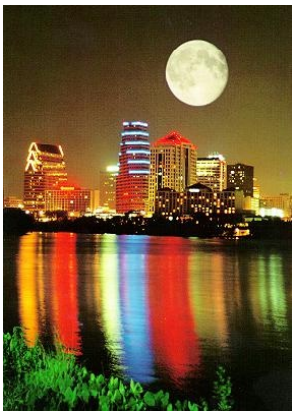

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§§ Vol. 33, No. 15 - April 21, 2025

Case Name: ***Randy Ray Gutierrez v. The State of Texas***

- **OFFENSE**: Aggravated Sexual Assault of a Child & Indecency with a Child
- **COUNTY**: Bee
- **COURT OF APPEALS**: Corpus Christi 2024
- **C/A CITATION**: Not Designated for Publication
- **C/A RESULT**: Conviction Reversed
- **CCA. CASE No**. PD-0480-24 **DATE OF OPINION**: April 16, 2025
- **DISPOSITION**: Court of Appeals Reversed
- **OPINION**: Judge Jay Finley **VOTE**: 6-3-0
- **TRIAL COURT**: 156th D/C
- **LAWYERS**: Mark Bennett and Nathan Burkett (Defense); Emily Johnson-Liu (SPA)

Ed Note: "Super Aggravated Sexual Assault of a Child" is where the victim is under 6-years old or the defendant has previously been convicted of a violent sexual assault of a victim under age 14; or the offense is continuous sexual abuse, OR the defendant has previous convictions for child abuse or aggravated sexual assault of a child. It is a first-degree felony that carries a minimum sentence of twenty-five years' imprisonment.

[§§ 539 **Sufficiency of the Evidence / Sexual Assault**]: Appellant was charged with and convicted of three counts of super aggravated sexual assault of a child. He received 75-year sentences on sexual assault counts and a 20 year sentence on an indecency count. On appeal, Appellant challenged the sufficiency of the evidence and the Court of Appeals reversed the conviction. Instead of addressing the merits of Appellant's sufficiency claim, however, the Court of Appeals held that the grammatical errors in the aggravating elements section of Appellant's indictment rendered the indictment "indeterminate as to which aggravating element [was] being alleged." Nevertheless, the indictment did charge a facially complete offense of aggravated sexual assault of a child offense in both counts. Accordingly, the Court of Appeals modified the judgment on each count to reflect convictions for the lesser-included offenses, found the evidence sufficient to sustain those convictions, and remanded the cases for a new punishment hearing.

Holding: "The difference between 'Let's eat grandma' and 'Let's eat, grandma' illustrates two simple truths: (1) proper grammar matters, and (2) punctuation saves lives. This case is the perfect illustration. Do poor grammar and usage errors in an indictment require reforming the judgment to a lesser-included offense? In this case, no."

Holding: (**Element vs. Enhancement**) We first address the Court's threshold issue: whether Subsection (f) in Section 22.021 of the Penal Code is an element of the offense or a punishment enhancement. The parties agree that Subsection (f) is an element of the offense of super aggravated sexual assault of a child. We also agree. *** In ***Oliva v. State***, 548 S.W.3d 518 (Tex.Cr.App. 2018)(see ¶¶, Vol. 26, No. 21; 05/28/2018), this Court examined whether, under Section 49.09 of the Penal Code, entitled "Enhanced Offenses and Penalties" for DWI offenses, subsection (a) -- the offense elevation for DWI offenses after a single prior DWI conviction -- served as an element of an offense or a punishment issue. *** But the five ***Oliva*** factors are not dispositive here. Subsection (f) is not explicitly labeled as either an element or a punishment issue. Section 22.021(a), not (f), includes the phrase, "A person commits an offense if. . ." Subsection (f) does not contain prefatory language. And, regardless of whether subsection (f) is satisfied, the offense prosecuted is a felony. *** This leaves the third factor. Subsection (f) neither uses the phrasing "is a particular grade of felony or misdemeanor" nor "punish" or "punishable." See ***State v. Green***, 682 S.W.3d 253 (Tex.Cr.App. 2024)(see ¶¶, Vol. 32, No. 3; 01/22/2024). Instead, it increases the minimum punishment, which will always remain classified as a first-degree felony offense under subsection (e). Application of the third ***Oliva*** factor here marginally supports treating subsection (f) as a punishment issue because it is untethered to an offense grade. *** But in ***Green***, as in ***Oliva***, we also considered two additional textual factors. *** Applying extra-textual considerations, subsection (f) operates more as an element of a super aggravated sexual assault of a child offense, rather than a punishment issue. *** This conclusion is supported by application of the principles in ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), and ***Alleyne v. United States***, 570 U.S. 99 (2013). *** Considering the factors in ***Oliva***, the extra-textual considerations in ***Green***, and the proper application of ***Apprendi*** and ***Alleyne***, we adopt the conclusion that both parties before us have. Subsections (f)(1) and (f)(2) constitute separate elements of a distinct super aggravated sexual assault of a child offense that may result in an aggravated sentence, as compared to the first-degree felony default.

Holding: (**Language in the Indictment**): Evidence is legally sufficient if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Joe v. State***, 663 S.W.3d 728 (Tex.Cr.App. 2022)(see ¶¶, Vol. 30, No. 23; 06/27/2022)(citing ***Jackson v. Virginia***, 443 U.S. 307 319 (1979)). To determine whether the evidence is legally sufficient, we compare the evidence produced at trial to "the elements of the offense as defined by the hypothetically correct jury charge." ***Malik v. State***, 953 S.W.2d 234 (Tex.Cr.App. 1997)(see ¶¶, Vol. 5, No. 36; 09/15/1997). A hypothetically correct jury charge "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *** The charging instrument must be "specific enough to inform the accused of the nature of the accusation against him" and "to allow him to investigate the allegations against him and establish a defense." ***State v. Moff***, 154 S.W.3d 599 (Tex.Cr.App. 2004)(see ¶¶, Vol. 12, No. 40; 10/11/2004). *** Coupled with the aggravating element in

subsection (f)(2), the hypothetically correct jury charge for Appellant's offense would be: (1) Appellant, (2) intentionally and knowingly, (3) committed sexual assault, (4) against a complainant under the age of 14, and (5) with an aggravating factor under subsection (a)(2)(A). *** In ***Delarosa v. State***, 677 S.W.3d 668 (Tex.Cr.App. 2023)(see ☙, Vol. 31, No. 35; 10/09/2023), this Court was asked to determine whether the indictment in that case alleged the offense of non-consensual sexual assault, sexual assault of a child, or both. The body of the indictment "completely alleged non-consensual sexual assault, omitting no element." As a consequence, the indictment body was "facially complete." By contrast, the body of the indictment did not allege the "child under 17" element needed to establish sexual assault of a child. Although the caption of the indictment contained the phrase "sexual assault of a child" and cited the Penal Code provision for sexual assault of a child, the Court held that the information in the caption did not constitute an "allegation" for purposes of alleging an offense. Consequently, the Court held that the indictment alleged only non-consensual sexual assault and did not allege sexual assault of a child. *** Similarly, in ***Crawford v. State***, PD-0243-23 (Tex.Cr.App. 2025)(see ☙, Vol. 33, No. 12; 03/31/2025), we needed to determine whether the indictment alleged the offense of assault on a public servant, assault on a peace officer, or both. We held that because the indictment alleged assault on a "deputy sheriff," who, in fact, was a "peace officer," the indictment included every fact needed to convict the Appellant of assault on a peace officer. *** On its face, Appellant's indictment completely alleged a super aggravated sexual assault of a child offense. *** We conclude that the State's indictment sufficiently alleged, albeit with grammatical errors, a super aggravated sexual assault of a child offense, which alleged, as an aggravating factor, an allegation of conduct under subsection (a)(2)(A)(ii). The indictment sufficiently conveyed to Appellant that the State intended to prosecute him for that offense, and sufficiently put him on notice to prepare a defense. *** We agree with the State and Appellant that subsection (f) of the Section 22.021 of the Penal Code creates two different statutory elements that the State can prove to allege an offense for super aggravated sexual assault of a child. Regarding Appellant's indictment, we agree with the State and conclude that the language, "the Defendant did then and there by acts and words threaten to cause, or place, the complainant in fear that kidnapping would be imminently inflicted on Kelly Cruz," was sufficient to allege an aggravating factor under Section 22.021(a)(2)(A)(ii) of the Penal Code.

> **Concurring / Dissenting Opinions**: Judge Kevin Yeary joined the Court's opinion (without note) except as to Part II of the opinion, which discussed whether Penal Code § 22.021(f) constitutes an element or a punishment enhancement. Judge David Newell and Judge Jesse McClure concurred, each without note.

Sidebars

(**David A. Schulman**) To be clear, this opinion solidifies the holdings in ***Delarosa*** and ***Crawford***, and means that, unless a defendant can demonstrate a significant level of surprise in what the State seeks to do, that there might be something technically wrong with the indictment is not going to be of much help.

(**John G. Jasuta**) Seems like another apology for sloppy work by the drafter of the indictment, or maybe the law.