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In the
Texas Court of Criminal Appeals
At Austin

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COURT OF CRIMINAL APPEALS
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Nos. 14-18-00235-CR & 14-18-00236-CR
In the Court of Appeals for the
Fourteenth District of Texas
at Houston

ANDREW JAMES TURLEY
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S BRIEF ON DISCRETIONARY REVIEW

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ORAL ARGUMENT DENIED

IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.2(a)(1)(A), the undersigned includes a complete list of all interested parties below:

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Trial Judge:

Honorable Jan Krocker—Judge Presiding

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The Fourteenth Court of Appeals erred in its application of the legal sufficiency standard when it found the evidence insufficient as a matter of law to prove both the compelled prostitution and the human trafficking charges.[1] It held that no person could compel the prostitution of someone younger than 14 because the child lacked the lawful authority to consent to sexual activity, and because the child had to knowingly offer, agree, or exchange sexual contact for a fee before the person who sold sex with the child could be convicted of compelling the child's prostitution.[2] Then, because the basis for the human trafficking charge was the intent to make the child the victim of compelled prostitution, the lower court reversed and rendered acquittal on that charge, as well. Yet, as this Court and other appellate courts have uniformly held, a completed prostitution by the child is not an element of a compelling prostitution charge. The four-year-old child need not knowingly prostituted herself for the evidence to provide legally sufficient evident that appellant compelled her prostitution and trafficked her for that purpose.

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[1] *Turley v. State*, 597 S.W.3d 30 (Tex. App.—Houston [14th Dist.] 2020, pet. granted).
[2] *Id*. at 32-47.

STATEMENT OF THE CASE

The State charged appellant by indictment with the felony offenses of compelling the prostitution of a child younger than 18, and with trafficking the child by harboring, providing, or obtaining a child younger than 18, and did cause her to become a victim of compelled prostitution.[3] Appellant pled not guilty on both charges to a jury, and the jury returned guilty verdicts.[4] The trial court assessed sentence at 30 years confinement in the Texas Department of Criminal Justice, Institutional Division, a $10,000 fine, and the trial court ordered the sentences served consecutively.[5] Appellant filed timely written notice of appeal.[6]

STATEMENT OF THE PROCEDURAL HISTORY

On March 12, 2020, the Fourteenth Court of Appeals issued a published opinion that reversed the trial court's judgment of convictions on both cases, and

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[3] (CR-11);
The appellate record consists of the following:
CRI-Clerk's Record in cause number 1488216 and appellate cause number 14-18-00235-CR, the compelling prostitution charge;
CRII-the Clerk's Record in cause number 1488217 and appellate cause number 14-18-00236-CR, the human trafficking charge;
RRI-RRXI-Court Reporter's Record from March 8 and 9, 2018, prepared by Cynthia J. Lee.
[4] (CRI-212-222; CRII-198-209).
[5] (CRI-225, 236; CRII-210, 221).
[6] (CRI-225, 236; CRII-210, 221).

rendered acquittals.[7] It did so after it found the evidence legally insufficient to prove the child committed the precursor offense of prostitution that the court of appeals held was an essential element of both the compelling prostitution charge and the trafficking one.[8] The panel split over the reason for the acquittals with a concurrence by one justice that found insufficient evidence because the child did not knowingly offer, agree, or solicit sexual contact in exchange for a fee, whereas the majority held she could not as a matter of law consent to the sexual acts and thus could not commit the prostitution.[9] The State timely filed a petition for discretionary review, which this Court granted on June 17, 2020. It ordered briefing to follow.

ISSUES PRESENTED

3. **Did the court of appeals err when it held as a matter of law that selling sexual contact with a four-year-old child could never constitute compelled prostitution?**

4. **Must a child knowingly engage in an act of prostitution for the person who sold sex with her to be guilty of compelling prostitution?**

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[7] *Turley*, 597 S.W.3d at 46.
[8] *See id*. at 43-47.
[9] *Turley*, 597 S.W.3d at 47-53 (Frost, J., concurring in judgment); *see also Turley* 597 S.W.3d at 43-47 (holding as a two-judge majority that a child under 14 could not as a matter of law commit prostitution and thus could not be compelled to commit prostitution).

STATEMENT OF FACTS

I. Through a Craigslist post, appellant offered to sell sexual contact with his four-year-old daughter to an undercover officer.

On November 2, 2015, an undercover officer saw an online post indicative of a trafficked children that advertised an opportunity to "play with daddy's little girl."[10] He recognized that the post offered a young girl for prostitution purposes.[11]

The undercover officer emailed using deliberately graphic terminology for the sexual contact he suggested engaging in with the child to determine the true nature of the poster's intent.[12] The poster responded with, "how young is too young?"[13] The undercover officer claimed he was open to any age, and he requested to perform oral sex on the child.[14] The poster asked the officer if he would be, "okay with…her sleeping….?"[15] The officer responded, "Yeah, I'm cool with that."[16]

The poster sent two pictures of his daughter and asked, "Is she too young?"[17] The photographs showed appellant's four-year-old daughter.[18] The officer agreed

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[10] (RRIV-32, 35-36).
[11] (RRIV-14-15, 36).
[12] (RRIV-40-41).
[13] (RRIV-43).
[14] (RRIV-43).
[15] (RRIV-43).
[16] (RRIV-44).
[17] (RRIV-44-45, 216-217; State's Exhibit No. 31, 47, 48).
[18] (RRIII-72, 82; RRIV-216-217; RRIV-105; State's Exhibit No. 31, 47, 48).

to meet with appellant and the child.[19] Before appellant committed to the meeting, he demanded to know if the officer would be generous and made clear he must provide more money to spend more time with the child.[20] They agreed the officer could spend two hours with the pictured child engaging in sex contact with her in exchange for $1,000.[21]

The men arranged a time and location.[22] Appellant limited the sexual acts he would permit the undercover officer to perform on the child, and he agreed to host the interaction at a safe apartment.[23] He instructed the officer not to cause her pain because he did not want the child's mother to discover the sexual activity, and the officer agreed.[24]

As the date approached, appellant and the officer confirmed the agreement by communicating about the sexual activity the officer expected to engage in with the child.[25] Appellant demanded that the officer bring the $1,000 dollars with him to the meeting.[26] The officer agreed to provide cash and appellant indicated his consent to the officer placing his mouth on the child's genitals in exchange.[27]

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[19] (RRIV-45-46).
[20] (RRIV-46)
[21] (RRIV-47, 48).
[22] (RRIV-49, 51).
[23] (RRIV-51).
[24] (RRIV-51-52).
[25] (RRIV-52-53).
[26] (RRIV-54).
[27] (RRIV-48, 54, 55).

On the original date for the encounter, appellant canceled the meeting because the child's mother stayed home.[28] He rescheduled it for the next day, explained that he planned to medicate the child so she would sleep, and not remember the sexual contact.[29] The officer agreed to meet appellant and his daughter around lunch on November 12, 2015.[30]

Before the meeting, appellant texted that he would meet the officer outside for the officer to "flash the gift" as proof he brought it, and then appellant would bring the officer to the child.[31] Appellant texted that, "She will be asleep. You may then leave, and we never talk again. Unless you want it again before Saturday."[32]

On November 12, appellant kept the officer appraised as he medicated the child and described her responses.[33] He gave the officer his address.[34] Appellant continued to assess the child's sleep because he wanted her in a deep sleep to avoid the sexual contact waking her.[35]

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[28] (RRIV-66).
[29] (RRIV-67).
[30] (RRIV-67).
[31] (RRIV-70).
[32] (RRIV-70).
[33] (RRIV-72).
[34] (RRIV-73).
[35] (RRIV-75).

Appellant met the officer in the parking lot.[36] The officer fanned out $1,000 dollars in cash when appellant asked to see it.[37] Then, appellant led the officer to the apartment.[38]

II. Appellant led the officer to a bedroom where his daughter lay unclothed from the waist down.

Inside the apartment appellant patted the officer down for a gun or a wire, and he took the officer to the child's bedroom.[39] The officer reiterated that he intended to place his mouth on the child's genitals.[40] Appellant led him into the child's darkened bedroom.[41] The officer saw the small girl lying in bed with a comforter covering everything but her head.[42]

Appellant told the officer to touch her and the officer leaned down, touched her head, and exclaimed, "Oh, she is precious. How old is she?"[43] His comment included the prearranged "bust" signal to his team that indicated he found a child present.[44] Appellant refused to tell the officer her age, and instead he leaned over the child to expose her bare buttocks.[45] She wore only a pajama top, and had no

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[36] (RRIV-89).
[37] (RRIV-90).
[38] (RRIV-91-92).
[39] (RRIV-97).
[40] (RRIV-97).
[41] (RRIV-98-99).
[42] (RRIV-98-99).
[43] (RRIV-99).
[44] (RRIV-99, 170-171).
[45] (RRIV-99).

clothing on below her waist.[46] She opened her eyes, which the officer used as an excuse to leave the room.[47] He took appellant with him and the officer open the front door for his team to arrest appellant.[48]

Another officer assessed the child, learned from her that she was four years old, and that officer observed the child's panties and pajama bottoms on the floor near her bed.[49] The child reported that her daddy gave her strawberry medicine.[50] Police found in the apartment a receipt for two sleep aids, a liquid and a pill, and an opened adult sleep aid on a table.[51] The child's mother stated that appellant purchased the medicine the day before.[52] She testified that the child was in good health when she left for work that morning, and the child raised no complaints about illness.[53] The child appeared groggy to the officer.[54]

III. Appellant obtained access to and harbored his four-year-old daughter in order to make her a victim of compelled prostitution.

Appellant had no contact with his daughter until a court ordered child support after she turned one.[55] Her mother acted as her sole caretaker.[56] After her

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[46] (RRIV-99-100).
[47] (RRIV-100).
[48] (RRIV-100).
[49] (RRIII-67, 72).
[50] (RRIII-75).
[51] (RRIV-109; State's Exhibit No. 16).
[52] (RRIV-109, 221; RRV-8; Petitioner's Exhibit No. 16, 49, 50).
[53] (RRV-10-12).
[54] (RRIII-169).
[55] (RRIV-213-214).
[56] (RRIV-213).

second birthday, they moved to Houston, and appellant only saw her two or three times between the move and his arrest.[57]

Appellant flew into Houston for a visit on November 11, 2015.[58] The mother agreed to let him spend a couple days with his daughter while she worked.[59] The day of appellant's arrest, the mother left her in his care.[60] When she left, her daughter was completely clothed.[61]

Police obtained appellant's cell phone and a warrant to search it.[62] The extraction showed that appellant exchanged numerous communications before his visit wherein he discussed prostituting his daughter, including discussions with 15 people about exchanging sexual contact with her for money.[63] Appellant negotiated prices, and he specified the type of sexual contact he would allow them to engage in with her.[64] At least one other person agreed to exchange money for the opportunity to perform sexual acts on the child.[65]

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[57] (RRIV-215).
[58] (RRIV-219).
[59] (RRIV-219, 222).
[60] (RRV-12).
[61] (RRV-12).
[62] (RRV-109-110).
[63] (RRVI-81-82).
[64] (RRVI-87).
[65] (RRVI-89).

SUMMARY OF ARGUMENT

The Fourteenth Court of Appeals erred when it held as a matter of law that any child younger than 14 lacked the mental capacity to consent to sex, and thus could not knowingly agree to engage in sexual conduct for a fee.[66] It then concluded that legally insufficient evidence supported appellant's convictions for compelling prostitution and trafficking of a person because the child was too young to consent to sex.[67] It reached this conclusion despite the fact that appellant offered and agreed that the undercover officer could have sexual contact with appellant's 4-year-old daughter in exchange for money.[68]

The Fourteenth Court's opinion conflicted with binding precedent from this Court that held commission of prostitution is not a prerequisite to committing compelling prostitution, and it contradicted contrary authority from multiple sister courts.[69] It erred when it relied on the Texas Supreme Court's *In re B.W.* despite

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[66] *Turley*, 597 S.W.3d at 43-44 (citing *In re B.W.*, 313 S.W.3d 818, 822, 824 (Tex. 2010)).
[67] *Id*. at 44, 46.
[68] *Id*. at 36-7.
[69] *Compare id*. at 43-47 *with Davis v. State*, 635 S.W.2d 737, 739 (Tex. Crim. App. 1982) (interpreting §43.05 not to require proof of a completed prostitution offense under §43.02); *Waggoner v. State*, 897 S.W.2d 510 (Tex. App.—Austin 1995, no pet.) (same); *Reese v. State*, 725 S.W.2d 793, 795 (Tex. App.—Beaumont 1987), *rev'd on other grounds by* 773 S.W.2d 314 (Tex. Crim. App. 1989) (same).

contrary language in *B.W.* that conflicted with the Fourteenth Court of Appeals' interpretation of Texas Penal Code Section 43.05.[70]

Its interpretation also leads to an absurd result wherein someone may sell sexual conduct with children 13 and younger without that sale constituting the crime of compelled prostitution. And the interpretation contradicts the statutory language, which on its face applied the prohibition to all children younger than 18.[71]

The law does not require proof that the child, and only the child, knowingly offered, agreed, or engaged in sexual conduct for a fee to establish that a child's pimp compelled her prostitution.[72] The evidence demonstrated that even if a completed act of prostitution was a necessary element of a compelling prostitution charge, it may be performed by the purveyor (appellant), the procurer (the undercover officer), or both. Thus, even without the child's knowledge or legal consent, they had compelled her prostitution.[73]

The evidence sufficed to uphold appellant's convictions for compelling prostitution and trafficking when it established that he offered and agreed to exchange oral sexual contact with his 4-year-old daughter for $1,000, and when

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[70] *See id.*; *but see B.W.*, 313 S.W.3d at 824 (stating that *B.W.*'s central holding will have no impact on prosecution of pimps and purveyors of children).
[71] Tex. Penal Code Ann. § 43.05(a)(2) (West 2015).
[72] *See id.*
[73] *See id.*

appellant obtained her in order to compel her sexual conduct with another person for a fee. The statutes do not excuse his conduct merely because he drugged the child to gain her cooperation or avoid discovery. The evidence sufficed to prove the elements of Section 43.05. That, along with the evidence that appellant provided and obtained the child while he caused her to become the victim of compelled prostitution provided sufficient evidence to support his conviction for trafficking in violation of Section 20A.02(a)(7)(H).

ARGUMENT ON THE FIRST ISSUE PRESENTED

Did the court of appeals err when it held as a matter of law that selling sexual contact with a four-year-old child could never constitute compelled prostitution?

The majority's faulty interpretation of Section 43.05 began and ended with *B.W.*[74] Yet, neither *B.W.* nor the events that followed it supported the conclusion that Texas Penal Code Section 22.021 somehow infringed upon the legislature's express language that people who sold sex with children may be held accountable for that separate and distinct offense from a prosecution for sexually assaulting a child. The sale of sexual contact with the child presents a different offense from

[74] *Turley*, 597 S.W.3d at 34-36, 43-45 (citing *B.W.*, 313 S.W.3d at 818, 822-26).

the sexual assault and the State may punish that additional offense instead of or in addition to any assault.[75]

I. Children can be both sexually assaulted and the victim of compelled prostitution regardless of their consent.

The Fourteenth Court of Appeals confused consent with abuse, but the legislature suffered no such misimpression. On the contrary, it wrote various series of laws that criminalized the sexual abuse of children and public indecency laws that penalized those who published or profited from such abuse.[76] Nothing in the statutes anticipates that courts will interpret them identically or in unison.[77]

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[75] *See* Tex. Penal Code Ann. §43.05(c) (West 2015) ("If conduct constituting an offense under this section also constitutes an offense under another section of the code, the actor may be prosecuted under either section or under both sections.").

[76] *See* Appendix A (listing five statutes prohibiting sexual abuse of a child and ten statutes penalizing a person attempting to publish images of or profit from such abuse); *including* Tex. Penal Code Ann. §20A.02(a)(7) (West 2015)(prohibiting trafficking of a person for purposes of prostitution, compelling prostitution, forced labor, etc.); Tex. Penal Code Ann. §43.05 (West 2015)(penalizing a person compelling a child under 18 to commit prostitution regardless of the means used to cause it).

[77] *See* Tex. Penal Code Ann. §§2.03, §2.04 (West 2015)(noting that a defense or affirmative defense is so labeled in the penal code); §8.01-8.07 (West 2015)(defining general defenses and affirmative defenses to prosecution, but not listing consent among them); *see also* Tex. Penal Code Ann. §43.05 (West 2015)(including no reference to lack of consent or inability to consent as a defense to compelled prostitution); Tex. Penal Code Ann. §43.02(d) (West 2015)(including as a defense to prosecution that the person knowingly committed the offense while a victim of trafficking or compelled prostitution); *see also Miles v. State*, 468 S.W.3d 719, 731-36 (Tex. App.—Houston [14th Dist.] 2015), *aff'd by* 506 S.W.3d 485 (Tex. Crim. App. 2016)(holding the sexual assault and compelling prostitution statutes criminalize different types of conduct for which there can be varying defenses and punishments); *see also Miles v. State*, 506 S.W.3d 485, 487-8 (Tex. Crim. App. 2016)(holding the statutes clear and unambiguous language is given full effect, and refusing to conflate provisions even in the same statute when separated by subsections and an "or"); *Ex*

Neither this Court's precedent nor that of other appellant courts to consider it have interpreted the various statutes collectively.[78] Based on the very language of the statute, consent simply plays no part in the assessment of whether someone has compelled a child's prostitution.[79]

a. Compulsion does not require consent.

The very title of the statute at issue announces that consent is not a part of the proof necessary to establish a violation.[80] Black's Dictionary defines the word "compel" as to "cause or bring about by force, threats, or overwhelming

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parte Dehnert, __S.W.3d__, Nos. 01-20-00344-CR through 01-20-00353-CR, 2020 WL 3969755 (Tex. App.—Houston [1st Dist.] Jul. 14. 2020, no pet. h.)(holding use of under 17 for purposes of sexual assault and indecency did not require the legislature to use the same age in its prohibition against child pornography); *see also Dombusch v. State*, 156 S.W.3d 859, 871 (Tex. App.—Corpus Christi 2005, pet. ref'd)(holding sexual performance of a child statute may use a higher age than the sexual assault statute); *Ex parte Fujisaka*, 472 S.W.3d 792, 800 (Tex. App.—Dallas 2015, pet. ref'd)(same).

[78] *See Davis v. State*, 635 S.W.2d 737, 739 (Tex. Crim. App. 1982)("There is no need to set out the elements of prostitution [in a compelling prostitution indictment]. The actual commission of the offense of prostitution is not a p[re]requisite to the commission of the offense of compelling prostitution."); *Dula v. State*, 679 S.W.2d 601 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd)(refusing to interpret §43.05 in terms of the amount of force specified in the rape and aggravated rape statutes); *Waggoner v. State*, 897 S.W.2d 510 (Tex. App.—Austin 1995, no pet.)(holding that a completed act of prostitution is not required to prove compelling prostitution because evidence that the defendant provided an opportunity for the minor to engage in prostitution sufficed to prove compelling prostitution); *In re B.D.S.D.*, 289 S.W.3d 889, 894-5 (Tex. App.—Houston [14th Dist.] 2009, pet. denied), *cert denied by* 562 U.S. 1218 (2011)(holding §43.05 did not create a defense to prosecution for a 14-year-old child who knowingly engaged in prostitution).

[79] *See* Tex. Penal Code Ann. §43.05 (West 2015).

[80] *See id*. ("Compelling Prostitution").

pressure[.]"[81] No language in the compelling prostitution statute references consent.[82]

The Fourteenth Court leapt to the concept that the child's ability to consent is a necessary element of compelled prostitution in two distinct jumps.[83] First, to compel prostitution the defendant must have caused the child to engage in a completed act of prostitution, namely that the child must have knowingly committed a violation of Texas Penal Code Section 43.02.[84] Second, it found that no child younger than 14 could ever commit prostitution because the child "lacked the mental capacity to consent to sexual conduct as a matter of law[,]" and thus could not have committed the precursor offense of prostitution.[85] Accordingly, it held that no person could ever compel a child 13 or younger to commit prostitution as a matter of law because the child was legally incapable of committing the precursor crime.[86]

b. The house of cards that *In re B.W.* built.

The majority reached this conceptual leap not based on case law interpreting the compelling prostitution statute, despite decades of such interpretations, but instead based on the non-binding, unrelated Texas Supreme Court decision in *In re*

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[81] COMPEL, Black's Law Dictionary (11th ed. 2019).
[82] *See* Tex. Penal Code Ann. §43.05 (West 2015).
[83] *See Turley*, 597 S.W.3d at 39-44.
[84] *Id*. at 42.
[85] *Id*. at 43.

B.W., which interpreted Texas Family Code provisions related to juvenile delinquency.[87] In a statutory analysis of Texas Family Code Section 51.03, the Court questioned whether the legislature meant its "wholesale incorporation of Penal Code offenses into the juvenile justice provisions[,]" including the prosecution of a 13-year-old for prostitution in light of its "specific pronouncement that a child under fourteen is legally incapable of consenting to sex with an adult."[88] The Court concluded that the legislature had no intent to transform child victims of an adult's sexual exploitation into juvenile offenders based on a lack of statutory guidance regarding the legislature's specific intent.[89]

The legislature, however, gave the Court guidance on its intent in the next legislative session. It expressly included prostitution within the "children in need of supervision" definition for which the State could prosecute children between the ages of 10 and 17.[90] Thus, the legislature definitively spoke on whether the State

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[86] *See id*. at 43-44.

[87] *Id*. at 43-44 (finding *B.W.* persuasive because it addressed the legal incapacity of children under 14 to consent to sex as a factual matter)(citing *B.W.*, 313 S.W.3d at 822-824, 826; Tex. Penal Code Ann. §43.02 (West 1993)).

[88] *See B.W.*, 313 S.W.3d at 819.

[89] *Id*. at 819, 826.

[90] Act of Apr. 14, 2011, 82nd Leg., R.S., Chp. 1150, §1, sec. 51.03(b)(7), 2011 Tex. Sess. Law Serv. Chp. 1150 (to be codified as Tex. Fam. Code §51.03(b)(7))(amending Tex. Fam. Code Ann. §51.03 to expressly include Tex. Penal Code §43.02 within the "children in need of supervision" conduct for which the State may prosecute a child); *see also* Tex. Fam. Code Ann. §51.02(2) (West 2015)(defining a child as someone over age 10 and under 17).

could prosecute a child under the juvenile delinquency statutes for prostitution, and concluded that it could.[91]

c. The Texas Supreme Court refused to extend *B.W.*

More recently, as another breeze to blow over the house of cards *B.W.* built, the Texas Supreme Court narrowed the holding in *State v. R.R.S.*[92] Although the Court reiterated its central holding from *B.W.* that "a child younger than fourteen cannot legally 'consent to sex' and thus, as a matter of law, cannot commit the offense of prostitution", it further found that a child's legal inability to consent to sex *did not* render the child legally incapable of committing aggravated sexual assault.[93]

It held that the intermediate appellate court in *R.R.S.* too broadly interpreted *B.W.* when it found that *B.W.* created a defense to an aggravated sexual assault charge based solely on the fact that the accused was 13 years old.[94] The Texas

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[91] *See id*.

[92] *State v. R.R.S.*, 597 S.W.3d 835 (Tex. 2020)(reversing the lower court which found based on *B.W.* that no juvenile could be prosecuted for aggravated sexual assault because the juvenile perpetrator could not consent to sex and so could not have knowingly sexually assaulted two younger children).

[93] *Id*., at 837; *but see* Act of Apr. 14, 2011, 82nd Leg., R.S., Chp. 1150, §1, sec. 51.03(b)(7), 2011 Tex. Sess. Law Serv. Chp. 1150 (codifying Tex. Fam. Code §51.03(b)(7)).

[94] *Id*.. at 839-40.

Supreme Court found the lower court's decision misinterpreted the ultimate holding in *B.W.*[95]

B.W. exempted the victim of a sexual assault from prosecution, not the abuser.[96] In *B.W.*, the Court found a requirement within the prostitution statute that the accused must have the lawful ability to consent to sex because the statute required her to agree or offer to agree to exchange sex for a fee.[97] Thus, it interpreted into the prostitution statute a requirement that the accused be lawfully able to consent to sex to reach the mutual assent necessary for an agreement.[98] It reached its conclusion despite longstanding precedent from this Court that no intent to consummate the sexual conduct must accompany the offer or agreement to exchange sex for a fee.[99] Regardless, the *R.R.S.* Court held that the juvenile's

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[95] *See id*., at 840, n. 4 (questioning *Matter of T.V.T.*, No. 14-18-00807-CV (Tex. App.—Houston [14th Dist.] Dec. 19, 2019, no pet. h., mot. for reh'g pending) when it relied on R.R.S. to find a 13-year-old could not commit aggravated sexual assault).

[96] *See id*., at 840-41 ("We explained in *B.W.* that sections 22.021 (the aggravated sexual assault statute) and 22.011 (the sexual assault statute) confirm the legislature's recognition that children under fourteen cannot 'consent to sex,' but we never suggested that either of those statutes requires proof that the *accused* consent to sex. Rather,…the statutes confirm the legislature's recognition that children under fourteen cannot consent to sex by providing no defense when the *victim* is younger than fourteen.")(emphasis original)(citing *B.W.*, 313 S.W.3d at 821).

[97] *See id*., at 841.

[98] *See R.R.S.*, 597 S.W.3d at 842 ("The requirement that the accused 'agreed' or offered to 'agree' with another person is what makes the accused's ability to '*consent* to sex' essential to the offense of prostitution.")(emphasis original).

[99] *Compare id*., 839-842 (distinguishing the offer or agreement to exchange sex for a fee which requires a conscious awareness of an the agreement and the accused's ability to "consent to sex" from aggravated sexual assault because there is no agreement when the crime focuses on the desire to engage in the conduct, cause the result, or an

"legal inability to 'consent to sex' did not render him illegally incapable of committing the offense of aggravated sexual assault" since consent was not an element of that offense.[100]

Ultimately, the lack of any need to reach an agreement with the victim as a precursor element of aggravated sexual assault showed that *B.W.* raised no defense to an aggravated sexual assault charge.[101] Likewise, the compelling prostitution charge has no requirement that the victim consent to her own compelled prostitution.[102] Consent or lack of consent is not an element of the offense.[103]

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awareness that the conduct is reasonably certain to cause the result) *with Mattias v. State*, 731 S.W.2d 936, 937, 940 (Tex. Crim. App. 1987)(holding that intent to consummate an offer is not an element of a knowing offer to engage in sexual conduct for a fee under §43.02(a)); *Frieling v. State*, 67 S.W.3d 62, 470-1 (Tex. Crim. App. 2002) ("'The intent that must accompany future sexual contact need not accompany the offer or agreement to engage in sexual conduct.' We hold the intent to consummate an offer or agreement to engage in sexual conduct is not an element of the offense of prostitution under §43.02(a)(1)[.]")(citations omitted).

[100] *Id.*, at 842-43.

[101] *Id.*, at 841-43.

[102] *See* Tex. Penal Code Ann. §43.05 (West 2015)(providing as the gravamen of compelling prostitution that the defendant knowingly cause by any means a child younger than 18 to commit prostitution); *see also* Tex. Penal Code Ann. §6.03 (West 2015)(defining knowingly for a result-of-conduct offense as acting "with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."); *Hill v. State*, 265 S.W.3d 539, 543 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd)(holding that compelling prostitution is a result-of-conduct offense); Tex. Penal Code Ann. §6.04 (West 2015)(holding a person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient); *see also Davis*, 635 S.W.2d at 739 (holding proof of a prostitution offense is not a prerequisite to commission of compelling prostitution); *Reese v. State*, 725 S.W.2d 793, 795 (Tex. App.—Beaumont 1987), *rev'd on other grounds by* 773 S.W.2d 314 (Tex. Crim. App. 1989)(same).

The child need not agree to prostitute herself to be the victim of a compelled prostitution, so her ability to lawfully consent to the event is not an element.[104] *B.W.*'s reasoning has no impact on interpretations of an adult's conduct that violated Texas Penal Code Section 43.05.[105] The child's lawful ability to offer, agree, much less consent to sex, is simply not required to convict a person who *compelled* her prostitution.[106]

d. By its express terms, *B.W.* allowed the State to prove compelling prostitution of a child younger than 14.

In *B.W.*, the Texas Supreme Court expressly disavowed that its holding had any effect on prosecution of "pimps and other sexual exploiters of children" because the State could prosecute such offenses without the need to prosecute the child.[107] It rejected openly "the State's argument that exempting children under

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[103] *Id.* (listing as elements a person knowingly causing by any means the child to commit prostitution).

[104] *See id*.

[105] *Compare R.R.S*, at 839-42 (distinguishing *B.W.* as applying when the accused is a minor and when his offer or agreement, thus ability consent to sex, is an essential element of the offense) *with Davis*, 635 S.W.2d at 739 (holding prostitution is not a precursor to proving compelling prostitution); *Waggoner*, 897 S.W.2d at 513 (holding the evidence sufficient to prove compelling prostitution even in the absence of an offer or agreement reached by the child to engage in prostitution because the defendant's acts compelled her prostitution when he brought her to the location to engage in sexual conduct, and when the defendant negotiated the price to exchange sexual conduct for a fee).

[106] *See* Tex. Penal Code Ann. §43.05 (West 2015); *see also Waggoner*, 897 S.W.2d at 511, 513.

[107] *B.W.*, 313 S.W.3d at 824 (citing *Waggoner v. State*, 897 S.W.2d 510, 513 (Tex. App.—Austin 1995, no pet.); *Davis v. State*, 635 S.W.2d 737, 739 (Tex. Crim. App. 1982)).

fourteen from prosecution for prostitution w[ould] somehow undermine the State's ability to protect children and encourage the sexual exploitation of minors."[108]

Rather, relying on *Davis v. State* and *Waggoner v. State*, the Texas Supreme Court supported its conclusion that the State may still prosecute sexual exploiters of children for compelling prostitution by noting "[t]he actual commission of the offense of prostitution is not a prerequisite to the commission of the offense of compelling prostitution."[109] A child can be "caused to commit prostitution" by other than her own offer, agreement, or lawful consent because a person has caused the child's prostitution when he sold sexual contact with her or when someone else agreed to pay a fee for that sexual conduct.[110]

II. Precedent from this Court and the other appellate courts to consider the matter have long held that proof of a completed prostitution is not an element of compelling prostitution.

The majority opinion, rather than acknowledge the lack of applicability *B.W.* itself announced, instead chose to distinguish *Davis v. State* and disagree with *Waggoner v. State* in order to hold that *B.W.* somehow supplanted *Waggoner's* and

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[108] *Id*.

[109] *Id*. (quoting *Waggoner*, 897 S.W.2d at 513; citing *Davis*, 635 S.W.2d at 739; Tex. Penal Code Ann. §43.25 (West 2015)(sexual performance by a child)).

[110] *Compare* Tex. Penal Code Ann. §43.05(a)(2) (West 2015)(defining compelling prostitution as a person knowingly causing by any means a child younger than 18 to commit prostitution without regard to whether the actor knows the child's age at the time) *with* Tex. Penal Code Ann. §43.02 (West 2015)(defining prostitution to include a person offering to engage, agreeing to engage, or engaging in sexual conduct in return for receipt of a fee; and, as a person based on payment of a fee offering to

Davis's conclusion that a completed prostitution offense is not a precursor to proving compelling prostitution.[111] The *Turley* majority found that *Davis* considered only an attempt to compel prostitution, and so did not require the State to allege the secondary culpable mental state required for prostitution to prove an attempted compelling prostitution.[112] And, as to *Waggoner*, it found that the Austin Court failed to consider the child's capacity to knowingly offer or agree, and so distinguished its holding.[113] The majority reached this conclusion without consideration of *B.W.*'s reliance on those very holdings, or that *Waggoner* directly considered and refuted that the child must commit prostitution to provide sufficient evidence to prove compelling prostitution.[114]

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engage, agreeing to engage, or engaging in sexual conduct, or through the public solicitation of sexual conduct for hire).

[111] *See Turley*, 597 S.W.3d at 44-45 (distinguishing *Davis* as an attempt to compel the prostitution of an adult, and concluding that *Waggoner* predated *B.W.* and did not directly consider the capacity of the 13-year-old to knowingly offer or agree to receive a fee for sexual conduct).

[112] *Id*. at 44 (distinguishing *Davis*, 635 S.W.2d at 738-9).

[113] *Id*. at 44-45.

[114] *See id*. at 44-45; *but see B.W.*, 313 S.W.3d at 824 (relying on *Waggoner* for the conclusion that a completed prostitution is not an element of proving compelling prostitution); *Waggoner*, 897 S.W.2d at 513 ("Appellant also seeks reversal on the basis that there is insufficient evidence to establish that prostitution occurred. However, the actual commission of the offense of prostitution is not a prerequisite to the commission of the offense of compelling prostitution)(citing *Davis*, 635 S.W.2d at 739; *Reese v. State*, 725 S.W.2d 793, 795 (Tex. App.—Beaumont 1987), *rev'd on other grounds*, 773 S.W.2d 314 (Tex. Crim. App. 1989)).

a. *Davis v. State* offered binding precedent from this Court that the Fourteenth Court of Appeals ignored.

Although *Davis* considered an attempt to compel prostitution, it provided binding precedent the *Turley* Court disregarded.[115] In a comparison between compelling prostitution and aggravated robbery, this Court held that like an aggravated robbery indictment need not list the elements of theft, a compelling prostitution indictment need not list the elements of prostitution.[116] The rationale for this was not specific to how indictments must be phrased, but instead based on the conclusion that commission of prostitution is not a prerequisite required to prove compelling prostitution.[117] It equated compelling prostitution to robbery wherein a completed theft is not an element necessary to prove robbery.[118] The majority's disagreement with *Davis*'s reasoning and the fact that the case involved attempt did not make central holding any less binding on the intermediate appellate

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[115] *Compare Turley*, 597 S.W.3d at 44 (distinguishing *Davis* because the indictment alleged attempting to compel prostitution) *with Davis*, 635 S.W.2d at 739 ("The actual commission of the offense of prostitution is not a prequisite (sic) to the commission of the offense of compelling prostitution. For an analogous situation see Earl v. State, 514 S.W.2d 273 (Tex. Crim. App. 1974), where the appellant was indicted for aggravated robbery and on appeal he argued the indictment should have alleged the elements of theft….we find that the required culpable mental state is properly alleged [in *Davis*'s indictment].").

[116] *Davis*, 635 S.W.2d at 739 (citing *Earl*, 514 S.W.2d at 273).

[117] *Id*.

[118] *See id*.

court as a final statutory interpretation of the elements necessary to prove compelling prostitution.[119]

b. *Waggoner v. State* followed *Davis* and provided contrary authority to the majority's decision to add an element to the compelling prostitution statute that the legislature did not require.

The Austin Court of Appeals had no cause to consider the capacity of a 13-year-old to knowingly offer or agree to exchange sex for a fee, and neither did the Fourteenth Court.[120] Despite similar circumstances between the two factual scenarios, the *Waggoner* Court held that proof of a completed prostitution is not an element necessary to prove compelling prostitution.[121] In *Waggoner* police intervened before the child could make any offer, reach any agreement, or actually

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[119] *See* Tex. Const. Art. 5, §5 (stating the Court of Criminal Appeals has final appellate jurisdiction and its determinations are final unless an exception is provided by law or the constitution); *Purchase v. State*, 84 S.W.3d 696, 701 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd)(holding that an intermediate court of appeals is bound by the decisions of the state's highest criminal court and without authority to address the propriety of that court's precedent)(citation omitted).

[120] *See Waggoner*, 897 S.W.2d at 513; *see also Davis*, 635 S.W.2d at 739; *Reese*, 725 S.W.2d at 795.

[121] *Compare Waggoner*, 897 S.W.2d at 511 (addressing sufficiency of the evidence to prove compelling prostitution when police intervened before the 13-year-old child could enter the room to offer, agree, or exchange sexual conduct for a fee, but finding under *Davis* that a completed prostitution is not require to prove compelling prostitution) *with Turley*, 597 S.W.3d at 36-37 (showing appellant negotiated $1,000 for sexual contact with the child, designated the sexual contact permitted, provided a place to host the encounter, and provided the child for the sexual contact, but police intervened before any sexual contact occurred).

engage in sexual conduct in exchange for a fee.[122] And the appellate court upheld the conviction for compelled prostitution despite a sufficiency challenge.[123]

Waggoner brought the 13-year-old to the location where police set up a sting operation to catch him in the act of providing a minor for prostitution purposes.[124] Police arrested the defendant while he had the child in his car, after he had purchased condoms for her, provided her with a cell phone, and drove her to the location where he believed she had "a call" for prostitution services.[125] The child never met with anyone other than the defendant.[126] She made no offers or agreements with any proposed clients.[127]

Similarly, the defendant in *Waggoner* alleged insufficient evidence to support his compelling prostitution conviction because he claimed the State failed to prove that the child engaged in prostitution to underlie the compelling prostitution conviction.[128] Relying on this Court's holding in *Davis*, the Austin Court held that actual commission of prostitution is not a prerequisite to commission of compelling prostitution.[129] The State was not required to prove that

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[122] *Waggoner*, 897 S.W.2d at 511.
[123] *See id*. at 511-513.
[124] *Id*.
[125] *Id*.
[126] *Id*.
[127] *Id*.
[128] *Id*. at 513.
[129] *Id*.

the child committed prostitution for the jury to convict appellant.[130] Rather, appellant's efforts caused her "by any means" to commit prostitution when he provided the contact, transported her to the call, negotiated the price for her services, provided her with condoms, and the cell phone.[131] The defendant's actions "caused her to act" and in that way met the causation and knowledge elements of compelling prostitution.[132]

The evidence found sufficient in *Waggoner* differed little from the evidence in this case. Appellant found the buyer, negotiated the price, set up the "safe location", and provided the drugged child to ensure her compliance, all in an effort to receive the $1,000.[133] His actions were just as directly the cause of this child's prostitution, with or without her cooperation, knowledge, or lawful ability to consent.[134] The Fourteenth Court's decision to stray into uncharted territory by creating a lawful-ability-to-consent-to-sex element of compelled prostitution was unnecessary and unsupported.[135]

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[130] *Id*.
[131] *Id*. at 512.
[132] *Id*. at 512-13.
[133] *See Turley*, 597 S.W.3d at 36-7.
[134] *Compare Waggoner*, 897 S.W.2d at 511-13 *with id*.
[135] *See Waggoner*, 897 S.W.2d at 513; *see also* Tex. Penal Code Ann. §43.05(a)(2) (West 2015)(listing the element of compelling prostitution without mentioning consent).

c. In *Reese v. State*, the Beaumont Court of Appeals held that Section 43.05 does not require proof of a completed prostitution to sustain a conviction for compelling prostitution.

The Beaumont Court of Appeals in *Reese v. State* relied on *Davis* when it upheld the jury's verdict convicting the defendant of compelling prostitution after the jury found him not guilty of the lesser-included offense of prostitution.[136] Reese alleged on appeal that the trial court erred by denying his motion for instructed verdict "because the state did not prove that any prostitution took place", but the Beaumont Court reiterated that proof of a prostitution is not a prerequisite to proving compelling prostitution.[137] The version of the statute applicable in *Reese* was fundamentally the same as the elements required to prove compelling in *Turley*.[138]

d. Numerous sister courts considered the issue, and relied upon *Davis* and *Waggoner* for their evidentiary sufficiency analysis.

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[136] *Reese*, 725 S.W.2d at 794-5 (overruling point of error that alleged the form of the verdict was defective when the jury first returned with a verdict that found the defendant guilty of compelling prostitution and not guilty of the lesser included offense of prostitution, the judge ordered the jury to reread the charge, and it returned later with a form that lined through the prostitution lesser, but still found appellant guilty of compelling because commission of prostitution is not a prerequisite to commission of compelling prostitution)(citing *Davis*, 635 S.W.2d 737).

[137] *Id*. (citing *Davis*, 635 S.W.2d 737).

[138] *Compare* Tex. Penal Code Ann. §43.05(a)(2) (West 2015)(criminalizing a person's knowingly causing by any means a child younger than 18 to commit prostitution) *with* Tex. Penal Code Ann. §43.05(a)(2) (West 1974)(criminalizing a person's knowingly causing by any means a child younger than 17 to commit prostitution).

The Dallas Court of Appeals in *Cotton v. State* held that the defendant compelled the prostitution of a 13-year-old runaway despite his claim that the State had not proved a specific act of prostitution.[139] The Court relied in part on *Davis*, *Waggoner*, and *Reese* to find that "the actual commission of the offense of prostitution is not a prerequisite to the commission of the offense of 'compelling prostitution.'"[140] It further held that compulsion of a child could include persuasion, as well as force, and thus providing an opportunity to a child to engage in prostitution while influencing, persuading, or prevailing upon the child to do so sufficed to prove the causation element of compelling prostitution.[141]

In 2011, after the *B.W.* decision, the First Court of Appeals upheld a defendant's compelling prostitution conviction despite an insufficiency claim when the victim was 13 years old in *Johnson v. State*.[142] The First Court cited to *Davis* and *Waggoner* in its sufficiency evaluation to hold the actual commission of prostitution was not a prerequisite to the commission of compelling prostitution.[143] Thus, despite the defendant's complaints that the victim was incoherent in her

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[139] *See Cotton v. State*, No. 05-85-01070-CR, 1997 WL 331008, at *3 (Tex. App.—Dallas Jun. 18, 1997, pet. ref'd)(not designated for publication).

[140] *Id*. (citing *Davis*, 635 S.W.2d at 739; *Waggoner*, 897 S.W.2d at 513; *Reese*, 725 S.W.2d at 795).

[141] *Id*. (citing *Waggoner*, 897 S.W.2d at 513; *Wood*, 579 P.2d at 296).

[142] *Compare Johnson v. State*, No. 01-09-00799-CR, 01-09-00800-CR, 2011 WL 494813, at *1 (Tex. App.—Houston [1st Dist.] Feb. 10, 2011, pet. ref'd)(not designated for publication) *with B.W.*, .313 S.W.3d at 818 (decided on Jun. 18, 2010).

[143] *Id*. at *2 (citing *Wagoner*, 897 S.W.2d at 513; *Davis*, 635 S.W.2d at 739).

testimony, a drug user, and that other than her testimony only circumstantial evidence connected him, the First Court found the evidence sufficient to prove compelling prostitution.[144]

The First Court followed *Johnson*, and again relied on *Waggoner* and *Davis* in 2017 when in *Payne v. State* it upheld the compelling prostitution conviction.[145] Again, the defendant complained the evidence was legally insufficient to prove that the child committed prostitution, but the Court relied on *Waggoner* to hold that no completed act of prostitution must occur to prove compelling.[146]

The San Antonio Court of Appeals addressed the sufficiency of the evidence to support a compelling prostitution conviction on a 15-year-old child.[147] The San Antonio Court noted that *Davis* did not require the commission of prostitution as a prerequisite to commission of a compelling prostitution, and it too found the evidence sufficient to prove compelling prostitution when the defendant transported the child to locations so she could find men to have sex with and took the money she brought back.[148]

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[144] *Id*. at *3-4.

[145] *Payne v. State*, No. 01-16-00821-CR, 2017 WL 5503650, at *2 (Tex. App.—Houston [1st Dist.] Nov. 16, 2017, no. pet.)(not designated for publication)(quoting *Waggoner*, 897 S.W.2d at 513; citing *Davis*, 635 S.W.2d at 739; *Johnson*, 2011 WL 494813, at *2).

[146] *Id*.

[147] *Agyin v. State*, Nos. 04-12-00749-CR, 04-12-00750-CR, 04-12-00751-CR, 2013 WL 5864483 (Tex. App.—San Antonio Oct. 30, 2013)(not designated for publication) (upholding compelling prostitution conviction despite sufficiency challenge).

[148] *Id*. at *2 (citing *Davis*, 635 S.W.2d at 739).

In *Menyweather v. State*, the Dallas Court of Appeals cited to *Waggoner* in its sufficiency evaluation of a compelling-prostitution conviction.[149] It noted that proof of a completed prostitution was not required to prove the charge.[150] "[O]ne who *provides opportunity* for a willing minor to engage in prostitution and *influences*, *persuades* or *prevails upon her to do so* has…caused the prostitution…."[151] But, it specified the premise also applied to an unwilling child when the defendant provided an opportunity for the child to engage in prostitution.[152] The Dallas Court declined to find that *Waggoner* created an overly expansive definition of causation.[153]

In *Kelly v. State*, the Waco Court of Appeals relied heavily on *Waggoner v. State*, in its causation analysis.[154] The defendant staunchly contested whether she had induced or caused the child to commit prostitution.[155] Although *Waggoner* expressed one manner in which a person might cause a child's prostitution, the facts in *Kelly* still sufficed to show the defendant influenced the child by assisting

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[149] *Menyweather v. State*, No. 05-13-01108-CR, 2014 WL 6450826, at *4 (Tex. App.—Dallas Nov. 18, 2014, no pet.) (not designated for publication) (citing *Waggoner*, 897 S.W.3d at 512; *State v. Wood*, 579 P.2d 294, 296 (Or. Ct. App. 1978)).
[150] *Id*. at *4 (quoting *Waggoner*, 897 S.W.2d at 512; *Wood*, 579 P.2d at 296).
[151] *Id*. at *4 (quoting *Waggoner*, 897 S.W.2d at 512; *Wood*, 579 P.2d at 296).
[152] *Id*.
[153] *Id*. (citing Tex. Penal Code Ann. §6.04(a)).
[154] *Kelly v. State*, 453 S.W.3d 634, 641-44 (Tex. App.—Waco 2015, pet. ref'd)(citing *Waggoner*, 897 S.W.2d at 510-13).
[155] *Id*.

her.[156] "[W]hile providing a willing minor the opportunity to engage in prostitution and influencing, persuading, or prevailing upon her to do so is one way to commit the offense of compelling prostitution, the statute does not limit that conduct to the only conduct by which a person commits the offense."[157] Section 6.04(a) provided a more expansive definition of causation applicable to the defendant's actions that sufficed when she assisted the child with translation and the use of a room for the activity.[158]

In further reliance on *Davis* and also *B.W.*, the Texarkana Court of Appeals modified one of three trafficking counts to a compelling prostitution despite the perpetrator injecting the 15-year-old child with heroin, which was not her drug of chose, in order to make sure she would do whatever the individuals selling sex with her wanted.[159] The child testified she passed out after the injections and had no clear recollection of the events that occurred while she was incoherent.[160]

Although the Texarkana Court found on the final instance that the record lacked evidence the defendant received money from the child's prostitution more than two times, it held the evidence sufficed to show the lesser-included offense of

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[156] *Id*. at 642.
[157] *Id*.
[158] *Id*.
[159] *Evans v. State*, No. 06-16-00064-CR, 2017 WL 1089806, at *2, *6 (Tex. App.—Texarkana Mar. 22, 2017, pet. ref'd)(not designated for publication).
[160] *Id*. at *2.

compelling prostitution.[161] Relying on *B.W.* and *Davis*, the Court noted that the actual commission of prostitution was not a prerequisite to commission of compelling prostitution, and that the jury had necessarily found that the defendant knowingly caused the child, who was under 18, to commit prostitution.[162]

Notably, the explanation included in *B.W.* and *Davis* enveloped the defendant's conduct despite the child's incapacity due to forced heroin intoxication and the lack of evidence on the third occasion to show he took money in exchange for sex with the child.[163] Relying on the defendant's explanation that "these whores going to stop playing with me" and evidence that he injected her so she would do whatever he wanted sufficed to prove the compelling, even though others removed the child before further prostitution activities commenced.[164]

The list of cases spanning numerous sister courts who relied upon *Davis* and *Waggoner* to hold a completed act of prostitution is not a prerequisite to commission of compelling prostitution includes additional cases from the Dallas and Austin appellate courts.[165] Courts have consistently held that providing an

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[161] *Id*. at *6.
[162] *Id*. (citing *B.W.*, 313 S.W.3d at 824; quoting *Davis*, 635 S.W.2d at 739).
[163] *See id*. at *2-3, 6.
[164] *See id*. at *2-3, 6.
[165] *See Wilkerson v. State*, Nos. 05-11-00060-CR through 05-11-00062-CR, 2012 WL 2877623, at *4 (Tex. App.—Dallas Jul. 16, 2012, pet. ref'd)(not designated for publication)(citing *Waggoner*, 897 S.W.2d at 513; *Davis*, 635 S.W.2d at 739 to hold actual commission of prostitution is not a prerequisite to commission of compelling prostitution); *Williams v. State*, Nos. 05-11-01729-CR, 05-12-00007-CR, 2013 WL 3974045, *5 (Tex. App.—Dallas Jan. 15, 2014, pet. ref'd)(not designated for

opportunity for the child's prostitution while doing something to effectuate or cause it suffices to prove compelling prostitution.[166]

e. No court other than the Fourteenth has considered consent to the sexual activity an element of compelled prostitution.

To show that consent plays no role in a compelling prostitution sufficiency analysis, the Eastland Court of Appeals upheld a compelling prostitution conviction when the perpetrator held the 13-year-old child at gunpoint throughout the forced sexual acts.[167] Appellant paid the child $60 after he forced her to engage in sex acts at gunpoint, and he gave another $60 to the person who arranged the encounter.[168] Similar to *Turley*, a third person set up the encounter between

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publication)(same); *Torres v. State*, Nos. 03-15-00520-CR, No. 02-15-00690-CR, 2017 WL 3585240, *6 (Tex. App.—Austin Aug. 15, 2017, no pet.)(not designated for publication)(relying on *Waggoner* to hold holding providing opportunity for a minor to engage in prostitution while influencing, persuading, or prevailing upon the child suffices, because "the State was not required to show that [the child] intended to engage in prostitution to establish an offense under section 43.05(a)(2)" because providing the opportunity while prevailing on her sufficed).

[166] *See Torres*, 2017 WL 3585240, at *6 (creating opportunity and prevailing upon child sufficed); *Kelly*, 453 S.W.3d at 642 (providing opportunity for a minor by persuading is one means of compelling prostitution, but a jury may still find "but for" the defendant's conduct in making the calls to the men for the child, acting as a translator, and providing a bedroom sufficed to prove she compelled the child's prostitution).

[167] *See Underwood v. State*, No. 11-02-00254-CR, 2004 WL 584606 (Tex. App.—Eastland Mar. 25, 2004, pet. ref'd)(not designated for publication).

[168] *Id*. at *1-2.

appellant and the child.[169] The third person and appellant took the child to the motel room appellant rented.[170]

In *Cramer v. State*, the Dallas Court of Appeals upheld a compelling prostitution conviction despite a sufficiency challenge for an adult victim who had the mental age of a five-year-old.[171] It held the force used to cause the prostitution took into account the diminished capacity of the victim, who appeared to have no clear understanding of sex, after the trial court found her only competent to testify to her own name and nothing else.[172]

In *Cramer*, the defendant made the offers and reached the agreements to exchange sex with the mentally challenged woman for a fee.[173] The victim appeared not to understand what had occurred, and instead she appeared "shocked, scared, and like 'she didn't know where she was'" when the men who had purchased sexual contact returned with her from a field.[174] With the next set of customers who paid the defendant the complainant said "no", appeared scared, and did not want to go with the men when they dragged her crying into the field.[175]

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[169] *Id*.
[170] *Id*. at *1-2.
[171] *Cramer v. State*, No. 05-02-01757-CR, 2003 WL 22663512, at *1-3 (Tex. App.—Dallas Apr. 7, 2004, pet. ref'd) (not designated for publication).
[172] *Id*. at *3.
[173] *Id*.
[174] *Id*. at *2.
[175] *Id*.

The *Cramer* Court upheld the conviction despite the defendant's sufficiency challenge in which he claimed no evidence showed that he used force, threat, or fraud to cause her to commit prostitution.[176] The victim's diminished capacity, her apparent fear, and the force used to take her despite her protests sufficed to provide legally sufficient evidence to uphold the compelling prostitution conviction, even though the evidence otherwise established a clear lack of consent.[177]

The lower court erred in *Turley* when it disregarding binding precedent from this Court, as well as a body of case law from its sister courts, to find that the child's lawful ability to consent to sex was an element of a compelling prostitution charge.[178] It further erred when it found a completed prostitution offense an element of a compelling prostitution charge.[179] This Court should reverse the court of appeals' decision on the State's first issue presented, and affirm the convictions for compelling prostitution and trafficking of the child because the lower court

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[176] *Id*. at *1-3.

[177] *See id*. at *3.

[178] *Compare Turley*, 597 S.W.3d at 35 (holding the child cannot as a matter of law commit the precursor offense of prostitution and so legally insufficient evidence supported appellant's conviction for compelling prostitution because the child lacked the capacity to understand the significance of agreeing to sex, could not legally consent to sex, and could not be tried for prostitution) *with Davis*, 635 S.W.2d at 739 (holding commission of prostitution is not a prerequisite to commission of compelling prostitution); *Waggoner*, 897 S.W.2d at 513 (same); *Reese*, 725 S.W.2d at 795 (same).

[179] *Compare id*. *with Davis*, 635 S.W.2d at 739; *Waggoner*, 897 S.W.2d at 513; *Reese*, 725 S.W.2d at 795.

erred when it required as a matter of law that the child be of legal age to consent to sex for someone to have unlawfully compelled her prostitution.[180]

ARGUMENT ON THE SECOND ISSUE PRESENTED

Must a child knowingly engage in an act of prostitution for the person who sold sex with her to be guilty of compelling prostitution?

As this Court held in *Davis v. State*, no secondary culpable mental state exists under the compelling prostitution statute that would require an allegation in the indictment or proof at trial that the child knowingly engaged in prostitution to prove a compelling prostitution offense.[181] The State need not prove two separate crimes with a completed prostitution offense being a precursor element to proof of a compelling prostitution offense.[182] The child's knowing offer or agreement is not necessary because she may be "cause[d] *by any means*…to commit prostitution" without her own knowledge or participation when her body is the subject of the agreed upon exchange of sex for money the child's exploiter gains.[183] The sale of

[180] *See id*. at 35, 43-44.

[181] *Davis*, 635 S.W.2d at 739 (arguing the indictment was insufficient for failing to include a "secondary culpable mental state required for the offense of prostitution" under §43.02(a) to prove compelling because only the elements of compelling prostitution need to be set out and because the actual commission of prostitution is not a prerequisite to the commission of the offense of compelling prostitution).

[182] *See id*.

[183] *See* Tex. Penal Code Ann. §43.05(a)(2) (West 2015)(emphasis added).

sex with the child is a different crime separately penalized and punished from someone illegally performing a sexual act on the child without exchanging a fee.[184]

I. The "knowledge" element of the compelling prostitution statute penalizes a defendant when he is aware that his conduct is reasonably certain to cause the result.

a. The child's culpable mental state is not an element.

Section 43.05 lists only one culpable mental state, and that is for the person who compelled the child's prostitution.[185] It states, "knowingly… causes by any means a child younger than 18 to commit prostitution[.]"[186] An individual violates the statute regardless of whether he knows the child's age at the time he commits it.[187]

Compelling prostitution is a result-of-conduct offense.[188] A person acts "knowingly" when "he is aware that his conduct is reasonably certain to cause the result."[189] For causation, "[a] person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the

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[184] *Compare* Tex. Penal Code Ann. §43.05 (West 2015)(prohibiting anyone causing a child younger than 18 to commit prostitution by any means) *with* Tex. Penal Code Ann. §22.011 (West 2015)(prohibiting sexual assault of a child, and creating an affirmative defense to prosecution based on the age difference between the actor and the child when the child is at least 14 years of age, but without agreement to exchange a fee).

[185] *See* Tex. Penal Code Ann. §43.05 (West 2015).

[186] Tex. Penal Code Ann. §43.05 (West 2015).

[187] *Id*.

[188] *Hill v. State*, 265 S.W.3d 539, 543 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd).

result and the conduct of the actor clearly insufficient."[190] The term "commit prostitution" describes the conduct the defendant is aware that his conduct is reasonably certain to cause. Accordingly, when the defendant makes effort to have the child offer, agree, or engage in sex for a fee he had compelled her prostitution.[191]

b. The causation element of "by any means" includes anything the defendant does knowing it will cause the child's prostitution.

In terms of causation, the compelling statute makes clear that any means used, regardless of what they are, meet the requirements of the statute.[192] The Dallas Court of Appeals long ago held that this language meant the State need not plead the mechanism used by the defendant to cause the prostitution because the statute penalized a person "regardless of the means used" so it "logically follow[ed] that an indictment [wa]s not fundamentally defective for failing to describe the specific means used."[193] The failure to allege the manner and means did not fail to allege an essential element of the compelling prostitution offense.[194]

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[189] Tex. Penal Code Ann. §6.03(b) (West 2015).
[190] Tex. Penal Code Ann. §6.04(a) (West 2015).
[191] *See* Tex. Penal Code Ann. §43.01(2) (West 2015)(defining prostitution as the offense defined by §43.02); *see also* Tex. Penal Code Ann. §43.02 (West 2015)(defining prostitution as based on payment of a fee or in return for receipt of a fee offering, agreeing, or exchanging sexual conduct or soliciting sexual conduct for hire in a public place).
[192] *See* Tex. Penal Code Ann. §43.05 (West 2015).
[193] *Tubbs v. State*, 670 S.W.2d 407, 408 (Tex. App.—Dallas 1984, no pet.).
[194] *Id*.

Likewise, the *Waggoner* Court considered Section 6.04(a) to find the "by any means" was consistent with creating the maximum protection for minors from the harmful, cumulative effects of prostitution, and therefore it criminalized any "'conduct that exploit[ed] the immature' regardless of the coercion" used.[195] Providing an opportunity to the child to engage in prostitution sufficed, including when the defendant negotiated the price for the sexual acts and when he provided the child with the customer's contact information.[196] Appellant's actions were no different. He caused the child's prostitution when he negotiated the price for specific sexual acts, brought the buyer to the child, and produced the child to the buyer for the fee.[197]

II. Requiring proof of a very young child's knowing participation in the scheme to prove compelling prostitution fails to effectuate the purpose of the legislation and leads to an absurd result.

All three judges on the Fourteenth Court of Appeals panel concluded that legally sufficient evidence required proof of a completed prostitution offense, not the effort to cause prostitution to result, unlike the appellate courts to consider the matter before it.[198] This reading of the statute leads to an absurd result and does

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[195] *Waggoner*, 897 S.W.2d at 512 (quoting *State v. Wood*, 579 P.2d 294, 296 (1978)).
[196] *Id*.
[197] (RRIV-35-36, 48, 55, 75, 89, 90, 98-100).
[198] *See Turley*, 597 S.W.3d at 42 (holding unambiguous language of (a)(2) required proof that the child committed an offense under §43.02); *see also Turley*, 597 S.W.3d at 47-48 (Frost, J., concurring)(requiring that the child complainant have "engaged in Prostitution Conduct" to find the evidence legally sufficient to support a compelling

not effectuate the purpose of the statute which criminalizes any sale of sexual contact with a child, not just children aged 14 to 18, and not just those old enough to knowingly engage in the conduct.

a. The Fourteenth Court's interpretation guts a public indecency statute by decriminalizing the sale of sex with a child unless the child herself is a willing and aware participant.

The appellate court's interpretation decriminalizes any sale of sexual contact with a child too young to knowingly make the offer or reach the agreement to engage in sexual contact in exchange for a fee. This interpretation invalidates a large portion of the statute that on its face includes within the protected group all children under 18, meaning from birth through age 17.[199] Based on the majority's holding, this interpretation results in 78 percent of those in the stated age range no longer being within the range of people protected by this statute because they are too young to legally consent.[200]

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prostitution offense); *but see Davis*, 635 S.W.2d at 739 (holding actual commission of prostitution is not a prerequisite to proving compelling prostitution); *Waggoner*, 897 S.W.2d at 513 (holding a completed prostitution offense is not required to prove compelling prostitution); *Reese*, 725 S.W.2d at 795 (holding no error occurred when jury returned a "not guilty" verdict on prostitution but a guilty verdict on compelling because actual commission of prostitution is not a prerequisite to proving compelling prostitution).

[199] *See* Tex. Penal Code Ann. §43.02(a)(2) (West 2015).

[200] *See Turley*, 597 S.W.3d at 43-44 (holding as a matter of law that a child 13 and younger could not commit prostitution because the child lacks the culpable mental state, and thus as a matter of law no one can compel that child's prostitution).

Likewise, according to the Fourteenth Court's interpretation, a perpetrator would be not guilty of compelling prostitution were he to sell sexual contact with an unconscious child, an unwilling child, or a child who lacked any awareness that the seller and buyer had agreed to exchange a fee for the sexual contact regardless of the child's age.[201] This reading contradicts cases such as the one where the defendant tied a child to a bed, drugged her whenever she resisted, and then took money from numerous men before he allowed them into the room so they could sexually assaulted the child.[202] The Fourteenth Court's interpretation would have rendered the evidence legally insufficient in that circumstance not only based on the child's age, but also because her captors drugged her and did not tell her they took the money from the men before each sexual assault.[203] By failing to give the child knowledge of the monetary transactions or seek her consent to the prostitution, they somehow failed to compel her, were this Court to accept the Fourteenth Court's interpretation of the statute.[204]

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[201] *See id*. at 45 (holding even without *B.W.* pronouncement the child could not have possessed the requisite "knowing" mental state because appellant drugged her).

[202] *See Moreno v. State*, 413 S.W.3d 119 (Tex. App.—San Antonio 2013, no pet.) (upholding conviction for compelling prostitution, human trafficking, aggravated sexual assault of a child, and aggravated kidnapping of a 13-year-old child after defendant and his brother injected the child with drugs to prevent her struggling, tied her to the bed, and accepted money from men who forced her to engage in sexual intercourse with them).

[203] *See id*. at 112-124,130-133; *but see Turley*, 597 S.W.3d at 43-46 (holding as a matter of law when the child did not lawfully consent and knowingly commit prostitution, the evidence is legally insufficient to prove compelling prostitution).

[204] *See id*. at 112-124,130-133; *but see Turley*, 597 S.W.3d at 43-46.

Exempting the majority of the class of people the statute is intended to protect based on age or the child's knowledge of the underlying circumstances even when the defendant financially profited from the sexual abuse fails to effectuate the language or intent of the statute.[205] The statute penalizes anyone bringing a child into a life of prostitution regardless of whether money changed hands, regardless of whether anyone actually forced sexual acts on the child, and regardless of whether the child herself "made the deal" to exchange sex for money.[206]

b. The statutory language differs from the Fourteenth Court's interpretation because it includes all children caused to enter a life of prostitution without regard to the child's knowledge of the defendant's intended result.

The Fourteenth Court's interpretation fails to effectuate the purpose and intent of the statute, which is meant to protect all children under 18 from the harmful and cumulative effects of a life in the sex trade.[207] The bill digest

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[205] *See Turley*, 597 S.W.3d at 43-45; *see also* Tex. Penal Code Ann. §43.05 (West 2015).

[206] *See* Tex. Penal Code Ann. §43.05 (West 2015); *see also Waggoner*, 897 S.W.2d at 513.

[207] *See* Tex. Penal Code Ann. §43.05 (West 2015); *see also Waggoner*, 897 S.W.2d at 512 (noting the purpose of such statutes is to provide the maximum protection for minors from the harmful, cumulative effects of a life to prostitution by prohibiting any conduct that exploits the immature regardless of the coercion used)(citing *Wood*, 579 P.2d 296); Bill Analysis, Senate Research Center, H.B., 81st Leg., R.S. (2009) (amending Tex. Penal Code Ann. §43.05 while adding section for Trafficking of Persons to address domestic victimization of girls, many of are between the ages of 12 and 15 "who are trafficked almost exclusively for the sex trade….Most are forced into drug addiction as a means of keeping them compliant. The amount of control via fear

explained the statutory changes enacted in 2009 to the compelling prostitution and trafficking statutes protected victims "in which a commercial sex act [wa]s induced by force, fraud, or coercion, or in which the person induced to perform the act has not reached the age of 18[.]"[208] The addition of a secondary culpable mental state for the victim of the offense, namely the child under 18 recruited into the sex trade be it by force, persuasion, intoxication, or incapacity, excludes from protection the most vulnerable victims. It excludes those too young to talk, too young to form an intent to exchange sex for a fee, and those drugged into submission who would be the most tragic sufferers "from the harmful, cumulative effects of a life of prostitution" that the legislature wrote this law and the trafficking statute to protect.[209]

The Fourteenth Court of Appeals' interpretation runs counter to the statutory language and the legislature's intent to criminalize the victimizer's conduct, not the child victim's intent-level, when the statute broadly criminalizes the prostitution of

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and torture is also much greater for domestic victims than international victims."); Act 2009, 81st Leg. R.S., §9, eff. Sept. 1, 2009 (amending Tex. Penal Code Ann. §43.05 to change the age for 17 to 18, changing "person" to "child", and adding "regardless of whether the actor knows the age of the child at the time the actor commits the offense."); Acts 2011, 82nd Leg., ch. 1 (SB 24), §1.03, eff. Sept. 1, 2011 (amending Tex. Penal Code Ann. §43.05(b) to make compelling prostitution of a child a first-degree felony, but making no substantive changes to the statutory elements).

[208] Bill Analysis, Senate Research Center, H.B., 81st Leg., R.S. (2009)(amending Tex. Penal Code Ann. §43.05 and amending Tex. Penal Code Ann. §20A.02).

[209] *See Waggoner*, 897 S.W.2d at 512; *see also id*. (addressing purpose behind amendments to Tex. Penal Code Ann. §§43.05, §20A.02); Tex. Penal Code Ann.

any child younger than 18 regardless of the means used to cause the prostitution.[210] Notably, the bill digest utilizes the definition of "induced [a child] to perform the act", not language indicative of any requirement that the child have completed a prostitution offense.[211] Black's Law Dictionary defines "induction" as "[t]he act or process of initiating."[212] The New Oxford Dictionary defines "induce" to include to "bring about or give rise to".[213] No reading of the statute or the legislature's intent in drafting it requires any particular scienter on the part of the child victim, or any particular age range beyond the stated, "a child…younger than 18 years[.]"[214]

The statutory language does not confine the criminal conduct to only those children who willingly or knowingly participate in the prostitution.[215] Instead, it criminalizes any efforts to prostitute a child younger than age 18.[216] The use of "prostitution" describes the type of conduct prohibited, not a secondary culpable

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§43.05 (West 2015)(protecting anyone caused to engage in prostitution by force, threat, fraud, or any child younger than 18 years old when caused "by any means").

[210] *See* Tex. Penal Code Ann. §43.05(a)(2) (West 2015).

[211] Bill Analysis, Senate Research Center, H.B., 81st Leg., R.S. (2009)(amending Tex. Penal Code Ann. §43.05 and amending Tex. Penal Code Ann. §20A.02).

[212] INDUCTION, Black's Law Dictionary (11th ed. 2019).

[213] INDUCE, New Oxford Dictionary (2nd ed. 2008).

[214] *See* Bill Analysis, Senate Research Center, H.B., 81st Leg., R.S. (2009)(amending Tex. Penal Code Ann. §43.05 and amending Tex. Penal Code Ann. §20A.02); *see also* Tex. Penal Code Ann. §43.05(a)(2) (West 2015).

[215] *Id.*

[216] *Id.*

mental state for the child victim.[217] It prohibits any person who causes a child to engage in prostitution, which would include the perpetrator's offer or agreement that the child will engage in sexual activity for a fee, or the child's engagement in sexual conduct for a fee.[218]

As this Court explained in *Griffith v. State*, when interpreting a statute the Court "seek[s] to effectuate the collective intent or purpose of the legislators who enacted the legislation."[219] It interprets an unambiguous statute literally, "unless doing so would lead to an absurd result that the legislature could not possibly have intended."[220] The unambiguous language lists no minimum age, and thus demonstrates that it applies to *all* children.[221] The "by any means" shows any effort to cause the child's prostitution violates the statute.[222]

Thus, evidence that appellant offered to exchange sexual contact with his four-year-old to the undercover officer, who agreed to pay the fee for that sexual conduct, met the requirements of the statute showing sufficient evidence that appellant compelled the child's prostitution.[223] It did not require additional

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[217] *See* Tex. Penal Code Ann. §§43.01(2), §43.02, §43.05(a)(2) (West 2015).
[218] *See* Tex. Penal Code Ann. §§43.01(2), §43.02, §43.05(a)(2) (West 2015).
[219] *Griffith v. State*, 116 S.W.3d 782, 785 (Tex. Crim. App. 2003).
[220] *Id*. (citing *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)).
[221] Tex. Penal Code Ann. §43.05(a)(2) (West 2015).
[222] *See id*.
[223] *See id*.; *see also Turley*, 597 S.W.3d at 36-37 (finding the record supported that appellant posted the ad, agreed the officer could meet the child for a sexual encounter if the officer was generous, the officer offered to pay $1,000 for two hours with her, and appellant hosted the interaction at a "safe apartment"); (RRIV-48, 61, 75, 99-100;

evidence that the child agreed to engage in the act, understood the sexual contact was in exchange for a fee, or that she had any culpable mental state, whatsoever.[224]

c. Adding a secondary culpable mental state ignores repeated recodifications of the statute after *Davis v. State* that did not require one and leads to an absurd result.

In addition to the unambiguous language, interpreting the statute in a way that eliminates a large group of the people the statute clearly envelopes by adding an additional culpable mental state for the child victim further leads to an absurd result that the legislature could not have intended when drafting and recodifying the statute multiple times.[225] It simply defies belief and common sense that the

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RRV-10-12)(showing appellant would not bring the officer to the child until the officer "flashed" the cash, police found the child unclothed from the waist down, and "groggy", but she awoke while the officer touched her head).

[224] Tex. Penal Code Ann. §43.05(a)(2) (West 2015); *see also Davis*, 635 S.W.2d at 739 (holding that §43.05 does not have a secondary culpable mental state requiring an allegation of, and thus proof of, a §43.02 prostitution offense).

[225] *See Griffith*, 116 S.W.3d at 785 (citing *Boykin*, 818 S.W.2d at 785); *see also* Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974 (codifying Compelling Prostitution as Tex. Penal Code Ann. §43.05 (West 1974)); *amended by* Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994 (recodifying multiple Texas Penal Code provisions including Texas Penal Code Ann. §43.05 (West 1994) as a second-degree felony); Acts 2009, 81st Leg., ch. 1002, § 9, eff. Sept. 1, 2009 (amending Tex. Penal Code Ann. §43.05 to change the pronoun to a non-gender specific one, changing "person" to "child", 17 to 18, and adding that the actor need not know the child's age when committing the offense); Acts 2011, 82nd Leg., ch. 1 (S.B. 24), § 1.03, eff. Sept. 1, 2011 (amending Tex. Penal Code Ann. §43.05 to make the offense a first-degree felony when involving a child, instead of a second-degree felony); Acts 2015, 84th Leg., ch. 1273 (S.B. 825), § 2, eff. Sept. 1, 2015 (adding subsection (c) the anti-*in peri materia* clause that allows for prosecution of any and all applicable offenses); Acts 2017, 85th Leg., ch. 685 (H.B. 29), § 40, eff. Sept. 1, 2017 (amending Tex. Penal Code Ann. §43.05, changing "regardless of whether the actor knows the age of the child at the time the actor commits" the offense to "the time of the offense"); Acts 2017, 85th Leg., ch. 1038 (H.B. 1808), § 11, eff. Sept. 1, 2017 (same); Acts 2019,

statute requires proof the victim knowingly committed the crime of prostitution to punish someone who compelled, tricked, coerced, or drugged her into participation in it. Such a reading leads to an absurd result that the legislature could not possibly have intended for a statute entitled "*compelling* prostitution", and one that incorporates prohibits a person's use of threats, force, or fraud to cause the prostitution.[226]

Since this Court issued its opinion its 1982 opinion in *Davis* that interpreted Section 43.05 not to include any requirement for proof of prostitution as a precursor to proving compelling prostitution, the legislature has amended the statute seven times. None of those amendments changed or disagreed with this Court's conclusion about the necessary elements to prove the charge.[227] The

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86th Leg., ch. 273 (S.B. 1802), § 5, eff. Sept. 1, 2019 (amending Tex. Penal Code Ann. §43.05 to make any offense under that provision a first-degree felony, and adding the word "coercion" to (a)(1) while defining coercion for purposes of 43.05).

[226] *See* Tex. Penal Code Ann. §43.05 (West 2015).

[227] *See* Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974 (codifying Compelling Prostitution as Texas Penal Code Ann. §43.05 (West 1974)); *amended by* Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994 (recodifying multiple Texas Penal Code provisions including Texas Penal Code Ann. §43.05 (West 1994) as a second-degree felony); Acts 2009, 81st Leg., ch. 1002, § 9, eff. Sept. 1, 2009 (amending Tex. Penal Code Ann. §43.05 to change the pronoun to a non-gender specific one, changing "person" to "child", 17 to 18, and adding that the actor need not know the child's age when committing the offense); Acts 2011, 82nd Leg., ch. 1 (S.B. 24), §1.03, eff. Sept. 1, 2011 (amending §43.05 to make the offense a first-degree felony when involving a child, instead of a second-degree felony); Acts 2015, 84th Leg., ch. 1273 (S.B. 825), §2, eff. Sept. 1, 2015 (adding subsection (c) the anti-*in peri materia* clause that allows for prosecution of any and all applicable offenses); Acts 2017, 85th Leg., ch. 685 (H.B. 29), §40, eff. Sept. 1, 2017 (amending Tex. Penal Code Ann. §43.05, changing "regardless of whether the actor knows the age of the child at the time the actor

legislature, unlike in response to *B.W.*, made no substantive changes that would indicate disagreement with this Court's analysis.[228] As this Court explained, "[i]t is presumed that the legislature is aware of the case law affecting or relating to the statutes."[229] And "when a statute is reenacted without material change, it is generally presumed that the legislature knew and adopted or approved the interpretation placed on the original or an earlier act and intended that the new enactment should receive the same construction as the older one."[230]

Similarly, the legislature has met repeatedly since drafting the compelling prostitution statute, prostitution statute, and definitions for Texas Penal Code Chapter 43 offenses that went into effect in 1974.[231] Since 1974, the legislature included as the definition of "prostitution" the offense defined by Texas Penal

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commits" the offense to "at the time of the offense"); Acts 2017, 85th Leg., ch. 1038 (H.B. 1808), § 11, eff. Sept. 1, 2017 (same); Acts 2019, 86th Leg., ch. 273 (S.B. 1802), § 5, eff. Sept. 1, 2019 (amending Tex. Penal Code Ann. §43.05 to make any offense under that provision a first-degree felony, and adding the word "coercion" to (a)(1) and defining coercion for purposes of §43.05).

[228] *See id.*; *but see* Act of Apr. 14, 2011, 82nd Leg., R.S., Chp. 1150, §1, sec. 51.03(b)(7), 2011 Tex. Sess. Law Serv. Chp. 1150 (to be codified as Tex. Fam. Code §51.03(b)(7))(abrogating *B.W.* by including prostitution within the "children in need of supervision" conduct for which the State may prosecute a child).

[229] *Frieling v. State*, 67 S.W.3d 462, 471 (Tex. App.—Austin 2002, pet. ref'd)(citing *Miller v. State*, 33 S.W.3d 257, 560 (Tex. Crim. App. 2000)).

[230] *Id.* (citing *Miller*, 33 S.W.3d at 260).

[231] Acts 1973, 63rd Leg., p. 883, chp. 399, § 1, eff. Jan. 1, 1974) (codifying Tex. Penal Code Ann. §43.01 entitled "Definitions", §43.02 prostitution, and §43.05 compelling prostitution).

Code Section 43.02.[232] The legislative history, along with the claims raised in *Davis v. State*, show that this appellant did not raise an original claim that compelling prostitution requires a completed prostitution offense.[233]

Rather, that claim had been raised repeatedly since 1982, and yet no court to consider Sections 43.01(2), 43.02, and 43.05 has required the State to prove a completed prostitution offense to prove compelling prostitution.[234] Defendants have repeatedly raised the claim that the State must prove prostitution as a precursor offense to compelling prostitution, but appellate courts across Texas refused to embrace that statutory interpretation, and yet the legislature has not amended that statute to require proof of a completed prostitution. *Freiling* explains that the repeated meetings of the legislature since *Davis*'s 1982 interpretation and

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[232] Acts 1973, 63rd Leg., p. 883, chp. 399, § 1, eff. Jan. 1, 1974) (codifying Tex. Penal Code Ann. §43.01 entitled "Definitions" defining "prostitution" as "the offense defined in Section 43.02 of this code.")(amended by Acts 1979, 66th Leg., p. 373, ch. 168, §2 Aug. 27, 1979, amending the definition of "sexual contact" to remove a provision that confined it to the touching the breast of a female 10 years or older).

[233] *See id.*; *see also Davis*, 635 S.W.2d at 738-9 (addressing this statutory interpretation).

[234] *See id.*; *see also Davis*, 635 S.W.2d at 738-9 (complaining that the indictment failed to allege "the secondary culpable mental state required for the offense of prostitution", but holding because the defendant was indicted for attempting to compel prostitution, only the elements of compelling prostitution needed to be set out in the indictment); *Waggoner*, 897 S.W.2d at 513 (seeking reversal on the basis that there was insufficient evidence that prostitution occurred, but holding commission of prostitution is not a prerequisite to commission of compelling prostitution); *Menyweather*, 2014 WL 6450826, at *3-4 (claiming evidence insufficient to prove she caused the child to commit prostitution, but holding the "means used" could include "providing an opportunity for a child, willing or unwilling, to engage in prostitution while influencing, persuading, or prevailing upon the child to do so",

Waggoner's 1995 one creates the presumption that the legislature did not intend to require a completed prostitution to prove compelling prostitution.[235] Rather, the lack of substantive changes to the compelling prostitution statute, lead to the reasonable presumption "that the legislature knew and adopted or approved the interpretation placed on the original[.]"[236] The "prostitution" definition applied to the compelling prostitution statute has not changed in all that time, only the Fourteenth Court's unique interpretation of it has.

III. Appellant caused the child to commit prostitution through his actions.

Yet, even were this Court to conclude that a completed prostitution is required to prove a compelling prostitution charge, the Court of Appeals erred when it concluded that the child, *and the child alone*, had to be the one to knowingly commit and complete it.[237] This interpretation finds that if the child is not a knowing participant in the negotiation to exchange sexual conduct for a fee, and yet still the recipient of the sexual conduct without knowing a fee is to change hands, Section 43.05 fails to prohibit the conduct. The statute, however, leaves

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because "actual commission of the offense of prostitution is not a prerequisite to commission of the offense of compelling prostitution.").

[235] *See Frieling*, 67 S.W.2d at 471; *Davis*, 635 S.W.2d at 739; *Waggoner*, 897 S.W.2d at 513.

[236] *Id*.

[237] *See Turley*, 597 S.W.3d at 42 (holding unambiguous language of (a)(2) required proof that the child committed an offense under §43.02); *see also Turley*, 597 S.W.3d at 47-48 (Frost, J., concurring)(requiring that the child complainant have "engaged in Prostitution Conduct" to find the evidence legally sufficient to support a compelling prostitution offense).

open more possibilities than just the one scenario envisioned by the Fourteenth Court of Appeals.

a. Appellant caused the child to commit prostitution when he made her the subject of the transaction.

A person who sold sexual conduct with the child has also "caused by any means a child younger than 18 years to commit prostitution" regardless of whether the child realized she was the subject of an agreement to exchange sexual conduct for a fee.[238] As the subject of the agreement, she is nonetheless incorporated into "prostitution" regardless of her knowledge level when she is an essential component of the transaction as the recipient of the sexual conduct.[239]

The court of appeals' interpretation reframed the child as a knowing accomplice to the illicit conduct, or otherwise left her unprotected by the statute.[240] But the statute protects anyone compelled into prostitution regardless of whether the child wanted or realized her participation in a transaction that exchanged sexual contact with her body for a fee. Section 43.05's focus is on the defendant's actions, not the child's.[241] That is why it has traditionally punished efforts to cause

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[238] *See* Tex. Penal Code Ann. §43.05(a)(2) (West 2015).

[239] *Compare id*. (penalizing anyone who causes the child to commit prostitution by any means) *with Turley*, 597 S.W.3d at 45 (interpreting the statute to require the child's knowing participation in the prostitution conduct for a person compelling her actions to be guilty of compelling prostitution).

[240] *See Turley*, 597 S.W.3d at 45.

[241] *See* Tex. Penal Code Ann. §43.05(a)(2) (West 2015).

a child to commit prostitution even when those efforts fall short of resulting in a completed act of prostitution.[242]

Yet, even were this Court to require evidence of a completed act of prostitution, appellant was responsible for that underlying offense as the principal actor in the prostitution, as well as the principal actor in the compelling prostitution offense. Appellant acted as the driving force behind the child's engagement in prostitution, and thus he acted as the principal actor in both offenses when he caused her prostitution by making the offer, negotiating the price, reaching an agreement, and bringing her and the person paying the fee for sexual contact with her together.

b. Section 43.02 allows the State to prove prostitution committed by the seller, the buyer, or as a public solicitation.

The legislature defined prostitution as an offense that the person selling sexual conduct can commit, or a crime the person buying sexual conduct has committed even when purchased for someone else.[243] The State may prove prostitution under the 2015 version of the statute when a person knowingly, in return for receipt of a fee: (1) offers to engage, agrees to engage, engages in sexual

[242] *See Waggoner*, 897 S.W.2d at 511-13 (finding the evidence sufficient to prove compelling prostitution when the defendant negotiated the price for the sexual acts, and brought the child to the location to meet with the person who agreed to pay a fee for the acts, but without the child making any offers, agreements or engage in the activity).

conduct, or (2) when the person solicits another in a public place to engage with the actor in sexual conduct for hire.[244] In the alternative, it could be committed when a person knowingly based on payment of a fee by the actor or another person on behalf of the actor: (1) offers to engage, agrees to engage, engages in sexual conduct; or (2) solicits another in a public place to engage with the actor in sexual conduct for hire.[245] The actual payment or receipt of the fee is not an element.[246]

Section 43.05 specifies that criminal conduct occurred when the defendant caused by any means the child to commit prostitution, but the prostitution statute allowed prostitution to be committed in a multitude of ways. One of those mechanisms for commission is through the purchaser's offer or agreement to pay a fee in exchange for sexual conduct.[247] In this case, the officer made an offer and reached an agreement to exchange $1,000 for sexual contact with the child. Thus, prostitution occurred through the officer and the defendant's agreement, and by those means caused the child to commit prostitution.

c. Sufficient evidence supported both convictions when appellant caused the child's prostitution through his offer and the officer's agreement to exchange sexual contact with the child for money.

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[243] *See* Tex. Penal Code Ann. §43.02 (West 2015).
[244] Tex. Penal Code Ann. §43.02(a) (West 2015).
[245] Tex. Penal Code Ann. §43.02(b) (West 2015).
[246] Tex. Penal Code Ann. §43.02(b-1) (West 2015).
[247] *See* Tex. Penal Code Ann. §43.02(b) (West 2015).

The court of appeals erred by finding the evidence insufficient as a matter of law to support appellant's compelling prostitution and trafficking of a person for the purpose of making the child a victim of compelled prostitution convictions. A completed prostitution offense is not a precursor offense required to prove compelling prostitution, and the child's knowing participation in the offense is likewise not an element of the crimes.[248] Rather, appellant committed compelling prostitution when he offered sexual contact with his four-year-old daughter to another person in exchange for $1,000. Likewise, the agreement between appellant and the officer to exchange $1,000 for sexual conduct with the child provided sufficient evidence of appellant's guilt for compelling prostitution. That, along with the evidence that appellant obtained the child to cause her to become a victim of compelled prostitution offered sufficient evidence from which to find appellant guilty of the trafficking charge.[249] Accordingly, this Court should reverse the lower court and affirm the trial court's judgments in each case.

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[248] *See* Tex. Penal Code Ann. §43.05(a)(2) (West 2015); Tex. Penal Code Ann. §20A.02(a)(7)(H) (West 2015).

[249] *See* Tex. Penal Code Ann. §20A.02(a)(7)(H) (West 2015).

PRAYER

The State respectfully requests that this Court reverse the decision of the Fourteenth Court of Appeals, and affirm the trial court's judgments because sufficient evidence supported each conviction.

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APPENDIX A

(Fifteen statutes prohibiting sexual abuse of children and actions that profit from or publish images of such abuse)

STATUTES INVOLVING SEXUAL ABUSE OF A CHILD

- **Trafficking of Persons**, Tex. Penal Code Ann. §20A.02(a)(7) (West 2015)—penalizing trafficking of a child for the purpose of sexual assault, sexual abuse, indecency, prostitution, sexual performance, or child pornography as a first degree felony.
- **Continuous Sexual Abuse of Young Child or Children,** Tex. Penal Code Ann. §21.02 (West 2015)—penalizing continuous sexual abuse of a young child or children as a first-degree felony with a minimum term of 25 years.
- **Indecency with a Child**, Tex. Penal Code Ann. §21.11 (West 2015)—penalizing indecency with a child, a second-degree felony when the actor engaged in sexual contact with the child or caused the child to engage in sexual contact, but incorporating an affirmative defense when the defendant and child are within three years of each other and no force, threat or duress used.
- **Sexual Assault,** Tex. Penal Code Ann. §22.011 (West 2015)—penalizing as a second degree felony sexual contact with someone under the age of 17 regardless of consent unless the actor is not three years older than the victim, was not required to register as a sex offender, the child was at least 14 years old, and the person was not prohibited by law from marrying the child.
- **Aggravated Sexual Assault,** Tex. Penal Code Ann. §22.021 (West 2015)—penalizing as a first-degree felony the sexual assault of a child under 14 and applying the defense that the conduct consisted of medical care for the child, did not include any contact between the anus or sexual organ of the child with the mouth, anus, or sexual organ of the actor or a third party.
- **Online Solicitation of Minor,** Tex. Penal Code Ann. §33.021 (West 2015)—penalizing as a second-degree felony the online solicitation of someone under 14 when the actor through the Internet, electronic mail, text message, or other commercial online service knowingly solicited a minor to meet with the intent that they engage in sexual contact.
- **Prostitution,** Tex. Penal Code Ann. §43.02(c-1)(3) (West 2015)—penalizing as a second-degree felony anyone who agreed to engage in sexual conduct with a person under 18 in exchange for a fee.
- **Promotion of Prostitution,** Tex. Penal Code Ann. §43.03 (West 2015)—penalizing as a second-degree felony the actor's knowing receipt of money or property pursuant to an agreement to participate in the proceeds of prostitution, or solicitation of another to engage in sexual conduct with someone for compensation when it involves a person under 18 engaging in prostitution.
- **Online Promotion of Prostitution,** Tex. Penal Code Ann. §43.04 (West 2015)—penalizing as a first-degree felony the knowingly ownership of, investment in, financing of, control of, supervision of, or management of a prostitution enterprise when one or more of the prostitutes under 18.

- **Compelling Prostitution,** Tex. Penal Code Ann. §43.05 (West 2015)—penalizing as a first-degree felony someone who causes by any means a child under 18 to commit prostitution.
- **Obscenity,** Tex. Penal Code Ann. §43.23 (West 2015)—penalizing as a second-degree felony the wholesale promotion or possession with intent to promote obscene material that depicts someone under 18.
- **Sale, Distribution, or Display of Harmful Material to Minor,** Tex. Penal Code Ann. §43.24 (West 2015)—penalizing the sale, distribution, or possession for sale or distribution harmful material to someone under 18.
- **Sexual Performance by a Child,** Tex. Penal Code Ann. §43.25 (West 2015)—penalizing as a first-degree felony the inducement of someone under 14 to engage in sexual conduct or sexual performance, or a parents consent to the participation of the child in a sexual performance, including the production, direction, or promotion of such a performance of sexual conduct by a child).
- **Employment Harmful to Children,** Tex. Penal Code Ann. §43.251 (West 2015)—prohibiting the employment of a child under 14 in a sexually-oriented commercial activity or business when child requested to work nude or topless).
- **Possession or Promotion of Child Pornography,** Tex. Penal Code Ann. §43.26 (West 2015)—prohibiting the knowingly possession or access with intent to view visual material that depicts a child under 18 engaged in sexual conduct.

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