IN THE SUPREME COURT OF TEXAS

NO. 08-1044

IN THE MATTER OF B.W.

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

JUSTICE O'NEILL delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE GUZMAN joined.

JUSTICE WAINWRIGHT filed a dissenting opinion, in which JUSTICE JOHNSON and JUSTICE WILLETT joined.

In this case we must decide whether the Legislature, by its wholesale incorporation of Penal Code offenses into the juvenile justice provisions of the Family Code, intended to permit prosecution of a thirteen-year-old child for prostitution considering its specific pronouncement that a child under fourteen is legally incapable of consenting to sex with an adult. We conclude that transforming a child victim of adult sexual exploitation into a juvenile offender was not the Legislature's intent, and reverse the court of appeals' judgment.

I. Background

B.W. waved over an undercover police officer who was driving by in an unmarked car and offered to engage in oral sex with him for twenty dollars. The officer agreed. When B.W. entered the officer's car, he arrested her for the offense of prostitution. B.W. was originally charged in

criminal court, but when a background check revealed that she was only thirteen the case was dismissed. Charges were then refiled under the Family Code, which governs juvenile proceedings. TEX. FAM. CODE §§ 51.02(2), .04(a).

Before trial, a State psychologist examined B.W. During the examination, B.W. related a history of sexual and physical abuse. The psychologist concluded that B.W. was "emotionally impoverished, discouraged and dependent." The psychologist noted that the report should be viewed with caution given that some of B.W.'s statements were inconsistent with probation records, but expressed concern over B.W.'s untreated substance abuse and her report that she had been living, and having sex, with her thirty-two-year-old "boyfriend" for the last year and a half.

At trial, pursuant to an agreed recommendation, B.W. pleaded true to the allegation that she had "knowingly agree[d] to engage in sexual conduct . . . for a fee." Following her plea, the trial court found that B.W. had engaged in delinquent conduct constituting a Class B misdemeanor offense of prostitution as defined by section 43.02 of the Penal Code, and placed her on probation for eighteen months. The trial court denied B.W.'s motion for new trial and granted her permission to appeal. The court of appeals affirmed. 274 S.W.3d 179. We granted B.W.'s petition for review to consider the challenges she raises to her adjudication of delinquency for the offense of prostitution.

II. Discussion

The statute proscribing prostitution is found in the Texas Penal Code, which does not generally apply to juveniles under the age of seventeen. *See* TEX. PENAL CODE § 8.07. Instead, the

Legislature made a blanket adoption of the Penal Code into the Texas Family Code, which provides that the juvenile justice courts have jurisdiction in all cases involving delinquent conduct of children between the ages of ten and seventeen. TEX. FAM. CODE §§ 51.02(2), .04(a). The Family Code defines "[d]elinquent conduct" as "conduct, other than a traffic offense, that violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail." *Id.* § 51.03(a)(1). One of the purposes of placing such jurisdiction in civil courts under the Family Code is to "provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions." TEX. FAM. CODE § 51.01(3).

The offense of prostitution is punishable by confinement in jail, *see* TEX. PENAL CODE §§ 12.22(2), 43.02(a), and therefore falls under the Family Code's definition of "delinquent conduct." Under the Texas Penal Code, a person commits prostitution if the person "knowingly offers to engage, agrees to engage, or engages in sexual conduct for a fee." TEX. PENAL CODE § 43.02(a)(1). "A person acts knowingly, or with knowledge, with respect to the nature of his conduct . . . when he is aware of the nature of his conduct." TEX. PENAL CODE § 6.03(b). Thus, "knowing agree[ment]" suggests agreement with an understanding of the nature of what one is agreeing to do. B.W. contends the Legislature cannot have intended to apply the offense of prostitution to children under fourteen because children below that age cannot legally consent to sex. *See* TEX. PENAL CODE § 22.021 (criminalizing sex with a child irrespective of consent). The State, on the other hand, claims that consent by a child under the age of fourteen is a shifting concept designed to protect victims of sex crimes rather than juvenile offenders like B.W. We agree with B.W.

The notion that an underage child cannot legally consent to sex is of longstanding origin and derives from the common law. *See, e.g., State v. Hazelton*, 915 A.2d 224, 233-34 (Vt. 2006) ("The rule that an underage child cannot consent to sex need not derive from statute, as suggested by the dissent, but is a part of common law"); *Payne v. Commonwealth*, 623 S.W.2d 867, 875 (Ky. 1981) ("The conclusive presumption of inability to consent is not of recent vintage. It has been with us at least from the reign of Queen Elizabeth of England (1558-1603)."); *see also* MODEL PENAL CODE § 213.1, Comment at 276 (1980); WILLIAM BLACKSTONE, 4 COMMENTARIES *212. While at the time of Blackstone this age was set at ten, every state in the United States has raised this age by statute. *See Payne*, 623 S.W. 2d at 875 ("Coming to this country as a part of our common law, the doctrine has universally been spoken to by the state legislative bodies."); MODEL PENAL CODE § 213.1, Comment at 324 ("[N]o state continues the common-law rule of 10 years"). Texas follows the majority of states which have established a two-step scheme that differentiates between sex with a younger child and sexual relations with an older teen. *See id.* at 325. (citations omitted). *See also* TEX. PENAL CODE §§ 22.011, .021. The rule's underlying rationale is that younger children lack the capacity to appreciate the significance or the consequences of agreeing to sex, and thus cannot give meaningful consent. *See, e.g.*, *Hazelton*, 915 A.2d at 234; *Collins v. State*, 691 So.2d 918, 924 (Miss. 1997); *Coates v. State*, 7 S.W. 304, 304–06 (Ark. 1888); *see also Anschicks v. State*, 6 Tex. App. 524, 535 (Tex. Ct. App. 1879); *cf. Roper v. Simmons*, 543 U.S . 551, 569 (2005) (holding that as compared to adults, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility'. . . [they] are more vulnerable or susceptible to negative influences and outside

pressures, including peer pressure") (quoting *Johnson v. Tex.*, 509 U.S. 350, 367 (1993)); *Graham v. Florida,* ___ U.S. ___ (2010) (confirming the Court's observations in *Roper* about the difference between juvenile and adult minds).

Our Legislature has incorporated this rationale into the Texas Penal Code. In enacting the sexual assault statute, section 22.011 of the Texas Penal Code, the Legislature made it a crime to intentionally or knowingly have non-consensual sex with an adult, or sex under any circumstances with a child (a person under seventeen). TEX. PENAL CODE § 22.011. There are defenses available if the child is at least fourteen, such as when the accused is no more than three years older than the child, or when the accused is the child's spouse. TEX. PENAL CODE § 22.011(e). In those instances, the child's subjective agreement or assent becomes the main issue in determining whether or not a crime has been committed. *Id.* There are no such defenses, however, when the child is under fourteen, irrespective of the child's purported willingness. TEX. PENAL CODE § 22.011, .021. Thus, in Texas, "a child under fourteen cannot legally consent to sex." *May v. State*, 919 S.W.2d 422, 424 (Tex. Crim. App. 1996).

The Legislature has passed a number of statutes providing greater protection against sexual exploitation for underage children. For example, promotion of prostitution involving an adult, without the use of force, threat, or fraud, is a misdemeanor. Compelling a child under eighteen to commit prostitution, however, is treated as a crime equivalent to using "force, threat, or fraud" to compel an adult to commit prostitution, and is a second-degree felony. TEX. PENAL CODE §§ 43.03,

.05.[1] Similarly, sexual assault of a child under fourteen is considered "aggravated sexual assault" and is subject to the same consequences as the rape of an adult involving serious bodily injury or other aggravating circumstances. TEX. PENAL CODE §§ 22.011, .021; *see also* TEX. PENAL CODE § 43.25(e) (imposing harsher penalties for inducing a child under fourteen to engage in sexual conduct or performance); TEX. PENAL CODE § 20A.02 (imposing harsher penalties for trafficking a child under eighteen for purposes of compelling prostitution or sexual performance). In passing these statutes, the Legislature has expressed both the extreme importance of protecting children from sexual exploitation, and the awareness that children are more vulnerable to exploitation by others even in the absence of explicit threats or fraud.

It is difficult to reconcile the Legislature's recognition of the special vulnerability of children, and its passage of laws for their protection, with an intent to find that children under fourteen understand the nature and consequences of their conduct when they agree to commit a sex act for money, or to consider children quasi-criminal offenders guilty of an act that necessarily involves their own sexual exploitation. In the context of these laws, and given the blanket adoption of the Penal Code into the Family Code, it is far more likely that the Legislature intended to punish those

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[1] The dissent argues that because Penal Code section 43.05 makes it a crime for a person to cause a child younger than eighteen to commit prostitution, the Legislature must have envisioned the prosecution of children under the age of fourteen for prostitution. But section 43.05 applies to children who have been caused to commit prostitution whether they are six or sixteen. Furthermore, it is well established that a person may be prosecuted for compelling prostitution and other crimes of sexual exploitation even though the child herself is not prosecuted for prostitution. *See Waggoner v. State*, 897 S.W.2d 510, 513 (Tex. App.—Austin 1995, no pet.) (stating "[t]he actual commission of the offense of prostitution is not a prerequisite to the commission of the offense of compelling prostitution") (citing *Davis v. State*, 635 S.W.2d 737, 739 (Tex. Crim. App. 1982)). That a child under fourteen may be forced to engage in sex for a fee does not mean that the child may be prosecuted for that act. The fact that the State provides for the punishment of those who sexually exploit children does not mean that the State intends to punish the exploited children as well.

who sexually exploit children rather than subject child victims under the age of fourteen to prosecution. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). Given the longstanding rule that children under fourteen lack the capacity to understand the significance of agreeing to sex, it is difficult to see how a child's agreement could reach the "knowingly" standard the statute requires. Because a thirteen-year-old child cannot consent to sex as a matter of law, we conclude B.W. cannot be prosecuted as a prostitute under section 43.02 of the Penal Code. *See Duby v. State*, 735 S.W.2d 555, 557 (Tex. App.—Texarkana 1987, pet. ref'd) (holding that the minor victim of incest is not an accomplice since she is incapable of giving consent as a matter of law); *but cf. Bolin v. State*, 505 S.W.2d 912, 913 (Tex. Crim. App. 1974) (holding that the father could not be convicted of incest based solely upon uncorroborated testimony of thirteen-year-old prosecutrix who, under longstanding caselaw, was considered an accomplice witness in the absence of threats, force, fraud, or undue influence).[2]

The dissent contends Texas' statutory rape statutes do not render all minors under the age of fourteen incapable of consenting to sex with an adult as a matter of law. In the dissent's view, the statutes merely eliminate consent as an affirmative defense to the offense of child rape. But the very purpose of the Legislature's abrogation of the consent defense was its determination that underage

[2] Although *Bolin* has never been overruled, it is of questionable precedence. *Bolin* focused mainly on the question whether someone can be convicted based upon uncorroborated testimony and concentrated on whether the act was the result of force, threats, fraud, or undue influence. Remarkably, the court found that the intercourse was consensual despite the fact that the underage prosecutrix told her father "on more than one occasion" that "she did not want to do it." *Id.* at 913. Tellingly, the cases decided after *Duby* have either relied on the holding in *Duby*, *Reid v. State*, 2005 Tex. App. LEXIS 3072 (Tex. App.—Fort Worth April 21, 2005, pet. ref'd), or cited it with approval. *McCrory v. State*, 854 S.W.2d 262 (Tex. App.—Eastland 1993, pet. ref'd).

children cannot meaningfully consent to sex. While no statute explicitly states that children under fourteen are unable to provide consent for all purposes, the inability of children to consent to sex as a matter of law is both part of the common law and a necessary inference from section 22.021 and the other statutes dealing with sexual exploitation of a child. *See* TEX. PENAL CODE §§ 22.011, 43.05; *Helena Chem. Co.*, 47 S.W.3d at 493 (noting that we can consider the common law and laws on the same or similar subjects in determining legislative intent).

The dissent concedes that children below a certain age lack the mental capacity to consent to certain actions, and that the law reflects that inability to consent. Nonetheless, the dissenting justices would themselves allow children as young as ten to be prosecuted for prostitution. *See* TEX. FAM. CODE §§ 51.02(2)(A),.04(a). By contrast, our conclusion that children under a certain age lack the legal capacity to consent to sex rests on the legislative policy determination expressed in the statutory rape statute that children under the age of fourteen are legally incapable of consenting to sex. *See* TEX. PENAL CODE §§ 22.011, .021.

Courts around the country have long recognized that children lack the experience and mental capacity to appreciate the nature and consequences of sex, and therefore cannot knowingly consent to sex. *See*, *e.g., Hazelton*, 915 A.2d at 234; *Collins*, 691 So. 2d at 924; *Jones v. State*, 640 So. 2d 1084, 1089 (Fla. 1994) (Kogan, J., concurring); *Payne*, 623 S.W.2d at 875; *Goodrow v. Perrin*, 403 A.2d 864, 866 (N.H. 1979). *Cf. Roper,* 543 U.S. at 569-70; *Graham*, ___ U.S. ___ (discussing the reduced mental capacity of minors as compared to adults). As Justice Kogan noted in his concurrence in *Jones v. State*:

> I cannot believe, for example, that any responsible adult seriously thinks a six-year-old legally could consent to sex. Children of that age always lack the experience and mental capacity to understand the harm that may flow from decisions of this type. They may unwittingly "consent" to something that can ruin their lives, jeopardize their health, or cause emotional scars that will never leave them. I think most concerned adults and experts in the field would agree that this lack of prudent foresight continues in youths well into the teen years.

640 So.2d at 1089. By unequivocally removing the defense of consent to sexual assault, the Texas Legislature has drawn this line at the age of fourteen.

Nor is this the only area in which the law recognizes that minors of a certain age have a reduced or nonexistent capacity to consent, no matter their actual agreement or capacity. A minor under the age of sixteen cannot consent to be married without a court order finding the marriage to be in the child's best interest, no matter how mature the child appears or how earnestly the child might mouth the words "I do." *See* TEX. FAM. CODE § 2.103. Similarly, a minor's contracts are voidable at the minor's election, even if the minor knew what he or she was doing and innocent people are prejudiced. *See Dairyland County Mut. Ins. Co. v. Roman*, 498 S.W.2d 154, 158 (Tex. 1973). When it comes to a child under fourteen consenting to sex, the Legislature has made it clear that the child's consent is void rather than voidable. *See May*, 919 S.W.2d at 424; TEX. PENAL CODE § 22.021. 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. The Legislature closed this door with regard to minors over the age of fourteen when it abolished the defense of promiscuity to sexual assault and indecency with a child, *see* Act of May 29, 1993, 73d Leg., ch. 900, 1993 Tex. Gen. Laws 3616, 3616-18, and has never opened this

door with regard to children under the age of fourteen. *See* Act of 1983, 68th Leg., ch. 977, 1983 Tex. Gen. Laws 5311, 5315 (current version TEX. PENAL CODE § 22.021(a)(2)(b))(explicitly stating that the promiscuity defense does not apply to children under fourteen).

The State posits a number of arguments in an attempt to show that juveniles may engage in consensual sex in certain circumstances, including the fact that children over fourteen may legally engage in sex with a person within three years of their age, and that children may legally engage in sex with a spouse. However, most of these arguments have to do with children aged fourteen and over, and do not apply in this case where the defendant is under fourteen.[3]

Additionally, while the Code of Criminal Procedure does provide certain exemptions to mandatory sex-offender registration for offenders under the age of nineteen when the victim was over thirteen and the conviction was based solely on age, this speaks more to the treatment of teenage sex offenders than to the ability of a child under the age of fourteen to legally consent to sex. TEX. CODE CRIM. PROC. art. 42.017, 62.301(a),(b). While both the dissent and the State argue that this demonstrates that a minor under fourteen may consent to sex, they have confused the ability to factually agree to sex, which can have legal relevance in the treatment of the offender, with the legal

[3] The State argues that an adult may legally engage in sexual intercourse with a thirteen-year-old spouse. In fact, the statute is unclear. While consensual sex with a minor spouse is a defense to sexual abuse under 22.011 of the Penal Code, being the spouse of the child is not a defense to section 22.021 which governs sex with children under fourteen. *See* TEX. PENAL CODE §§ 22.011, 22.021. Since children under fourteen lack the capacity to legally consent to marriage (without a court order), the question of whether the spousal defense applies to a child under fourteen has no bearing on a child-under-fourteen's ability to legally consent to sex in general.

capacity to consent, which is necessary to find that a person "knowingly agreed" to engage in sexual conduct for a fee.

We do not agree that our decision today infringes on prosecutorial discretion. The Legislature has determined that children thirteen and younger cannot consent to sex. This necessitates the holding that these children cannot be tried for prostitution. If this holding infringes on the prosecutor's discretion, then so too does every decision upholding a legislative or constitutional limitation on the ability of a prosecutor to bring a case.

We also reject the State's argument that exempting children under fourteen from prosecution for prostitution will somehow undermine the State's ability to protect children and encourage the sexual exploitation of minors. The State claims that under our interpretation, an adult male who agreed to pay a thirteen-year-old girl for sex could claim that he did not commit the offense of prostitution because the sex would not have been consensual. But section 43.02 expressly allows for the prosecution of a person who "solicits another in a public place to engage with him in sexual conduct for hire," regardless of the solicitee's consent. TEX. PENAL CODE § 43.02(a)(2). Similarly, pimps and other sexual exploiters of children may still be prosecuted for compelling prostitution and other crimes of sexual exploitation even though the child herself may not be prosecuted for prostitution. *See Waggoner v. State*, 897 S.W.2d at 513 (stating "[t]he actual commission of the offense of prostitution is not a prerequisite to the commission of the offense of compelling prostitution") (citing *Davis v. State*, 635 S.W.2d 737, 739 (Tex. Crim. App. 1982)); TEX. PENAL CODE § 43.25.

Similarly unavailing is the State's argument that our reading of the law will encourage pimps to seek out young children because they would be immune from criminal liability. The sexual exploitation of children under fourteen is already a crime, *see, e.g.*, TEX. PENAL CODE §§ 22.011, 22.021, 43.05, 43.25. It is unclear how the prosecution of a child for prostitution would serve as any further deterrent, especially in the case of children on the streets. *See Roper*, 543 U.S. at 571 ("[T]he same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.") Most of these children are controlled by their pimps through a combination of emotional and financial security mixed with violence and drugs, and are unaware that the treatment they are receiving is against the law. *See* EVA J. KLAIN, PROSTITUTION OF CHILDREN AND CHILD-SEX TOURISM: AN ANALYSIS OF DOMESTIC AND INTERNATIONAL RESPONSES (Nat'l Center for Missing & Exploited Children, 1999) *available at* http://www.hawaii.edu/hivandaids/Prostitution%20of%20Children%20and%20Child%20Sex%20Tourism.pdf; REPORT ON LEGISLATION IMPACTING CHILDREN: 81ST LEGISLATURE (Children at Risk Public Policy and Law Center, 2009).

The State has broad power to protect children from sexual exploitation without needing to resort to charging those children with prostitution and branding them offenders. Section 261.101 of the Family Code requires a person to report to a law enforcement agency or the Department of Family and Protective Services if there is cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect. TEX. FAM. CODE § 261.101. The department or agency must then conduct an investigation during which the investigating agency may

take appropriate steps to provide for the child's temporary care and protection. *See id*. §§ 261.301, 261.302, 262.001-.309.

The dissent suggests that our decision bars the State from providing treatment, confinement, probation, counseling or any other rehabilitation, implying that the juvenile justice system is the only portal to such services for children like B.W. That is simply not true. Even absent a report or investigation, a law enforcement officer may take possession of a child without a court order if a person of ordinary prudence and caution would believe there is an immediate danger to the physical health or safety of the child, or that the child has been the victim of sexual abuse. Id. § 262.104(a)(1) & (3). Presumably a thirteen-year-old girl walking the streets offering sex for money would meet this standard. The State may also seek a court order to take possession of a child to protect the child's health and safety. *See id*. § 262.001. Thus, the suggestion that lack of criminal prosecution would somehow mean the State would have no option but to put the exploited child back on the streets is entirely without merit. While in CPS custody, a child has access to a full range of counseling and treatment options, including 24-hour supervision and one-on-one monitoring. *See* Service Levels for Foster Care at http://www.dfps.state.tx.us/Child_Protection/Foster_Care/Care_Levels.asp. CPS provides these services within a purely rehabilitative setting, and without the permanent stigma associated with being adjudged a prostitute. Furthermore, while the trial court in this particular case may have exercised good judgment in adjudicating treatment and rehabilitation, there is no guarantee that a another judge would do the same, nor would the dissent's opinion

protect a thirteen-year-old, or even a ten-year-old, from being subjected to a harsh and punitive sentence.

The dissent emphasizes B.W.'s "long and sad history of delinquent behavior," presumably suggesting that her bad behavior is indicative of her mental capacity to commit this crime. The United States Supreme Court has recognized that juveniles "are more vulnerable or susceptible to negative influences and outside pressures," and that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 569, 573 (internal citations omitted). Notwithstanding that fact, B.W.'s behavior is sadly in keeping with many children who have been abused or neglected at home. This dysfunctional family life leads to problems with discipline and fighting, and often results in the child running away, just as B.W. did. *See* KLAIN, PROSTITUTION OF CHILDREN, 3. These children are also the ones most at risk of being victimized by pimps and exploited as prostitutes, and are the most in need of serious treatment. *See id.* at 3–4. If B.W.'s prior CPS temporary placement was inadequate to treat her, then that placement should be reviewed and her level of care increased.

Children are the victims, not the perpetrators, of child prostitution. Children do not freely choose a life of prostitution, and experts have described in detail the extent to which they are manipulated and controlled by their exploiters. *See, e.g.,* FEMALE JUVENILE PROSTITUTION: PROBLEM AND RESPONSE (Nat'l Center for Missing & Exploited Children, 2d Ed. 2002); KLAIN, PROSTITUTION OF CHILDREN, 3–5. Courts, legislatures, and psychologists around the country have

recognized that children of a certain age lack the mental capacity to understand the nature and consequences of sex, or to express meaningful consent in these matters. *See, e.g.*, *Hazelton*, 915 A.2d at 234; *Collins*, 691 So.2d at 924; *Jones*, 640 So.2d at 1089; *Payne*, 623 S.W.2d 867; *Goodrow*, 119 N.H. 483. *See also*, Roland C. Summitt, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983). Drawing a distinction between consensual sex with a child and exploitation simply blinks reality.

Our Legislature has passed laws recognizing the vulnerability of children to sexual exploitation, including an absolute prohibition of legal consent for children under fourteen. 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 the age of fourteen may not be charged with that offense. Accordingly, we reverse the court of appeals' judgment, and remand the case to the trial court for an appropriate disposition.

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Harriet O'Neill
Justice

OPINION DELIVERED: June 18, 2010