



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-15-00201-CR**

MICHAEL RAY SENN

APPELLANT

V.

THE STATE OF TEXAS

STATE

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FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY  
TRIAL COURT NO. 1308222R

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**OPINION ON REMAND**

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**I. INTRODUCTION**

As set forth in our opinion on original submission, Appellant Michael Ray Senn sexually assaulted and impregnated his biological daughter Brenda<sup>1</sup> while he was married to her step-mother. A jury convicted Senn of prohibited sexual

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<sup>1</sup>To protect the anonymity of the victim, we use a pseudonym. See *McClendon v. State*, 643 S.W.2d 936, 936 n.1 (Tex. Crim. App. [Panel Op.] 1982).

conduct, for which he was sentenced to twenty years' imprisonment,<sup>2</sup> and of sexual assault, for which he was sentenced to life imprisonment after the jury affirmatively answered a special issue statutorily enhancing his sexual assault conviction from a second-degree felony to a first-degree felony under Texas Penal Code section 22.011(f). See Tex. Penal Code Ann. § 22.011(f) (West Supp. 2017), § 25.02(a)(1), (c) (West 2011). After addressing Senn's four issues—challenging the sufficiency of the evidence to trigger the enhancement, the constitutionality of section 22.011(f) as applied to him, and the absence of a bigamy instruction from the jury charge—we affirmed both of his convictions. See *Senn v. State* (*Senn I*), No. 02-15-00201-CR, 2017 WL 117306, at \*7 (Tex. App.—Fort Worth Jan. 12, 2017), *vacated*, *State v. Senn* (*Senn II*), 2017 WL 5622955, at \*1 (Tex. Crim. App. Nov. 22, 2017) (not designated for publication).

In a per curiam opinion, the court of criminal appeals vacated our judgment and remanded this case to us because we did not have the benefit of its subsequent opinion in *Arteaga*, which construed for the first time the enhancement provision in Texas Penal Code section 22.011(f) in the context of jury-charge error. See *Senn II*, 2017 WL 5622955, at \*1 (citing *Arteaga v. State*, 521 S.W.3d 329 (Tex. Crim. App. 2017)). After applying *Arteaga*'s holding—that “[t]he legislature intended for the State to prove facts constituting bigamy

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<sup>2</sup>Senn's notice of appeal states that he is appealing “from the judgments heretofore rendered against him,” but he does not raise any issue on appeal related to his prohibited-sexual-conduct conviction.

whenever it alleges that the defendant committed sexual assault, and the State invokes Section 22.011(f)” to enhance a sexual assault conviction from a second-degree felony to a first-degree felony—to the facts here, we hold that the evidence is insufficient to trigger the statutory enhancement of Senn’s sexual assault charge. Accordingly, we will affirm Senn’s unchallenged conviction for prohibited sexual conduct, modify the trial court’s judgment on the sexual assault to reflect a conviction for a second-degree felony, reverse the judgment on the sexual assault as to punishment, and remand the sexual assault case for a new trial on punishment.<sup>3</sup>

## **II. THE EVIDENCE IS INSUFFICIENT TO TRIGGER THE STATUTORY ENHANCEMENT**

In his first issue, Senn argues that the evidence is insufficient to trigger the statutory enhancement under section 22.011(f) because there is no evidence that he was engaged in a bigamous relationship with Brenda.

### **A. Standard of Review**

In our due-process review of the sufficiency of the evidence, we view all of the evidence in the light most favorable to the jury’s answer to the special issue to determine whether any rational trier of fact could have found the essential elements of the special issue beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Gale v. State*, 998 S.W.2d 221,

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<sup>3</sup>Because Senn does not challenge the sufficiency of the evidence to support the elements of sexual assault as a second-degree felony, we omit a detailed factual and procedural background.

224 (Tex. Crim. App. 1999); *Stewart v. State*, 350 S.W.3d 750, 755 (Tex. App.—Amarillo 2011, pet. ref'd).

To determine whether the State has met its burden under *Jackson* to prove a defendant's guilt beyond a reasonable doubt, we compare the elements of the special issue as defined by the hypothetically correct jury charge to the evidence adduced at trial. *Cf. Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016); *Crabtree v. State*, 389 S.W.3d 820, 824 (Tex. Crim. App. 2012) ("The essential elements of the crime are determined by state law."). A hypothetically correct jury charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Jenkins*, 493 S.W.3d at 599. The law as authorized by the indictment means the statutory elements of the special issue as modified by the factual details and legal theories contained in the charging instrument. *Cf. id.*

## **B. The Statutory Provisions at Issue**

Section 22.011(f) of the penal code enhances the offense of sexual assault from a second-degree felony to 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." Tex. Penal Code Ann. § 22.011(f). Section 25.01 (the bigamy statute) states,

(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 country, 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 country, 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.

*Id.* § 25.01 (West Supp. 2017).

### **C. *Arteaga's* Holdings**

The court of criminal appeals summarized its *Arteaga*<sup>4</sup> holdings in its opinion remanding this case to us:

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<sup>4</sup>*Arteaga* involved jury-charge error, but the analysis also governs the sufficiency challenge here because we are required to compare the elements of the crime as defined by the hypothetically correct jury charge to the evidence adduced at trial, and *Arteaga* set forth what must be included in a hypothetically correct jury charge for the statutory enhancement at issue here. See *Jenkins*, 493 S.W.3d at 599. Consequently, although in *Senn I* we analyzed section 22.011(f) without regard to section 25.01, we now apply the *Arteaga* analysis incorporating section 25.01. See *Arteaga*, 521 S.W.3d at 336–38; *Senn I*, 2017 WL 117306, at \*1–3.

We recently handed down our opinion in *Arteaga v. State*, [citation omitted] in which we held that under § 22.011(f), the [l]egislature “intended for the State to prove facts constituting bigamy.” We also held that the jury charge in that case was erroneous because it neglected to include the definition of bigamy from § 25.01.

*Senn II*, 2017 WL 5622955, at \*1.

#### **D. Applying *Arteaga* to These Facts**

Under the court of criminal appeals’s opinion in *Arteaga*, the State was required to prove facts constituting bigamy, see *id.* (stating “we held under §22.11(f), the legislature intended for the State to prove facts constituting bigamy”), or facts that would constitute bigamy. See *Arteaga*, 521 S.W.3d at 335 n.9 (outlining requirements necessary for the State to prove facts that would constitute bigamy); see also *Estes v. State*, No. PD-0429-16, 2018 WL 2126740, at \*4 (Tex. Crim. App. May 9, 2018) (quoting *Arteaga*’s holding). The State conceded in its original briefing<sup>5</sup> to this court “that it offered no evidence at trial that Senn had committed a bigamy offense with [Brenda].” Thus, regardless of the correctness or incorrectness of the section 22.011(f) special issue submitted in this case, because no facts exist that Senn committed a bigamy offense with Brenda, the evidence is insufficient to “prove facts constituting bigamy” and is insufficient to prove facts that would constitute bigamy as required by *Arteaga*’s

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<sup>5</sup>We did not request, nor did the parties file, new briefing when this case was submitted after remand.

holding.<sup>6</sup> As conceded by the State, based on the evidence presented, no reasonable factfinder could have found beyond a reasonable doubt that Senn and Brenda's relationship was or would be bigamy when he sexually assaulted her. See *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; cf. *Torres v. State*, No. 03-14-00712-CR, 2017 WL 3124238, at \*5 (Tex. App.—Austin July 17, 2017, no pet.) (mem. op., not designated for publication) (holding, in light of *Arteaga*, evidence insufficient to prove that appellant “committed the first-degree-felony offense of sexual assault of a person whom he was prohibited from marrying under the bigamy statute”). Accordingly, we hold the evidence insufficient to trigger the statutory enhancement for sexual assault under section 22.011(f), and we sustain Senn's first issue.<sup>7</sup>

### **E. Effect on Conviction and Punishment**

Senn prays that we vacate the sentence on his sexual assault conviction and enter a judgment of acquittal. Because Senn does not challenge the sufficiency of the evidence to support the elements of sexual assault as a

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<sup>6</sup>Because the State did not have the benefit of *Arteaga*'s construction of section 22.011(f) when it tried this case, the State mistakenly believed that no proof of bigamy or of facts that would constitute bigamy was required under section 22.011(f). The State thus concedes “that it offered no evidence at trial that Senn had committed a bigamy offense with [Brenda].”

<sup>7</sup>Because we hold the evidence insufficient to trigger the statutory enhancement under section 22.011(f), we need not address Senn's fourth issue challenging the correctness of the jury charge or his second and third issues challenging the constitutionality of section 22.011(f). See Tex. R. App. P. 47.1 (requiring appellate court to address only issues necessary to disposition of appeal).

second-degree felony, it would be an “unjust’ windfall” for us to order an acquittal on the sexual assault charge based on insufficient evidence relating solely to the statutory enhancement that raised the offense to the level of a first-degree felony. See *Thornton v. State*, 425 S.W.3d 289, 298 (Tex. Crim. App. 2014). Moreover, in the course of convicting Senn of sexual assault as a first-degree felony, the jury must have found every element necessary to convict him of the charged sexual assault as a second-degree felony; therefore, there is sufficient evidence to support a second-degree felony conviction for sexual assault. See *id.* at 300. Thus, we modify Senn’s sexual assault judgment to reflect that he was convicted of a second-degree felony, but we must remand that charge to the trial court for a new trial on punishment so that a factfinder may consider the proper punishment range. See *id.*; *Torres*, 2017 WL 3124238, at \*6 (modifying judgment to reflect a conviction for the second-degree-felony offense of sexual assault, affirming the judgment as modified as to the finding of guilt, reversing the part of the judgment imposing sentence, and remanding to the district court for a new punishment hearing for that offense); *Smith v. State*, Nos. 02-08-00394-CR, 02-08-00395-CR, 2010 WL 3377797, at \*15–16 (Tex. App.—Fort Worth Aug. 27, 2010, no pet.) (not designated for publication) (holding that when the first-degree felony range of punishment under section 22.011(f) had been improperly applied to a defendant but the defendant had not challenged the sufficiency of the evidence to support second-degree felony convictions, the appropriate remedy was to “remand for a new trial on punishment alone”).

### III. CONCLUSION

Having sustained Senn's first issue, which is dispositive of the appeal on remand, we affirm the trial court's judgment of conviction on Senn's unchallenged conviction for prohibited sexual conduct, modify the trial court's judgment on Senn's charge for sexual assault to reflect a second-degree felony, reverse the trial court's judgment on Senn's charge for sexual assault as to punishment, and remand the sexual assault case to the trial court for a new trial on punishment only.

/s/ Sue Walker  
SUE WALKER  
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

PUBLISH

DELIVERED: May 17, 2018