MODIFY, AFFIRM, REVERSE and REMAND; Opinion Filed June 7, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00515-CR

COLLIN WAYNE COPE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 3
Dallas County, Texas
Trial Court Cause No. F-1640624-J

MEMORANDUM OPINION

Before Justices Bridges, Brown, and Boatright
Opinion by Justice Brown

Following a jury trial, Collin Wayne Cope appeals his conviction for sexual assault of a child prohibited spouse, a first-degree felony. The complainant, T.C., was appellant's biological daughter. Appellant complains the jury charge erroneously required the State to prove he was prohibited from marrying T.C. for consanguinity reasons, when the penal code required proof he was prohibited from marrying T.C. for bigamy reasons. He raises issues of charge error and the sufficiency of the evidence. The court of criminal appeals's opinion in *Arteaga v. State*, 521 S.W.3d 329 (Tex. Crim. App. 2017), determines the outcome of these issues. The State concedes that under *Arteaga* the court's charge was erroneous and the evidence is legally insufficient to support appellant's conviction for the first-degree felony. We reform the judgment to reflect a

conviction for the lesser included offense of sexual assault of a child, a second-degree felony, and remand for a new punishment hearing.

We begin with appellant's third issue, which is an evidentiary issue unrelated to appellant's other issues. In his third issue, appellant contends the trial court erred in admitting testimony from T.C.'s younger sister, C.S., under article 38.37 of the code of criminal procedure. The trial court conducted a hearing on the admissibility of C.S.'s testimony outside the presence of the jury. Appellant was C.S.'s biological father. When C.S. was 14 years of age, appellant started making inappropriate comments to her about her body and T.C.'s body. Appellant made the inappropriate comments for two to three months. Then, one day as C.S. was sitting down, appellant put his hand under her. His fingers were near her vagina. C.S. was shocked and stood back up. According to C.S., the incident was not an accident. C.S. told T.C. what had happened, and then T.C. revealed what appellant had done to her.

The State argued that C.S.'s testimony was admissible under article 38.37 because it showed a pattern of behavior and could be used to determine appellant's character, motive, scheme, and opportunity. Appellant maintained the evidence was inadmissible under 38.37 and also objected based on the rules of evidence. The trial court overruled appellant's objections. C.S. testified later for the jury about appellant's comments, behavior, and her conversation with T.C.

The objection appellant made in the trial court regarding article 38.37 does not comport with the complaint he now raises on appeal. In the trial court, appellant's objection concerned section 2 of article 38.37. When a defendant is on trial for certain sex offenses, article 38.37, section 2 allows for the admission of evidence that the defendant committed sex crimes against children other than the victim of the alleged offense "for any bearing the evidence has on relevant matters, including the character of the defendant, and acts performed in conformity with the character of the defendant." TEX. CODE CRIM. PROC. ANN. art. 38.37, § 2(b) (West Supp. 2017).

Appellant argued to the trial judge that, although evidence of certain offenses against other children were admissible, the incident C.S. described was not one of the enumerated offenses. In this appeal, appellant does not mention article 38.37, section 2. His argument is limited to section 1 of article 38.37. Article 38.37, section 1 allows evidence of other crimes, wrongs, or acts against the child who is the victim of the alleged offense for its bearing on relevant matters including the state of mind of the defendant and the child and the relationship between the defendant and the child. *Id.* art. 37.37, § 1(b). Appellant argues the trial court erred in admitting C.S.'s testimony because the bad acts she described did not provide insight into the state of mind of appellant and T.C. or the relationship between appellant and T.C.

To preserve error, a party must object and state the ground for the objection with enough specificity to make the trial judge aware of the complaint, unless the specific grounds were apparent from the context. TEX. R. APP. P. 33.1(a)(1). The objection must be sufficiently clear to give the judge an opportunity to address and, if necessary, correct any error. *Thomas v. State*, 505 S.W.3d 916, 924 (Tex. Crim. App. 2016). If a trial objection does not comport with the argument on appeal, error has not been preserved. *Id.* The objection appellant raised in the trial court based on article 38.37, section 2 did not inform the judge of the complaint he now makes on appeal involving section 1 of article 38.37. Accordingly, appellant has not preserved this issue for our review. We overrule appellant's third issue.

Appellant's first two issues are related, and we address them together. In his first issue, appellant contends the evidence is legally insufficient to support the verdict because there was no evidence of bigamy. In his second issue, appellant complains of the charge's failure to require the jury to determine if he committed bigamy.

Under section 22.011 of the penal code, a person commits the offense of sexual assault if he intentionally or knowingly causes the penetration of the sexual organ of a child by any means.

TEX. PENAL CODE ANN. § 22.011(a)(2)(A) (West Supp. 2017). A child is a person younger than 17 years of age. *Id.* § 22.011(c). An offense under section 22.011 is a second-degree felony unless "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." *Id.* § 22.011(f). In those circumstances, the offense is a first-degree felony. *Id.* Section 25.01, titled "Bigamy," provides that an individual commits an offense if he is legally married and purports to marry or does marry a person other than his spouse or if he knows that a married person other than his spouse is married and he purports to marry or does marry that person. *Id.* § 25.01(a) (West Supp. 2017).

The indictment in this case alleged:

> That **COLLIN WAYNE COPE**, hereinafter called Defendant, **on or about the 1st day of November, 2010** in the County of Dallas, State of Texas, did then and there intentionally and knowingly cause the PENETRATION OF THE FEMALE SEXUAL ORGAN of [T.C.], a child younger than 17 years of age, by any means, to-wit: DEFENDANT'S SEXUAL ORGAN, and said complainant was someone whom the defendant was prohibited from marrying.

At trial, T.C. testified that appellant was her biological father. T.C.'s parents separated when she was a young child. In late September or early October of 2010, when T.C. was 15 years' old, she had a weekend visitation with appellant at the motel where he lived. While they were watching a movie in bed, appellant started touching T.C. on her legs with his hands. Appellant removed T.C.'s pants and pushed her underwear to the side. Appellant put his penis inside T.C.'s vagina; it hurt T.C.

In the abstract portion of the charge, the court instructed the jury that

> A person is prohibited from marrying an ancestor or descendant, by blood or adoption; a brother or sister, of the whole or half blood or by adoption; a parent's brother or sister, of the whole or half blood or by adoption; a son or daughter of a brother or sister, of the whole or half blood or by adoption; a current or former stepchild or stepparent; or a son or daughter of a parent's brother or sister, of the whole or half blood or by adoption.

See TEX. FAM. CODE ANN. §§ 6.201, 6.206 (West 2006) (marriage is void if parties have certain familial relationships). The application paragraph instructed the jury:

> if you find and believe from the evidence beyond a reasonable doubt that on or about the 1st day of November 2010, the defendant . . . intentionally or knowingly caused the penetration of the sexual organ of T.C., with the sexual organ of the defendant, and T.C. was younger than 17 years of age, and T.C. was someone whom [the defendant] was prohibited from marrying, you will find him guilty of Sexual Assault of a Child Prohibited Spouse.

There was no mention of bigamy in the charge. Appellant did not object to the inclusion of the consanguinity instruction or to the exclusion of an instruction on bigamy. The jury found appellant guilty as charged in the indictment, and it assessed his punishment at forty years' confinement.

In *Arteaga*, the State alleged the defendant was guilty of the first-degree felony of sexual assault of a child because he was prohibited from marrying the complainant, his biological daughter. *Arteaga*, 521 S.W.3d at 331. As in this case, the abstract portion of the charge contained an instruction on consanguinity and there was no mention of the consanguinity statute in the application paragraph. *Id.* at 332. The defendant argued on appeal that the State was required to prove he was prohibited from marrying his daughter under the bigamy statute. The court of appeals noted that the phrases "purports to marry" and "living under the appearance of being married" are contained in both penal code sections 22.011(f) and 25.01. *Id.* at 336. But "prohibited from marrying" does not appear in the bigamy statute, section 25.01, and thus the court of appeals concluded the legislature intended that phrase to the construed according to its common usage and upheld the conviction. *Id.* The court of criminal appeals disagreed and held that the legislature intended for the State to prove facts constituting bigamy whenever the State alleges that the defendant committed sexual assault and invokes section 22.011(f). *Id.* The bigamy statute was "law applicable to the case" and should have been included in the charge because the jury had to understand what "prohibited from marrying" meant before it could determine whether the defendant was guilty of the allegations. *Id.* at 338. Likewise, the law of consanguinity was not

law applicable to the case and should not have been included. *Id.* The court further concluded that the defendant was egregiously harmed by the errors because the charge deprived him of the right to be convicted only upon proof beyond a reasonable doubt of every element of the offense. *Id.* at 340.

As in *Arteaga*, the charge in this case was erroneous for failing to include the bigamy statute and for including the law of consanguinity. We measure the sufficiency of the evidence by the elements of the offense as defined by the hypothetically correct jury charge for the case. *Grotti v. State*, 273 S.W.3d 273, 280 (Tex. Crim. App. 2008). A hypothetically correct charge would have required the jury to find that appellant was prohibited from marrying T.C. under section 25.01. There was no evidence of bigamy. No rational trier of fact could have found that element of first-degree sexual assault beyond a reasonable doubt. *See Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000) (in reviewing sufficiency of evidence, we view evidence in light most favorable to verdict and determine whether any rational trier of fact could have found essential elements of offense beyond reasonable doubt).

The parties disagree about the proper remedy for this situation. In his opening brief, appellant contends he is entitled to an acquittal or alternatively a new trial. As another alternative, he asserts we should reform the judgment to reflect the lesser included offense of ordinary assault, a misdemeanor. The State maintains we should reform the judgment to reflect a conviction for sexual assault of a child, a second-degree felony. In appellant's reply brief, he does not mention acquittal or a new trial; he asks us to reform the judgment to reflect an assault conviction.

In *Arteaga*, the court of criminal appeals reformed the judgment to reflect a conviction for second-degree felony sexual assault. *Id.* at 340–41. The court noted that a defendant should not receive the unjust windfall of an outright acquittal when there is legally sufficient evidence to prove he is guilty of a lesser included offense. *Id.* at 340. In determining whether to reform a

judgment to reflect a conviction for a lesser included offense, we must answer two questions: (1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant of the lesser included offense, and (2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted for the lesser included offense at trial, is there sufficient evidence to support a conviction for that offense? *Id.* (citing *Thornton v. State*, 425 S.W.3d 289, 300 (Tex. Crim. App. 2014)).

Appellant seeks to distinguish *Arteaga* because the charge in that case contained a special issue on the allegation that the defendant was prohibited from marrying the complainant. *Id.* at 332. The jury considered that issue only after it had found the defendant guilty of sexual assault of a child. *Id.* Here, although the question of whether appellant was prohibited from marrying T.C. was not submitted separately, in finding appellant guilty of first-degree felony sexual assault of a child prohibited spouse, the jury must have necessarily found every element necessary to convict him of the second-degree felony of sexual assault of a child. Also, if appellant had originally been convicted of that lesser included offense, there is sufficient evidence in the record to support such a conviction.

Appellant does not argue that the evidence is insufficient to support a second-degree sexual assault conviction. He instead maintains we should apply "the rule of lenity" found in section 311.035(b) of the government code. That section provides that a statute or rule that creates or defines a criminal offense or penalty shall be construed in favor of the actor if any part of the statute or rule is ambiguous on its face or as applied to the case, including an element of the offense or the penalty to be imposed. TEX. GOV'T CODE ANN. § 311.035(b) (West Supp. 2017). That provision, however, does not apply to a criminal offense or penalty under the penal code. *Id.* § 311.035(c). To not reform the judgment to convict appellant of the greatest possible lesser included offense supported by the evidence would amount to another type of "unjust windfall."

Other courts of appeals faced with this issue after *Arteaga* have reformed the judgment to reflect a conviction for the second-degree felony of sexual assault. *See Senn v. State*, No. 02-15-00201-CR, 2018 WL 2248673, at *3 (Tex. App.—Fort Worth May 17, 2018, no pet. h.) (not designated for publication); *Torres v. State*, No. 03-14-00712-CR, 2017 WL 3124238, at *5–6 (Tex. App.—Austin July 21, 2017, no pet.) (mem. op., not designated for publication). We will do the same in this case. We sustain appellant's second issue complaining of charge error. We sustain his first issue to the extent that we agree the evidence is insufficient to support his conviction for first-degree felony sexual assault of a child prohibited spouse.

Accordingly, we reform the trial court's judgment to reflect a conviction for the second-degree felony of sexual assault of a child and remand for resentencing.

/Ada Brown/
ADA BROWN
JUSTICE

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

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

COLLIN WAYNE COPE, Appellant	On Appeal from the Criminal District Court No. 3, Dallas County, Texas
No. 05-17-00515-CR V.	Trial Court Cause No. F-1640624-J.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Brown, Justices Bridges and Boatright participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to reflect that the offense for which the defendant was convicted is "Sexual Assault of a Child" and to reflect that the degree of the offense is a "2nd Degree Felony."

As modified, the judgment is **AFFIRMED** as to guilt, and **REVERSED AND REMANDED** for a new punishment hearing.

Judgment entered this 7th day of June, 2018.