IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1661-15

ROBERT FRANCIS RITZ, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD COURT OF APPEALS HAYS COUNTY

NEWELL, J., filed a concurring opinion in which HERVEY, YEARY, and KEEL JJ. joined.

A jury convicted Ritz of continuous trafficking of a person based upon his driving a fourteen-year-old girl to his home and having sex with her on multiple occasions. The court of appeals affirmed the conviction and held that the evidence was legally sufficient under the plain text of the statute even though the facts did not involve "organized crime,

prostitution, or forced labor."[1] This Court initially granted discretionary review to examine that holding, but now dismisses Appellant's petition for discretionary review as improvidently granted. The Court rightly concludes that there is no room for material improvement on the court of appeals' opinion. Further, reaching the contrary conclusion requires this Court to redraft the statute to add terms that our legislature did not include and risks substituting our own policy considerations for those of our legislature.

The Facts

The court of appeals correctly lays out the relevant facts in its opinion below.

> Ritz met K.D., the complaining witness, through an online dating site. Ritz, who was 44 years old at the time, and K.D., who was 14 at the time, eventually began meeting in person and entered into a sexual relationship. At first, the two would have sex in Ritz's vehicle or on a blanket outside. Later, K.D. began sneaking out of her parents' home to see Ritz. Ritz would pick K.D. up near her home, drive her to his home, have sex with her there, and then drop her off near her home. K.D. testified that their sexual encounters began in early fall 2012 and ended in January 2013.
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> While working on an online harassment case involving K.D.'s friend, police learned that K.D. was involved in a relationship with an adult male. After extracting information

[1] *Ritz v. State*, 481 S.W.3d 383, 386 (Tex. App.–Austin 2015).

> from K.D.'s electronic devices, police began the investigation of Ritz that led to his arrest. At trial, the State introduced text messages between Ritz and K.D. which, according to the State, show that Ritz continued his relationship with K.D. even after he learned that she was a minor.[2]

At trial, K.D. testified that Ritz drove her 20 or 25 minutes in order to have sex with her at his home on multiple occasions. She also testified that this sexual relationship lasted longer than 30 days. The court of appeals also noted that Ritz acknowledged in his brief that, in viewing the evidence in the light most favorable to the verdict, the evidence shows that he "transported" K.D. to several places not more than 10 miles from her home for the purpose of engaging in sexual relations with her.[3] It is equally undisputed that K.D. was 14 years old throughout her sexual relationship with Ritz.

The Standard of Review

The court of appeals also correctly set out the applicable standard of review.

> In reviewing whether the evidence is sufficient to support a conviction, "an appellate court must view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found each essential element of the offense beyond a reasonable doubt." *Schneider v.*

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[2] *Id.* at 384.

[3] *Id.* at 385.

> *State*, 440 S.W.3d 839, 841 (Tex. App.–Austin 2013, pet. ref'd.) (mem. op.); *see also Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010)(plurality op.).[4]

Of course, in some cases, sufficiency of the evidence turns on the meaning of the statute under which the defendant has been prosecuted.[5] This strain of law appears to have started with the Court analyzing whether a court of appeals erred by construing a statutory term too restrictively when conducting a legal sufficiency analysis.[6] We have recognized that this is necessary to avoid dissimilar outcomes attendant to alternative statutory interpretations.[7] And by the time we reached *Liverman v. State*, the question had grown from the analysis of a statutory term to the question of whether certain conduct actually constitutes an offense under the statute with which the defendant has been charged.[8] Still, in these cases, the Court is not responding directly to a statutory-construction complaint; it is only concerned with whether

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[4] *Id.* at 384.

[5] *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015).

[6] *Thomas v. State*, 65 S.W.3d 38, 39 (Tex. Crim. App. 2001) (analyzing whether the term "evidence of indebtness" as used in the definition of security in the Texas Securities Act requires a writing).

[7] *Moore v. State*, 371 S.W.3d 221, 227 (Tex. Crim. App. 2012).

[8] *Liverman*, 470 S.W.3d at 836.

the evidence at issue satisfies the statute not how the statute works in every circumstance.[9]

The construction of a statute is a question of law that we review *de novo*.[10] Courts must construe a statute in accordance with the plain meaning of its text unless the language of the statute is ambiguous or the literal text leads to absurd results that the legislature could not possibly have intended.[11] As the court of appeals observed below, "As long as a statute is constitutional (and Ritz had not challenged the constitutionality of this statute), we must enforce the statute as it is written, not as it might or even should have been written."[12] Where a statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from the statute.[13]

Is the Statute Ambiguous?

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[9] *Moore*, 371 S.W.3d at 227 ("Although statutory-construction complaints generally may not be raised for the first time on appeal, appellate construction of a statute may be necessary to resolve an evidence-sufficiency complaint when alternative statutory interpretations would yield dissimilar outcomes.").

[10] *Id.* at 230.

[11] *Boykin v. State*, 81 S.W.2d 782, 785 (Tex. Crim. App. 1991).

[12] *Ritz*, 481 S.W.3d at 386; *see also Boykin*, 818 S.W.2d at 785 (courts seek to effectuate intent of legislators "because our state constitution assigns the law *making* function to the Legislature while assigning the law *interpreting* function to the Judiciary.").

[13] *Boykin*, 818 S.W.2d at 785.

Section 20A.03 of the Penal Code makes it a crime if a person, during a period that is 30 or more days in duration, engages two or more times in conduct that constitutes the offense of "trafficking of persons" against one or more victims.[14] Section 20A.02(a) of the Penal Code lists all the different ways in which a person can commit the offense of "trafficking of persons."

> (a) A person commits an offense if the person knowingly:
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> (1) traffics another person with the intent that the trafficked person engage in forced labor or services;
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> (2) receives a benefit from participating in a venture that involves an activity described by Subdivision (1), including by receiving labor or services the person knows are forced labor or services;
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> (3) traffics another person and, through force, fraud, or coercion, causes the trafficked person to engage in conduct prohibited by:
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> (A) Section 43.02 (Prostitution);
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> (B) Section 43.03 (Promotion of Prostitution);
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> (C) Section 43.04 (Aggravated Promotion of Prostitution); or
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> (D) Section 43.05 (Compelling Prostitution);
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> (4) receives a benefit from participating in a venture that

[14] TEX. PENAL CODE § 20A.03 ("Continuous Trafficking of Persons"); *see also* TEX. PENAL CODE § 20A.02 ("Trafficking of Persons").

involves an activity described by Subdivision (3) or engages in sexual conduct with a person trafficked in the manner described in Subdivision (3);

(5) traffics a child with the intent that the trafficked child engage in forced labor or services;

(6) receives a benefit from participating in a venture that involves an activity described by Subdivision (5), including by receiving labor or services the person knows are forced labor or services;

(7) traffics a child and by any means causes the trafficked child to engage in, or become the victim of, conduct prohibited by:

(A) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);

(B) Section 21.11 (Indecency with a Child);

(C) Section 22.011 (Sexual Assault);

(D) Section 22.021 (Aggravated Sexual Assault);

(E) Section 43.02 (Prostitution);

(F) Section 43.03 (Promotion of Prostitution);

(G) Section 43.04 (Aggravated Promotion of Prostitution);

(H) Section 43.05 (Compelling Prostitution);

(I) Section 43.25 (Sexual Performance by a Child);

(J) Section 43.251 (Employment Harmful to Children); or

> (K) Section 43.26 (Possession or Promotion of Child Pornography); or
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> (8) receives a benefit from participating in a venture that involves activity described by Subdivision (7) or engages in sexual conduct with a child trafficked in the manner described in Subdivision (7).[15]

The State charged Ritz with a violation of the "continuous trafficking of persons" statute (Section 20A.03) based upon repeated violations of the "trafficking of person" statute (Section 20A.02).

> [Appellant did] then and there, during a period that was 30 or more days in duration, to wit: from on or about May 6, 2012 through January 19, 2013, commit two or more acts of trafficking of persons, namely:
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> 1. Intentionally or knowingly traffic by transport [complainant], a child, and cause [complainant] to engage in or become a victim of indecency with a child, where with the intent to arouse or gratify the sexual desire of said defendant, he did intentionally or knowingly cause [complainant], a child younger than 17 years of age, to engage in sexual contact by causing the said [complainant] to touch the genitals of the defendant[.]
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> 2. Intentionally or knowingly traffic by transport [complainant], a child, and cause [complainant] to engage in or become a victim of sexual assault of a child, and did intentionally or knowingly cause the penetration of the sexual organ [of complainant], a child who was then and there younger than 17 years of age, by defendant's sexual organ[.]

The State alleged that Ritz had transported the victim and repeatedly

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[15] TEX. PENAL CODE § 20A.02(a).

caused her to become the victim of both sexual assault of a child and indecency with a child.[16]

At no point on appeal did Ritz argue that the legislature's use of passive voice in subsection (7) and its use of active voice in subsection (8) renders the statute ambiguous. Ritz does not argue that the statute's structure is designed to criminalize either trafficking or exploitation rather than both trafficking and exploitation. To the contrary, Ritz agrees that a literal reading of the statute applies to his conduct. His argument has consistently been that the statute makes the punishment for the commission of the individual offenses of "Sexual Assault of a Child" and "Indecency with a Child by Contact" more egregious upon a simple showing that a defendant moves the victim from one place to another. According to Ritz, the absurd result lies in a literal interpretation of the broad definition that the legislature provided for "traffic." Nevertheless, even had Ritz made this argument regarding ambiguity, it would fail because it assumes limitations in the text of the statute that are not there.

First, the only thing evident from the plain text of the statute is that

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[16] TEX. PENAL CODE § 20A.02(a)(7)(B); TEX. PENAL CODE § 20A.02(a)(7)(C).

the legislature sought to criminalize both human trafficking and the exploitation of human trafficking victims. For example, Section 20A.02(a)(1) criminalizes the trafficking of a person for forced labor, while section 20A.02(a)(2) criminalizes the use of that labor.[17] Section 20A.02(a)(5) criminalizes the trafficking of a child for forced labor, while Section 20A.02(a)(6) criminalizes the use of that child labor.[18] In both situations, the person receiving the benefit of the slave labor is just as culpable as the person providing the slave labor because both parties are responsible for the exploitation.

Additionally, Section 20A.02(c) provides that "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."[19] The legislature limited this in subsection (d) by prohibiting (with some exceptions) simultaneous prosecution for both continuous human trafficking and continuous sexual abuse of a child.[20] Under the plain text of the statute, the legislature

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[17] *Compare* TEX. PENAL CODE § 20A.02(a)(1) *with* TEX. PENAL CODE § 20A.02(a)(2).

[18] *Compare* TEX. PENAL CODE § 20A.02(a)(5) *with* TEX. PENAL CODE § 20A.02(a)(6).

[19] TEX. PENAL CODE § 20A.02(c).

[20] TEX. PENAL CODE § 20A.02(d).

sought to provide as much protection for exploited people and children as possible by allowing prosecution for both human trafficking and the product of that trafficking. There is no suggestion that the person who traffics in children be treated differently than those who exploit those children.

Second, the legislature's use of passive voice in subsection (7) demonstrates a legislative intent to protect children, not those who traffic them. By using the passive voice the legislature intentionally left the identity of who abuses the child open. Had the legislature truly envisioned "two culpable actors" within the same offense when drafting the statute it would have said so. But it did not specify that the person engaging in human trafficking in subsection (7) had to be different from the person victimizing the child. The legislature contemplated criminalizing situations where the trafficker engages in both the traffic and the victimization, in addition to situations where the trafficker transports the child without subsequently victimizing her.

Finally, the use of active voice in subsection (8) would seem to put the debate to rest. Under that subsection, a person commits an offense if he engages in sexual conduct with a child trafficked in a manner described in subdivision (7). Just as subdivision (7) places no limitation

on who victimizes the trafficked child, subdivision (8) places no limitation on who traffics the child "in the manner described in Subdivision (7)." Had the legislature truly intended an "either-or" scenario, it would have written "engaged in sexual conduct with a child trafficked by another." It did not. The plain text demonstrates our legislature's focus upon protecting exploited children, not exempting human traffickers from criminal liability for abusing those whom they traffic.

In short, nothing in the plain text of the statute evidences the legislature's perception that a person either traffics a child or exploits a child but not both. The suggestion that the statute is ambiguous does not spring from the text of the statute itself; it comes from reading terms into the statute in order to justify a conclusion that the statute is ambiguous. The Court does not need to grant discretionary review to clarify an ambiguity that was never argued and that does not exist.[21]

Does the Statute Lead to Absurd Results?

We have long recognized that we should not apply the language of a statute literally if doing so would lead to absurd consequences that the

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[21] *See Coit v. State*, 808 S.W.2d 473, 475 (Tex. Crim. App. 1991) ("'Where the statute is clear and unambiguous the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute.'") (quoting *Ex parte Davis*, 412 S.W.2d 46, 52 (Tex. Crim. App. 1967)).

legislature could not *possibly* have intended.[22] This exception is a narrow one, however, and is regarded as such to avoid intruding upon the lawmaking powers of the legislative branch.[23] This narrow exception is intended to demonstrate respect for the legislative branch by presuming that the legislature would not act in an absurd way.[24]

But determining whether a particular result is absurd is a dangerously subjective endeavor. Our sister court has observed that the bar for concluding a plain-faced interpretation of a statute would lead to absurd results is, and should be, high.[25] It should be reserved for truly exceptional cases, and mere oddity does not equal absurdity.[26] Even if a consequence is unintended, improvident, or inequitable, it may still fall short of being unthinkable or unfathomable.[27] The focus should be on whether it is quite impossible that a rational legislature could have intended it.[28]

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[22] *Boykin*, 818 S.W.2d at 785.

[23] *Id.*

[24] *Id.*

[25] *See Combs v. Health Care Services Corp.*, 401 S.W.3d 623, 630 (Tex. 2013).

[26] *Id.*

[27] *Id.*

[28] *Id.* at 630-31; *see also Basal v. State*, 116 S.W.2d 385, 386 (Tex. Crim. App. 1938) ("It seems to us that a strictly literal construction of the statute in question would

Here, again, the court of appeals properly addressed and rejected Ritz's claims that the application of this statute leads to absurd, rather than merely improvident, results. For example, Ritz posits questions regarding how far someone must be transported in order to be considered a victim of trafficking.[29] But we have rejected this argument in the analogous situation of kidnapping.[30]

In *Hines v. State*, the State charged the defendant with kidnapping for his participation in a bank robbery.[31] There, two men sought to rob a bank and did so by holding one of the tellers at gun point and forcing her inside the back to open the vault.[32] When the robbery plan fell apart, the two men, one of whom was later identified as the defendant, fled the bank.[33] The State charged the defendant with both aggravated robbery

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make compliance therewith impossible and contravene the intention of the Legislature in passing it.").

[29] He also devotes time to the other ways in which someone can be "trafficked." Under the statute, "traffic" means "to transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means." TEX. PENAL CODE. § 20A.01(4). But the State only alleged that Ritz had "transported" the victim. Consequently, the court of appeals properly avoided the rabbit-hole of imagining every possible application of the word "traffic" by focusing only upon the essential elements of the offense under the hypothetically correct jury charge.

[30] *Hines v. State*, 75 S.W.3d 444, 447 (Tex. Crim. App. 2002).

[31] *Id.* at 445.

[32] *Id.*

[33] *Id.* at 445-46.

and aggravated kidnapping by abduction.[34]

The question in *Hines* was whether the definition of "interfere substantially" in the kidnapping statute led to absurd results because it could be applied to temporary confinement or slight movement of the victim incidental to another substantive criminal offense.[35] We rejected the argument that the phrase led to absurd results.[36] We did so even while acknowledging that "there is nothing in the Texas statute that even *suggests* that it is necessary for the State to prove that a defendant moved his victim a certain distance, or that he held him a specific length of time before he can be found guilty of kidnapping."[37] We consequently rejected the defendant's legal sufficiency claim that he could not be convicted of kidnapping even though the victim had been transported only a short distance within the bank.[38] If that is not an absurd application of the kidnapping statute, neither is this application of the trafficking statute.

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[34] *Id.* at 446 & n. 2.

[35] *Id.* at 445.

[36] *Id.* at 447 ("Not only is the phrase '"interfere substantially'" unambiguous, but application of its plain meaning in the context of the kidnapping statute does not lead to absurd results.").

[37] *Id.*

[38] *Id.* at 448.

Though the court of appeals recognized that applying the human trafficking statute to the facts of this case suggest an unintended result, it properly determined that it was not an absurd one.[39] The court of appeals noted that the dictionary definition of transport is "[t]o carry, convey, or remove from one place or person to another; to convey across."[40] Ultimately, it was up to Ritz to demonstrate that it was absolutely impossible for the legislature to rationally intend this application of the statute. The court of appeals properly determined that regardless of how broadly the statute was written, it was still at least possible that our legislature did intend to classify Ritz's conduct as trafficking based upon the plain text of the statute. Because the court of appeals' decision was correct in this regard, there was no need to resort to extratextual factors.

Conclusion

Ritz's challenge to the sufficiency of the evidence is not really a challenge to the evidence. While he does challenge the specific application of the statute to the facts of his case, he attempts to overturn

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[39] *Ritz*, 481 S.W.3d at 386.

[40] *Id.* at 386 n.3 (quoting *The Compact Oxford English Dictionary* 2100 (2d ed. 1994)).

his conviction by arguing how the statute might hypothetically operate in extreme circumstances unrelated to his own case. This is actually just an overbreadth or vagueness challenge to the statute in disguise without the usual standards or presumptions. If we would like to address those issues, we should wait until we are faced with actual challenges to the constitutionality of the statute. Recognizing that Ritz did not purport to be challenging the constitutionality of the statute, the court of appeals properly addressed the legal sufficiency claim before it. I agree with this Court's dismissal of Ritz's petition for discretionary review because the court of appeals adequately addressed the issue before it below.

With these thoughts I concur.

Filed: June 14, 2017

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