the Jasuta / Schulman report

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TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***Francisco Delarosa Jr. v. The State of Texas***

- **OFFENSE**: Sexual Assault of a Child
- **COUNTY**: Liberty
- **COURT OF APPEALS**: Beaumont 2022
- **C/A CITATION**: Not Designated for Publication
- **C/A RESULT**: Convictions Affirmed
- **CCA. CASE No**. PD-0197-22 to PD-0199-22 **DATE OF OPINION**: October 4, 2023
- **DISPOSITION**: Convictions Reversed & Rendered
- **OPINION**: Judge Mary Lou Keel **VOTE**: 5-4
- **TRIAL COURT**: 253rd D/C; Hon. Chap Cain
- **LAWYERS**: Matthew Gott (Defense); John Messinger (SPA)

(**Background Facts**): Appellant was accused, in an indictment which charged him with three counts of sexual assault for non-consensual contact between his sexual organ and that of "the pseudonymous complainant, LAM." Appellant was employed by LAM's school district, and LAM and Appellant's daughter became good friends after meeting through a softball program in middle school.

Ed Note (**LAM's Testimony**): LAM testified that she spent the night at Appellant's house regularly to hang out with Appellant's daughter. She said she usually slept in Appellant's bedroom because "he told me to." She testified that he bought her gifts including lingerie and an engagement ring that she picked out. LAM stated that they had sex "every weekend" when she was between fourteen and seventeen years old. But she acknowledged that sometimes she would stay the night at another friend's house so it could not have been every weekend. After some of LAM's extended family expressed concern about LAM and Appellant's closeness, LAM denied having a relationship with Appellant. Months later LAM disclosed the relationship to a school resource officer and wrote in her statement, "I am aware that I am a minor and unable to give consent." LAM testified that

she thought she was "in love" with Appellant during their relationship but was no longer because, "I'm not in his chains anymore." No one asked whether she had consented to the sexual contact. (**Appellant's Testimony**): Appellant testified that he had a relationship with LAM while she was a minor but denied having sex with her. He fell in love with her the summer after she finished eighth grade. He admitted sending her "I love you" text messages three months after they met. Appellant testified that LAM used his phone to order lingerie, but he did not receive it. He agreed that LAM would sometimes sleep in his bed, but he would sleep elsewhere. The prosecutor asked, "[Y]ou're not disputing your relationship with her; you're not disputing you're in love with her. The only thing you're disputing is that you had sexual intercourse with her?" Appellant replied, "Yes. Correct."

[539 **Sufficiency of the Evidence / Sexual Assault**]: The abstract portion of the jury charge defined "sexual assault of a child" in terms of non-consensual sexual contact. Appellant was found guilty of three counts of "Sexual Assault of a Child" as listed on the jury verdict forms. The judgment likewise stated that he was convicted of sexual assault of a child. On appeal, Appellant argued, among other things, that the evidence did not prove LAM's lack of consent and that there was jury charge error because he was indicted for one offense but tried for another. In an unpublished opinion, the Court of Appeals held that, even though the jury charge should have asked whether the sexual assaults occurred without LAM's consent, the evidence was sufficient to support Appellant's convictions. The Court of Appeals said the evidence of lack of consent was sufficient for two reasons. First, minority is a "defect" under Texas Penal Code § 22.011(b)(4). Second, the court stated that Appellant did not contest lack of consent but only whether sexual contact occurred. The Court of Appeals remanded to the trial court to correct the judgments to reflect that Appellant was convicted of three counts of sexual assault instead of sexual assault of a child. The Court of Criminal Appeals granted review to decide whether the Court of Appeals erred in assessing the legal sufficiency of the evidence.

Holding: This is a sufficiency-of-the-evidence case in which the indictment and jury charges were a mishmash of non-consensual sexual assault and sexual assault of a child under Texas Penal Code § 22.011. *** The evidence at trial centered on Appellant and LAM's relationship and whether they had sexual intercourse. *** We understand Section 22.011 to define sexual assault in two ways; one definition depends on lack of consent, and the other depends on the age of the complainant. The statute dispenses with consent in the second scenario; it does not say that a child cannot consent; it does not mention consent at all. *** Appellant was indicted for three counts of non-consensual sexual assault of LAM. The hypothetically correct jury charge would have required the State to prove beyond a reasonable doubt that: (1) on the dates alleged, (2) Appellant intentionally or knowingly, (3) contacted the sexual organ of LAM, (4) by Appellant's sexual organ, (5) without LAM's consent. No evidence showed that the sexual contacts were without LAM's consent. On the contrary, her testimony suggests that she willingly participated in them. She testified to a later change of heart but never expressed any lack of consent contemporaneous to the sexual contacts. *** The Court of Appeals, however, held that LAM's lack of consent was proven through LAM's mental defect as a minor under § 22.011(b)(4) and through Appellant's failure to contest LAM's lack of consent. *** But § 22.011(b)(4), unlike other statutes,

does not say that minority is a mental disease or defect, and Appellant's denial of any sexual contact with LAM was not evidence of her lack of consent. *** Section 22.011(b)(4)'s failure to reference youth as a way to find lack of consent, coupled with other statutes' references to it in defining effective consent, demonstrate that the legislature did not intend for minority to apply in this subsection. See ***Campbell v. State***, 49 S.W.3d 874 (Tex.Cr.App. 2001)(see Vol. 9, No. 10; 03/12/2001)(noting that the legislature's use of language in one section of the Penal Code but not another was intentional). And the omission is all the more significant because minority is addressed in its own subsection. *** Further, the Court of Appeals erred when it asserted its certainty that under a proper jury charge "the jury would still have convicted [Appellant] given his admission that he was not contesting any of the issues and that instead he claimed the two of them had never engaged in any sexual acts." Appellant's denial of any sexual contact does not support an inference of non-consensual, sexual contact. *** It would be anomalous to find evidence of a crime in a defendant's testimony that he committed no crime. *** The State claims that children cannot legally consent to sexual contact no matter what statutory language is alleged in the indictment, so "child" is a proxy for "without consent." But the statute does not say that children cannot consent; it omits any mention of consent from § 22.011(a)(2). Our Legislature could have said that children cannot consent to sexual contact with adults; other legislatures have. *** The State argues that a jury could rationally conclude that "mental defect" includes the diminished capacity of a minor under § 22.011(b)(4). But as explained above, the legislature did not include "youth" in the § 22.011(b)(4) language like it did in similarly worded sections of the Penal Code. *** The State alleged that Appellant committed three counts of sexual assault without LAM's consent, so it was required to prove that beyond a reasonable doubt. Since it did not, the evidence is legally insufficient to support Appellant's sexual assault convictions.

Concurring / Dissenting Opinions: Presiding Judge Sharon Keller dissented and was joined by **Judge Barbara Hervey**. Stating that the question in this case is whether the indictment charged the defendant "only with non-consensual sexual assault or also charged him with sexual assault of a child, she argued that the indictment was defective, but that "it also charged him with sexual assault of a child, and so he was properly convicted of that offense." Judge Kevin Yeary filed a separate dissent in which he argued that the evidence was sufficient to sustain the convictions. **Judge Michelle Slaughter** dissented without note.

Sidebars

(**Troy McKinney**) The majority got it right. The dissents are little more than *ex post facto* rationalizations and excuse for the State's errors. This case is a lesson in why one may not want to file a motion to quash and why the defense counsel never asked whether the sex was without consent. Good strategic moves. Never underestimate the value in giving the opposition to opportunity to muck up. The remaining question, however, is whether, this defendant can now be prosecuted for sexual assault of a child (based on age) -- an issue left for another day,

(**John G. Jasuta**) I thought the case important for its rationality. But, the phrase, " It would be anomalous to find evidence of a crime in a defendant's testimony that he committed no crime.," was a high point for me.

(**David A. Schulman**) This case is a classic example of why the phrase "bad facts make bad law" is most often incorrect and certainly misleading. The more accurate phrase, as set out in Dave's rules (#4b) is that "bad lawyering makes bad law." The reality is that this prosecution was ill-planned from the beginning.

Ed Note: The majority opinion spends a significant amount of paper discrediting the dissent. Readers are encouraged to consider the entirety of all three opinions.