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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 PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

In the event this Honorable Court grants the State's petition for discretionary review, the State respectfully requests oral argument. The Fourteenth Court of Appeals' opinion misinterpreted Texas Penal Code Section 43.05 to require a completed prostitution offense committed by the child victim in order to prove the person who sold sexual contact with the child committed a compelling prostitution offense. Oral argument would facilitate a just resolution to this matter; and so, the State respectfully requests that this Court grant the parties the opportunity to present oral argument.[1]

[1] *See* Tex. R. App. P. 68.4(c).

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:

Counsel for the State:

Kim Ogg—District Attorney of Harris County

Stacey M. Soule—State's Prosecuting Attorney

Jessica Caird—Assistant District Attorney on appeal

Johnna Stallings & Stewanna Miskell—Assistant District Attorneys at trial

Appellant or criminal defendant:

Andrew James Turley

Counsel for Appellant:

Cheri Duncan—Attorney on appeal

Ray Castro—Attorney at trial

Trial Judge:

Honorable Jan Krocker—Judge Presiding

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

The State charged appellant by indictment with the felony offenses of compelling prostitution of a child and trafficking the child to compel her prostitution.[2] Appellant pled not guilty, proceeded to trial on both charges, and a jury returned guilty verdicts.[3] 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.[4] Appellant filed timely written notice of appeal.[5]

STATEMENT OF THE PROCEDURAL HISTORY

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

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[2] (CRI-19; CRII-23);
The appellate record consists of the following:
CRI-Clerk's Record in cause number 1488216, appellate case number 14-18-00235-CR;
CRII-Clerk's Record in cause number 1488217, appellate case number 14-18-00236-CR;
RRI-RRX-Court Reporter's Record from March 8 through 23, 2018, prepared by Cynthia Lee.

[3] (CRI-212-222; CRII-198-209).

[4] (CRI-225, 236; CRII-210, 221).

[5] (CRI-225, 236; CRII-210, 221).

rendered acquittals.[6] It rendered acquittals after it found the evidence insufficient as a matter of law 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 conviction and the trafficking charge.[7] The panel split over the reason for the acquittals with a concurrence by one justice that found the evidence insufficient 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 sex and thus could not commit the prostitution.[8] The State timely files this petition for discretionary review in accordance with Texas Rule of Appellate Procedure 68.2(a).

STATE'S GROUNDS FOR REVIEW

1. **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?**

2. **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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[6] *Turley v. State*, Nos. 14-18-00235-CR & 14-18-00236-CR, slip op. at 23-24 (Tex. App.—Houston [14th Dist.] Mar. 12, 2020, pet. filed).

[7] *See id*. at 21, 23-24.

[8] *Turley*, Nos. 14-18-00235-CR & 14-18-00236-CR, slip op. at 4-6, 12 (Frost, C.J., concurring in judgment) (Appendix B).

STATEMENT OF JURISDICTION

This Court may grant discretionary review for any of the reasons listed in Texas Rule of Appellate Procedure 66.3, but the rule does not control this Court's discretion.[9] Subsections (a), (b), (c), (d), (e), and (f) of 66.3 apply to support granting discretionary review.[10] The Fourteenth District Court of Appeals' opinion disregards and conflicts with this Court's *Davis v. State* opinion, as well as six intermediate appellate court decisions.[11] It interpreted into the statute a new element not previously required to prove Texas Penal Code Section 43.05, and thus misinterpreted the statute.[12] The concurrence in judgment and majority differed on

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[9] Tex. R. App. P. 66.3.

[10] *See id*.

[11] *See* Tex. R. App. P. 66.3(a), (b); *see also Davis v. State*, 635 S.W.2d 737, 739 (Tex. Crim. App. 1982)("The actual commission of the offense of prostitution is not a prequisite [sic] to the commission of the offense of compelling prostitution."); *Waggoner v. State*, 897 S.W.2d 510, 513 (Tex. S.W.2d 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); *Evans v. State*, No. 06-16-00064-CR, 2017 WL 1089806, *6 (Tex. App.—Texarkana Mar. 22, 2017, pet. ref'd)(not designated for publication)(same); *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)(same); *Agyin v. State*, No. 04-12-00749-CR, 2013 WL 5864483, at *2 (Tex. App.—San Antonio Oct. 30, 2013, pet. ref'd)(not designated for publication)(same); *Johnson v. State*, No. 01-09-00799-CR, 2011 WL 494813, at *2 (Tex. App.—Houston [1st Dist.] Feb. 10, 2011, pet. ref'd)(not designated for publication)(same).

[12] *Compare Turley*, slip op. at 19 (holding "as a matter of law [the child] could not have committed prostitution as 'the offense defined in Section 43.02' as an essential element of subsection (a)(2) of the 2015 Compelling-Prostitution Statute.") *with* Tex. R. App. P. 66.3(a), (b), (c); *Davis*, 635 S.W.2d at 739.

their reasoning of that interpretation.[13] And the Fourteenth Court of Appeals departed from the accepted and usual judicial proceedings as the first appellate court to hold a completed prostitution must be committed by the victim to establish legally sufficient evidence to uphold a compelling prostitution conviction.[14] Their opinions call for this Court's exercise of supervisory powers.[15]

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."[16] He recognized that the post offered a young girl for prostitution purposes.[17]

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 offer.[18] The poster responded with, "how young is too young?"[19] The undercover officer claimed that he was open to any age, and he

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[13] *See* Tex. R. App. P. 66.3(e).
[14] *See* Tex. R. App. P. 66.3(f); *see also Turley*, slip op. at 19, 22-24.
[15] *Id*.
[16] (RRIV-32, 35-36).
[17] (RRIV-14-15, 36).
[18] (RRIV-40-41).
[19] (RRIV-43).

requested to perform oral sex on the child.[20] The poster asked the officer if he would be, "okay with…her sleeping….?"[21] The officer responded, "Yeah, I'm cool with that."[22]

The poster sent two pictures of his daughter and asked, "Is she too young?"[23] The photographs showed appellant's four-year-old daughter.[24] The officer agreed to meet with appellant and the child.[25] 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.[26] They agreed the officer could spend two hours with the pictured child in exchange for $1,000.[27]

The men arranged a time and location.[28] Appellant confined the sexual acts he would permit the officer to perform on the child, and he agreed to host it at a safe apartment.[29] He instructed the officer not to cause her pain because he did not want the child's mother to discover it, and the officer agreed.[30]

As the date approached, appellant and the officer confirmed the agreement by communicating about the sexual activity the officer expected to engage in with

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[20] (RRIV-43).
[21] (RRIV-43).
[22] (RRIV-44).
[23] (RRIV-44-45, 216-217; State's Exhibit No. 31, 47, 48).
[24] (RRIII-72, 82; RRIV-216-217; RRIV-105; State's Exhibit No. 31, 47, 48).
[25] (RRIV-45-46).
[26] (RRIV-46)
[27] (RRIV-47, 48).
[28] (RRIV-49, 51).
[29] (RRIV-51).

the child.[31] Appellant demanded that the officer bring the $1,000 dollars with him to the meeting.[32] The officer agreed to provide cash and appellant indicated his consent to the officer having oral genital contact with the child in exchange.[33]

On the original date for the encounter, appellant canceled the meeting because the child's mother stayed home.[34] He rescheduled it for the next day, and he explained that he planned to medicate her so she would sleep to avoid her remembering the sexual contact.[35] They planned to meet midday on November 12, 2015.[36]

Before the meeting, appellant texted that he would meet the officer outside for him to "flash the gift" to prove he had it, and then he would bring the officer in to the child.[37] Appellant texted that, "She will be asleep. You may then leave, and we never talk again. Unless you want it again before Saturday."[38]

On November 12, appellant kept the officer appraised as he medicated the child and described her responses.[39] He gave him the address.[40] Appellant

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[30] (RRIV-51-52).
[31] (RRIV-52-53).
[32] (RRIV-54).
[33] (RRIV-48, 54, 55).
[34] (RRIV-66).
[35] (RRIV-67).
[36] (RRIV-67).
[37] (RRIV-70).
[38] (RRIV-70).
[39] (RRIV-72).
[40] (RRIV-73).

continued to assess the child's sleep because he wanted her in a deep sleep to avoid the sexual contact waking her.[41]

Appellant met the officer in the parking lot.[42] The officer fanned out the $1,000 dollars in cash when appellant asked to see it.[43] Then, appellant led the officer to the apartment.[44]

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.[45] The officer reiterated that would engage in oral genital contact with the child.[46] Appellant led him into her darkened bedroom.[47] The officer saw the small girl lying in bed with a comforter covering everything but her head.[48]

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?"[49] His comment included the prearranged "bust" signal for the surveillance team to indicate he

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[41] (RRIV-75).
[42] (RRIV-89).
[43] (RRIV-90).
[44] (RRIV-91-92).
[45] (RRIV-97).
[46] (RRIV-97).
[47] (RRIV-98-99).
[48] (RRIV-98-99).
[49] (RRIV-99).

found a child in the apartment.[50] Appellant refused to tell the officer her age, and instead he leaned over the child to expose her bare buttocks.[51] She had no clothing on below the waist and wore only in a pajama top.[52] She opened her eyes, which the officer used as an excuse to leave the room.[53] He took appellant with him and he open the front door for the other officers.[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 was her sole caretaker.[56] After her 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

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[50] (RRIV-99, 170-171).
[51] (RRIV-99).
[52] (RRIV-99-100).
[53] (RRIV-100).
[54] (RRIV-100).
[55] (RRIV-213-214).
[56] (RRIV-213).
[57] (RRIV-215).
[58] (RRIV-219).

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.[64] At least one other person agreed to exchange money for the opportunity to perform sexual acts on the child.[65]

STATE'S FIRST GROUND FOR REVIEW

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 opinion held as a matter of law that the child "lacked the mental capacity to consent to sexual conduct" and thus she could not " 'knowingly agree[ ]' to engage in sexual conduct for a fee."[66] From that holding, the Court

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[59] (RRIV-219, 222).
[60] (RRV-12).
[61] (RRV-12).
[62] (RRV-109-110).
[63] (RRVI-81-82).
[64] (RRVI-87).
[65] (RRVI-89).
[66] *Turley*, slip op. at 18.

concluded, "as a matter of law [the child] could not have committed prostitution as 'the offense defined in Section 43.02' as an essential element of subsection (a)(2) of the 2015 Compelling-Prostitution Statute."[67] It held no child younger than 14 years of age could knowingly agree to exchange sex for a fee because she lacked the lawful ability to consent to sex.[68] As a matter of law, the State could not prove the predicate offense of prostitution for any victim under 14, thus any compelling prostitution conviction inherently rested on insufficient evidence.[69]

I. The court of appeals' holding rests on a faulty premise that no child can be the victim of compelled prostitution absent the child being able to lawfully consent to sexual contact.

The majority rested its holding that children under 14 cannot consent to sex, and therefore cannot knowingly offer sex for a fee, on the Texas Supreme Court's holding in *In the Matter of B.W.*[70] Although not binding on the Fourteenth District Court of Appeals, the majority found the opinion persuasive.[71]

B.W., however, rested on unsound footing when it mixed provisions from Texas Penal Code Section 22.021(a) with the definitions and legislatively

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[67] *Id*. at 19.
[68] *Id*. at 18-19 (citing *In the Matter of B.W.*, 313 S.W.3d 818, 822-24 (Tex. 2010)).
[69] *Id*.
[70] *See id*. (citing *B.W.*, 313 S.W.3d at 822-824); *but see* Tex. Penal Code Ann. §7.03(2) (West 2015)(immunity from prosecution of person for whom actor bears criminal responsibility is no defense to the actor's prosecution).
[71] *Id*. at 19.

proscribed behavior of Section 43.02(a).[72] The statutes do not overlap because they criminalize different behavior, and the reliance on one to interpret the other fails to give effect to the plain meaning and text of the statutes.[73] *B.W.* misinterpreted the applicable law by confusing a child's lawful ability to consent with the child's conduct of offering to exchange sex for money.[74]

It also addressed juvenile delinquency proceedings under the Texas Family Code, not criminal ones.[75] And it resulted from a lack of clear legislative guidance on whether young children could be delinquent for violating Section 43.02, which the Legislature explicitly provided in the next session when it legislatively abrogated *B.W.*[76] The amended statute now specifically includes prostitution

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[72] *B.W.*, 313 S.W.3d at 821-23, 826 (holding children under 14 may not be found delinquent for violating Tex. Penal Code Ann. §43.02 because they are the victims, not the perpetrators, when lacking the legal capacity to consent)(citing Tex. Penal Code Ann. §§22.011, §22.021 (West 2010)).

[73] *See Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)(relying on the text to interpret the statute unless ambiguous); *see also* Tex. Penal Code Ann. §§ 22.021(a), §43.02(a) (West 2015).

[74] *See B.W.*, 313 S.W.3d at 822-824.

[75] *Id*. at 819 (deciding based on a lack of clarity if the wholesale incorporation of penal code offenses into Tex. Fam. Code Ann. §51.03(a)(1) meant to include prosecution of those 13 and younger for prostitution when they lacked capacity to consent to sex with an adult).

[76] *Compare B.W.*, 313 S.W.2d at 826 ("In the absence of a clear indication that the Legislature intended to subject children under fourteen to prosecution for prostitution when they lack the capacity to consent to sex as a matter of law, we hold that a child under age fourteen may not be charged with the offense.") *with* 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)) (expressly including Tex. Penal Code §43.02 within the "children in need of supervision" conduct for which the State

within the prohibited conduct of the Juvenile Justice Code.[77] The Legislature corrected the Supreme Court's misunderstanding.[78]

The Supreme Court expressly disclaimed use of *B.W.*'s holding in compelling prostitution cases.[79] As support, it referenced this Court's *Davis v. State* opinion and the Austin Court of Appeals' *Waggoner v. State*, which held a completed prostitution offense is not a prerequisite to proving compelling prostitution.[80] The Court explained pimps and sexual exploiters of children remained prosecutable for compelling prostitution despite the Court's interpretation of delinquent conduct.[81] The court of appeals erred when it rested its reversal and rendering of acquittals on *B.W.*[82]

Because the court of appeals' opinion rested on a faulty premise to hold the evidence legally insufficient in every case where the child victim was 13 or younger, the State respectfully requests that this Court grant review. This Court should determine whether the Legislature meant what it wrote when it included all children younger than 18 in the group protected from compelled prostitution, not

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may prosecute a child); *see also* Tex. Fam. Code Ann. §51.02(2) (West 2015) (defining a child as someone over 10 and under 17 years old).

[77] *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)).

[78] *See id*.

[79] *See B.W.*, 313 S.W.3d at 824.

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

[81] *Id*.

[82] Tex. Penal Code Ann. §§7.02(a), §7.03(2) (West 2015).

just children over 14 and under 18. The State respectfully requests that this Court grant review of the State's first issue.

STATE'S SECOND GROUND FOR REVIEW

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

The other vital questions raised by the court of appeals' fractured opinions include: (1) is proof of a prostitution offense a necessary prerequisite to proving compelling prostitution, and (2) if it is, whether the child must be the person to commit the predicate offense?

I. A completed prostitution offense is not an element of a compelling prostitution charge.

Texas Penal Code Section 43.05(a)(2) defines compelling prostitution as when a person knowingly "causes by any means a child younger than 18 years to commit prostitution, regardless of whether the actor knows the age of the child at the time the actor commits the offense."[83] The majority and the concurrence misinterpreted the statutory requirements.[84] Both found as an essential element that the child must first have engaged in "prostitution conduct", in other words

[83] Tex. Penal Code Ann. §43.05(a)(2) (West 2015).

[84] *See Turley*, slip op. at 17-19 (holding State required to prove the child committed an act of prostitution to prove compelling prostitution); *see also Turley*, slip op. at 5 (Frost, C.J., concurring)(holding proof the child engaged in "prostitution conduct" is required to prove compelling prostitution).

completed a prostitution offense, for the State to present legally sufficient evidence to prove compelling prostitution.[85]

Yet, by reaching this conclusion, the opinions departed from settle law issued by this Court and its sister courts. In *Davis v. State*, an attempted compelling prostitution case, this Court held there is no need to set out the elements of prostitution in the indictment, because the actual commission of the offense of prostitution is not a prerequisite to the commission of a compelling prostitution offense.[86] It equated the situation with aggravated robbery wherein the State need not prove a completed theft or plead the elements of one.[87]

Following *Davis*, the Beaumont Court of Appeals held in *Reese v. State*, a compelling prostitution case, that "the actual commission of the offense of prostitution is not a prerequisite to the commission of compelling prostitution."[88] The Austin Court of Appeals reached the same conclusion in *Waggoner v. State*, another compelling prostitution case, when it found the evidence legally sufficient despite the failure to prove an underlying prostitution offense.[89]

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[85] *Id.*; *Turley*, slip op. at 5 (Frost, C.J., concurring)
[86] *Davis*, 635 S.W.2d at 739.
[87] *Id.* (citing *Earl v. State*, 514 S.W.2d 273, 274 (Tex. Crim. App. 1974) ("Thus, the actual commission of the offense of theft is not a prerequisite to commission of a robbery[.]")).
[88] *Reese*, 725 S.W.2d at 795 (citing *Davis*, 635 S.W.2d at 737).
[89] *Waggoner*, 897 S.W.2d at 513 (citing *Davis*, 635 S.W.2d at 739; *Reese*, 725 S.W.2d at 795).

In *Waggoner*, police arrested the defendant before the 13-year-old victim made an offer to exchange sex for money after he arrived with the victim at the prearranged location.[90] In nearly identical circumstances, the child victim had no opportunity to engage in prostitution because the defendant made the offer and agreement to exchange sexual conduct with her for money.[91] Yet, because the Austin Court held that proof of prostitution is not a prerequisite, it nonetheless found the evidence sufficient to prove the compelling charge.[92]

The First Court of Appeals, the Texarkana Court of Appeals, the San Antonio Court of Appeals, and the Dallas Court of Appeals followed suit in unpublished opinions that relied on *Waggoner* or *Davis* to support their conclusion that a prostitution offense need not occur to prove compelling prostitution.[93] Part of the basis for *Waggoner's* holding included a review of Texas Penal Code Section 6.04(a)'s causation definition.[94] A person is criminally responsible for the results if it would not have occurred but for his conduct, operating either alone or concurrently with another cause.[95] Thus, when the defendant provided the child to

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[90] *Id*. at 511.
[91] *Id*.
[92] *Id*. at 511-513.
[93] *Johnson*, 2011 WL 494813, at *2 (citing *Waggoner*, 897 S.W.2d at 513); *Evans*, 2017 WL 1089806, at *6 (citing *B.W.*, 313 S.W.3d at 824; *Davis*, 635 S.W.2d at 739); *Agyin*, 2013 WL 5864483, at *2 (citing *Davis*, 635 S.W.2d at 739); *Menyweather*, 2014 WL 6450826, at *4 (citing *Davis*, 635 S.W.2d at 739).
[94] *See Waggoner*, 897 S.W.2d at 512; *see also Menyweather*, 2014 WL 6450826, at *4.
[95] Tex. Penal Code Ann. §6.04(a) (West 2019).

someone for the purposes of prostitution, when he transported her to a location to engage in prostitution, or when he negotiated the exchange of sex with her for money, the defendant caused the child to commit prostitution, which proved compelling.[96]

Similarly, appellant provided the child victim for prostitution purposes, he negotiated the price, he specified the permissible sexual contact, and he drugged the child to ensure her cooperation.[97] The record offers definitive evidence that consistent with Section 6.04(a), he caused the child to commit prostitution through these actions when he provided the opportunity, procured the customer, and arranged the location for the prostitution. [98]

Law enforcement need not delay intervention until after a perpetrator had sexual contact with the child to prove compelling prostitution. Yet, based on the court of appeals' holding, delay until after sexual conduct occurred, if it sufficed to meet the burden, would provide the only means for the State to prove compelling

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[96] *See id*.; *see also Waggoner*, 897 S.W.2d at 512; *Menyweather*, 2014 WL 6450826, at *2 (holding *Waggoner's* understanding of "any means" accorded with §6.04(a) when someone offered opportunity for an unwilling child to engage in prostitution which proved compelling charge); *Agyin*, 2013 WL 5864483, at *2 (transporting the child and locating customers for her was legally sufficient evidence to prove he caused the child to commit prostitution).

[97] (RRIV-21, 22, 28, 46-48, 51-55, 68-70).

[98] *See Waggoner*, 897 S.W.2d at 512-3.

of a child too young to make an offer or reach an agreement.[99] To interpret the compelling prostitution statute to have such a requirement for the youngest and most vulnerable of victims, non-verbal ones, when the statute clearly penalizes anyone offering the child for prostitution purposes leads to an absurd and unnecessary result.[100] Precedent from this Court and the other appellate courts interpreting the statute found no such requirement.[101]

II. Even if a prostitution offense must occur, the compelling prostitution statute does not require the child victim to knowingly commit it.

Yet, even were evidence of a completed prostitution required to prove compelling, nothing in the statute requires that the child knowingly offer, agree, or engage in sexual contact for a fee to prove it. Rather, this Court held that Texas

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[99] *See* Tex. Penal Code Ann. §43.02(a)(1) (West 2015)("A person commits an offense if, in return for receipt of a fee, the person knowingly:…offers to engage, agrees to engage, or engages in sexual conduct[.]").

[100] *See* Tex. Penal Code Ann. §§6.04(a), §43.05(a)(2) (West 2015)(defining causation and penalizing a person who causes any child younger than 18 to commit prostitution); *see also Flowers v. State*, 815 S.W.2d 724, 729 (Tex. Crim. App. 1991)(stating that "[b]ecause a statute should be interpreted to be effective," it would not construe a statute in such a way that its language would be nullified); *see also Griffith v. State*, 116 S.W.3d 782, 785 (Tex. Crim. App. 2003)("If one reasonable interpretation yields absurd results while the other interpretation yields no such absurdities, the latter interpretation is preferred.").

[101] *See id.*; *see also Davis*, 635 S.W.2d at 739; *Waggoner*, 897 S.W.2d at 513; *Reese*, 725 S.W.2d at 795; *Evans*, 2017 WL 1089806, at *6 (holding compelling prostitution proven when defendant sold sexual contact with intoxicated child victim despite child making no offers, agreements, or pubic solicitations).

Penal Code Section 7.02 applies to create party responsibility for prostitution.[102] A defendant is a party to another's conduct if he: (1) acts with the required culpable mental state to commit prostitution and causes or aids an innocent person to engage in the prohibited conduct; (2) acts with intent to promote or assist in commission of the offense when he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or (3) when he has a legal duty to prevent the commission of the offense, but he acts with intent to promote or assist in its commission, while failing to make reasonable effort to prevent it.[103] Thus, the person compelling the prostitution has himself committed prostitution when criminally responsible for the offer or agreement.[104]

Here, the record shows that prostitution occurred under any of the theories of criminal liability. The four-year-old was an innocent person appellant caused to commit prostitution.[105] His deal with the undercover officer, and others, sold sexual contact with her body. Just because he made the offer, agreement, and demanded the money, he still caused her by those means to commit prostitution.

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[102] *Raven v. State*, 533 S.W.2d 773, 775 (Tex. Crim. App. 1976)(holding prostitution is a lesser-included offense of compelling because accused is criminally responsible as a party to the prostitution).
[103] Tex. Penal Code Ann. §7.02(a) (West 2019).
[104] *Raven*, 533 S.W.2d at 775.
[105] *See* Tex. Penal Code Ann. §§7.01, §7.02(a)(1), §43.02 (West 2015).

Moreover, there can be no doubt he solicited, directed, aided and attempted to aid her to commit prostitution through his actions.[106]

The buyer need not sexually assault her to prove the prostitution of a drugged child unknowingly the subject of the agreement. Rather, prostitution occurred when appellant made the offer and reached an agreement to exchange sex with her for $1,000. The State proved it when the officer showed up with the money, displayed it to appellant, and appellant led him to the partially clad child.

Section 7.03 also provides for criminal liability when appellant's criminal responsibility is based on the conduct of another because he may be convicted on proof of the crime's commission and that he was a party to it.[107] It is no defense that the person whose conduct he is responsible for has not been prosecuted or that she is immune from prosecution.[108]

A plain reading of Section 43.05 does not require that the child, and only the child, must made the offer, agreement, engage in sex for a fee or solicit sex for hire in a public place. The very term "causes by any means a child younger than 18 years to commit prostitution" shows that the statute penalizes the compeller's acts to engage the child in prostitution. The very title demonstrates a lack of

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[106] *See Raven*, 533 S.W.2d at 775 (holding pimp liable as a party for prostitution as a lesser offense of compelling).
[107] Tex. Penal Code Ann. §7.03 (West 2015).
[108] *Id*.

willingness or cooperation on the prostitute's part.[109] Consequently, until now, no court required evidence the victim knowingly and consciously engaged in prostitution to prove compelling.[110]

Rather, if prostitution must occur to prove compelling, then evidence the perpetrator offered and agreed to exchange sexual contact with the child sufficed to prove it. To read the statute any other way leads to an absurd result unsupported by the statutory text or the intent behind it.[111]

The State asks this Court to grant review of its second issues. The published opinions misinterpreted the statute by requiring the child's knowing and lawful consent to the sexual conduct another planned to perform on her, instead of considering the criminal conduct of the person who compelled her participation in it.

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[109] *See* Tex. Penal Code Ann. §43.05 (West 2015)("Compelling Prostitution").

[110] *C.f. Waggoner*, 897 S.W.2d at 513 (finding compelling prostitution evidence sufficient without a completed prostitution offense); *Cramer v. State*, No. 05-02-01757-CR, 2003 WL 22663512 (Tex. App.—Dallas Nov. 12, 2003, pet. ref'd)(not designated for publication)(finding compelling prostitution evidence sufficient when appellant sold sex with a mentally-challenged woman who had severely limited language or understanding of sex); *Mata v. State*, No. 11-00-00189-CR, 2001 WL 34373170 (Tex. App.—Eastland Jun. 28, 2001, no pet.)(not designated for publication)(upholding compelling prostitution conviction when victim did not know appellant had accepted money in exchange for allowing someone to sexually assault her).

[111] *See Griffith*, 116 S.W.3d at 785 (interpreting statute literally, unless it would lead to an absurd result the legislature could not have intended).

PRAYER

The State respectfully asks this Court to grant its petition for discretionary review on both issues, consider the merits, reverse the decision of the court of appeals, and affirm the judgments of the trial court.

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APPENDIX A

(The Fourteenth District Court of Appeals' majority opinion in *Turley v. State*)

Reversed and Rendered and Majority and Concurring Opinions filed March 12, 2020.

In the

Fourteenth Court of Appeals

NO. 14-18-00235-CR
NO. 14-18-00236-CR

ANDREW JAMES TURLEY, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause Nos. 1488216 & 1488217

MAJORITY OPINION

Can a child commit the offense of prostitution? We must address this question for two reasons. First, because the State chose to charge appellant with the offenses of (1) compelling prostitution and (2) trafficking a person based on compelling prostitution. And the State succeeded in convincing the jury to convict appellant of committing both offenses. But second, because the plain language of the laws

enacted by the legislature requires as a necessary element in each of those offenses that *another person* be caused to commit prostitution.

We do not believe the legislature intends that it is possible for the "other person" here—S.E.B., a four-year-old child—to commit prostitution.[1] While the record does not reflect that the child in these cases has been charged with committing any crime, in reviewing appellant's convictions, we must for the first time determine if it is even possible for her to have committed prostitution.[2] This is because for

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[1] The common-law rule made children below the age of seven absolutely incapable of committing crimes. *See* 4 William Blackstone, Commentaries *22. While Texas recognized common-law crimes in 1836, Texas has not recognized them since 1857. Act approved Dec. 21, 1836, 1st Cong., R.S., § 54 ("All offences known to the common law of England as now understood and practiced, which are not provided for in this act, shall be punished in the manner as known to the said common law."), 1836 Repub. Tex. Laws 187, 195, *continued in force by* Tex. Const. of 1845, art. XIII, § 3, *repealed by* 1856 Penal Code, 6th Leg., Adj. S., § 2, 1856 Tex. Penal Code 1, 165, 167; 1856 Penal Code, 6th Leg., Adj. S., § 1, art. 3 ("In order that the system of penal law in force in this State, may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission as a penal offence, unless the same is expressly defined and the penalty affixed by the written law of this State."), § 3 (Feb. 1, 1857 effective date), 1856 Tex. Penal Code 1, 2, 167, *recodified and repealed by* 1879 Penal Code and Code of Criminal Procedure, 16th Leg., R.S., § 1 (Penal Code), art. 3, § 3 (repealer), 1879 Tex. Crim. Stat. n.p., 1 (Penal Code), 6, 157 (repealer following Code of Criminal Procedure), *recodified and repealed by* 1895 Penal Code and Code of Criminal Procedure, 24th Leg., R.S., § 1 (Penal Code), art. 3, § 3 (repealer), 1895 Tex. Crim. Stat. 2 (Penal Code), 3, 182 (repealer following Code of Criminal Procedure), *recodified by* 1911 Penal Code and Code of Criminal Procedure, 24th Leg., R.S., § 1 (Penal Code), art. 3, 1911 Tex. Crim. Stat. n.p. (Penal Code), 1 (no repealer of 1895 Penal Code; *see Berry v. State*, 156 S.W. 626, 635 (Tex. Crim. App. 1913)), *recodified and repealed by* 1925 Penal Code and Code of Criminal Procedure, 39th Leg., R.S., § 1 (Penal Code), art. 3, § 3, art. 1 (repealer), 1925 Tex. Crim. Stat. 2 (Penal Code), 3, 181 (repealer following Code of Criminal Procedure for both 1895 and 1911 Penal Codes), *recodified and repealed by* Act of May 24, 1973, 63d Leg., R.S., § 1, sec. 1.03(a), § 3(a), 1973 Tex. Gen. Laws 883, 991. See *infra* note 12 for an explanation of statutory presumed intent from 1857 through 1973.

[2] The Penal Code provisions related to compelling prostitution of a child—sections 8.07 (age affecting criminal responsibility), 43.01(2) (definition of prostitution), 43.02 (prostitution offense), and 43.05 (compelling-prostitution offense)—date to the 1973 substantive revision of the Penal Code. Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 1, secs. 8.07, 43.01(2), 43.02, 43.05, 1973 Tex. Gen. Laws 883, 897–98, 958–59 (since amended). The 1973 Penal Code was based on the 1962 Model Penal Code, which made "promoting prostitution' of a child under 16 a felony of the third degree. Model Penal Code § 251.2(2), (3)(c) (Official Draft 1962). Texas modified Model

purposes of the compelling-prostitution offense, the legislature has defined "prostitution" as the Penal Code offense. *See* Tex. Penal Code Ann. § 43.01(2).[3]

The facts are deeply disturbing. At the end of the guilt/innocence portion of the trial and outside the presence of the jury, appellant's counsel stated to the trial court, "While the defendant's conduct in this case meets the definition of probably another uncharged offense, it does not satisfy the elements of compelling prostitution as stated in the indictment."

It is, obviously, beyond this court's power to fix what has been done. But the issue we must resolve is not merely about the facts. The issue challenges the presumption that a four-year-old can commit the offense of prostitution because we must review the sufficiency of the conviction by comparing the evidence presented at trial to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Accordingly, we must determine whether the hypothetically correct jury charge for the case supports a presumption that a four-year-old child can commit the offense of prostitution, an analysis that leads us back to the Old Code, the 1856 Penal Code.

We recognize that the Court of Criminal Appeals of Texas, which binds this court in criminal matters, has not decided the issue of whether a four-year-old can

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Penal Code section 215.2 ("Prostitution and Related Offenses") to include a separate offense for compelling prostitution. Page Keeton & Lee Clyburn, *Texas Penal Code Revision Project: Report on Prostitution* 2, 19 (Draft 1, Mar. 16, 1970) (proposing section 251.5 to "condemn the most reprehensible forms of the pandering offense described in [1925 Penal Code] Article 519); *see also* State Bar Committee on Revision of the Penal Code, *Texas Penal Code: A Proposed Revision* 59 (Final Draft Oct. 1972) (compelling prostitution).

[3] Both the 1970 Draft 1 and 1972 Final Draft contain a definitions section, and each is less restrictive than Penal Code section 43.01(2) ("In this subchapter: . . . (2) 'Prostitution' means the offense defined in Section 43.02 of this code."): (a) Draft 1, at 1 ("In this article [Prostitution], unless the context requires a different definition, . . . (2) 'prostitution' means the offense defined in Section 251.2") and (b) Final Draft at 58 ("In this subchapter, unless the context requires a different definition: . . . (2) 'Prostitution' means the offense defined in Section 43.02.").

commit prostitution—perhaps not surprisingly since the legislature generally proscribes a four-year-old child from being prosecuted for or convicted of most offenses, including prostitution. *See* Tex. Penal Code Ann. § 8.07.[4] While we

[4] *See also infra* note 12. The 1962 Model Penal Code adopted the position that the criminal court is deprived of jurisdiction to proceed in the case of a person who is within the competence of the juvenile court. *See* Model Penal Code § 4.10 (Official Draft 1962) ("No court shall have jurisdiction to try or convict a person of an offense . . . ."). Drafters of the 1973 Penal Code initially contemplated language concerning "criminal court jurisdiction." *See* State Bar Committee on Revision of the Penal Code, *Texas Penal Code: A Proposed Revision* 74 (Final Draft Oct. 1970) ("Age Affecting Criminal Court Jurisdiction"); Page Keeton, Seth Searcy & Paul Echols, *Texas Penal Code Revision Project: Report on General Defenses to Criminal Responsibility* 12, 38 (Draft 1, Jan. 22, 1970) ("Immaturity Affecting Criminal Court Jurisdiction").

The 1973 enactment of Family Code title 3 included language concerning exclusive juvenile jurisdiction. Act of May 25, 1973, 63d Leg., R.S., ch. 544, § 1, sec. 51.04(a), 1973 Tex. Gen. Laws 1460, 1462 ("The juvenile court has exclusive original jurisdiction over proceedings under this title."), *amended by* Act of May 19, 1975, 64th Leg., R.S., ch. 693, § 5, 1975 Tex. Gen. Laws 2152, 2153 ("This title covers the proceedings in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of this title at the time he engaged in the conduct, and the juvenile court has exclusive original jurisdiction over proceedings under this title."), *amended by* Act of May 27, 2001, 77th Leg., R.S., ch. 1514, § 12, sec. 51.04(a), 2001 Tex. Gen. Laws 5396, 5408 ("This title covers the proceedings in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of this title at the time the person engaged in the conduct, and, except as provided by Subsection (h), the juvenile court has exclusive original jurisdiction over proceedings under this title.), *amended by* Act of May 23, 2019, 86th Leg., R.S., ch. 660, § 1, sec. 51.04(a), 2019 Tex. Gen. Laws 1916, 1916 ("This title covers the proceedings in all cases involving the delinquent conduct or conduct indicating a need for supervision engaged in by a person who was a child within the meaning of this title at the time the person engaged in the conduct, and, except as provided by Subsection (h) or Section 51.0414, the juvenile court has exclusive original jurisdiction over proceedings under this title."); *see also* Act of Apr. 21, 1943, 48th Leg., R.S., ch. 204, §§ 4–5, 1943 Tex. Gen. Laws 313, 314 (juvenile-court jurisdiction; Tex. Rev. Civ. Stat. Ann. art 2338—1), *amended by* Act of Mar. 14, 1945, 49th Leg., R.S., ch. 35, § 1, 1945 Tex. Gen. Laws 52, 52, *amended by* Act of June 9, 1949, 51st Leg., R.S., ch. 368, § 1, 1949 Tex. Gen. Laws 702, 702–03, *amended by* Act of Apr. 26, 1951, 52d Leg., R.S., ch. 156, § 1, 1951 Tex. Gen. Laws 270, 270–71, *amended by* Act of May 5, 1953, 53d Leg., R.S., ch. 165, § 1, 1953 Tex. Gen. Laws 475, 475–76, *amended by* Act of May 26, 1965, 59th Leg., R.S., ch. 577, § 2, 1965 Tex. Gen. Laws 1256, 1256–57, *amended by* Act of May 24, 1967, 60th Leg., R.S., ch. 475, § 3, 1967 Tex. Gen. Laws 1082, 1083, *repealed by* Act of May 25, 1973, 63d Leg, R.S., ch. 544, § 3, 1973 Tex. Gen. Laws 1460, 1485 (Family Code title 3).

Unlike the Model Penal Code, 1973 Penal Code section 8.07 did not expressly state that the criminal court is deprived of jurisdiction if jurisdiction properly lies in juvenile court. Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 1, sec. 8.07, 1973 Tex. Gen. Laws 883, 897–98 (since

recognize that the juvenile court does not have jurisdiction over a four-year-old, *see* Tex. Fam. Code Ann. §§ 51.02(2), 51.03, 51.04(a), the Supreme Court of Texas unequivocally has concluded that children under 14 cannot knowingly agree to engage in sexual conduct for a fee and therefore cannot commit prostitution under the juvenile justice code, Family Code title 3. *In re B.W.*, 313 S.W.3d 818, 824, 826 (Tex. 2010) (children under 14 lack capacity to understand significance of agreeing to sex, cannot legally consent to sex, and cannot be tried for prostitution); *see* Tex. Fam. Code Ann. §§ 51.02(2), 51.04(a).[5] Following the plain meaning of the

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amended). This decision led to unintended consequences. *Bannister v. State*, 552 S.W.2d 124, 125 (Tex. Crim. App. 1977), involved circumstances wherein a juvenile used a false name and lied to her attorney and the court about her actual age. She claimed to be 19 or older, but was in fact 15 years of age. She pleaded guilty to felony burglary of a habitation and received a probated sentence. She did not report to her probation officer, and the State moved to revoke. Only then did she reveal her actual age. The *Bannister* court concluded that since she was a juvenile at the time of the offense, the district court was without jurisdiction to try her despite the juvenile's being able to benefit from bringing a fraud upon the court. *Id.* at 130.

In 1995, in apparent response to cases like *Bannister*, the legislature adopted Code of Criminal Procedure article 4.18(a). *See* Act of May 27, 1995, 74th Leg. R.S., ch. 262, § 80, art. 4.18(a), 1995 Tex. Gen. Laws 2517, 2582. The statute provides: "A claim that a district court or criminal district court does not have jurisdiction over a person because jurisdiction is exclusively in the juvenile court and that the juvenile court could not waive jurisdiction under Section 8.07(a), Penal Code, or did not waive jurisdiction under Section 8.07(b), Penal Code, must be made by written motion in bar of prosecution filed with the court in which the criminal charges against the person are filed." Tex. Code Crim. Proc. Ann. art. 4.18(a). In other words, under such circumstances, a defendant could be subjected to criminal proceedings if he fails to file an article-4.18 motion. *See id.* The Court of Criminal Appeals since has held that article 4.18 "by its plain language, applies only if jurisdiction is 'exclusively in the juvenile court.'" *Alberty v. State*, 250 S.W.3d 115, 118 (Tex. Crim. App. 2008) ("The record indisputably shows that the evidence supported jurisdiction in both the juvenile and district courts, thus jurisdiction in the juvenile court was not exclusive. Because the district court also had jurisdiction, art. 4.18 does not apply, and appellant was not bound to file any motion in regard to the earlier assaults.").

Except for article 4.18 and article 4.19, which governs transfer of a person certified to stand trial as an adult, the rest of article 4, "Courts and Criminal Jurisdiction," provides for criminal jurisdiction in various courts, generally based on the type of offense, without otherwise referencing age as a part of the court's jurisdiction over a person. *See* Tex. Code Crim. Proc. Ann. arts. 4.01–.17.

[5] This court in a juvenile proceeding recently applied the holding of *B.W.* and "h[e]ld that a child under 14 years of age may not be charged with [aggravated sexual assault of a child under

compelling-prostitution statute, which requires as a necessary element a showing that another person (in this case, the four-year-old) was caused to commit prostitution, when the other person is a "child"[6] and that child cannot commit the offense of prostitution, we conclude the defendant cannot be convicted for compelling prostitution.[7]

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section 22.021 of the Texas Penal Code]." *In the Matter of T.V.T.*, No. 14-18-00807-CV, 2019 WL 6974971, at *5 (Tex. App.—Houston [14th Dist.] Dec. 19, 2019, no pet. h.) (citing *B.W.*, 313 S.W.3d at 826).

We also note the Supreme Court of Texas recently heard argument on the State's petition for review in *State v. R.R.S.*, No. 17-0819 (Tex. argued Jan. 7, 2020), reviewing *In re R.R.S.*, 536 S.W.3d 67, 80 (Tex. App.—El Paso 2017, pet. granted), a case in which the Eighth Court of Appeals in a juvenile proceeding discussed *B.W.* in concluding that the trial court erred in refusing to (1) permit a 13-year-old to withdraw his plea and stipulation of evidence and (2) order a new trial regarding an alleged aggravated sexual assault.

[6] There is no simple answer to the question of who is a "child" under Texas criminal law. *See Davis v. State*, No. 14-17-00884-CR, 2019 WL 5157382, at *4 n.7 (Tex. App.—Houston [14th Dist.] Oct. 15, 2019, no pet.) (comparing Tex. Penal Code Ann. § 8.07(b) (person reaching 17 years of age may be prosecuted for and convicted of any offense) with Tex. Civ. Prac. & Rem. Code. Ann. § 129.001 (civil age of majority for persons at least 18 years of age)). There is no general definition of "child" in either the Code Construction Act or the Penal Code's general provisions. *See* Tex. Gov't Code Ann. § 311.005; Tex. Penal Code Ann. § 1.07. Within certain offenses of the Penal Code, a "child" is defined as: (1) a person 14 years of age or younger, *see* Tex. Penal Code Ann. § 22.04(c)(1) ("Injury to a Child"); (2) a person or individual younger than 17 years of age, *see id.* §§ 21.02(a) ("Continuous Sexual Assault of Young Child or Children," cross-referencing definition of "child" in Tex. Penal Code Ann. § 22.011(c)), 22.011(c)(1) ("Sexual Assault"), 22.021(b)(1) ("Aggravated Sexual Assault," cross-referencing definition of "child" in Tex. Penal Code Ann. § 22.011(c)), 46.13(a)(1) ("Making a Firearm Accessible to a Child"), 71.022(d)(1) ("Coercing, Inducing, or Soliciting Membership in a Criminal Street Gang"); and (3) a person younger than 18 years of age, *see id.* §§ 20A.01(1) (within chapter 20A "Trafficking of Persons"), 25.081(a)(1) ("Unregulated Custody Transfer of Adopted Child," defining "adopted child"), 25.09(d)(1) ("Advertising for Placement of Child," cross-referencing definition of "child" in Tex. Fam. Code Ann. § 101.003)), 43.251(a)(1) ("Employment Harmful to Children"). Other offenses instead use the term "minor," which is defined as: (1) an individual younger than 17 years of age, *see* Tex. Penal Code Ann. §§ 15.031(f) ("Criminal Solicitation of a Minor"), 33.021(a)(1) ("Online Solicitation of a Minor"); and (2) a person or individual younger than 18 years of age, *see id.* §§ 43.24(a)(1) ("Sale, Distribution, or Display of Harmful Material to Minor"), 43.261(a)(2) ("Electronic Transfer of Certain Visual Material Depicting Minor").

[7] The concurring opinion characterizes following the hypothetically correct jury charge and respecting the opinion of the Supreme Court of Texas as a rash expedition into a dark forest. But it is not absurd to harmonize the application of the same law as applied to both juveniles and adults.

Appellant Andrew James Turley was convicted by a jury of compelling prostitution of a child younger than 18 (trial court cause number 1488216; appellate court cause number 14-18-00235-CR) and of trafficking a child based on compelling prostitution (trial court cause number 1488217; appellate court cause number 14-18-00236-CR). *See generally* Tex. Penal Code Ann. §§ 20A.02(a)(7)(H), (b)(1) (trafficking), 43.05(a)(2), (b) (compelling prostitution). For each alleged offense, the jury assessed punishment at imprisonment for a term of 30 years and a $10,000 fine. *See id.* § 12.32 (punishment for first-degree felony). The trial court ordered the sentences to run consecutively. *See* Tex. Code Crim. Proc. Ann. art. 42.08(a).

Appellant challenges his convictions in two issues. First, he argues the State's evidence is insufficient to prove that he compelled prostitution of a child because the complainant, his daughter S.E.B., was younger than 14 at the time and could not as a matter of law commit prostitution. Second, appellant argues that the State's evidence is insufficient to prove that he trafficked a child because he did not cause S.E.B. to become the victim of compelled prostitution.

I. BACKGROUND

Appellant posted a Craigslist ad captioned "Play with Daddy's Little Girl." An undercover officer in the Houston Police Department's vice division came across the ad in the "male woman for male sex" category of the "casual encounter" section.[8]

If the two high courts are to disagree, then it is their place to have that disagreement, not ours to predict. Moreover, similar to *B.W.*, both of appellant's criminal jury charges instructed that children under 14 lack the capacity to consent to sexual activity and may not be charged with prostitution. *See infra* notes 11 & 24.

[8] The officer explained:

> I didn't know it was an adult section until I went to vice and was trained, but you can tell what they have. They have like a woman from—says casual encounters. You click, and casual encounters takes you to another section where you choose. They have male woman for male, male woman for male, male woman—they probably have 10 to 12 different things you can click on.

The officer began to e-mail and later texted back and forth with appellant. Based on appellant's responses and the pictures he sent, the officer suspected that appellant "was pimping out a small girl" who appeared to be no older than six.

Appellant proposed a "meet up" for a sexual encounter with his daughter as long as the officer was "generous." The officer proposed "a thousand dollars for two hours." Appellant let the officer know that he would "host" "a safe apartment," the apartment of his daughter's mother. The officer assured appellant he would bring the "gift," meaning the cash payment.

On the morning of November 12, 2015, appellant gave his daughter a "sleep aid" and told the officer to come over. Appellant met the officer in the parking lot, and they went to the apartment. Appellant took the officer into his daughter's bedroom, where she was sleeping on the bed, wearing only a pajama top. Once the officer saw the child, he used a prearranged code phrase to signal backup officers to enter the apartment. Police determined appellant's daughter was four-years old and arrested appellant.

II. ANALYSIS

Appellant's issues challenge the sufficiency of the evidence to support his convictions for (1) compelling prostitution of a child younger than 18 and (2) trafficking a child based on compelling prostitution.[9]

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[9] Appellant raised his legal-sufficiency objection at trial, as well as the question of why did the State not charge appellant with an offense that it could legally prove:

> [DEFENSE COUNSEL]: . . . It's our position that the child cannot engage in prostitution because it's a—it's a—result-oriented offense. She has got to have knowledge to be able to engage in that prostitution. . . .
>
> Under Section 43.05, the offense itself compels someone else to commit the offense of prostitution, in this case [the] child at bar. A jury must first find that the complainant child, S.E.B., committed the act and that it would constitute prostitution, which it is our position here that it did not occur. . . .

A. Standard of review

In determining whether the evidence is sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational jury could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *see also Jourdan v. State*, 428 S.W.3d 86, 94 (Tex. Crim. App. 2014) (jury must find every constituent element of charged offense). We may not reevaluate the weight and credibility of the evidence and substitute our judgment for that of the jury. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). We defer to the jury's resolution of any conflicting inferences from the evidence and presume that it resolved such conflicts in favor of the judgment. *Jackson*, 443 U.S. at 326; *Whatley v. State*, 445 S.W.3d 159, 166 (Tex. Crim. App. 2014).

We measure sufficiency to support a conviction by comparing the evidence

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> . . . While the defendant's conduct in this case meets the definition of probably another uncharged offense, it does not satisfy the elements of compelling prostitution as stated in the indictment.
>
> Accordingly, the defendant cannot possibly be guilty of compelling prostitution where the complainant herself never committed the act of prostitution. So, based on that language, Judge, we're asking that the Court grant an instructed verdict on this particular case.
>
> THE COURT: Thank you. The Motion for Instructed Verdict is denied.

In his motion for directed verdict regarding the alleged compelling-prostitution offense, appellant argued: "According to the plain wording of the statute, a defendant cannot possibly be guilty of compelling prostitution where the child complainant herself never committed an act of prostitution." In his motion for directed verdict regarding the alleged trafficking offense, appellant argued: "According to the plain wording of the statute, a defendant cannot possibly be guilty of trafficking for the purpose of compelling prostitution where the child complainant herself never committed an act of prostitution." The trial court signed orders denying appellant's motions for directed verdict.

presented at trial to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik*, 953 S.W.2d at 240. A hypothetically correct jury charge reflects the governing law, the charging instrument, the State's burden of proof and theories of liability, and an adequate description of the offense for the particular case. *Id.*

B. Compelling prostitution of a child

At the time of the alleged offenses, November 2015, subsection (a)(2) of the compelling-prostitution statute provided: "A person commits an offense if the person knowingly . . . causes by any means a child younger than 18 years to commit prostitution, regardless of whether the actor knows the age of the child at the time the actor commits the offense."[10] We subsequently refer to this statute as the 2015 Compelling-Prostitution Statute.

Appellant's indictment alleged that on or about November 12, 2015, he knowingly caused by any means S.E.B., a person younger than 18 years of age, to commit prostitution. Appellant's jury charge tracked his indictment and the statute.

Appellant argues that "[b]ecause the complainant was four years old at the

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[10] Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 1, sec. 43.05, 1973 Tex. Gen. Laws 883, 959, *amended by* Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, sec. 43.05, 1993 Tex. Gen. Laws 3586, 3681, *amended by* Act of May 31, 2009, 81st Leg., R.S., ch. 1002, § 9, 2009 Tex. Gen. Laws 2611, 2616, *amended by* Act of Apr. 7, 2011, 82d Leg., R.S., ch. 1, § 1.03, 2011 Tex. Gen. Laws 1, 3 (elevating subsection (a)(2) offense to first-degree felony), *amended by* Act of May 30, 2015, 84th Leg., R.S., ch. 1273, § 2, 2015 Tex. Gen. Laws 4311, 4312 (amended 2017) (current version at Tex. Penal Code Ann. § 43.05(a)(2)).

Before the 2009 amendment of subsection (a)(2), the statute involved "a person younger than 17 years." The 2015 amendment added subsection (c): "If conduct constituting an offense under this section also constitutes an offense under another section of this code, the actor may be prosecuted under either section or under both sections." As amended in 2017, a person commits an offense under subsection (a)(2) if the person knowingly "causes by any means a child younger than 18 years to commit prostitution, regardless of whether the actor knows the age of the child at the time of the offense." Tex. Penal Code Ann. § 43.05(a)(2).

time of this incident, she could not commit prostitution, as a matter of law." Appellant therefore contends he could not commit the offense of compelling prostitution of a child under the 2015 Compelling-Prostitution Statute.

We certainly recognize that in prosecuting its case the State presented evidence of appellant's seriously disturbing conduct concerning his own very young daughter. But the legal issue is whether a rational jury could have found all the essential elements of the offense for which appellant was charged and tried—compelling prostitution of a child—beyond a reasonable doubt. Based on the plain and unambiguous language of the statute, we must agree with appellant that the evidence is insufficient to support a crucial element of his conviction for compelling prostitution of a child.

Here, the legal-sufficiency issue turns on the meaning of the statute under which appellant has been prosecuted. *See Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015) (citing *Moore v. State*, 371 S.W.3d 221, 227 (Tex. Crim. App. 2012)); *Clinton v. State*, 354 S.W.3d 795, 799 (Tex. Crim. App. 2011) (two steps in legal-sufficiency analysis are, first, determining essential elements of crime with appropriate statutory interpretation, and second, conducting sufficiency review). Statutory construction is a question of law that we review de novo. *Ramos v. State*, 303 S.W.3d 302, 306 (Tex. Crim. App. 2009). When interpreting statutes, "we seek to effectuate the collective intent or purpose of the legislators who enacted the legislation." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) (internal quotation marks omitted). We focus our attention on the literal text of the statute in question and "attempt to discern the fair, objective meaning of that text at the time of its enactment." *Id.* When statutory language is clear and unambiguous, we give effect to its plain meaning unless to do so would lead to absurd consequences that the legislature could not possibly have intended. *Id.* We do not resort to

extratextual factors unless the language is ambiguous, meaning it is not plain. *Yazdchi v. State*, 428 S.W.3d 831, 838 (Tex. Crim. App. 2014). In interpreting the literal text of a statute, we "presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible." *State v. Hardy*, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997).

Subsection (a)(2) of the 2015 Compelling-Prostitution Statute plainly and expressly states that the offense of compelling prostitution is committed when (1) a person (2) knowingly (3) causes by any means (4) a child younger than 18 (5) to commit prostitution. Both appellant's indictment and jury charge on compelling prostitution essentially included all these elements.

Appellant contends that a child under the age of 14 cannot commit the offense of prostitution, focusing on S.E.B.'s legal inability as a four-year-old to commit that offense. In other words, appellant argues that in the case of a four-year-old, the State could never meet element (5) by proving the child "committed prostitution." We agree.

At the time of the alleged offenses, the prostitution statute provided:

> (a) A person commits an offense if, in return for receipt of a fee, the person knowingly:
>
> > (1) offers to engage, agrees to engage, or engages in sexual conduct; or
> >
> > (2) solicits another in a public place to engage with the actor in sexual conduct for hire.
>
> (b) A person commit an offense if, based on the payment of a fee by the actor or another person on behalf of the actor, the person knowingly:
>
> > (1) offers to engage, agrees to engage, or engages in sexual conduct; or
> >
> > (2) solicits another in a public place to engage with the actor in

sexual conduct for hire.

We subsequently refer to this statute as the 2015 Prostitution Statute.[11]

As a practical matter, based on her age, S.E.B. could not have been prosecuted for or convicted of the criminal offense of prostitution. *See* Tex. Penal Code Ann. § 8.07.[12] Likewise, based on her age, S.E.B. could not have been subjected to

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[11] Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 1, sec. 43.02, 1973 Tex. Gen. Laws 883, 959, *amended by* Act of May 18, 1977, 65th Leg., R.S., ch. 286, § 1, 1977 Tex. Gen. Laws 757, 757, *amended by* Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 1.01, sec. 43.02, 1993 Tex. Gen. Laws 3586, 3681, *amended by* Act of May 31, 2009, 81st Leg., R.S., ch. 1002, § 8, 2009 Tex. Gen. Laws 2611, 2616, *amended by* Act of May 23, 2013, 83d Leg., R.S., ch. 1252, § 15, 2013 Tex. Gen. Laws 3167, 3170, *amended by* Act of May 30, 2015, 84th Leg., R.S., ch. 1273, § 1, Tex. Gen. Laws 4311, 4311–12 (amended 2017) (current version at Tex. Penal Code Ann. § 43.02(a), (b)).

The 2009 amendment added subsection (d): "It is a defense to prosecution under this section that the actor engaged in the conduct that constitutes the offense because the actor was the victim of conduct that constitutes an offense under Section 20A.02." Subsection (d) was amended in 2015: "It is a defense to prosecution for an offense under Subsection (a) that the actor engaged in the conduct that constitutes the offense because the actor was the victim of conduct that constitutes an offense under Section 20A.02 or 43.05." As amended in 2017, subsections (a) and (b) provide: "(a) A person commits an offense if the person knowingly offers or agrees to receive a fee from another to engage in sexual conduct. (b) A person commits an offense if the person knowingly offers or agrees to pay a fee to another person for the purpose of engaging in sexual conduct with that person or another." Tex. Penal Code Ann. § 43.02(a), (b).

Appellant's compelling-prostitution jury charge included the following definition for prostitution: "A person commits prostitution if the person knowingly: (1) offers to engage, agrees to engage, or engages in sexual conduct for a fee; or (2) solicits another in a public place to engage that person or anotherin [sic] sexual conduct for hire." And appellant's compelling-prostitution jury charge instructed that "[a] child under the age of 14 may not be charged with prostitution, children lack the capacity to consent to sexual activity." *See supra* note 7.

[12] *See also supra* note 4. In Penal Code chapter 8, the legislature has made an express policy decision that a four-year-old may not be prosecuted for or convicted of most offenses. *See* Tex. Penal Code Ann. § 8.07 ("Age Affecting Criminal Responsibility"). Under the Penal Code, with limited exceptions, none of which is at issue here, a person "younger than 15 years of age" is not criminally responsible and therefore not subject to prosecution or conviction for an offense. *Id.* § 8.07(a). The exceptions are even more limited when the person is "younger than 10 years of age." *Id.* § 8.07(d). In addition, again with limited exceptions not at issue here, unless the juvenile court waives jurisdiction and certifies and transfers the child for criminal prosecution, a person may not be prosecuted for or convicted of any offense committed before reaching 17 years of age. *Id.* § 8.07(b); Tex. Fam. Code Ann. § 54.02 (describing available waivers for various categories of offenses and ranges of ages).

The law regarding age affecting criminal responsibility, Penal Code section 8.07, has a long history that dates back to the Old Code. 1856 Penal Code, 6th Leg., Adj. S., § 1, arts. 36 ("No person shall in any case be convicted of any offence committed before he was of the age of nine years; nor of any offence committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offence."), 52 ("The intention to commit an offence is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act."), 1856 Tex. Penal Code 1, 8, 10, *recodified and repealed by* 1879 Penal Code and Code of Criminal Procedure, 16th Leg., R.S., § 1 (Penal Code), arts. 34 ("No person shall, in any case, be convicted of any offense committed before he was of the age of nine years; nor of any offense committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offense."), 50 ("The intention to commit an offense is presumed, whenever the means used is such as would ordinarily result in the commission of the forbidden act."), § 3 (repealer), 1879 Tex. Crim. Stat. n.p. (Penal Code), 4, 6, 157 (repealer following Code of Criminal Procedure), *recodified and repealed by* 1895 Penal Code and Code of Criminal Procedure, 24th Leg., R.S., § 1 (Penal Code), arts. 34 ("No person shall, in any case, be convicted of any offense committed before he was of the age of nine years; nor of any offense committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offense."), 56 ("The intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act."), § 3 (repealer), 1895 Tex. Crim. Stat. 2 (Penal Code), 7, 9, 182 (repealer following Code of Criminal Procedure), *amended by* Act approved Apr. 3, 1905, 29th Leg., R.S., ch. 59, § 1 ("No person shall in any case be convicted of any offense committed before he was of the age of nine years, except perjury, and for that only, when it shall appear by proof that he had sufficient discretion to understand the nature and obligation of an oath; nor of any other offense committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offense."), 1905 Tex. Gen. Laws 83, 83, *recodified by* 1911 Penal Code and Code of Criminal Procedure, 24th Leg., R.S., § 1 (Penal Code), arts. 34 ("**Children not punishable.—**No person shall in any case be convicted of any offense committed before he was of the age of nine years, except perjury, and for that only, when it shall appear by proof that he had sufficient, discretion to understand the nature and obligation of an oath; nor of any other offense committed between the years of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offense."), 51 ("**Intention presumed.—**The intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act."), 1911 Tex. Crim. Stat. n.p. (Penal Code), 8, 13 (no repealer of 1895 Penal Code; *see Berry*, *supra* note 1), *recodified and repealed by* 1925 Penal Code and Code of Criminal Procedure, 39th Leg., R.S., § 1 (Penal Code), arts. 30 ("**Children not punishable.—**No person shall be convicted of any offense committed before he was nine years old except purjury, and for that only when it shall appear by proof that he had sufficient discretion to understand the nature and obligation of an oath; nor of any other offense committed between the age of nine and thirteen, unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offense."), 45 ("**Intention presumed.—**The intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act."), § 3, art. 1 (repealer), 1925 Tex. Crim. Stat. 2 (Penal Code), 6, 8, 181 (repealer following

proceedings for delinquent conduct for the offense of prostitution under the juvenile justice code. *See* Tex. Fam. Code Ann. § 51.03(a).[13]

Code of Criminal Procedure for both 1895 and 1911 Penal Codes), *amended by* Act of May 24, 1967, 60th Leg., R.S., ch. 474, § 7 ("**Art. 30. Children not punishable.** Section 1. No person may be convicted of any offense, except perjury, which was committed before he was 15 years of age; and for perjury only when it appears by proof that he had sufficient discretion to understand the nature and obligation of an oath. Sec. 2. No male under 17 years of age and no female under 18 years of age may be convicted of an offense except perjury unless the juvenile court waives jurisdiction and certifies the person for criminal proceedings. Sec. 3. No person who has been adjudged a delinquent child may be convicted of any offense alleged in the petition to adjudge him a delinquent child or any offense within the knowledge of the juvenile judge as evidenced by anything in the record of the juvenile proceeding."), 1967 Tex. Gen. Laws 1082, 1086 (currently codified as Tex. Penal Code Ann. § 8.07 with additional offense exceptions), *repealed by* Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 3(a), 1973 Tex. Gen. Laws 883, 991.

The law regarding age affecting criminal responsibility does not generally appear to be based on culpability. As it related to children under the age of nine until 1967 when the 1925 Penal Code was amended, then 15 until 1974 when the prior law was repealed and the current Penal Code took effect, the existence of the statutory presumption of intent suggested that those children theoretically could commit an offense, yet they nonetheless could not be convicted of any offense except perjury, and for that offense the State had to prove capacity. Act of May 24, 1973, 63d Leg., R.S., ch. 399, §§ 3(a), 4, 1973 Tex. Gen. Laws 883, 991 (repeal of 1925 Penal Code arts. 30, 45), 995 (effective date of 1973 Penal Code); *see Santillian v. State*, 182 S.W.2d 812, 815 (Tex. Crim. App. 1944) (1895 Penal Code article 34 "was amended so as to provide for the punishment of any child of any age for the crime of perjury, provided it was shown to have had sufficient discretion to understand the nature and obligation of an oath") (op. on reh'g). With the 1974 repeal of the statutory presumption of intent, the State bears the burden of proof on the defendant's culpable mental state, putting capacity at issue if the defendant is a child.

While it seems strange in the 21st century that the offense of compelling a child to commit prostitution requires as an element of the offense that the child commit the offense of prostitution, Texas criminal law from 1857 through 1973 presumed intent. These appeals force this court to confront what appears to be the last vestiges of the old law.

[13] One of the purposes of the juvenile justice code is "to remove, where appropriate, the taint of criminality from children committing certain unlawful acts." Tex. Fam. Code Ann. § 51.01(2)(B). The juvenile court has exclusive original jurisdiction of delinquency proceedings involving children under the juvenile justice code. *Id.* § 51.04(a); *see id.* § 54.03 (governing adjudication hearings). The juvenile justice code defines a "child" as a person "who is ten years of age or older and under 17 years of age" or "seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age." *Id.* § 51.02(2); *see also* Tex. Code Crim. Proc. Ann arts. 45.057(a)(1), 45.058(h)(1) (articles governing "Offenses Committed by Juveniles" and "Children Taken Into Custody" define "child" as a person who is "at least 10 years of age and younger than 17 years of age").

However, regardless of whether the State is barred by statute from bringing criminal or juvenile proceedings against a child complainant for the offense of prostitution, subsection (a)(2) of the 2015 Compelling-Prostitution Statute plainly indicates and requires the State prove as an essential element that the child "commit prostitution." When a statute uses an undefined term, we may consult dictionary definitions to determine the term's plain meaning. *See* Tex. Gov't Code Ann. § 311.011(a) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."); *Clinton*, 354 S.W.3d at 800. However, "words or phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Code Construction Act, Tex. Gov't Code Ann. § 311.011(b); *see Yazdchi*, 428 S.W.3d at 837. For purposes of Penal Code chapter 43, subchapter A ("Prostitution"), the legislature expressly has provided a definition of "prostitution"—"'[p]rostitution' means *the offense* defined in Section 43.02." Tex. Penal Code Ann. § 43.01(2) (emphasis added). In addition, when interpreting statutes, we presume that the legislature intended for the entire statutory scheme to be effective. *See* Tex. Gov't Code Ann. § 311.021(2); *Mahaffey v. State*, 364 S.W.3d 908, 913 (Tex. Crim. App. 2012). Therefore, construing the plain, unambiguous language of subsection (a)(2) of the 2015 Compelling-Prostitution Statute and the plain, unambiguous language of section 43.01(2), compelling prostitution of a child requires the State to prove that the child committed the offense of prostitution under Penal Code section 43.02.[14]

It is not our place to enforce the 2015 Compelling-Prostitution Statute as it might have or should have been written. Nor can we ignore the legislatively-defined

[14] This requirement is consistent with the legislature's inclusion of a specific affirmative defense to prosecution for the offense of prostitution in subsection (d) of the 2015 Prostitution Statute. *See supra* note 11 (2015 amendment to subsection (d)).

meaning of prostitution.[15] Instead, we are to give effect to and harmonize the statutes, if possible. Accordingly, to meet its burden to prove that appellant committed the offense of compelling prostitution of a child, the State must have presented sufficient evidence that S.E.B. was caused to commit the offense of prostitution. This includes proving the underlying culpable-mental-state element of the offense of prostitution, which is "knowingly." 2015 Prostitution Statute; *see* Tex. Penal Code Ann. §§ 1.07(a)(22) ("element of offense" includes its "required culpability"), 6.02(a) ("[A] person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires."), 6.03(b).[16] Both as a matter of law and

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[15] *See supra* note 3.

[16] As discussed in *supra* note 12, from 1857 through 1973, Texas statutorily presumed intent to commit an offense whenever the means used would ordinarily result in the commission of the "forbidden act." This presumption (1856 Penal Code article 52, 1879 Penal Code article 50, 1895 Penal Code article 51, 1911 Penal Code article 51, and 1925 Penal Code article 45) was repealed effective January 1, 1974. Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 3(a), 1973 Tex. Gen. Laws 883, 991. Our review has not revealed any case holding 1925 Penal Code article 45 or any of its predecessor statutes unconstitutional. Even before its repeal, however, the Court of Criminal Appeals recognized the difficulty in reconciling the intent presumption with the "paramount," "stronger" presumption of innocence. *E.g.*, *Baylor v. State*, 208 S.W.2d 558, 561 (Tex. Crim. App. 1948) ("The intent presumed by Art. 45, P.C., is a legal presumption against the accused and should be strictly construed, because it is at variance with and antagonistic to the paramount presumption of innocence which continues throughout the trial of every criminal case."); *Hall v. State*, 49 S.W.2d 793, 796 (Tex. Crim. App. 1932) ("It has been held improper in a number of instances to give this article [45] in charge to the jury against the defendant, because the presumption of innocence is stronger than any presumption of guilt arising merely from the means used to accomplish the guilty purpose, and the burden rests upon the state in a criminal trial to overcome the presumption of innocence by establishing the guilt of the accused by legal evidence beyond a reasonable doubt.").

Although the presumption of innocence is guaranteed by a Texas statute, the statute itself arises from the constitutional guarantee of a fair and impartial trial. *Miles v. State*, 154 S.W.3d 679, 681 (Tex. App.—Houston [14th Dist.] 2004) (citing U.S. Const. amend. XIV and Code of Criminal Procedure article 38.03), *aff'd*, 204 S.W.3d 822, 825–26 (Tex. Crim. App. 2006); *see* Tex. Code Crim. Proc. Ann. art. 38.03 ("All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial."); *see also Hurst v. Florida*, 136 S. Ct. 616,

fact, the State failed to meet its burden in appellant's case.

A person commits the offense of prostitution either by (1) "in return for receipt of a fee . . . knowingly . . . offer[ing] to engage, agree[ing] to engage, or engag[ing] in sexual conduct; or . . . solicit[ing] another in a public place to engage with the actor in sexual conduct for hire" or (2) "based on the payment of a fee by the actor or another person on behalf of the actor . . . knowingly . . . offer[ing] to engage, agree[ing] to engage, or engag[ing] in sexual conduct; or . . . solicit[ing] another in a public place to engage with the actor in sexual conduct for hire." 2015 Prostitution Statute. We conclude that S.E.B. could not have committed prostitution because she lacked the mental capacity to consent to sexual conduct as a matter of law.

There is no dispute that S.E.B. was four-years old at the time of the alleged offenses. Previously faced with a similar question involving a juvenile proceeding in which a 13-year-old pleaded "true" and was found to have engaged in delinquent conduct involving the offense of prostitution, the Supreme Court of Texas in *B.W.* considered the culpable-mental-state element of the offense of prostitution and held that "a child under the age of fourteen may not be charged with" prostitution. 313 S.W.3d at 826. As explained by the *B.W.* court, this is because children younger than 14 lack "the legal capacity to consent, which is necessary to find that a person 'knowingly agreed' to engage in sexual conduct for a fee." *Id.* at 822, 824 (discussing former 1993 Penal Code section 43.02). In other words, regardless of any factual agreement to sex, children younger than 14 years of age cannot as a matter of law

621 (2016) ("This [Sixth Amendment] right [to trial by impartial jury], in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt."); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."); *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

possess the requisite culpable mental state of the offense of prostitution and "cannot be tried for prostitution."[17] *See id.* at 822–24. According to the *B.W.* court, the legal incapacity of children under 14 to knowingly consent to sex entirely does away with the need to consider whether any particular child under 14 may have consented to sex as a factual matter. *Id.* at 823 ("To engage in an individualized determination of a child's capacity to knowingly consent to sex is contrary to the Legislature's pronouncement that all minors under fourteen lack the capacity to give that consent."). We find *B.W.* to be persuasive.

There is no dispute here that the trial evidence showed the child at issue, appellant's daughter S.E.B., to be four-years old at the time of appellant's alleged offenses. Accordingly, as a matter of law S.E.B. could not have committed prostitution as "the offense defined in Section 43.02" as an essential element of subsection (a)(2) of the 2015 Compelling-Prostitution Statute. *See* Tex. Penal Code Ann. § 43.01(2).

The State relies on *Davis v. State*, 635 S.W.2d 737 (Tex. Crim. App. 1982). The offense at issue in *Davis* was the attempt to compel prostitution of an adult, not compelling prostitution of a child. *See id.* at 738. The *Davis* court considered whether the defendant's indictment was required to allege the secondary culpable mental state required for the offense of prostitution. *See id.* at 739. The high court concluded: "As noted above, [defendant] was indicted for attempting to compel prostitution. Thus, only the elements of that offense, attempting to compel prostitution need be set out in the indictment." *Id.*[18]

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[17] *See supra* notes 7, 11 & *infra* note 24.

[18] The *Davis* court cited *Earl v. State*, 514 S.W.2d 273 (Tex. Crim. App. 1974), as "an analogous situation." 635 S.W.2d at 739. At issue in *Earl* was whether the defendant's indictment for aggravated robbery was defective because it "should have alleged the constituent elements of the theft in the course of which the robbery was committed." 514 S.W.2d at 274. The *Earl* court

The State also relies on *Waggoner v. State*, 897 S.W.2d 510 (Tex. App.—Austin 1995, no pet.). The Third Court of Appeals in *Waggoner* affirmed the defendant's conviction for compelling prostitution of a 13-year-old under former 1973 Penal Code section 43.05. In doing so, the *Waggoner* court, citing *Davis*, simply stated that "the actual commission of the offense of prostitution is not a prerequisite to the commission of the offense of compelling prostitution." 897 S.W.2d at 513. *Waggoner* did not address, much less analyze, what committing prostitution meant in light of its statutory definition at the time. Nor did *Waggoner* (which pre-dated *B.W.*) directly consider a 13-year-old's capacity to *knowingly* offer or agree to receive a fee from another to engage in sexual conduct, thus committing the offense of prostitution under the Penal Code or the juvenile justice code. *See In re B.D.S.D.*, 289 S.W.3d 889, 895 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("The Austin Court of Appeals in *Waggoner* interpreted the meaning of 'causing' a child 'by any means' to commit prostitution under subsection 43.05(a)(2). . . . The *Waggoner* court did not address the issue of whether a child could commit an act of prostitution or engage in delinquent conduct by committing the offense of prostitution.").[19]

We cannot conclude, based on these cases, that the State was excused from

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concluded:

> Thus the actual commission of the offense of theft is not prerequisite to commission of a robbery . . . . Of course it must be alleged and proven that the alleged offense was committed "in the course of committing a theft" and "with intent to obtain or maintain control of the property" involved in the theft. Although the proof will involve proving up a theft or attempted theft, the elements of the particular theft . . . or attempted theft . . . need not be alleged in the indictment.

Id.

[19] *In re B.D.S.D.* involved a juvenile proceeding in which a 16-year-old was adjudicated to have engaged in delinquent conduct by committing the offense of prostitution under former 1993 Penal Code section 43.02. We affirmed.

proving that S.E.B. committed the offense of prostitution, including its knowing culpable-mental-state element, to prove that appellant committed the offense of compelling prostitution of a child.

The State also argues that even if it was required to prove an act of prostitution to support a conviction for compelling prostitution, the evidence showed that appellant made an offer, as well as reached an agreement with the officer, to exchange sexual contact for a fee, and that offer and agreement constituted the crime of prostitution. But no matter what the evidence showed as to appellant's own commission of the offense of prostitution either as a principal actor or as a party,[20] such evidence could not prove the child's commission of the offense of prostitution, as required by subsection (a)(2) of the 2015 Compelling-Prostitution Statute. In other words, the statute requires a showing that the child committed the offense of prostitution, not that the person alleged to have compelled prostitution of that child committed the offense of prostitution.

Finally, regardless of *B.W.*'s pronouncements in a juvenile proceeding deliberately addressing and interpreting the law concerning the culpable-mental-state element of prostitution,[21] here, the State did not prove that S.E.B. possessed the requisite knowing mental state to have committed the offense of prostitution. Appellant's communications with the officer indicated he planned to drug S.E.B. for the sexual encounter. In the apartment, the police recovered sleep aids together with a recent receipt from a local pharmacy. The child was asleep when

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[20] The record does not indicate that appellant was charged with any other offense.

[21] Such pronouncements would control as a matter of course in a civil appeal. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam) (explaining that Texas courts are obligated to follow higher Texas courts and United States Supreme Court); *Rice v. Rice*, 533 S.W.3d 58, 62 (Tex. App.—Houston [14th Dist.] 2017, no pet.) ("Under principles of vertical stare decisis, Texas intermediate appellate courts and trial courts are bound by the decisions of the Texas Supreme Court.").

the officer entered the bedroom, and she did not open her eyes when the officer touched her head. When asked by appellant's defense counsel whether the sleeping S.E.B. could have knowingly offered to engage, solicited, or agreed to engage in sexual conduct with the officer, the officer replied: "I don't know any 4-year-old who understands that, sir." The only evidence at trial was that S.E.B. did not possess a knowing culpable mental state.

We sustain appellant's first issue.[22]

C. Trafficking a child based on compelling prostitution

At the time of the alleged offenses, November 2015, subsection (a)(7)(H) of the trafficking statute provided: "[a] person commits an offense if the person knowingly . . . traffics a child and by any means causes the trafficked child to engage in, or become the victim of, conduct prohibited by . . . Section 43.05 (Compelling Prostitution)."[23] In chapter 20A, "Trafficking of Persons," "'[c]hild' means a person

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[22] Appellant further argues that the totality of the evidence did not show that he caused S.E.B. to commit prostitution. Because we already have concluded that the record contains insufficient evidence that a child younger than 18 years of age committed prostitution, we do not address causation. *See* Tex. R. App. P. 47.1.

[23] Act of May 22, 2003, 78th Leg., R.S., ch. 641, § 2, 2003 Tex. Gen. Laws 2045, 2045–46, *amended by* Act of May 23, 2007, 80th Leg., R.S., ch. 849, § 5, 2007 Tex. Gen. Laws 1776, 1778, *amended by* Act of May 28, 2007, 80th Leg., R.S., ch. 258, § 16.02, 2007 Tex. Gen. Laws 367, 392–93, *amended by* Act of May 31, 2009, 81st Leg., R.S., ch. 1002, § 7, 2009 Tex. Gen. Laws 2611, 2615–16, *amended by* Act of Apr. 7, 2011, 82d Leg., R.S., ch. 1, § 1.02, 2011 Tex. Gen. Laws 1, 2–3 (amended 2019) (current version at Tex. Penal Code. Ann. § 20A.02(a)(7)).

In addition to providing for prosecution when the person trafficked a child and caused the trafficked child to engage in or become the victim of conduct prohibited by section 43.05 (Compelling Prostitution), as of the 2011 amendment, subsection (a)(7) reached conduct prohibited by Penal Code sections 21.02 (Continuous Sexual Abuse of Young Child or Children), 22.11 (Indecency with a Child), 22.011 (Sexual Assault), 22.021 (Aggravated Sexual Assault), 43.02 (Prostitution), 43.03 (Promotion of Prostitution), 43.04 (Aggravated Promotion of Prostitution), 43.25 (Sexual Performance by a Child), 43.251 (Employment Harmful to Children), and 43.26 (Possession or Promotion of Child Pornography). As amended in 2019, subsection (a)(7) also reaches conduct prohibited by Penal Code sections 43.031 (Online Promotion of Prostitution) and 43.041 (Aggravated Online Promotion of Prostitution). Tex. Penal Code Ann.

younger than 18 years of age." Tex. Penal Code Ann. § 20A.01(1). "'Traffic' means to transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means." *Id.* § 20A.01(4).

Appellant's indictment alleged that on or about November 12, 2015, he knowingly harbored, provided, and obtained S.E.B., a person younger than 18 years of age, and caused by any means S.E.B. to become the victim of conduct prohibited by section 43.05. Appellant's jury charge also essentially tracked his indictment and the statute. In addition, appellant's jury charge provided a definition for the offense of compelling prostitution that tracked the statute: "A person commits the offense of compelling prostitution if the person knowingly: (1) causes another by force, threat, or fraud to commit prostitution; or (2) causes by any means a child younger than 18 years to commit prostitution, regardless of whether the actor knows the age of the child at the time the actor commits the offense." *See* 2015 Compelling-Prostitution Statute.[24]

In his second issue, appellant argues that "[b]ecause [he] could not commit the offense of compelling prostitution as a matter of law, and because the evidence did not support a conclusion that he did compel S.E.B. to commit prostitution, he also could not commit the offense of trafficking of a person." We agree. Regardless of the disturbing nature of the evidence, the jury could not have found that S.E.B. became the victim of "conduct prohibited by Section 43.05" when as a matter of law the jury could not have found that the child S.E.B. committed prostitution as an essential element under section 43.05.

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§ 20A.02(a)(7)(F-1), (G-1).

[24] Appellant's trafficking jury charge also included essentially the same definition of prostitution and instruction that a child under the age of 14 may not be charged with prostitution as his compelling-prostitution jury charge. *See supra* notes 7 & 11.

We also sustain appellant's second issue.

III. CONCLUSION

We reverse the trial court's judgments and render judgments of acquittal. *See* Tex. R. App. P. 43.2(c). Because this result is dictated by Penal Code sections 20A.02(a)(7)(H), 43.01(2), 43.02(a), (b), and 43.05(a)(2),[25] we urge the legislature to take appropriate action.

/s/ Charles A. Spain
Justice

Panel consists of Chief Justice Frost and Justices Spain and Poissant. (Frost, C.J., concurring).

Publish—Tex. R. App. P. 47.2(b).

[25] *See supra* note 12 (discussing backdrop of statutory scheme created in 1856 in which child's intent was presumed so offense could theoretically be committed, but child nonetheless cannot be convicted).

APPENDIX B

(Chief Justice Frost's opinion concurring in judgment on *Turley v. State*)

Reversed and Rendered and Majority and Concurring Opinions filed March 12, 2020.

In the

Fourteenth Court of Appeals

NO. 14-18-00235-CR
NO. 14-18-00236-CR

ANDREW JAMES TURLEY, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause Nos. 1488216 & 1488217

C O N C U R R I N G O P I N I O N

This case presents simple questions and calls for simple answers. Instead of taking the clear-cut path to reversal, the majority forges new trails to reach that destination, leaving dangerous debris along the way. For the sake of future travelers (and Texas jurisprudence), the court should stay on the sure path and leave trail-blazing for a case that holds no other option.

The Sure Path

Regardless of the complainant's age, the evidence is legally insufficient to support appellant's convictions. Appellant stood charged by indictment with compelling prostitution of a child under the age of 18.[1] The version of Section 43.05(a) of the Penal Code in effect at the time of the charged offenses provided that "[a] person commits an offense if the person knowingly . . . causes by any means a child younger than 18 years to commit prostitution, regardless of whether the actor knows the age of the child at the time the actor commits the offense."[2] "Prostitution" as used in this statute means "the offense defined in Section 43.02 [of the Penal Code]."[3] At the time of the charged offenses, Subsections (a) and (b) of Section 43.02 provided:

> (a) A person commits an offense if, in return for receipt of a fee, the person knowingly:
>
> > (1) offers to engage, agrees to engage, or engages in sexual conduct; or
> >
> > (2) solicits another in a public place to engage with the actor in sexual conduct for hire.
>
> (b) A person commits an offense if, based on the payment of a fee by the actor or another person on behalf of the actor, the person knowingly:
>
> > (1) offers to engage, agrees to engage, or engages in sexual conduct; or
> >
> > (2) solicits another in a public place to engage with the actor in

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[1] *See* Act of May 31, 2009, 81st Leg., R.S., ch. 1002, § 9, 2009 Tex. Gen. Laws 2611, 2616, *amended by* Act of Apr. 7, 2011, 82d Leg., R.S., ch. 1, § 1.03, 2011 Tex. Gen. Laws 1, 3, *amended by* Act of May 30, 2015, 84th Leg., R.S., ch. 1273, § 2, Tex. Gen. Laws 4311, 4312 (amended 2017) (current version at Tex. Penal Code Ann. § 43.05(a))(hereinafter "2015 Version of Section 43.05").

[2] 2015 Version of Section 43.05.

[3] Tex. Penal Code Ann. § 43.01(2).

sexual conduct for hire.

(hereinafter "Subsection (a) or (b) of Section 43.02").[4]

Subsection (d) of that same version of Section 43.02 provides that "[i]t is a defense for an offense under Subsection (a) that the actor engaged in the conduct that constitutes the offense because the actor was the victim of conduct that constitutes an offense under Section 20A.02 or 43.05."[5] Under the plain text of the Penal Code version that applies to today's case, the elements of the offense of compelling prostitution under Section 43.05(a)(2) are (1) a person (2) knowingly (3) causes by any means (4) a child younger than 18 years (5) to commit prostitution.[6] Under the unambiguous language of Sections 43.01(2) and 43.02, the fifth element — to commit prostitution — means "either (a) in return for receipt of a fee, to knowingly: (1) offer to engage, agree to engage, or engage in sexual conduct; or (2) solicit another in a public place to engage with the actor in sexual conduct for hire; or (b) based on the payment of a fee by the actor or another person on behalf of the actor, to knowingly: (1) offer to engage, agree to engage, or engage in sexual conduct; or (2) solicit another in a public place to engage with the actor in sexual conduct for hire" (hereinafter "Prostitution Conduct").[7]

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[4]Act of May 30, 2015, 84th Leg., R.S., ch. 1273, § 1, Tex. Gen. Laws 4311, 4311–12 (amended 2017 & 2019) (current version at Tex. Penal Code Ann. § 43.02(a),(b)) (hereinafter "2015 Version of Section 43.02(a),(b)").

[5] Act of May 31, 2009, 81st Leg., R.S., ch. 1002, § 8, 2009 Tex. Gen. Laws 2611, 2616, *amended by* Act of May 18, 2011, 82d Leg., R.S., ch. 514, § 4.02, 2011 Tex. Gen. Laws 1, 1276, 1281, *amended by* Act of May 23, 2013, 83d Leg., R.S., ch. 1252, § 15, 2013 Tex. Gen. Laws 3167, 3170, *amended by* Act of May 26, 2015, 84th Leg., R.S., ch. 332, § 14, 2015 Tex. Gen. Laws 1499, 1507, *amended by* Act of May 30, 2015, 84th Leg., R.S., ch. 1273, § 1, Tex. Gen. Laws 4311, 4311–12 (amended 2017 & 2019) (current version at Tex. Penal Code Ann. § 43.02(a),(b)) (hereinafter "2015 Version of Section 43.02(d)").

[6] *See* 2015 Version of Section 43.05; 2015 Version of Section 43.02(a),(b); 2015 Version of Section 43.02(d); *Raven v. State*, 533 S.W.2d 773, 775 (Tex. Crim. App. 1976).

[7] *See* Tex. Penal Code Ann. § 43.01(2); 2015 Version of Section 43.05; 2015 Version of Section

In evaluating a challenge to the sufficiency of the evidence supporting a criminal conviction, we view the evidence in the light most favorable to the verdict.[8] The issue on appeal is not whether we, as a court, believe the State's evidence or believe that appellant's evidence outweighs the State's evidence.[9] We may not overturn the verdict unless it is irrational or unsupported by proof beyond a reasonable doubt.[10] Because the jury stands as "the sole judge of the credibility of the witnesses and of the strength of the evidence,"[11] the jury may choose to believe or disbelieve any portion of the witnesses' testimony.[12] When faced with conflicting evidence, we presume the jury resolved conflicts in favor of the prevailing party.[13] So, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm.[14]

Evidence at trial showed that appellant gave the complainant — his young daughter — a "sleep aid" and told the undercover police officer to come over. After meeting the officer in a parking lot, appellant took him to a bedroom in an apartment where the child was sleeping on a bed, wearing only a pajama top. No evidence and no reasonable inferences from any evidence at trial showed (1) that in return for receipt of a fee, the complainant offered to engage, agreed to engage, or engaged in sexual conduct; or (2) that the complainant solicited another in a public place to

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43.02(a),(b).

[8] *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

[9] *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1984).

[10] *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991).

[11] *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999).

[12] *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986).

[13] *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

[14] *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

engage with the complainant in sexual conduct for hire; or (3) that based on the payment of a fee by the complainant or another person on the complainant's behalf, the complainant offered to engage, agreed to engage, or engaged in sexual conduct, or (4) that the complainant solicited another in a public place to engage with the complainant in sexual conduct for hire.[15] Simply put, the record contains no evidence of Prostitution Conduct.

Regardless of the complainant's age or status as a child, the evidence cannot withstand a legal-sufficiency challenge. Viewing the evidence in the light most favorable to the verdict, no rational trier of fact could have found beyond a reasonable doubt that the complainant engaged in Prostitution Conduct. Because Prostitution Conduct is an essential element of the compelling-prostitution offense, this court must hold the evidence legally insufficient to support appellant's conviction for compelling prostitution.[16] Appellant has asserted that the evidence is legally insufficient on this basis, and contrary to the majority's conclusion, nothing in the law mandates that this court inquire into whether the complainant's age precluded her as a matter of law from committing prostitution.

Appellant's conviction for trafficking a child was based on the complainant being a victim of conduct prohibited by Section 43.05 — the compelling-prostitution statute.[17] Whatever the complainant's age, no rational trier of fact could have found

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[15] *See* 2015 Version of Section 43.05; 2015 Version of Section 43.02(a),(b); 2015 Version of Section 43.02(d).

[16] *See* Tex. Penal Code Ann. § 43.01(2); 2015 Version of Section 43.05; 2015 Version of Section 43.02(a),(b); 2015 Version of Section 43.02(d); *Liverman v. State*, 470 S.W.3d 831, 836–39 (Tex. Crim. App. 2015).

[17] Act of May 22, 2003, 78th Leg., R.S., ch. 641, § 2, 2003 Tex. Gen. Laws 2045–46, *amended by* Act of May 23, 2007, 80th Leg., R.S., ch. 849, § 5, 2007 Tex. Gen. Laws 1776, 1778, *amended by* Act of May 28, 2007, 80th Leg., R.S., ch. 258, § 16.02, 2007 Tex. Gen. Laws 367, 392–93, *amended by* Act of May 31, 2009, 81st Leg., R.S., ch. 1002, § 7, 2009 Tex. Gen. Laws 2611, 2615–16, *amended by* Act of Apr. 7, 2011, 82d Leg., R.S., ch. 1, § 1.02, 2011 Tex. Gen. Laws 1, 2–3

that appellant committed the trafficking-a-child offense.[18]

For these reasons, this court should reverse and render an acquittal as to each charged offense. Though the majority reaches this judgment, the majority goes places the court need not and should not tread.

The Court's Unnecessary Journey

In unpacking today's issues, the majority engages in a lengthy analysis to determine whether the complainant may be convicted of prostitution, whether a juvenile court may find that the complainant engaged in delinquent conduct based on the complainant's having engaged in prostitution, and whether the complainant, as a matter of law, can commit the offense of prostitution.[19] En route the majority follows the reasoning in *In re B.W.*,[20] a juvenile-justice case in which the Supreme Court of Texas concluded, as a matter of law, that a child under age 14 lacks the capacity to consent to sex and may not be adjudicated by a juvenile court as an offender who engaged in delinquent conduct based on committing the offense of prostitution.[21] The *In re B.W.* court did not, as the majority asserts, conclude unequivocally "that children under 14 cannot knowingly agree to engage in sexual

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(amended 2017 & 2019) (current version at Tex. Penal Code. Ann. § 20A.02)

[18] *See* 2015 Version of Section 43.05; 2015 Version of Section 43.02(a),(b); 2015 Version of Section 43.02(d); *Liverman*, 470 S.W.3d at 836–39.

[19] *Ante* at 2–6, 10–20. The majority states several times that the trial court instructed the jury that children under 14 lack the capacity to consent to sexual activity and may not be charged with prostitution. But we are to review the sufficiency of the evidence based on the hypothetically correct jury charge, not on the charge actually given. *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). Thus, the majority may not rely on this instruction and still must determine if this statement of the law is correct and thus part of the hypothetically correct jury charge.

[20] *Ante* at 5,18–19.

[21] *See In re B.W.*, 313 S.W.3d 818, 826 (Tex. 2010).

conduct for a fee and therefore cannot commit prostitution."[22] Finding the *In re B.W.* analysis persuasive, the majority relies on it to conclude that regardless of whether a particular child younger than 14 years consented to sexual conduct as a matter of fact, no child younger than 14 years, as a matter of law, can consent to sexual conduct, and so, as a matter of law, no child younger than 14 years can commit prostitution or be a victim of a compelling-prostitution offense.[23]

The supreme court's decision in *In re B.W.* is not binding on this court's adjudication of today's criminal appeals, and this court has never before addressed whether the *In re B.W.* majority's interpretation of the Penal Code should be applied in a criminal case.[24] Though the majority cites a juvenile-justice case in which this court applied *In re B.W.*, that precedent does not require this court to apply *In re B.W.* in a criminal appeal.[25] Texas has two high courts. The Court of Criminal Appeals need not follow the supreme court's decision in *In re B.W.*[26]

If faced with the issue, the Court of Criminal Appeals might well take a different course or opt for a different method of statutory interpretation, one rooted in textualism and judicial restraint. The Court of Criminal Appeals might disagree with the *In re B.W.* majority and agree with the *In re B.W.* dissenting opinion,[27]

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[22] *Ante* at 5.

[23] *See ante* at 18–19.

[24] *See Olivo v. State*, 918 S.W.2d 519, 524–25 (Tex. Crim. App. 1996); *Commissioners' Court of Nolan Cnty. v. Beall*, 81 S.W. 526, 528 (Tex. 1904).

[25] *See ante* at 5–6, n.5. (citing *In the Matter of T.V.T.*, —S.W.3d—, —, No. 14-18-00807-CV, 2019 WL 6974971 (Tex. App.—Houston [14th Dist.] Dec. 19, 2019, no pet. h.)); *Olivo*, 918 S.W.2d at 524–25; *Commissioners' Court of Nolan Cnty.*, 81 S.W. at 528.

[26] *See Olivo*, 918 S.W.2d at 524–25; *Commissioners' Court of Nolan Cnty*., 81 S.W. at 528.

[27] *In re B.W.*, 313 S.W.3d at 820–26; *id*. at 826–36 (Wainwright, J., dissenting) (stating, among other things, that "[t]he language of the prostitution statute includes thirteen-year-olds, and the Juvenile Justice Code makes them subject to juvenile delinquency proceedings for committing that offense; and neither the Court nor B.W. point to any language in the Juvenile Justice or Penal Codes that changes the prostitution statute to mean something other than what it says.").

especially given the shower of legislative action in the wake of *In re B.W.*

The year after the supreme court issued *In re B.W.*, our lawmakers stepped into action with the apparent purpose of abrogating the supreme court's holding in that case.[28] Without a single "nay" vote, the Texas Legislature amended five statutes to state that a child younger than 14 years may be the victim of a compelling-prostitution offense, and thus may commit the offense of prostitution.[29] The analysis the majority delivers today (1) contradicts three statutes stating that a victim of a compelling-prostitution offense may be younger than 14 years of age,[30] (2) goes against one statute in which the Legislature states that a victim of a compelling-prostitution offense may be younger than 13 years of age,[31] and (3) clashes with yet another statute in which the Legislature states that a victim of a compelling-prostitution offense may be younger than 12 years of age.[32]

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[28] *See* Act of May 17, 2011, 82nd Leg., R.S., ch. 515, § 2.01, 2011 Tex. Sess. Law Serv. 1276, 1277–78; Act of April 7, 2011, 82nd Leg., R.S., ch. 1, §§ 2.06, 2.07, 4.01, 6.04, 2011 Tex. Sess. Law Serv. 1, 5, 9, 15–16.

[29] *See* Act of May 17, 2011, 2011 Tex. Sess. Law Serv. at 1277–78, 1282; Act of April 7, 2011, 2011 Tex. Sess. Law Serv. at 5, 9, 15–16, 17.

[30] *See* Tex. Code Crim. Proc. Ann. art. 17.153 (addressing denial of bail for violation of a bond condition as to a defendant charged with compelling prostitution under Penal Code Section 43.05(a)(2) "against a child younger than 14 years of age") (West, Westlaw through 2019 R.S.); Tex. Code Crim. Proc. Ann. art. 38.072 (addressing admissibility of hearsay statements in a case involving the prosecution of a compelling-prostitution offense under Penal Code Section 43.05(a)(2) "if committed against a child younger than 14 years of age") (West, Westlaw through 2019 R.S.); Tex. Pen. Code Ann. § 21.02(b),(c) (stating that a person commits an offense if during a period that is 30 or more days in duration, the person commits two or more violations of Penal Code Section 43.05(a)(2), if at the time of the commission of each of the [violations], the actor is 17 years of age or older and the victim is a child younger than 14 years of age") (West, Westlaw through 2019 R.S.).

[31] *See* Tex. Code Crim. Proc. Ann. art. 38.071 (addressing the testimony of "a child younger than 13 years of age" who is a victim of a compelling-prostitution offense under Penal Code Section 43.05(a)(2) (West, Westlaw through 2019 R.S.).

[32] Tex. Fam. Code Ann. § 54.031 (addressing the admissibility of hearsay statements at a juvenile-justice hearing in which a child is alleged to be delinquent on the basis of a violation of Penal Code Section 43.05(a)(2) "if a child 12 years of age or younger . . . is the alleged victim of the violation.")

Penal Code Section 8.07 provides that a child younger than 15 years of age can commit prostitution. Under subsection (a), entitled "Age Affecting Criminal Responsibility," the Legislature provides that, with certain exceptions that do not apply to the offense of prostitution, "[a] person may not be prosecuted for or convicted of any offense that the person committed when younger than 15 years of age."[33] This text means that one may not be criminally prosecuted for, or criminally convicted of, committing an offense of prostitution that one committed when younger than 15 years of age.[34]

A juvenile justice court may find that a child engaged in delinquent conduct based on the child's violation of a penal law, other than a traffic offense, punishable by imprisonment or by confinement in jail.[35] But, with exceptions not applicable to a prostitution offense, this adjudication does not constitute a criminal conviction.[36] So, the pursuit of an adjudication order or a disposition order in a juvenile court based on a child younger than 15 years of age having committed prostitution does not run afoul of Section 8.07(a)'s ban on criminal prosecution and conviction.[37] Section 8.07(a) does not provide that a child under 15 years of age cannot commit prostitution or any other offense.[38] Instead, under the statute's plain text a child under age 15 *can* commit an offense that the Legislature has promulgated in the Penal Code, but (with certain exceptions) these children cannot be criminally

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(West, Westlaw through 2019 R.S.).

[33] *See* Tex. Pen. Code Ann. 8.07(a) (West 2015).

[34] *See id.*

[35] *See* Tex. Fam. Code Ann. § 51.03(a)(1); *In re B.D.S.D.*, 289 S.W.3d 889, 893 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

[36] *See* Tex. Fam. Code Ann. § 51.13(a); *In re B.D.S.D.*, 289 S.W.3d at 893.

[37] *See* Tex. Fam. Code Ann. § 51.13(a); *In re B.D.S.D.*, 289 S.W.3d at 893.

[38] *See* Tex. Pen. Code Ann. 8.07(a).

prosecuted or convicted when they commit those offenses.[39]

If presented with the matter-of-law issue the majority addresses today, the Court of Criminal Appeals might conclude that under the plain meaning of the compelling-prostitution statute and the five related statutory amendments enacted post-*In re B.W.*,[40] a child under age 14 is not incapable as a matter of law of engaging in Prostitution Conduct.[41] In its rush to reach the opposite matter-of-law holding, the majority overlooks the impact of this legislative action and usurps the Texas Legislature's policy choices. Likewise, the majority misses the point in saying it is not this court's role to predict whether Texas's two high courts might disagree on what the compelling-prostitution statute means.[42] The point is this court need not decide.

The Unwelcome Consequences of Today's Decision

One source states that "[t]housands of children are exploited through prostitution every year in the United States and the average age of entry is 13 years of age."[43] The Legislature has provided that a child younger than 12 years of age may be the victim of a compelling-prostitution offense, and thus may commit prostitution.[44] To undergird enforcement of the compelling-prostitution statute the

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[39] *See* Tex. Pen. Code Ann. 8.07(a) (stating that with certain exceptions that do not apply to the offense of prostitution, "[a] person may not be prosecuted for or convicted of *any offense* that the person *committed when younger than 15 years of age*") (emphasis added).

[40] *See* Tex. Code Crim. Proc. Ann. art. 17.153; Tex. Code Crim. Proc. Ann. art. 38.071; Tex. Code Crim. Proc. Ann. art. 38.072; Tex. Fam. Code Ann. § 54.031; Tex. Pen. Code Ann. § 21.02.

[41] *See In re B.W.*, 313 S.W.3d at 826–36 (Wainwright, J., dissenting); Tex. Code Crim. Proc. Ann. art. 17.153; Tex. Code Crim. Proc. Ann. art. 38.071; Tex. Code Crim. Proc. Ann. art. 38.072; Tex. Fam. Code Ann. § 54.031; Tex. Pen. Code Ann. § 21.02.

[42] *Ante* at 6–7, n.7.

[43] *See Coleman v. State*, 183 A.3d 834, 842 (Md. Ct. Spec. App. 2018) (internal quotations omitted).

[44] Tex. Fam. Code Ann. § 54.031 (addressing the admissibility of hearsay statements at a juvenile-

Legislature has made compelling prostitution under Section 43.05(a)(2) one of only ten offenses to which no statute of limitations applies.[45] This action shows that Texas lawmakers view a violation of this statute as a serious offense. Rather than risk limiting the scope of Section 43.05(a)(2) or misstating the law, this court should choose a safer approach to resolving today's case.

This court could get to the same judgment by simply analyzing whether the trial evidence is legally sufficient to support a finding that the complainant engaged in Prostitution Conduct. The majority appears to concede that the trial evidence is legally insufficient to support a finding on the "knowingly" element without relying on the complicated legal point that consumes most of the court's opinion.[46] In addressing whether the complainant, as a matter of law, can commit the offense of prostitution, the majority takes on a difficult and problematic analysis. Though the majority repeatedly insists this court must do so,[47] nothing compels the court to take this thorny path.

Whether the complainant was age 4 or age 44, appellant did not compel her to commit prostitution. So, this court need not decide whether a child of the complainant's age or any other age can be caused to commit prostitution. And, by taking this needless venture, the majority undercuts five unambiguous Texas statutes, sews confusion in Texas jurisprudence, and opens the door to other unwelcome consequences.[48] If instead the court found the evidence legally

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justice hearing in which a child is alleged to be delinquent on the basis of a violation of Penal Code Section 43.05(a)(2) "if a child 12 years of age or younger . . . is the alleged victim of the violation.") (West, Westlaw through 2019 R.S.).

[45] *See* Tex. Code Crim. Proc. Ann. art. 12.01(1) (West, Westlaw through 2019 R.S.).

[46] *See ante* at 21–22.

[47] *See ante* at 1, 2, 3, 11, 15, n. 12.

[48] *See* Tex. Code Crim. Proc. Ann. art. 17.153; Tex. Code Crim. Proc. Ann. art. 38.071; Tex. Code Crim. Proc. Ann. art. 38.072; Tex. Fam. Code Ann. § 54.031; Tex. Pen. Code Ann. § 21.02.

insufficient under the facts of this case, the court could avoid the collateral damage that is sure to follow today's holding.

The Better Course

Restraint is the better course. Rather than taking the path that would undermine statutes and prevent the prosecution of individuals who knowingly cause children under age 14 to commit prostitution, the majority should presume for the sake of argument that the complainant *can* engage in Prostitution Conduct and ask whether the evidence is legally sufficient to show that the complainant engaged in this conduct. The court could resolve this case with a simple answer to that simple question. The majority instead opts to cut a new trail and strew it with bad precedent. Preferring to keep to the surer path, I respectfully decline to join the majority opinion, though I concur in the court's judgment.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Spain and Poissant. (Spain, J., majority).

Publish –Tex. R. App. P. 47.2(b).

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