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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

RITO LOPEZ, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Moore County

Appellate Cause Nos. 07-18-00084-CR through 07-18-00094-CR

Trial Cause No. 5465

****

APPELLANT'S REPLY TO STATE'S PETITION FOR DISCRETIONARY REVIEW

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IDENTITY OF JUDGE, PARTIES AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant Rito Gregory Lopez, Jr.

* The trial judge was Hon. Ron Enns, 69th Judicial District, Moore County, Texas.

* Counsel for Appellant at trial was Vaavia Edwards, 301 South Polk Avenue, Suite 620, Amarillo, Texas 79101.

* Counsel for Appelallant on appeal was Jerod Pingelton, P.O. Box 636, Dumas, Texas 79029.

*Counsel for the State at trial and on appeals was Bryan Denham, Assistant District Attorney, 715 Dumas Avenue, #304, Dumas, Texas 79029.

* Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosescuting Attorney, P.O. Box 13046, Austin, Texas 78711.

* Counsel for Appellant before this Court is Jerod Pingelton, P.O. Box 636, Dumas, Texas 79029.

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APPELLANT'S REPLY TO
STATE'S PETITION FOR DISCRETIONARY REVIEW

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant respectfully urges this Court to deny discretionary review. Appellant asserts the court of appeals correctly interpreted previous rulings from this Court regarding the sexual assault bigamy enhancement in Penal Code § 22.01(f). The court of appeals correctly concluded the State is obligated to present proof of actual bigamy in using the enhancement allegation.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested.

STATEMENT OF THE CASE

Appellant was indicted on eleven counts of sexual assault of a child, all enhanced to a first-degree felony under Penal Code § 22.01(f). [1]Appellant field a motion to quash the enhancements, which was denied. [2] Appellant was convicted and sentenced to 25 years' confinement on each count. [3]On appeal, Appellant challenged the enhancements. The court of appeals correctly stated that § 22.01 (f) was only meant for the instances of actual bigamy.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals reversed Appellant's sentences and remanded for a new punishment hearing. [4]

GROUND FOR REVIEW

Does the enhancement under Penal Code § 22.01 (f) require the State to prove the defendant committed bigamy?

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[1] CR 5-8.

[2] CR 27, 48; 2 RR 5-13.

[3] 3 RR 7, 43.

[4] *Lopez v. State*, _S.W. 3d_,Nos. 07-18-00084-CR through 07-18-00094-CR, 2018 WL6072250 (Tex. App.-Amarillo Nov. 20, 2018).

ARGUMENT

Statute at issue.

> [A]n 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 Section 25.01.

TEX. PENAL CODE § 22.011(f).

Court of Appeals statements on this issue.

Appellant would have the court note the facts of the present case are similar to *State v. Senn.* In their conclusion regarding the allegations of the subject enhancement allegations in Texas Penal Code § 22.01 (f), the court of appeals quoting Senn stated, "The state was required to prove facts constituting bigamy to enhace Senn's second-degree felony sexual assault to first-degree felony sexual assault." [1] The court of appeals continued, "to trigger the enhancement under Section 22.011 (f), the state was required to prove facts a sexual <u>and</u> facts constituting constituting one of the six bigamy prohibitions listed in Section 25.01.[2] "Furthermore the state's evidence of Senn having been married at the time of the assault was insufficient to satisfy that burden."[3]

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[1] Senn III, 2018 Tex. App. LEXIS 8722 at 13

[2] *Id. at *14*

[3] Id. at *14

"Evidence of the sexual assault and of Senn's marriage…to [the victim]'s step mother, standing alone [did] not amount to facts constituting one of the six bigamy prohibitions under Section 25.01"[1]. These are almost identical facts the State used to prove the enhancement allegations in the trial court against Appellant. So, in interpretting Senn, along with the facts of the present case, the court of appeals correctly asserts, "Section 22.011 (f) obligates the state to prove facts constituting bigamy as that term appears in §25.01. Merely proving the accused was married when the assault happened is not enough." [2]"[T]o trigger the enhancement under Section 22.011 (f), the State [is] required (emphasis added) to prove facts constituting a sexual assault and (emphasis added) facts constituting one of the six bigamy prohibitions listed in Section 25.01".[3] Further the court of appeals correctly concludes under that standard, "And, in applying that standard here, we find the evidence defficient." [4]

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[1] Senn III, 2018 Tex.App. LEXIS 8722 at 14-15

[2] Lopez v. State, _S.W. 3d_, Nos. 07-18-00084-CR through 07-18-00094CR, 2018 WL 6072250 (Tex. App. Amarillo Nov. 20, 2018).

[3] Senn III, 2018 Tex. App. Lexis 8722 at 14.

[4] *Lopez v. State*, _S.W. 3d_, Nos. 07-18-00084-CR through 07-18-00094-CR, 2018 WL 6072250 (Tex. App-Amarillo Nov. 20, 2018).

Conclusion

This Court in Senn found to trigger the enhancements under Section 22.011 (f), the State is required to prove the facts constituting a sexual assault and facts constituting one of the six bigamy prohibitions listed in Section 25.01. Senn and the present case are similar in fact, therefore the Court of Appeals correctly applied the Senn standard to the present case and under that standard found evidence deficient to trigger the enhancement under 27.011 (f). The Court of Appeals correctly referred Appellant's case back to the trial court for re-sentencing.

PRAYER FOR RELIEF

The Appellant prays that the Court of Criminal Appeals deny the State's petition for defficient evidence and refer Appellant's case back to the trial court for re-sentencing.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 616 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Jerod N. Pingelton*

Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on this 8th day of February 2019, Appellant's Reply to Discretionary Review was served electronically on the parties below.

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