IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1648-15

ROBERT MICHAEL ARTEAGA, JR., Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS BURNET COUNTY

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

I agree with the Court's ultimate construction of Section 22.011(f) of the Penal Code in all but one critical aspect. TEX. PENAL CODE § 22.011(f). Regardless of how we might resolve the ambiguity inherent in the lack of clarifying punctuation, I cannot agree that this provision ever requires the State to "prove facts that would constitute bigamy." The Court declares that "[t]he legislature intended for the State to prove facts constituting bigamy . . . [.]" Majority Opinion at 13. In my opinion, there is no sense in which Section 22.011(f) can

fairly be read to require the State to prove that the actor committed bigamy before the offense may be appropriately categorized as a first degree felony rather than a second degree felony. In a footnote, the Court explains that it means only to recognize a requirement that, in order to invoke Section 22.011(f), the State must prove that, *if* the actor were to actually marry or purport to marry his victim, or to live with his victim under the appearance of being married, then he would commit the offense of bigamy. Majority Opinion at 10 n.9. But the State need not "prove facts constituting bigamy" in the sense that it must prove the actor *actually* committed bigamy. In light of this explanation, I join the Court's opinion.

I.

Sexual assault is ordinarily a second degree felony. But the offense becomes a first degree felony under certain, very particular circumstances set out in Section 22.011(f) of the Penal Code:

> 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 Section 25.01.

This case draws our attention to an obvious question with respect to how much of Section 22.011(f) is tied to the bigamy statute (Section 25.01 of the Penal Code). The ambiguity arises from the lack of clarifying punctuation in the form of commas.

How much of what comes before the modifier "under Section 25.01" is actually modified by this phrase? We have encountered this kind of statutory ambiguity before, in both *Ludwig v. State*, 931 S.W.2d 239, 241-42 (Tex. Crim. App. 1996), and *Azeez v. State*,

248 S.W.3d 182, 188 (Tex. Crim. App. 2008). Recently, the Texas Supreme Court has encountered a similar ambiguity. *Sullivan v. Abraham*, 488 S.W.3d 294, 297-99 (Tex. 2016). In each of these cases, the lack of a clarifying comma rendered the provision reasonably susceptible to more than one construction.

As it was enacted, the relevant portion of Section 22.011(f) does not contain a single comma. Breaking it down, it is structured as follows:

- Sexual assault 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 Section 25.01 of the Penal Code (the bigamy statute).

Does "under Section 25.01" modify only the immediately antecedent clause in the sentence: "with whom the actor was prohibited from living under the appearance of being married"? Or does it also modify the clause before that: "whom the actor was prohibited from marrying or purporting to marry"? The court of appeals construed it to modify only the immediately antecedent clause. Reasoning from that construction, the court of appeals concluded that Appellant was subject to conviction for a first degree felony because he had sexually assaulted his daughter, whom he could not validly marry for reasons having nothing to do

with the bigamy statute. *Arteaga v. State*, 511 S.W.3d 675, 689-91 (Tex. App.—Corpus Christi 2015).

The court of appeals would undoubtedly be correct had the Legislature punctuated Section 22.011(f) in the following manner:

> 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 Section 25.01.

In this hypothetical version, the comma between the two antecedent clauses, and the lack of a comma immediately preceding the modifier, indicate that the modifier should apply only to the immediately preceding antecedent clause, not to both. *See Ludwig v. State*, 931 S.W.3d at 242 (quoting 82 C.J.S. Statutes § 334 (1953), at 672) ("Generally, a comma should precede a conjunction connecting two coordinate clauses or phrases in a statute in order to prevent the following qualifying phrases from modifying the clause preceding the conjunction."); *Azeez*, 248 S.W.3d at 188 (quoting *Ludwig*). By that understanding of the statute, the actor need not be prohibited from marrying or purporting to marry his victim exclusively on account of the bigamy statute. He might be subject to an enhanced conviction because he cannot validly marry his victim for some *other* reason—for instance, as in this case, the fact that she is his daughter.

But Section 22.011(f) could have been punctuated in such a manner as to make the court of appeals construction in this case clearly mistaken, thus:

> 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 Section 25.01.

Or, for that matter, it could have been punctuated like this (although here it might be argued that the first comma is superfluous):

> 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 Section 25.01.

In either event, the comma immediately preceding the modifier makes it clear that it should apply to both antecedent clauses. *See Ludwig*, 931 S.W.2d at 241 (again quoting 82 C.J.S., *supra*, at 672) ("Generally, the presence of a comma separating a modifying clause in a statute from the clause immediately preceding is an indication that the modifying clause was intended to modify all the preceding clauses and not only the last antecedent one."); *Azeez*, 248 S.W.3d at 188 (quoting *Ludwig*). Had the provision been punctuated in this way, the court of appeals could not reasonably have construed it as it did.

Unfortunately, there are no clarifying commas in Section 22.011(f). Consequently, we are left to divine the meaning of the statute in their absence.

In *Sullivan*, the Texas Supreme Court identified another convention of statutory construction that has an analogical bearing on this case: the "series-qualifier" canon. 488 S.W.3d at 297 (citing Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 147 (2012)). According to this convention, "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a

prepositive or postpositive modifier normally applies to the entire series." *Id*. This canon is meant to aide in the interpretation of individual phrases or clauses. For example, in the phrase "intoxicating bitters or beverages," the word "intoxicating" would ordinarily be understood to modify both "bitters" and "beverages." Scalia & Garner, *supra*, at 148. Analogizing this concept to apply not to serial words in a clause, but to serial clauses in a sentence, it is reasonable to ask whether there is a "straightforward, parallel" structure to the sentence such that it seems likely the drafters intended the ultimate modifying clause to apply to all preceding clauses in the series.

Such a parallel structure does seem to exist in Section 22.011(f). Both antecedent clauses refer to particular conduct that is "prohibited"—a word that does not actually appear anywhere in the Section 25.01, the bigamy statute.[1] They are parallel to each other in that sense. Moreover, in describing these discrete prohibitions, each antecedent clause expressly borrows language from specific provisions of Section 25.01(a).[2] The first antecedent clause

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[1] Neither does the word "prohibit" appear in Section 6.201 of the Family Code, the provision that declares certain marriages to be "void." TEX. FAM. CODE § 6.201.

[2] Section 25.01(a) of the Penal Code reads, in relevant part:

(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 . . . under circumstances that would, but for the actor's prior marriage, constitute a marriage; or
>
> (B) lives with a person other than his spouse . . . under the appearance

refers to the prohibition against "marrying or purporting to marry" that is contained in Subsections 25.01(a)(1)(A) and 25.01(a)(2)(A). The second antecedent clause references the prohibition against "living under the appearance of being married," contained in Subsections 25.01(a)(1)(B) and 25.01(a)(2)(B). Thus, the parallel structure of Section 22.011(f)'s two antecedent clauses mirrors the parallel structure of Subsections 25.01(a)(1) and 25.01(a)(2). This strongly suggests that the prohibition in each of the antecedent clauses was intended to be tethered to the specific parallel prohibitions enumerated in Section 25.01(a). For this reason, I agree with the Court's construction of Section 22.011(f)—at least to the extent that it holds that the court of appeals erred to believe that the statute authorizes an enhancement for sexual assault on a showing that the actor could not marry his victim on account of provisions other than the bigamy statute.

This understanding of Section 22.011(f) is consistent with our previous observation, in *State v. Rosseau*, 396 S.W.3d 550, 558 (Tex. Crim. App. 2013), that "[t]he 'under Section 25.01' portion of the statute suggests that the provision applies when both sexual assault and

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> 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 . . . under circumstances that would, but for the person's prior marriage, constitute a marriage; or
>
> (B) lives with that person . . . under the appearance of being married.

TEX. PEN. CODE § 25.01(a).

bigamous conduct are alleged." My only quibble with *Rosseau* is that it mistakenly assumed that the reference in Section 22.011(f) to the bigamy statute means that the enhancement can only apply to "bigamists who sexually assault their purported spouses." *Id*.

II.

I believe that *Rosseau* was mistaken to the extent it suggested that Section 22.011(f) means that the State may only enhance an offender's conviction to a first degree felony if it proves that he actually committed the offense of bigamy. I am convinced that Section 22.011(f) requires the State merely to prove that, *if* the actor were to actually to 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.

With these observations, I join the Court's opinion.

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