No. _____

IN THE
Supreme Court of the United States

MARK HENRY BENAVIDES,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari To
The Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER SECTION 20A.03 OF THE TEXAS PENAL CODE IS UNCONSTITUTIONAL.

PARTIES TO THE PROCEEDING BELOW

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LIST OF RELATED PROCEEDINGS

State of Texas v. Mark Henry Benavides, 186th District Court, Bexar County, Texas, Trial Court No. 2017CR7193 (April 6, 2018)

Mark Henry Benavides v. State of Texas, Fourth Court of Appeals, San Antonio, Texas, No. 04-18-00273-CR, 2019 Tex. App. LEXIS 9468 (October 30, 2019)

In re Benavides, Texas Court of Criminal Appeal, No. PD-1221-19, 2020 Tex. Crim. App. LEXIS 216 * (March 11, 2020)

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The Texas Court of Criminal Appeals refusal of Petition for Discretionary Review is available at 2020 Tex. Crim. App. LEXIS 216 and in Appendix III. The Court of Appeals for the Fourth Supreme Judicial District of Texas' decision is unpublished, but is available at 2019 Tex. App. LEXIS 9468, and its Opinion and Judgement is attached as Appendix II.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257. The decision appealed was rendered by the Texas Court of Criminal Appeals, the highest court of Texas in which a decision could be had. The validity of a statute of Texas is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATUTES INVOLVED

United States Constitution:

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Texas Statutes:

Texas Penal Code Section 20A.03
(*See,* Appendix I).

STATEMENT OF THE CASE

A. Factual Background:

Mr. Benavides was a Texas attorney practicing law for almost sixteen years -- primarily criminal law. R.R. 9:171:4-18. He specifically concentrated on misdemeanors and some state jail felonies and drew a substantial portion of his practice from court appointments. R.R. 9:211:24-212:4; 212:21-213:23.

Mr. Benavides engaged in relations with a number of women. *See, in passim*. Specifically, during the guilt innocence phase, six women testified that Mr. Benavides had relations with them at times when he was representing them in pending criminal matters and each averred that Mr. Benavides engaged in conduct that could be considered coercive.

Defendant Mark Henry Benavides was originally indicted in Cause Number 2016CR3810 for Compelling Prostitution. Five indictments later, he was charged in 2018CR2355 with six counts of the offense of Continuous Trafficking of persons in violation of Texas Penal Code section 20A.03. C.R. 6-7.

B. Proceedings Below:

On March 26, 2018 the case proceeded to trial and on April 3, 2018 the jury found Mr. Benavides guilty on all six counts assessing his punishment at eighty (80) years confinement in the Texas Department of Criminal Justice Institutional Division on each count. R.R. 1:1:1; 7:187:3-188:4; 10:124:9-125:18. A Judgment was entered, Mr. Benavides' Motion for New Trial was overruled and the case was appealed to the Fourth Court of Appeals. C.R. ; 127:9-22; 129:22-130:1; 193-197, 193. In that appeal, Mr. Benavides raised four issues: (1) Whether the court erred in admitting the testimony of a State expert; (2) Whether the court erred in refusing to grant a mistrial when a juror fainted during the proceedings; (3) Whether the court erred in failing to give an accomplice immunity instruction;

and (4) Whether Tex. Pen. Code section 20A.03 was unconstitutional as applied.

The Fourth Court of Appeals affirmed the trial court's judgment in a Memorandum Opinion filed on October 30, 2019. *See*, Appendix II. A Petition for Discretionary Review was filed on January 2, 2020. In that Petition, Mr. Benavides raised the issue of whether Tex. Pen. Code section 20A.03 was constitutional as applied by the trial court. On March 11, 2020 the Texas Court of Criminal Appeals denied Mr. Benavides' Petition. *See*, Appendix III. This Application for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. SECTION 20A.03 OF THE TEXAS PENAL CODE AS APPLIED IS UNCONSTITUTIONALLY BROAD AND VAGUE.

A. A STATUTE MUST GIVE CLEAR NOTICE OF THE CONDUCT PROSCRIBED.

A criminal statute must comport with the requirements of Due Process. A statute violates due process and is void for vagueness when "men of common intelligence must necessarily guess at its meaning and differ as to its application," thus denying them fair notice of the proscribed conduct. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). More specifically, a statute must be sufficiently clear as to provide notice and guidance to ordinary citizens of what conduct is prohibited and it also must define the offense with sufficient specificity as to limit law enforcement, prosecutors and juries from engaging in unbridled arbitrary enforcement. The Court in *Kolender v. Lawson* wrote:

> ... the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory

> enforcement. ... Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith*, 415 U. S., at 574. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

461 U.S. 352, 357-58 (1983); *see also Grayned v. Rockford*, 408 U.S. 104, 108-109 (1972).

In cases where ambiguity exists, the Rule of Lenity (strict construction) holds that with respect to criminal laws any ambiguity must be strictly construed against the government. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820); *King v. United States*, 595 F.3d 844, 851-52 (8th Cir. 2010).

B. SECTION 20A.03 OF THE TEXAS PENAL CODE AS APPLIED IS UNCONSTITUTIONALLY BROAD.

1. The Phrase "Human Trafficking" Has an Established Meaning.

The phrase "Human Trafficking" has a well established and accepted meaning from which this interpretation of the Texas statute seriously deviates. *See, e.g.,* Texas Human Trafficking Prevention Task Force, INTRODUCTION TO HUMAN TRAFFICKING: A GUIDE FOR CRIMINAL JUSTICE PROFESSIONALS (September 2013); Jennifer Mason McAward, *The Thirteenth Amendment, Human Trafficking, and Hate Crimes*, SEATTLE UNIV. L.R., Vol. 39, 831. During hearings on the Federal Trafficking Victims Protection Act, a State Department official testified, "[a] trafficking scheme involves a continuum of recruitment, abduction, transport, harboring, transfer, sale or receipt of persons through various types of coercion, force,

fraud or deception for the purpose of placing persons in situations of slavery or slavery-like conditions." McAward, SEATTLE UNIV. L.R., at 831-32. Human Trafficking is consistently referenced as modern day slave *trading*.[1] In other words, it involves a conspiracy -- more than a single defendant acting alone.

2. The Term "Transport," As Interpreted and Applied by the Trial Court, Created an Unreasonable and Unintended Result.

There can be little doubt that the conduct Mr. Benavides was charged with could be characterized as a violation of the Prostitution statute, or even potentially the crime of Compelling Prostitution. Just as one example, there was abundant testimony that Mr. Benavides traded legal services for sexual relations. *See, e.g.*, R.R.

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[1] *See, e.g.,* Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later* JOURNAL OF GENDER, SOCIAL POLICY & THE LAW, Vol. 19, Issue 4, 1248-49 (2011) (and numerous sources cited therein); Kelly E. Hyland, *The Impact of the Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children,* 8 HUM. RTS. BRIEF 30 (2001); George S. Yaconbiah, Heather J. Clawson. & Nicole Dutch, *An Examination of Law Enforcement Responses to Human Trafficking in the United States: A Compliance Assessment of U.S. Obligations under Customary and Conventional International Law*, 15 U.C. DAMS J. INT'L L. & POLICY 157 (2008); U.S. Dep't of State, TRAFFICKING IN PERSONS REPORT (2007); Tom Obokata, TRAFFICKING OF HUMAN BEINGS FROM A HUMAN RIGHTS PERSPECTIVE: TOWARDS A HOLISTIC APPROACH 10–13 (Martinus Nijhoff Publishers 2006) (explaining the historical background of slavery and how the origin of human trafficking relates to the history of slavery).

6:10:20-11:13; 9:80:14-18; 5:96:17-22 *cf.* 5:116:18-19; 117:17-120:7. What transformed the crime of prostitution into the first degree felony of Continuous Human Trafficking carrying a twenty-five year minimum sentence was the fact that *he drove the women to a hotel where he and they had relations*.

To be clear, he did not drive them to another town. He did not drive them to a remote location to separate them from their homes or families. He did not deliver them to co-conspirators or house them in a an environment where they would be forced to labor for his benefit -- he drove them a few miles to a hotel. *See, in passim*.

a. The Legislative History Shows the Legislature Intended to Target Human Trafficking as Commonly Defined and Understood.

The Court's application of Section 20A.03 resulted in a crime which the Texas Legislature did not intend. This is true for two independent reasons. First, it is inconsistent with the legislative history. Second, it renders most of the predicate crimes meaningless.

The Texas crime of Continuous Human Trafficking was one in a series of laws enacted as part of an ongoing initiative to counter human trafficking. The first paragraph of the Bill Analysis of SB 24 explains that "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 criminal industry in the world." Senate Research Center, Bill Analysis, S.B. 24, 82nd Leg., R.S. (August 2, 2011) (first paragraph) (emphasis added). In the Senate Transcripts the crime is again referred to as a "modern day form of slavery." Senate Transcript, 42-43 (March 23, 2011). In a discussion between state Senator Hinojosa and Senator Van De Putte of SB 24 and HB 3000, Sen. Hinojosa commented that Human Trafficking is "a very serious problem that we have all along the border." Senate Transcript, 44 (March 23, 2011). Senator Van De Putte then commented "that trafficking victims, it's for the purpose of a profit, for forced labor or forced sex *trade*. Senate Transcript, 44-

45 (March 23, 2011). She then added, "... in just last year we had over 139 rescued children, these are children who are being trafficked for the sex trade industry and that's in our state. And so what we want to do is say, you know, Texas is open for business and that we're very proud of. But this business is a business of greed and of profit." Senate Transcript, 46 (March 23, 2011).

Turning specifically to the bill on Continuous Human Trafficking, Senator Van De Putte noted the bill "is reserved for the worst offenders of human trafficking" and then explained, "[m]embers, this is a very strong bill but it's one that we feel merits approval because this is a heinous crime, in particular *selling* of a child for the purposes of human trafficking either *into forced labor or the forced sex slave industry*." Senate Transcript, 92 (March 23, 2011) (emphasis added).

In enacting this particular statute, the Texas Legislature was targeting Human Trafficking as traditionally and commonly defined and understood. It specifically was targeting a crime that was conspiratorial and involved multiple actors.

One of the few cases to come before the Texas Court of Criminal Appeals discussing this statute was *Ritz v. State*, 533 S.W.3d 302, 314 (Tex Crim. App. 2017) (per curiam). Justice Keller, writing a dissent in *Ritz v. State* examined both the legislative history behind the statute and its express language. He wrote:

> 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.
>
> 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.

Ritz v. State, 533 S.W.3d 302, 314 (Tex Crim. App. 2017) (per curiam) (Keller, J. Dissenting). (citations omitted).

It is difficult to read the legislative transcripts and believe that the legislature intended the law to apply to a lone defendant who drives a woman to a hotel and then coerces her into to having relations with him.

b. The Statute, As Applied, Would Inexplicably Subsume Other Crimes.

Second, as noted below, under this application of the Continuous Trafficking Statute, virtually any crime can be elevated to Human Trafficking and, in cases involving multiple instances, be transformed into a felony carrying immense consequences. *See infra* at ?.

3. <u>The Statute Fails to Provide Meaningful Notice</u>.

Section 20A.03 as applied fails to give clear and meaningful

notice of the exact parameters of the conduct proscribed. This is true for several reasons. First, it misuses (or substantially re-defines) an accepted phrase or crime -- Human Trafficking. No longer is this a crime limited to conspiracies, separation of victims from their home and support, modern slavery, etc. Indeed, even if one had followed the debates or inquired into the legislative intent of the statute (which was consistent with the accepted meaning of Trafficking), one could not foresee this application of the statute.

The Court of Appeal in *Ritz v. State* observed, "We agree that Ritz's conduct, however reprehensible it may have been, does not constitute what would ordinarily be considered 'human trafficking' because there were no allegations in this case of organized crime, prostitution, or forced labor. *Ritz*, 481 S.W.3d at 386 (citations omitted).

Second, the potential application is so broad, the reasonable person would not foresee this use. To the contrary, the ordinary person must assume absurd meanings and applications. *Ritz*, 533 S.W.3d at 310 (Keller, J. Dissenting). Since absurd applications of a statute are to be rejected, a reasonable person could not foresee the instant application of the statute. *See, e.g., Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). Third, the fact that Mr. Benavides was originally indicted on in May of 2009 on charges of compelling prostitution (Cause Number (2016CR3810) and that the charge was not changed until February of 2018 strongly indicates that reasonable minds were unsure for years as to the application of Section 20A.03. Both the Court of Appeals and the Dissent in the Court of Criminal Appeals in *Ritz* acknowledged that the language of the Statute was overly broad. The fact that the statute departs significantly from the traditional definition and understanding of Human Trafficking further adds to the confusion created.

4. <u>The Statute as Applied by the Court Is So Broad That it Is Capable of Subsuming Virtually Any Crime Involving Sex</u>.

Under the trial court's application of the Continuous Human Trafficking Statute, if a "client" gives a ride to a prostitute to their *agreed* destination -- even if it is merely to turn the corner and park -- the crime of prostitution is then transformed into Human Trafficking. The *Ritz* court correctly acknowledged that this understanding of "trafficking is so broad that nearly every adult who has sex with a minor may now be prosecuted as a human trafficker" -- now the same is true in adult cases. *Ritz v. State*, 481 S.W.3d 383, 385-86 (Tex. App.–Austin 2015).

Justice Keller, in his dissent in *Ritz*, held that the law did produce absurd results and argued that the broad interpretation must be abandoned and Ritz convicted on the lesser included offense. *Ritz*, 533 S.W.3d at 310 (Keller, J. Dissenting). He contended that any interpretation "[r]endering most punishment provisions for sex offenses superfluous is an absurd result." *Ritz*, 533 S.W.3d at 313 (Keller, J. Dissenting).

5. <u>By Making the Scope of the Crime So Encompassing, This Interpretation Gives Unchecked Discretion to Police, Prosecutors and Juries</u>.

In both *Ritz* and here, it is apparent that the incidental act of using a conveyance of any kind can now be used under this interpretation of the law to elevate virtually any of the predicate crimes to Human Trafficking. This provides no guidelines for law enforcement and encourages "arbitrary and discriminatory enforcement." Any predicate crime can be elevated on a whim -- and if the act occurred three or more times in a period of thirty or more days, the crime can be elevated to Continuous Trafficking.

This gives unchecked authority to law enforcement and prosecutors to elevate any predicate crime in such circumstances. Nothing in the legislative history, nor in the Federal law that grew out of the same campaign, warrants a belief that this was the intention of the legislature. Indeed, it is unprecedented. The result is a virtually unbridled discretion to transform a class B misdemeanor

into a felony, or a "super-felony" carrying a minimum of twenty-five years incarceration.

The law places no limitations nor restraints on its application leaving law enforcement, prosecutors and juries free to drastically increase the penalty range of a crime, merely based on the *incidental* use of *any form* (taxi, bus, horse, etc.) of transportation. Thus in a case that is politically charged or that garners the attention of the media (as in the instant case), the severity of the charge can be elevated based on who the defendant is, rather than on the actual conduct charged.

CONCLUSION

The law as applied in the trial court is inconsistent with both the common meaning of the phrase "Human Trafficking"and with the legislative intent of the statute. A reasonable person would not foresee the application of the statute in the case below. An informed individual following the legislative debates would similarly be unable to foresee this application. Independently, the way in which the statute was construed leads to absurd results. It transforms misdemeanor conduct into felony conduct based on incidental conduct and it creates a confusing structure in which a single actor can be trafficker an the exploiter. Furthermore, it potentially subsumes almost all predicate crimes based on the same incidental conduct -- that transportation of any kind across nay distance took place. Finally, it confers on law enforcement and prosecutors unchecked discretion to arbitrarily, and dramatically, change the severity of a crime in a broad range of cases.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Court issue a Writ of Certiorari in the instant case and for such further and other relief to which Petitioner my show himself to be entitled.

Respectfully submitted,

BY: /s/ Paul Belew
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APPENDIX A

DENIAL OF PETITION FOR DISCRETIONARY REVIEW BY THE TEXAS COURT OF CRIMINAL APPEALS

In re Benavides

Court of Criminal Appeals of Texas

March 11, 2020, Decided

PD-1221-19

Reporter
2020 Tex. Crim. App. LEXIS 216 *

MARK HENRY BENAVIDES

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [*1] FROM BEXAR COUNTY - 04-18-00273-CR.

Benavides v. State, 2019 Tex. App. LEXIS 9468 (Tex. App. San Antonio, Oct. 30, 2019)

Judges: JUDGE RICHARDSON DID NOT PARTICIPATE.

Opinion

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW REFUSED. JUDGE RICHARDSON DID NOT PARTICIPATE.

APPENDIX B

COURT OF APPEALS' JUDGMENT AND OPINION

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00273-CR

Mark Henry **BENAVIDES**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2017CR7193
Honorable Dick Alcala, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Luz Elena D. Chapa, Justice
Beth Watkins, Justice

Delivered and Filed: October 30, 2019

AFFIRMED

A jury found appellant Mark Henry Benavides guilty of six counts of continuous trafficking of persons and assessed punishment at eighty years' confinement for each count. On appeal, Benavides contends the trial court erred by admitting certain witness testimony, denying his request for a mistrial, and failing to include an accomplice witness immunity instruction. He also challenges the constitutionality of the statute making continuous trafficking of a person a criminal offense. We affirm the trial court's judgment of conviction.

BACKGROUND

The San Antonio Police Department investigated Benavides, a criminal defense attorney, after a woman alleged he forced her to have sex with him in exchange for legal services. During the investigation, a detective met with other women who made the same allegations. The women alleged that Benavides, who was their attorney, met with them—usually at their homes—to discuss their cases, then drove them to a motel to have sex. The women alleged Benavides made them have sex with him on multiple occasions and recorded the sexual encounters despite their objections.

The investigation ultimately led to the discovery of more than 200 videos of Benavides having sex with the women as well as directing them what to say and how to act on video. The State ultimately charged Benavides with six counts of continuous trafficking of persons. At trial, the jury heard testimony from several witnesses, including Bexar County detectives and investigators, a clinical psychologist, and six women who alleged Benavides forced them to have sex with him in exchange for legal services. The State also introduced the videos, which Benavides had labeled by date, name, and sexual act, and stored at his home. After the jury found Benavides guilty on all six counts and assessed punishment at eighty years' confinement for each count, the trial court signed a judgment consistent with the jury's verdict. Benavides appealed.

ANALYSIS

Admission of Dr. Pierce's Testimony

In his first issue, Benavides argues the trial court erred in admitting testimony from the State's expert, Dr. Aaron Pierce, that two of the six complainants exhibited symptoms of human trafficking because such testimony was conclusory, speculative, and invaded the province of the jury. The State responds that Dr. Pierce's testimony was properly admitted because Dr. Pierce was qualified to express an opinion as to the characteristics of sexual assault victims. The State

also argues that even if the testimony was inadmissible, the admission of the testimony was harmless error.

Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019). An abuse of discretion occurs only if the trial court acts "arbitrarily or unreasonably" or "without reference to any guiding rules and principles." *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016). We may not reverse the trial court's ruling unless the determination "falls outside the zone of reasonable disagreement." *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). An evidentiary ruling will be upheld if it is correct on any theory of law applicable to the case. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009).

Applicable Law

"To be admissible, expert testimony must assist the trier of fact." *Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997) (internal quotations omitted); *see* TEX. R. EVID. 702. When the jury is not qualified to "the best possible degree" to determine a particular issue intelligently, expert testimony is helpful. *Schutz*, 957 S.W.2d at 59. Expert testimony is not helpful, however, if it constitutes "a direct opinion on the truthfulness" of a complainant's allegations." *Id*. "[T]here is a 'fine but essential line' between helpful expert testimony and impermissible comments on credibility." *Id.* (quoting *State v. Myers*, 382 N.W.3d 91, 98 (Iowa 1986)).

Application

The State called Dr. Pierce, a psychologist with more than twenty years of experience in treating sex offenders and victims, to testify about grooming behaviors and that victims of sexual abuse may respond differently than a layperson would expect. On direct examination, Dr. Pierce testified that offenders typically groom their victims by developing a relationship with them so

that when the crime is committed, the victim is more likely to keep it a secret. According to Dr. Pierce, offenders are often in a position of power and can coerce victims "to go along with it" by using emotional force. Dr. Pierce added an attorney would "certainly" have power over a client due to an attorney's knowledge of the legal system. When asked about human trafficking, Dr. Pierce testified human traffickers often look for people who are "exceptionally weak" and easy to control, making them less likely to report a crime. For these reasons, Dr. Pierce explained, human trafficking victims, like sexual abuse victims, feel embarrassed, guilty, and fear their offender will retaliate against them if they report the crime.

On cross-examination, defense counsel vigorously challenged Dr. Pierce's credibility by pointing out he had not interviewed Benavides or any of the complainants. In response, the State elicited testimony that Dr. Pierce was present when two of the complainants testified and was able to observe their demeanor and mannerisms. The State then asked whether he believed the two complainants exhibited typical symptoms of human trafficking victims. The trial court overruled Benavides's timely objection, and Dr. Pierce testified that both complainants displayed themselves in ways consistent with sexual abuse and human trafficking victims he had examined. He further added that based on his experience and the literature, people respond in a variety of different—and sometimes unpredictable—ways to being sexually assaulted.

Benavides does not dispute that Dr. Pierce was qualified to testify as an expert. Rather, he argues Dr. Pierce's testimony was conclusory and speculative because it was "tantamount to testifying that the women were being truthful in their testimony." We disagree. Dr. Pierce's testimony drew no conclusions and made no speculation as to the two complainants' truthfulness. Dr. Pierce simply was not asked his opinion of the two complainants' credibility. Rather, he spoke generally about whether the two complainants demonstrated behaviors of human trafficking victims. *See DeLeon v. State*, 322 S.W.3d 375, 382–83 (Tex. App.—Houston [14th Dist.] 2010,

pet. ref'd) (holding expert's statements that complainant exhibited behavior similar to sexually abused child was admissible and not comment on truthfulness). Because, inter alia, the State offered this testimony to rebut Benavides's attempts to discredit Dr. Pierce on the basis that he lacked personal knowledge of the two complainants or Benavides, we cannot say that the trial court abused its discretion in admitting Dr. Pierce's testimony.

Even assuming the trial court erred in overruling Benavides's objections, any error must be disregarded unless it affected Benavides's substantial rights. *See* TEX. R. APP. P. 44.2(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). The erroneous admission of evidence does not require reversal if, after examining the record as a whole, we have a fair assurance that the error did not influence the jury or had but a slight effect. *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008).

After examining the record as a whole, we conclude that the admission of Dr. Pierce's testimony did not have a substantial or injurious effect or influence on the jury. *See King*, 953 S.W.3d at 271. Here, the jury heard testimony from the two complainants that Benavides was their lawyer and he made them have sex with him multiple times in exchange for legal services. The jury also saw video excerpts of the sexual encounters between Benavides and the two complainants. Moreover, the trial court instructed the jurors that they were the "exclusive judges of the facts provided, of the credibility of the witnesses, and of the weight to be given to the testimony." *See Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996) (noting that absent evidence to contrary, we presume jury followed instructions provided in charge). We therefore overrule Benavides's first issue.

Mistrial

Benavides next argues the trial court erred in denying his motion for mistrial when one of the jurors fainted following the presentation of video evidence. According to Benavides, the juror's reaction was unduly prejudicial and deprived him of his right to a fair trial by an impartial jury. In response, the State argues that Benavides inadequately briefed this issue and therefore waived it. Because Benavides provides some argument to support this issue with appropriate citations to authorities and to the record, we will address it. *See* TEX. R. APP. P. 38.1(i).

Standard of Review

We review a trial court's decision to deny a motion for mistrial for abuse of discretion, and we will not reverse that decision unless it was outside the "zone of reasonable disagreement." *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010). A mistrial is appropriate where "error is so prejudicial that expenditure of further time and expense would be wasteful and futile." *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). "The determination of whether a given error necessitates a mistrial must be made by examining the particular facts of the case." *Id.*

Application

On the first day of trial, the trial court admitted State's Exhibit 32 ("SX32"), a graphic video of Benavides having sex with one of the complainants. As the State played the video for the jury, the bailiff informed the trial court that the jurors needed a break. The trial court granted the request, and as the bailiff led the jurors out of the courtroom, Juror 8 fainted. After Juror 8 recuperated, the jurors went back into the courtroom. The trial court then excused the jury and explained for the record: "About three minutes into the video, the Bailiff indicated to the Court that the jurors needed a break, as the Court granted. As the jurors were being led out to the jury room, a female juror fainted in the hall and she was given time to recuperate." Benavides moved for a mistrial, arguing Juror 8's "strong reaction to the videos" was "unduly prejudicial." After

questioning outside the presence of the remaining jurors, the trial court excused Juror 8 from the courtroom and asked defense counsel if there was any objection to dismissing Juror 8 and replacing her with an alternate juror. Defense counsel did not object, and the trial court dismissed Juror 8.

On appeal, Benavides argues Juror 8's reaction to SX32 "increased [the other jurors'] perception that the video they witnessed was shocking and/or offensive." Even if it did, however, a mistrial would not be warranted unless Benavides could show a reasonable probability that Juror 8's reaction actually interfered with the jury's verdict. *See Coble*, 330 S.W.3d at 292 (applying rule in context of outburst from bystander and witness that interfered with normal proceedings of trial). For instance, in a case where a juror became physically ill and asked to lie down after viewing autopsy photographs, our sister court concluded the juror's reaction "was not so emotionally inflammatory as to prejudice the jury." *Edwards v. State*, 106 S.W.3d 833, 838 (Tex. App.—Dallas 2003, pet. ref'd). There, the trial court appropriately recessed and ensured the juror had recovered before proceeding. *Id.* at 839. Here, the trial court also granted the jurors a break when they needed one and replaced Juror 8 with an alternate juror when it determined Juror 8 could not continue. *See id.* Like the defendant in *Edwards*, Benavides moved for a mistrial but did not request a curative instruction, object to the trial court's replacement of Juror 8 with an alternate juror, or explain to the trial court how Juror 8's reaction actually prejudiced the rest of the jury. *See id.* Accordingly, we conclude the trial court did not abuse its discretion in refusing to grant a mistrial. We overrule Benavides's second issue.

Accomplice Witness Immunity Instruction

Benavides contends the trial court erred in denying his request for an accomplice witness immunity instruction. According to Benavides, the trial court should have instructed the jury that each of the complainants secured immunity from prosecution in exchange for their testimony because the outcome of the case depended on the jury's assessment of the credibility of these

witnesses. In response, the State argues Benavides failed to timely request this instruction or to demonstrate how he was entitled to it.

Standard of Review

We review the trial court's denial of a requested jury instruction for an abuse of discretion. *See Threadgill v. State*, 146 S.W.3d 654, 666 (Tex. Crim. App. 2004). When reviewing a trial court's decision to refuse a requested defensive instruction, we view the evidence in the light most favorable to the defendant's requested submission. *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006).

Applicable Law

"Under Texas law, the judge must provide the jury with a written charge distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in his charge calculated to arouse the sympathy or excite the passions of the jury." *Walters v. State*, 247 S.W.3d 204, 208 (Tex. Crim. App. 2007) (internal quotations omitted). A trial judge must instruct the jury on statutory defenses, affirmative defenses, and justifications when such matters are raised by the evidence. *Id.*

Before the formal charge conference, Benavides requested a "Section 28.04 [sic] accomplice witness, testimony of immunity" instruction. Section 20A.04 of the Texas Penal Code provides that a party to an offense may not be prosecuted for any offense about which she is required to testify. TEX. PENAL CODE. ANN. § 20A.04. The statute further provides that such "testimony may not be used against the party in any adjudicatory proceedings, except a prosecution for aggravated perjury." *Id.*

Application

Benavides essentially asks us to require a trial court to include an instruction on immunity which the jury could use to discredit the complainants' testimony. We decline to do so. Benavides does not point to any controlling authority supporting such a requirement, and we have not identified a sound basis for such an instruction. First, as our sister court has recognized, a grant of immunity does not necessarily discredit a witness's testimony. *See Jester v. State*, 62 S.W.3d 851, 855–56 (Tex. App.—Texarkana 2001, pet. ref'd) (holding no error when trial court declined to instruct jury that witness who was granted immunity was accomplice as matter of law). Second, unlike the accomplice witness instruction outlined in article 38.14 of the Texas Code of Criminal Procedure, which ensures a defendant's conviction is not based solely on uncorroborated accomplice testimony, section 20A.04 protects trafficking victims by granting them immunity, inducing them to testify when their testimony may inculpate them. *See* TEX. CODE. CRIM. PRO. ANN. art. 38.14; *Jester*, 62 S.W.3d at 855–56. To require a section 20A.04 instruction for the sole purpose of discrediting a witness would violate longstanding Texas law prohibiting trial courts from commenting on the credibility of witnesses. *See Russell v. State*, 749 S.W.2d 77, 78 (Tex. Crim. App. 1988) ("It has long been held that it is reversible error for the trial court to give instructions that refer to the credibility of the witnesses."). Accordingly, we hold the trial court did not err by denying Benavides's request for an accomplice witness immunity instruction. We therefore overrule this issue.

Section 20A.03 of the Texas Penal Code

Finally, Benavides asserts that section 20A.03 of the Texas Penal Code is unconstitutionally vague as applied to him. Specifically, he argues the term "human trafficking" is ambiguous and turns his incidental action of driving each woman to the motel where they were forced to have sex into the offense of "continuous trafficking." Benavides argues this application

departs from the traditional understanding of "human trafficking" and is contrary to the Legislature's intent.

The State responds that the statute is not unconstitutionally vague because it clearly prohibits Benavides's conduct of transporting women to a new location and forcing them to have sex. The State contends that even though Benavides's conduct may not seem like a "common form[] of human trafficking such as smuggling [a] person[] into the United States from another country to force them into various forms of labor," the statute's language is sufficiently clear to provide a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited.

Standard of Review

Whether a statute is constitutional is a question of law we review de novo. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). We begin our review of the constitutionality of a statute with the presumption that the statute is valid and assume the Legislature did not act arbitrarily and unreasonably in enacting the statute. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). "If we can determine a reasonable construction that will render the statute constitutional, we must uphold the statute." *Ex parte Zavala*, 421 S.W.3d 227, 231 (Tex. App.—San Antonio 2013, pet ref'd). The burden rests upon the party who challenges the statute to establish its unconstitutionality. *Rodriguez*, 93 S.W.3d at 69.

Applicable Law

A statute is unconstitutionally vague if its prohibitions are not clearly defined. *Wagner v. State*, 539 S.W.3d 298, 313 (Tex. Crim. App. 2018). A statute must provide a person of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. *Id.* at 314. A statute is not unconstitutionally vague merely because the words or terms used are not specifically defined. *Id.* The words or terms must be read in context, and we must construe the statute in

accordance with the rules of grammar and common usage. *Id.* "A statute satisfies vagueness requirements if the statutory language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* (internal quotations omitted). In addressing an as applied challenge, we will consider whether the statute is vague as applied to the defendant's conduct. *Id.*

Application

Under section 20A.03 of the Penal Code, a person commits continuous trafficking of persons "if, during a period that is 30 or more days in duration, the person engages two or more times in conduct that constitutes an offense under Section 20A.02 [trafficking of persons] against one or more victims." TEX. PENAL CODE § 20A.03(a). Section 20A.02 provides that a person commits the offense of trafficking of persons if the person knowingly "traffics another person with the intent that the trafficked person engage in forced labor or services." *Id*. § 20A.02(a)(1). The statute further defines "traffic" to mean "transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means." *Id.* § 20A.01(4).

When construing these sections in accordance with the rules of grammar and common usage, the statute clearly prohibits a person from transporting another person with the intent that the transported person engage in forced services more than once in a 30-day period. *See id.* § 20A.03(a); *Wagner*, 539 S.W.3d at 314. The Legislature defined the term "traffic" to include transporting a person, specifically defining what conduct constitutes "traffic" under section 20A.03(a). *See* TEX. GOV'T CODE ANN. § 311.011(a)(b) (mandating words and phrases with legislative definitions shall be construed accordingly). An act like driving falls within the plain meaning of the term "transport." *See Ritz v. State*, 533 S.W.3d 302, 309 (Tex. Crim. App. 2017) (Newell, J., concurring) (pointing out evidence that defendant drove minor to and from his home to have sex constituted evidence of "transporting" under continuous trafficking statute). Based on

the plain text of the statute, a person of ordinary intelligence is placed on notice that driving another person with the intent to force the other person to engage in prostitution more than once during a period of 30 days constitutes the offense of continuous trafficking. *See Wagner*, 539 S.W.3d at 314. This construction is reasonable and is consistent with our belief that the Legislature did not act unreasonably in including the driving of another person to a location with the intent to force that person to engage in sex in the definition of trafficking. *See Wagner*, 539 S.W.3d at 314; *Ritz*, 533 S.W.3d at 309.

Here, the evidence shows Benavides drove women to a motel where he forced them to have sex with him in exchange for his legal services. The record further reflects Benavides repeated this behavior more than once over the course of 30 days. This conduct is prohibited under the plain text of the continuous trafficking statute, and this result is not an absurd one. *See Wagner*, 539 S.W.3d at 314; *Ritz*, 533 S.W.3d at 309. Because Benavides failed to show that the continuous trafficking statute is unconstitutionally vague as applied to him, we overrule his final challenge.

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment of conviction.

Beth Watkins, Justice

DO NOT PUBLISH

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-18-00273-CR

Mark Henry **BENAVIDES**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2017CR7193
Honorable Dick Alcala, Judge Presiding

BEFORE CHIEF JUSTICE MARION, JUSTICE CHAPA, AND JUSTICE WATKINS

In accordance with this court's opinion of this date, the judgment of the trial court is AFFIRMED.

SIGNED October 30, 2019.

Beth Watkins, Justice

APPENDIX C

TEXAS PENAL CODE SECTION 20A.03

PENAL CODE
TITLE 5. OFFENSES AGAINST THE PERSON
CHAPTER 20A. TRAFFICKING OF PERSONS

Sec. 20A.03. CONTINUOUS TRAFFICKING OF PERSONS.

(a) A person commits an offense if, during a period that is 30 or more days in duration, the person engages two or more times in conduct that constitutes an offense under Section 20A.02 against one or more victims.

(b) If a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific conduct engaged in by the defendant constituted an offense under Section 20A.02 oron which exact date the defendant engaged in that conduct. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, engaged in conduct that constituted an offense under Section 20A.02.

(c) If the victim of an offense under Subsection (a) is the same victim as a victim of an offense under Section 20A.02, a defendant may not be convicted of the offense under Section 20A.02 in the same criminal action as the offense under Subsection (a), unless the offense under Section 20A.02:

(1) is charged in the alternative;

(2) occurred outside the period in which the offense alleged under Subsection (a) was committed; or

(3) is considered by the trier of fact to be a lesser included offense of the offense alleged under Subsection (a).

(d) A defendant may not be charged with more than one count under Subsection (a) if all of the conduct that constitutes an offense under Section 20A.02 is alleged to have been committed against the same victim.

(e) An offense under this section is a felony of the first degree, punishable by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 25 years.

Added by Acts 2011, 82nd Leg., R.S., Ch. 122 (H.B. 3000), Sec. 1, eff. September 1, 2011.
Amended by
Acts 2015, 84th Leg., R.S., Ch. 332 (H.B. 10), Sec. 12, eff. September 1, 2015.