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

KELLER, P.J., filed a dissenting opinion in which WALKER, J., joined.

On numerous occasions, appellant drove a fourteen-year-old girl to his home and had sex with her. He was convicted of the offense of continuous trafficking of persons, which was in turn based upon the commission of multiple offenses of trafficking of persons.[1] The offenses of trafficking of persons were in turn based upon appellant trafficking a child and causing the child to

[1] *See* TEX. PENAL CODE § 20A.03(a).

be a victim of the offenses of indecency with a child and sexual assault.[2] I would hold that this variant of the offense of trafficking of persons occurs only when the person who traffics the child is a different person from the one who commits a sexual offense against the child. Because the evidence showed that appellant was the only person involved in transporting and committing sex offenses against the child, the evidence was insufficient to support appellant's conviction. Consequently, rather than dismissing this petition as improvidently granted, I would reverse the judgments of the courts below, reform appellant's conviction to a lesser-included offense, and remand the case to the trial court for a new punishment hearing.

I. BACKGROUND

Appellant was a forty-four-year-old man who met a fourteen-year-old child through an online dating site. The two eventually began meeting in person and entered into a sexual relationship. At first, the two would have sex in appellant's vehicle or on a blanket outside. Later, the child would sneak out of her home, and appellant would pick her up and drive her to his home to have sexual relations. The sexual encounters began in early fall 2012 and ended in January 2013.

Appellant's indictment alleged that he:

> 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 said [complainant] to touch the genitals of the defendant.

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[2] *See id.* § 20A.02(a)(7)(B), (C)

> 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.[3]

Appellant was convicted and sentenced to life in prison.

On appeal, appellant contended that the evidence was insufficient to support his conviction. He posed the question as, "Does appellant's alleged conduct of transporting the alleged victim a few miles in his personal car for the purpose of having a sexual relationship with the victim constitute the offense of 'trafficking' as the legislature intended?" Appellant contended that the legislature "did not envision a person in appellant's circumstances being prosecuted for the crime of trafficking of persons." He contended that, instead, the trafficking statute was directed against "the conduct of individuals who participate in the modern-day slave trade." Appellant also claimed that applying the language of the statute so broadly that it encompasses cases such as his own leads to an absurd result that the legislature could not have intended.

The court of appeals agreed that appellant's conduct "[did] not constitute what would ordinarily be considered 'human trafficking,'" but the court concluded that the language of the trafficking statute was broad and that appellant's acts of transporting the child and committing sex offenses against her conformed to that language.[4] The court disagreed with appellant's contention that such a construction leads to absurd results, reasoning that the legislature might have "wished to significantly increase the sentences available for persons who commit sexual crimes involving children by including all such crimes under the 'trafficking' umbrella." Or, the court of appeals

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[3] The bracketed word "complainant" is substituted for the complainant's name.

[4] *Ritz v. State*, 481 S.W.3d 383, 385-86 (Tex. App.—Austin 2015).

suggested, the legislature could have "determined that removing a child from the safety of her home and driving her miles away to the seclusion of the defendant's home in order to sexually assault her is particularly egregious conduct."[5]

II. ANALYSIS

A. Standard of Review

In some cases, sufficiency of the evidence turns on the meaning of the statute under which the defendant has been prosecuted.[6] The construction of a statute is a question of law, to be determined *de novo*.[7] Courts must construe a statute in accordance with the plain meaning of its text unless the language of the statute is ambiguous or the plain meaning leads to absurd results that the legislature could not have possibly intended.[8] If the statute contains ambiguity or leads to absurd results, then a court may consult extratextual factors, which include the object sought to be obtained by the statute, the legislative history, and the consequences of a particular construction.[9] A statute should be read as a whole in determining the meaning of particular provisions,[10] it is presumed that

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[5] *Id.* at 386.

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

[7] *Id.*

[8] *Chase v. State*, 448 S.W.3d 6, 11 (Tex. Crim. App. 2014); *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

[9] *Chase*, 448 S.W.3d at 11.

[10] *Hines v. State*, 906 S.W.2d 518, 520 (Tex. Crim. App. 1995) ("Broadening our focus to the statute as a whole, we derive two reasons that application of Section 21.07 to the facts of this case is not as 'plain' as the State would have it, the statutory definition of 'another' notwithstanding."); *Martin v. State*, 874 S.W.2d 674, 677 (Tex. Crim. App. 1994) ("[I]n the context of the probation statute as a whole, we think it logical to conclude that subsection (b)'s limitation of restitution to 'the victim' refers to the victim of the crime for which the defendant has been charged, convicted, and sentenced."); *Crouch v. State*, 838 S.W.2d 252, 254 (Tex. Crim. App. 1992)

the entire statute is intended to be effective,[11] and each word, clause, or sentence in a statute should be given effect if reasonably possible.[12]

B. Ambiguity

As it relates to appellant's prosecution, the trafficking statute provides, in subsection (a), subdivision (7):

> 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 21.11 (Indecency with a Child) . . . [and] Section 22.011 (Sexual Assault).[13]

The term "traffic" is defined to mean "to transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means."[14] The court of appeals's conclusion was that appellant trafficked the fourteen-year-old complainant by transporting her to his home and committed the remainder of the elements of the trafficking offense by committing sex offenses (indecency with a child and sexual assault) against her.

But appellant argues that subdivision (7) should be read in light of subdivision (8), which provides:

> A person commits an offense if the person knowingly . . . engages in sexual conduct

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("Statutes should be read as a whole and construed to give meaning to every part."); *State v. Rosenbaum*, 818 S.W.2d 398, 402 (Tex. Crim. App. 1991) ("[O]ur reading of this phrase in the context of the statute as a whole leads to an interpretation that in this case the term 'entered by the court' encompasses the signing of an order by the trial judge.").

[11] TEX. GOV'T CODE § 311.021(2).

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

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

[14] *Id.* § 20A.01(4).

with a child trafficked in the manner described in Subdivision (7).[15]

When the two subdivisions are read together, it seems evident that the legislature contemplated two culpable actors in a trafficking case that involves a sex offense against a child: (1) the person who delivers the child, punished by subdivision (7), and (2) the person who commits the sex offense against the child, punished by subdivision (8). The trafficking statute contains other subdivisions that follow this two-step structure, with the first subdivision punishing the "trafficker" and the second subdivision punishing the user of the trafficked individual and others associated with the trafficking enterprise.[16] Further, a comparison of subdivisions (7) and (8) shows that the reference to sexual conduct is framed in the passive voice in subdivision (7) ("by any means causes the trafficked child to engage in, or become a victim of") but is framed in the active voice in subdivision (8) ("engages in sexual conduct with a child trafficked"), while the reference to trafficking conduct is framed in the active voice in subdivision (7) but is framed in the passive voice in subdivision (8). The prostitution portion of the trafficking statute employs this same use of active and passive voice with respect to trafficking and sexual conduct, so that subdivision (3) describes the trafficker and subdivision (4) describes the user of the prostitution services. These structural aspects of the statute suggest that the phrase "causes the trafficked to child to engage in, or become the victim of" describes a defendant's act of causing the child to be part of a sex offense with someone other than the defendant. Of course, the use of passive voice does not invariably require a conclusion that the

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[15] *Id.* § 20A.02(a)(8). Subdivision (8) also punishes other actors associated with the trafficking enterprise (those who "receive[] a benefit from participating in a venture that involves an activity described by Subdivision (7)").

[16] *See id.* § 20A.02(1) & (2) (forced labor), (3) & (4) (prostitution), (5) & (6) (forced child labor).

defendant is not himself participating in the activity;[17] it is the parallel nature of the various provisions and the comparison and contrasts between provisions that supports such a conclusion here.[18]

Even if the trafficking statute's structural characteristics listed above do not definitively establish the correct construction of that statute, they at least indicate an ambiguity. Ambiguity exists when statutory language may be understood by reasonably well-informed persons in two or more different senses.[19] The court of appeals understood the language of subdivision (7) to apply whenever an actor "traffics" a child and causes, by his own act or someone else's, an enumerated sex offense to be committed against the child. The above discussion shows that subdivision (7) could reasonably be understood to mean something else: that the provision applies only when the actor traffics a child and causes the child to be subjected to a sex offense committed by someone other than the actor.

C. Absurd Results

But if the statutory language were reasonably subject only to the broad construction placed on it by the court of appeals, then it would lead to absurd results. As outlined above, "traffic" means "to transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means."[20]

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[17] *See* TEX. PENAL CODE § 22.011(a)(1)(A), (B), (2)(A), (B)("causes the penetration of").

[18] *See Hines*, 906 S.W.2d at 520 (parallelism between two statutory theories of public lewdness relevant to construing the second theory); *Martin*, 874 S.W.2d at 677 ("[A] reading of the two provisions together leads to the conclusion that subsection (b) serves as a limitation on restitution that can be ordered under subsection (a)," and the context of the probation statute as a whole further narrows the reading of "the victim" in subsection (b)).

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

[20] TEX. PENAL CODE § 20A.01(4).

How far must a child be transported? Three feet? From one room in a house to another? What constitutes enticement or recruitment? Is any persuasion by a defendant that succeeds in causing a child to engage in sexual conduct with him sufficient to establish trafficking? What exactly must a defendant do to "harbor" a child that he sexually assaults? Is living with the child sufficient? What if he is living with the child because he is related to the child? What must an actor do to "obtain" a child? Does an actor necessarily obtain a child when he succeeds in committing a sex offense against the child? Interpreting the various methods of "traffic" as broadly as possible would render superfluous the statutory provisions that assign punishment to most of the sex offenses in the Penal Code[21] because proving those offenses would necessarily prove the offense of trafficking.[22] Rendering most punishment provisions for sex offenses superfluous is an absurd result. But narrowing the meaning of the words in the definition of "traffic" to avoid rendering those punishment provisions superfluous could unduly narrow the reach of the trafficking offense in situations in which there are separate people trafficking and exploiting a child.

Moreover, even if reasonable grounds could be found for restricting the scope of the various methods of "traffic" that would not unduly restrict the trafficking statute in other respects, those restrictions would create other absurdities when combined with the State's "single perpetrator" interpretation of the statute. The court of appeals thought that it was not necessarily absurd that the defendant would be punished more severely for transporting the child from the safety of her home to a less safe location, but transportation could work both ways. If the actor lives with the child, the

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[21] *See id.* §§ 21.11(d) (indecency with a child, second or third degree felony), 22.011(f) (sexual assault, first or second degree felony), 22.021(e) (aggravated sexual assault, first degree felony), 43.25(e) (sexual performance by a child, second or third degree felony).

[22] *See id.*§ 20A.02(b)(1).

actor could take the child home from school and then commit a sexual assault. How is that actor any different from an actor who lives with the child and who sexually assaults the child after the child arrives home from school on a bus? If "entice" and "recruit" can be used to distinguish sex offenses based on an actor's ability to persuade a child to engage in the conduct, then an actor who forces a child to engage in the conduct would be punished less severely than an actor who engages in the conduct with a "willing" child. This disparate treatment conflicts with the notion, underlying statutes proscribing sex offenses against children, that children cannot consent to sexual conduct with adults. But even it if it did not conflict with that notion, it would turn traditional morality on its head by punishing a forced sexual assault less severely than an unforced sexual assault.

D. Extratextual Factors

Appellant argues that the legislative history, in the form of a bill analysis, lends support to construing the statute in his favor. The "Author's/Sponsor's Statement of Intent" section of the bill analysis states:

> Human trafficking is the illegal trade of human beings and is a modern-day form of slavery. Human trafficking is a criminal enterprise frequently cited as the second largest industry in the world.[23]

If human trafficking is the illegal "trade" of human beings, then it follows that there must be at least two individuals, other than the victim or victims, who are involved. With only one individual, a "trade" cannot take place. There must be at least one person who traffics the victim and at least one other person who exploits the victim in some other way, by, for example, committing a sex offense against the victim.

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[23] Senate Research Center, Bill Analysis, S.B. 24, 82nd Leg., R.S. (August 2, 2011) (first paragraph).

This construction of the statute is further supported by the consequences of construing the trafficking statute to allow a person to be punished as both trafficker and exploiter when no one else is involved in committing an offense against the child. One obvious consequence is that such a defendant would be criminally liable under both subdivisions (7) and (8), because he would be trafficking the child and causing the child to be a victim of a sex offense in accordance with subdivision (7) and he would be engaging in sexual conduct with a trafficked child in accordance with subdivision (8). This overlap between subdivisions is not by itself a serious concern, but more serious concerns do inhere in the definition of "traffic."

As I have explained above, broadly construing the various methods of traffic (transport, entice, etc.) in conjunction with construing subdivision (7) to apply when there is only a single perpetrator would create results that can at best be described as odd, and at worst as absurd. But narrowly construing the various methods of traffic could result in unduly restricting subdivision (7)'s application in situations that are traditionally understood to be trafficking, when there are separate individuals who traffic and exploit the child. If, however, the statute is restricted to apply only when the person who traffics the child is a different person from the one who commits a sexual offense against the child, then the meaning of the word "traffic" can be broad without creating these oddities or absurdities because the various methods of "traffic" are methods of delivering a child to someone. The trafficker transports the child to another person, entices or recruits the child to meet another person, harbors the child so that the child will be available to another person, provides the child to another person, or otherwise obtains the child for another person.

The object of the trafficking statute, the legislative history, and the consequences of the competing constructions of the statute weigh in favor of construing subdivision (7) to apply only

when the trafficker and the sex-offense perpetrator are different people. Because appellant was the only person involved in transporting and committing sex offenses against the child, the evidence is insufficient to show that he committed the offense of child trafficking.

E. Reformation

When an appellate court finds the evidence to be insufficient to establish an element of the charged offense, but there is an available lesser-included offense that the jury necessarily found for which the evidence is sufficient, the appellate court must reform the judgment to reflect the lesser-included offense and remand for a new punishment hearing.[24] Sexual assault and indecency with a child are lesser-included offenses of the continuous child trafficking offense charged in appellant's indictment, the jury would have necessarily found that appellant committed those offenses, and the evidence was clearly sufficient to support his commission of those offenses. Because the State charged only one count of continuous child trafficking, reformation of the judgment can reflect only one of these lesser-included offenses.[25] Therefore, I would reform appellant's conviction to reflect a conviction on the offense of sexual assault and remand the case for a new punishment hearing.

I respectfully dissent.

Filed: June 14, 2017

Publish

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[24] *Thornton v. State*, 425 S.W.3d 289, 300-01 (Tex. Crim. App. 2014).

[25] *See Martinez v. State*, 225 S.W.3d 550, 554 (Tex. Crim. App. 2007) ("[A]n indictment cannot authorize more convictions than there are counts.").