

Opinion issued October 17, 2008



In The
Court of Appeals
For The
First District of Texas

NO. 01-06-00750-CR

GABRIEL LEMELL PRUDHOLM, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 1045916**

DISSENTING OPINION

I respectfully dissent from reversal of the judgment against appellant Gabriel Lemell Prudholm in his sexual-assault-of-a-child case.¹ *See* TEX. PENAL CODE ANN. § 22.011(a)(2)(C), (c)(1) (Vernon Supp. 2008) (sexual assault of a child). The jury found the enhancement paragraph in the charge, based on appellant’s previous felony conviction in California for sexual battery,² to be true for purposes of assessing appellant’s punishment for sexual assault of a child under the 2003 version of Texas’s habitual sexual offender statute, section 12.42(c) of the Texas Penal Code,³ and it accordingly assessed appellant’s punishment at life in prison. The majority, however, reverses appellant’s life sentence for sexual assault of a child on the ground that the California statute under which appellant was previously convicted was not

¹ Trial court case number 1045916; appellate court case number 01-06-00750-CR. I join in the Court’s opinion and judgment in the companion case, 01-06-00749-CR.

² CAL. PENAL CODE § 243.4(a) (West 2008)

³ Act of May 30, 2003, 78th Leg., R.S., ch. 1005, § 2, sec. 12.42(c)(2)(A)(i), (B)(v), 2003 Tex. Gen. Laws 2944, 2944–45, *amended by* Act of May 15, 2007, 80th Leg., R.S., ch. 340, § 3, 2007 Tex. Gen. Laws 627, 628 and Act of May 18, 2007, 80th Leg., R.S., ch. 593, § 1.15, 2007 Tex. Gen. Laws 1120, 1126 (hereinafter referred to as 2003 TEX. PENAL CODE ANN.) (current version at TEX. PENAL CODE ANN. § 12.42(c)(2) (Vernon Supp. 2008) (sexual assault of child; penalty with previous conviction of offense under laws of another state containing elements that are substantially similar to elements of offense listed in § 12.42(c)(2)(B)(i), (ii), (iii), or (iv)).

substantially similar to the Texas law under which appellant was convicted, as required for enhancement of punishment in a sexual assault case by an out-of-state conviction. I disagree and would affirm.

With respect to his sexual-assault-of-a-child conviction and sentencing as an habitual sexual offender, appellant alleges—and the majority agrees—that the trial court erred in submitting an enhancement paragraph in the charge concerning the California offense of sexual battery because Texas law permits enhancement only by convictions for substantially similar offenses and the California offense is not substantially similar to only *one* of the offenses (i.e., “an” offense) listed in section 12.42(c)(2)(B)(i), (ii), (iii), or (iv) of the 2003 version of the Penal Code.⁴

The majority opines that the elements of the California sexual battery offense (CAL. PENAL CODE § 243.4 (West 2008) (forcing “an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice,” against the will of the person touched and for sexual arousal, gratification, or abuse) fall within *two* of the offenses listed in section 12.42(c)(2)(B)—sexual assault (TEX.

⁴ See 2003 TEX. PENAL CODE ANN. § 12.42(c)(2)(B)(v) (mandating life imprisonment if defendant has previously been convicted “under the laws of another state containing elements that are substantially similar to the elements of an offense listed in Subparagraph (i), (ii), (iii), or (iv)” of section 12.42(c)(2)(B)).

PENAL CODE ANN. § 22.011(a)(1) (intentionally or knowingly causing the penetration of the anus, or sexual organ, or mouth of another person without that person’s consent or causing the sexual organ of another to penetrate the mouth, anus, or sexual organ of the actor and the person including the actor), listed in section 12.42(c)(2)(B)(ii), and aggravated kidnapping (TEX. PENAL CODE ANN. § 20.04(a)(4) (intentionally or knowingly abducting another person with the intent, inter alia, to “violate or abuse him sexually”), listed in section 12.42(c)(2)(B)(iii). Therefore, the enhancement requirements are not satisfied. *See* 2003 TEX. PENAL CODE ANN. § 12.42(c)(2)(B).

The majority points out that a conviction for sexual battery in California requires that the defendant have “touche[d] an intimate part of another person while that person is unlawfully restrained . . . against the will of the person touched and . . . for the purpose of sexual arousal,” but that the California law does not include penetration as an element. CAL. PENAL CODE § 243.4(a). The Texas sexual assault statute requires, however, that the defendant “intentionally or knowingly” cause penetration without consent,⁵ while the Texas aggravated kidnapping statute, as used for purposes of enhancement under section 12.42(c)(2)(B), requires that the defendant have “intentionally or knowingly” abducted another person with the intent to “violate

⁵ *See* TEX. PENAL CODE ANN. § 22.011(a)(1)

or abuse him sexually.” TEX. PENAL CODE ANN. § 20.04(a)(4).

The majority opines that “[t]he problem with the State’s argument is that it combines the elements from more than one of the offenses listed in 2003 Penal Code section 12.42(c)(2) to create a substantial similarity between Texas and California law.” *Prudholm v. State*, 01-06-00749-CR & 01-06-00750-CR, slip op. at 9 (Tex. App.—Houston [1st Dist.] Oct. 17, 2008, no pet. h.). Concluding that “[t]he plain wording of 2003 Penal Code section 12.42(c)(2)(B)(v), however, requires that the California statute contain elements that are substantially similar to the elements of *an* offense listed in subparagraph (i), (ii), (iii), or (iv),” the majority holds that the trial court erred in submitting the enhancement paragraph because the California sexual battery statute contains “elements that are substantially similar to the elements of *multiple* offense listed in subparagraph [12.42(c)(2)(B)] (i), (ii), (iii), or (iv).”

The majority cites generally to *Griffith v. State*, 116 S.W.3d 782, 785 (Tex. Crim. App. 2003) and *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) for support, noting parenthetically that Texas law requires that “we review an unambiguous statute literally, unless doing so would lead to [an] absurd result that [the] legislature could not possibly have intended.” *Prudholm*, No. 01-06-00749-CR & 01-06-00750-CR, slip. op. at 9. I disagree both with the majority’s conclusion and

with its contention that *Griffith* supports its interpretation of section 12.42(c)(2)(B).

First, I see no significant distinction between the elements of sexual battery under California law and aggravated kidnapping under Texas law. I would conclude, therefore, that appellant's conviction under California law is directly parallel to a conviction under Texas Penal Code section 22.04(a)(4), which is *one* of the offenses listed in section 12.42(c)(2)(B). Second, to exclude a defendant's conviction under an out-of-state law that parallels more than one Texas offense listed in section 12.42(c)(2)(B)(i)-(iv), rather than one and one only, is, to my mind, absurd and contrary to the purpose of the statute.

In *Griffith*, relied upon by the majority, the Texas Court of Criminal Appeals was faced with a similar circumstance in that the defendant's punishment was enhanced pursuant to section 12.42(c)(2) with offenses that were not named in the statute. The defendant argued that his sentence could not be enhanced by violations of repealed Texas statutes that were not listed in section 12.42(c)(2). *Griffith*, 116 S.W.3d 782, 784 & n.3 (Tex. Crim. App. 2003). The court observed, "The literal language of Section 12.42(c)(2) is clear and straightforward: conviction of one of four violent sexual offenses carries a mandatory punishment of confinement for life if the defendant has previously been convicted of one of eight enumerated offenses,

or an offense from another state containing elements substantially similar to the enumerated offenses.” *Id.* at 786. The court further pointed out, however, that “[t]he statute also makes clear the legislature’s intent to treat repeat sex offenders more harshly than other repeat or habitual offenders,” effectively creating “a two-strikes policy for repeat sex offenders in Texas.” *Id.* The court found the appellant’s proposed *literal* interpretation of section 12.42(c)(2) absurd—contrary to the spirit of the majority’s citation to *Griffith*—because “[t]he literal language of the provision dictates that defendants convicted of a prior rape or aggravated rape avoid an automatic life sentence simply because they committed the crime when it was titled differently in the Penal Code.” *Id.* The Court of Criminal Appeals held that such a literal interpretation of the provision would lead to the disparate treatment of sexual offenders. *Id.* Specifically, it held “[U]nder the construction proposed by the appellant, prior convictions for rape and aggravated rape from any other state could be used to enhance a later offense, but prior convictions for rape and aggravated rape from Texas could not be used.” *Id.* The court found such a reading to be “contrary to the Legislature’s intent” and to produce “an absurd result.” *Id.*

In my view, reading the word “an” literally to exclude enhancement by a defendant’s prior conviction for an out-of-state crime that parallels the elements of

more than one Texas statute listed in section 12.42(c)(2)(B)—one of them a statute whose elements directly parallel the out-of-state statute—has the same absurd result of preventing the imposition of a mandatory life sentence on a repeat sex offender as the suggested literal interpretation of section 12.42(c)(2)(B) in *Griffith*. *See id.* And, as in *Griffith*, such a literal interpretation of the statute leads to the disparate treatment of offenders convicted of offenses with substantially similar elements.

I would affirm the judgment in appellant’s sexual-assault-of-a-child case (trial court cause number 1045916; appellate court cause number 01-06-00750-CR).

Evelyn V. Keyes
Justice

Panel consists of Justices Nuchia, Jennings, and Keyes.

Justice Keyes, dissenting.

Publish. TEX. R. APP. P. 47.2(b).