 2018), the Court of Criminal Appeals reiterated its *Arteaga* holding, stating, "We have interpreted Section 22.011(f) as essentially requiring proof 'that if the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he would be guilty of bigamy.'" *Id.* (citing *Arteaga*, 521 S.W.3d 335 n.9). In summarizing its holding, the court quoted from footnote 9 of *Arteaga*, not from the body of the case. *See id.* The court then rejected Estes's argument that section 22.011(f) was unconstitutional as applied to him because it punished married child sex offenders more harshly than non-married offenders. *Id.* at 694, 699–702. The court concluded that the legislature had a rational interest in the punishment scheme established in section 22.011(f), "specifically as applied to cases in which a

married adult sexually abuses a child." *Id.* at 694. As *Estes* makes clear, it is the marital status of the abuser that triggers the application of section 22.011(f). "The particular facts and circumstances that inform—and limit—our ruling [that section 22.011(f) is not unconstitutional as applied] are that Estes is a married man convicted of sexually assaulting a child." *Id.* at 706.

Senn v. State and Torres v. State

Two intermediate appellate courts have since applied the holding in *Arteaga* in conducting legal sufficiency reviews.

In *Senn v. State*, the Fort Worth Court of Appeals held, like the Corpus Christi Court of Appeals in *Arteaga*, that "it is clear that the phrase "prohibited from marrying" is not tied to the phrase "under [the bigamy statute]." 51 S.W.3d 172, 177 (Tex. App.—Fort Worth 2018, pet. granted). "Because we have held that proof of bigamy was not required in this case and because we have held that section 22.011(f) is not vague as applied to Senn, the trial court was not required to include an instruction on bigamy under section 25.01, nor was it required to instruct the jury that it could find in the affirmative on the special issue only if it found that Senn was currently married to another." *Id.* at 183. The court concluded that because the victim was the defendant's biological daughter, there was evidence to support the finding that he was prohibited from marrying her without regard to the bigamy statute. *Id.* at 178.

When the Court of Criminal Appeals issued its opinion in *Arteaga*, it vacated the judgment in the *Senn* case and remanded it to the Fort Worth Court of Appeals because that court "did not have the benefit of [its] opinion in *Arteaga*." *Senn v. State*, No. PD-0145-17, 2017 WL 5622955 (Tex. Crim. App. Nov. 22, 2017) (not designated for publication).

On remand, the Fort Worth Court of Appeals considered the exact issue presented in this case: whether the State has to prove facts constituting bigamy or merely present facts showing that *if* the defendant were to marry or claim to marry his victim or to live with the victim under the appearance of being married, it *would* be bigamy. *See Senn v. State*, No. 02-15-00201-CR, 2018 WL 5291889 (Tex. App.—Fort Worth Oct. 25, 2018, no pet. h.).

The court noted that the court of criminal appeals has previously held that footnotes and concurring opinions are not precedential, *id.* at *5, and stated that "[a]fter arduous study, we are unable to reconcile footnote 9's articulation of the evidence the State is required to produce to trigger enhancement under section 22.011(f)—facts that would constitute bigamy—with the *Arteaga* opinion's articulation of the evidence the State is required to produce to trigger enhancement under section 22.011(f)—facts constituting bigamy." *Id.* at *3. The court decided that footnote 9 of *Arteaga* did not set the standard required for enhancement under section 22.011(f), holding that "the State was required to prove facts constituting a

sexual assault and facts constituting one of the six bigamy prohibitions listed in section 25.01. *Id.* at *5. Even though the State had put on evidence that Senn was married and it would be bigamy for him to marry someone else, the court held that the evidence was nonetheless insufficient to enhance his punishment because "[t]here was no evidence that [he] took, attempted, or intended to take any action involving marrying or claiming to marry [his victim] or living with [her] under the appearance of being married." *Id.* at *5.

Justice Gabriel dissented, noting the tension between the *Arteaga* holding and its clarification of that holding in footnote 9. *Id.* at *7. He stated:

> Because I believe the court of criminal appeals has twice stated that the State need only introduce evidence showing that the defendant would have been guilty of bigamy if he were to marry or claim to marry his victim, I would initially conclude that the State met its burden of proof regarding the enhancement allegation[.]

Id. In so concluding, Justice Gabriel noted (1) Judge Yeary's concurrence in *Arteaga* and the fact that the majority had not responded to his stated understanding of the holding in that case, and (2) that, in *Estes*, which was decided a year after *Arteaga*, the court of criminal appeals restated its *Arteaga* holding by referring to footnote 9, not the text of the opinion. *Id.* at *8. Justice Gabriel concluded that, because the State "proffer[ed] undisputed evidence that Senn was married to someone else at the time he sexually assaulted his daughter, I would

preliminarily conclude that the sexual-assault enhancement was supported by the evidence[.]" *Id.*

Torres v. State, from the Austin Court of Appeals, has also addressed the issue of sufficiency of the evidence to support an enhancement under section 22.011(h). *See* No. 03-14-00712-CR, 2107 WL 3124238 (Tex. App.—Austin July 21, 2017, no pet.) (mem. op., not designated for publication). Torres was convicted of the sexual assault of his adult daughter. *See id.* at *1. Applying *Arteaga* to Torres's sufficiency-of-the-evidence challenge, the court concluded that "[i]n this case, as in *Arteaga*, there was no evidence presented tending to show that if Torres were to marry or claim to marry [his victim], or to live with [her] under the appearance of being married, that he would be guilty of the offense of bigamy." *Id.* at *5. In so holding, the court noted:

> To the contrary, there is evidence in the record tending to show that Torres was single at the time of the offense. In a recorded interview of Torres by Detective Schroeder that was admitted into evidence, Schroeder asked Torres if he was married. Torres answered, "No, divorced," and he later explained to Schroeder that his marriage had ended years earlier. As for [his victim] although there is no direct evidence in the record reflecting her marital status, her testimony that she lived with her aunt at the time of the offense could be considered circumstantial evidence that she was single at that time. At any rate, it was the State's burden to prove facts that would constitute the offense of bigamy, and the State failed to do so.

Id. at *5 n.48.

Analysis

Our review of *Arteaga* and its progeny leads us to conclude that, to elevate appellant's punishment from a second-degree felony to a first-degree felony by applying 22.011(f), the State is not required introduce evidence to "prove the accused *actually* engaged in [bigamy]," as alleged by appellant. To the contrary, the State need only introduce evidence that "if [appellant] were to marry his victim . . . , then he would be guilty of bigamy." *See Arteaga*, 521 S.W.3d at 335 n.9.

We do not agree that we can simply disregard footnote 9 of the *Arteaga* opinion. To read *Arteaga* as requiring the State to prove bigamy would effectively write footnote 9 out of the opinion. This we cannot do. As an intermediate appellate court, we are not free to disregard pronouncements from the higher courts. *See In re K.M.S.*, 91 S.W.3d 331, 331 (Tex. 2002) ("[C]ourts of appeals are not free to disregard pronouncements from this Court . . .").

Our conclusion that the correct standard to follow is that set forth in footnote 9 is supported by the fact that, one year after *Arteaga* was decided, the court of criminal appeals actually cited footnote 9, stating, "We have interpreted Section 22.011(f) as essentially requiring proof 'that the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he would be guilty of bigamy.'" *Estes*, 546 S.W.3d at 699. Because the court of criminal appeals has

twice stated this as its holding, we are not free to simply disregard it. Instead, we will harmonize footnote 9 and the text of the opinion by considering footnote 9 as a clarification of the standard that must be met by the State to apply the enhancement. As such, we agree with Judge Yeary that section 22.011(f) "requires the State merely to prove that, if the actor were to actually marry or purport to marry his victim, or if he were to live with his victim under the appearance of being married, then he would commit the offense of bigamy." *Arteaga*, 521 S.W.3d at 343.

The State was unable to meet that burden in *Arteaga* and *Torres* because the evidence showed that the defendants and their victims were not married. *See Arteaga*, 521 S.W.3d at 339; *Torres*, 2017 WL 3124238 at *5 n.48. However, in this case, the State presented evidence that appellant was married at the time of the offenses. Specifically, the State introduced a Declaration of Informal Marriage, signed by appellant and his wife, Erika, which was dated April 3, 2014, and stated that appellant and Erika agreed to be married, lived together as husband and wife, and represented to others that they were married beginning in September 2009. And, E.R. testified that appellant and Erika were still married at the time of trial.

Thus, in this case, the State met its burden of showing that the victim was a person appellant was prohibited by the bigamy statute from marrying because, at the time of the offenses, appellant was already married to someone else.

Because the State was not required to show actual bigamy, but merely facts showing that the bigamy statute *would* prohibit appellant from marrying his victim, which the State proved by showing that that appellant was already married, the evidence is legally sufficient to sentence appellant as a first-degree felon under section 22.011(f) of the Texas Penal Code.

We overrule appellant's sole issue on appeal.

CONCLUSION

We affirm the trial court's judgments.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Jennings and Bland.

Publish. Tex. R. App. P. 47.2(b).