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STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT II
Case No 2020AP000192-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRYSTUL D. KIZER,

Defendant-Appellant.

On Appeal from a Non-Final Order Entered in
the Kenosha County Circuit Court,
the Honorable David Wilk Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

Chrystul Kizer is a child sex trafficking victim, as defined by Wis. Stat. § 948.051. Her trafficker is the alleged victim in this case. Is the affirmative defense for human trafficking victims whose offenses are a direct result of their victimization, set forth in Wis. Stat. § 939.46(1m), legally available in this case?

The circuit court answered: No. The affirmative defense is only available in prosecutions for trafficking offenses under Wis. Stat. § 940.302, whereas Ms. Kizer is charged with other crimes.

This Court should answer: Yes. The affirmative defense is legally available in any prosecution where the elements of the defense are met.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication may be warranted because there is no case law interpreting Wis. Stat. § 939.46(1m).

GOVERNING STATUTE

939.46 Coercion. (1) A threat by a person other than the actor's coconspirator which causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm to the actor or another and

which causes him or her so to act is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide.

(1m) A victim of a violation of s. 940.302 (2) or 948.051 has an affirmative defense for any offense committed as a direct result of the violation of s. 940.302 (2) or 948.051 without regard to whether anyone was prosecuted or convicted for the violation of s. 940.302 (2) or 948.051.

(2) It is no defense to a prosecution of a married person that the alleged crime was committed by command of the spouse nor is there any presumption of coercion when a crime is committed by a married person in the presence of the spouse.

(3) A petitioner under s. 813.12 or 813.122, or an individual whose parent, stepparent, or legal guardian filed a petition under s. 813.122 on behalf of the individual as a child victim, as defined in s. 813.122 (1) (c), has an affirmative defense for an offense under s. 175.35 (2e) that is punishable under s. 175.35 (3) (b) 2., or for an offense under s. 941.2905, if the person prohibited from possessing a firearm was the respondent in the action under s. 813.12 or 813.122.

STATEMENT OF THE CASE AND FACTS

Thirty-four-year-old R.V. repeatedly sexually assaulted Chrystul Kizer in exchange for money and gifts beginning when she was 16 years old or

younger. (60:12-13). He filmed some of the sexual assaults. Ms. Kizer was not R.V.'s only child victim. He filmed himself sexually assaulting numerous other children. He also recorded himself offering to post ads to help his victims get business and gave advice on how to be a better prostitute by keeping body parts in working order. (68:14-15).

The Kenosha Police Department was alerted by TCF Bank, a financial institution utilized by R.V., that R.V.'s account had been flagged under suspicion of being involved in human or sex trafficking. (16:3). In February 2018, Kenosha Police executed a search warrant on R.V.'s home. (71:30). They seized evidence of child sexual assault and child pornography. (16:2-3; 68:4). R.V. was arrested but released. (71:30-31). Police took R.V.'s DNA but did not refer any charges. (16:3; 32:1). Months later, in June 2018, Ms. Kizer was arrested for allegedly shooting R.V., trying to cover up the scene with a fire, and taking R.V.'s car.¹ The State has conceded that Ms. Kizer was R.V.'s trafficking victim, but has alleged that the crimes were premediated and that Ms. Kizer's motive was to steal R.V.'s car. (68:12-13; 32:1-2)

¹ The State charged: count one, first-degree intentional homicide, use of a dangerous weapon, Wis. Stat. §§ 940.01 and 939.63(1)(b); count two, operating a motor vehicle without owner's consent, Wis. Stat. § 943.23(2); count three, arson, Wis. Stat. § 943.02(1)(a), count four: felony bail jumping, Wis. Stat. § 946.49(1)(b), and count five: possession of a firearm by a felon, Wis. Stat. § 941.29(1m)(a). (1:1-2).

Ms. Kizer moved the circuit court to make a pretrial ruling that the affirmative defense set forth in Wis. Stat. § 939.46(1m) is legally available in her case. (30). That statute provides: “A victim of a violation of s. 940.302 (2) or 948.051 [human/sex trafficking crimes] has an affirmative defense for any offense committed as a direct result of the violation of s. 940.302 (2) or 948.051 without regard to whether anyone was prosecuted or convicted for the violation of s. 940.302 (2) or 948.051.”² The court accepted written arguments from the parties. (30, 31, 21, 33). It then issued an oral ruling and entered a written order in accord with its oral ruling. (70, 38).

The circuit court determined that the affirmative defense statute was ambiguous, finding that the affirmative defense could either be: (1) available in any prosecution, or (2) only available in prosecutions of human trafficking offenses under Wis. Stat. § 940.302(2). Having found the statute ambiguous, the court concluded that the second interpretation should prevail because the first interpretation would lead to absurd results. (70:2-6) (App. 104-08). Ms. Kizer petitioned this Court for leave to appeal from the circuit court’s non-final order, pursuant to Wis. Stat. § 809.50. This Court granted the request.

Although there is disagreement about whether the Wis. Stat. § 939.46(1m) affirmative defense is

² These statutes are reproduced in the appendix to this brief at 140, 141, and 142.

legally available in Ms. Kizer's case, the parties and circuit court agreed that if it is available, it operates according to the burden-shifting procedure applicable to other statutory affirmative defenses: if the defendant produces "some evidence" to support the defense, the State must disprove it beyond a reasonable doubt. (69:22-23; 70:5; App. 132-33, 107). *See State v. Steinz*, 2017 WI 58, 375 Wis. 2d 572, 895 N.W.2d 796; *Moes v. State*, 91 Wis. 2d 756, 765-66, 284 N.W.2d 66 (1979).³

SUMMARY OF ARGUMENT

In this appeal, Ms. Kizer asks the Court to reverse the circuit court's incorrect legal interpretation of Wis. Stat. § 939.46(1m), the affirmative defense for human trafficking victims. She does not ask the Court to decide whether there is "some evidence" to support the affirmative defense such that it should be presented to the jury or whether she should prevail on the defense. Those questions are for the circuit court and jury to decide. *See State v. Knight*, 168 Wis. 2d 509, 518, 484 N.W.2d 540 ("the appellate court is not an initial fact finder").

As will be shown, the affirmative defense for human trafficking victims applies to "any offense" committed as a direct result of human and sex trafficking. It is not limited to prosecutions of trafficking crimes under Wis. Stat. § 940.302(2).

³ Section I.C.3. explains the burden-shifting procedure for applying the affirmative defense.

However, the defense is not limitless. The affirmative defense only applies to those offenses committed as a “direct result” of the trafficking victimization.

The legislature created the affirmative defense for human trafficking victims as part of a package of bills that either increased criminal liability for traffickers or added protection for trafficking victims. Subsection 939.46(1m) was enacted in 2007 WI Act 216, at the same time as Wis. Stat. §§ 940.302 and 948.051 (the statutes prohibiting trafficking). Act 216 also enacted statutes providing emergency assistance for trafficking victims, Wis. Stat. § 250.04(14)(a); limiting public hearings to protect victims of trafficking from “embarrassment and emotional trauma,” Wis. Stat. § 970.03(4)(a); and providing restitution for psychological services for trafficking victims, Wis. Stat. § 973.20(4m). This context supports an inclusive reading of the affirmative defense to protect victims of trafficking. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶48, 271 Wis. 2d 633, 681 N.W.2d 110.

Contrary to the circuit court’s ruling, the plain meaning of the statute does not lead to absurd results. Human trafficking is a complex evil. It can take the form of sex trafficking or labor trafficking and can be committed against both adults and children. Traffickers are skilled in manipulating and controlling their victims by both physical and psychological means.

As the Wisconsin Department of Justice explains, “no victim of trafficking has real freedom to leave because traffickers have used trickery and psychological and/or physical abuse to instill fear and maintain control.”

Traffickers use threats, deception, violence and coercion to impose physical and psychological tactics to maintain control of their victims . . . [victims] are often isolated and conditioned to resist cooperation with social services or the criminal justice system. . .[they] often do not immediately seek help or see themselves as victims due fear and manipulation by the traffickers . . .

Wisconsin DOJ, *Human Trafficking: A Guide for Criminal Justice Professionals*, 1 (2011).

It is not absurd to think that the legislature intended to create an affirmative defense to protect victims of trafficking from criminal liability for crimes committed as a direct result of their victimization.

ARGUMENT

Pursuant to Wis. Stat. § 939.46(1m), a victim of human trafficking has a complete affirmative defense to any offense committed as a direct result of the victimization.

A. Standard of review.

The issues presented in this appeal are issues of statutory construction. Statutory construction is subject to de novo review. *Noffke v. Bakke*, 2009 WI 10, ¶9, 315 Wis. 2d 350, 760 N.W.2d 156.

B. Principles of statutory construction.

The rules of statutory construction are well settled. The Wisconsin Supreme Court has explained:

[S]tatutory interpretation “begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.

Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related

statutes; and reasonably, to avoid absurd or unreasonable results. Statutory language is read where possible to give reasonable effect to every word. . . . Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history. “In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute.”

Kalal, 271 Wis. 2d 633, ¶¶45-46 (citations omitted).

If application of the *Kalal* methodology for statutory interpretation yields a plain, clear statutory meaning, the statute is applied accordingly. *Id.*, ¶46. Where there is no ambiguity, there is no need to consult extrinsic sources of interpretation, such as legislative history. *Id.*

If a statute is ambiguous, the court may look to legislative history to ascertain meaning. *Id.*, ¶50. Yet, legislative history may not be used to contradict plain meaning. *Id.*, ¶51. Whether a statute is ambiguous is a question of law. *P.A.K. v. State*, 119 Wis. 2d 871, 878-79 (1984). A statute is ambiguous if the “statutory language reasonably gives rise to different meanings.” *Kalal*, 271 Wis. 2d 633, ¶47 (ellipsis omitted).

- C. Subsection 939.46(1m) is a complete defense for victims of human trafficking whose offenses are a direct result of their victimization. It is not limited to prosecutions of trafficking offenses under Wis. Stat. § 940.302(2).

The State concedes that Ms. Kizer is a child sex trafficking victim as defined by Wis. Stat. § 948.051. (68:12-13). R.V. repeatedly sexually assaulted Ms. Kizer when she was 16 and 17 years old, and possibly younger. He filmed some of these assaults and filmed assaults of other children. The Kenosha Police Department was investigating him prior to his death. The question for this Court is when and how, as a matter of law, the affirmative defense in Wis. Stat. § 939.46(1m), applies to trafficking victims. The circuit court, as the factfinder, must then apply that standard to the facts presented by Ms. Kizer to determine whether she provided “some evidence” that the affirmative defense applies in this case.

Evaluating the language of Wis. Stat. § 939.46(1m), in context, and giving reasonable effect to every word, yields a plain statutory meaning: the affirmative defense is available in any prosecution of a trafficking victim whose crime was a direct result of their victimization.

Subsection 939.46(1m) reads:

(1m) A victim of a violation of s. 940.302 (2) or 948.051 has an affirmative defense for **any**

offense committed as a **direct result** of the violation of s. 940.302 (2) or 948.051 without regard to whether anyone was prosecuted or convicted for the violation of s. 940.302 (2) or 948.051.

(Emphasis added).

1. To whom does the affirmative defense apply?

Initially, the statute indicates to whom the affirmative defense applies: “a victim of a violation of s. 940.302(2) or 948.051 . . . without regard to whether anyone was prosecuted or convicted for the violation of s. 940.302(2) or 948.051.” The definition of “victim” includes “a person against whom a crime has been committed.” Wis. Stat. § 950.02(4)(a)1.

Both Wis. Stat. §§ 940.302(2) (Human Trafficking) and 948.051 (Trafficking a Child) prohibit various forms of human trafficking, including trafficking a child for commercial sex acts. A person is guilty of trafficking a child if he or she “knowingly recruits, entices, provides, obtains, harbors, transports, patronizes or solicits or knowingly attempts to recruit, entice, provide, obtain, harbor, transport, patronize, or solicit any child for the purpose of commercial sex acts.” Wis. Stat. § 948.051.

A “commercial sex act” includes, but is not limited to, sexual contact or intercourse “for which anything of value is given to, promised, or received,

directly or indirectly by any person.” Wis. Stat. § 940.302(1)(a)1.-3.

A “child” is a person who has not reached age 18. Wis. Stat. § 948.01(1).

It is not disputed that Ms. Kizer is a sex trafficking victim as defined by Wis. Stat. § 948.051.

2. To what offenses does the affirmative defense apply?

Next, the statute indicates what the affirmative defense applies to: “**any offense** committed as a **direct result** of the violation of s. 940.302(2) or 948.051.” (Emphasis added). The word “any” is not statutorily defined. Undefined words in a statute are given their common, ordinary, and accepted meaning. Wis. Stat. § 990.01(1); *Kalal*, 271 Wis. 2d 633, ¶45. This Court recently determined that the common meaning of “any” when used in a statute, is “one, some, or all indiscriminately of whatever quantity.” *Brown Cty. v. A.P.*, 2019 WI App 18, ¶12, 386 Wis. 2d 557, 927 N.W.2d 650 (consulting dictionary for plain meaning).

The use of the phrase “any offense”—without providing exceptions or limitations—means that the affirmative defense for trafficking victims potentially applies to any offense charged. However, it is important to note that this does not mean all victims of human trafficking automatically have an affirmative defense to “any offense” charged by virtue of their status as a victim. There still must be a

nexus between the victimization and the offense charged—hence, the “direct result” language. This makes sense. Human trafficking is characterized by complex dynamics of power and control. Victims of human trafficking may become involved in a number of offenses because of their victimization. DOJ Human Trafficking Guide at 11-12 (traffickers’ common methods of control include exploiting a victim’s drug addiction and “Coerce[ing] the victim into illegal acts then build[ing] ‘evidence’ of wrongdoing and convince[ing] the victim that he or she will go to jail if detected.”). These situations are fact specific, and as such, each case should be evaluated individually to determine whether the trafficking victim’s alleged offense was a “direct result” of his or her victimization.

The circuit court concluded that the Wis. Stat. § 939.46(1m) affirmative defense was available solely within prosecutions of human trafficking offenses charged under Wis. Stat. § 940.302(2) (38:1; App. 101), but this conclusion can only be reached by adding language to the statute. “It is a cardinal ‘maxim[] of statutory construction ... that courts should not add words to a statute to give it a certain meaning.’” *State v. Hinkle*, 2019 WI 96, 389 Wis. 2d 1, 935 N.W.2d 271 (citation omitted). The legislature could have limited the affirmative defense to § 940.302(2) offenses by enacting a law reading: “*any offense under s. 940.302 committed as a direct result of the violation of s. 940.302(2) or 948.051.*” But it did not. Instead, it enacted a law reading: “*any offense committed as a direct result of the violation of*

s. 940.302(2) or 948.051,” without limitation. *See State v. Lopez*, 2019 WI 101, ¶21, 389 Wis. 2d 156, 936 N.W.2d 125 (“When the legislature does not include limiting language in a statute, we decline to read any into it.”).

The circuit court’s restricted interpretation of the statute is also unreasonable and undermines the purpose of the statute, which is to protect victims of trafficking. It arbitrarily limits the defense to prosecutions under Wis. Stat. § 940.302(2) (Human trafficking), but not Wis. Stat. § 948.051 (Trafficking a Child). It also leaves vulnerable victims of trafficking whose crimes are intrinsic to their victimization. For example, an undocumented immigrant trafficked for farm labor who was compelled to use false identification would be criminally liable for a violation of Wis. Stat. § 943.201(2), a Class H felony. Or, a child sex trafficking victim who takes drugs at the direction of her abuser to facilitate acts of prostitution would be criminally liable for possession of a controlled substance under Chapter 961.

There is no limitation on the type of prosecution to which the affirmative defense for human trafficking victims is legally available. It potentially applies to “any offense.” However, the defense is not limitless. It is the “direct result” language that limits the defense.

The phrase “direct result,” like the term “any” is not statutorily defined, but does have ordinary, common, and accepted meaning. A “result” is “a consequence, effect, or conclusion.”⁴ To be “direct” means to be “characterized by [a] close logical, causal, or consequential relationship.”⁵ Determining a direct result is a fact-intensive inquiry. *See, e.g., Tri City Nat. Bank v. Federal Ins. Co.*, 2004 WI App 12, ¶18, 268 Wis. 2d 785, 674 N.W.2d 617 (bank’s financial loss from mortgage defaults was not a direct result of employee’s actions where mortgage defaults occurred years later after intervening events).

The circuit court ruled that the phrase “direct result” means that “*the* cause of the offenses listed in 940.302(2) was the victimization, by others, of the alleged perpetrator in this matter.” (38:1; App. 101) (emphasis in original). The court did not elaborate further. However, the court’s emphasis implies a sole cause. This is inconsistent with the established meaning of causation in the criminal law. To “cause” means that an actor’s conduct is a substantial factor, not sole factor, in the result. *See, e.g., State v. Block*, 170 Wis. 2d 676, 683, 489 N.W.2d 715 (Ct. App. 1992) (“The prosecution is required to prove beyond a reasonable doubt only that defendant’s acts were a

⁴ *Result*, Merriam-Webster Dictionary, available at, <https://www.merriam-webster.com/dictionary/result> (last visited 5/20/20).

⁵ *Direct*, Merriam-Webster Dictionary, available at, <https://www.merriam-webster.com/dictionary/direct> (last visited 5/20/20).

“substantial factor” in causing the victim’s death—not that they were the sole cause.”).

“Direct result” does not mean the sole cause of the offense. Rather, it means there is a close logical, causal, or consequential relationship between the offenses charged and the victimization. This is a fact-intensive inquiry where the circuit court initially determines whether there is “some evidence” that the offenses charged were the “direct result” of the victimization. Because the inquiry is fact-intensive, the analysis will vary case by case.

In making such a determination, the court will evaluate the facts in the light most favorable to the defense. *See Steinz*, 375 Wis. 2d 572, ¶13. Factors that may be helpful include: the trafficking victim’s age and mental capacity, the duration of the abuse, whether violence or force was involved, whether threats of deportation or arrest were utilized, whether the victim was isolated and made to be dependent on the trafficker, and whether the victim was subject to psychological abuse. DOJ Human Trafficking Guide at 10-11 (listing methods of control). Other relevant factors may include whether time elapsed between the trafficking crimes and the charged offense, the nature of the charged offense, and any intervening or independent factors.

The questions for the circuit court are: (1) is the charged individual a human trafficking victim, and if so, (2) was the offense charged a direct result of that victimization. Here, there is no dispute that

Ms. Kizer is a trafficking victim, as defined by Wis. Stat. § 948.051. As will be explained below, the question for the circuit court will be whether Ms. Kizer can present “some evidence” that the offenses charged were the “direct result” of her victimization. In other words, viewing the facts most favorably to Ms. Kizer’s defense, is there “some evidence” that the alleged offenses had a close logical, causal, or consequential relationship to R.V.’s victimization of Ms. Kizer.

3. How does the affirmative defense operate?

The parties and circuit court agree that if the affirmative defense for human trafficking victims is legally available in Ms. Kizer’s case, then it operates according to the burden-shifting procedure generally applicable to statutory defenses. (69:22-23; 70:5; App. 132-33, 107).

To be entitled to a jury instruction on the affirmative defense, the accused must present to the court “some evidence” to support the elements of the defense. *Steinz*, 375 Wis. 2d 572, ¶16. In determining whether the accused has presented “some evidence,” the court must evaluate the evidence in the light most favorable to the accused. *Id.*, ¶13. The court may not weigh the evidence or make credibility findings—this is the province of the jury. *Id.*, ¶58. Whether the accused has presented “some evidence” to support the elements of the defense is a question of

law, reviewed de novo but benefitting from the circuit court's analysis. *Id.*, ¶14.

If the circuit court determines that the accused has met their burden to show “some evidence” to support the defense, the court should admit evidence relevant to the defense and should instruct the jury on the defense. The State must disprove the affirmative defense beyond a reasonable doubt. *Moes*, 91 Wis. 2d, at 768.

In Ms. Kizer's case, the circuit court has not yet considered or determined whether Ms. Kizer presents “some evidence” to support the Wis. Stat. § 939.46(1m) affirmative defense. It should be the first court to do so. If on remand the circuit court finds that Ms. Kizer presents “some evidence” to support her affirmative defense under Wis. Stat. § 939.46(1m), the court should permit the jury to consider the defense.

4. Is the affirmative defense for human trafficking victims a complete affirmative defense to first-degree intentional homicide?

The State argues that if the affirmative defense is legally available in Ms. Kizer's case, it would operate to mitigate the charge of first-degree intentional homicide to second-degree intentional homicide rather than providing a complete defense. (31:3). The State is wrong. The plain language of Wis. Stat. § 939.46(1m) does not limit the affirmative defense for trafficking victims. Therefore, it provides

a complete defense to the charge of first-degree intentional homicide. This conclusion is supported by a comparison to closely-related statutes, which is part of the *Kalal* analysis. *Kalal*, 271 Wis. 2d 633, ¶46.

First, Wis. Stat. § 939.46(1), which codified the common law coercion defense,⁶ explicitly limits the coercion defense for first-degree intentional homicide charges. It states that the coercion defense “is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide.” Wis. Stat. § 939.46(1). No such language appears in Wis. Stat. § 939.46(1m).

Second, Wis. Stat. § 940.01(2) lists circumstances where first-degree intentional homicide is to be mitigated to second-degree intentional homicide. The list does not include the affirmative defense for human trafficking victims. It does include death “caused in the exercise of a privilege under s. 939.45(1).” Wis. Stat. § 940.01(2)(d). Subsection 939.45(1) authorizes use of a privilege “[w]hen the actor’s conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 939.46 or 939.47.”⁷

⁶ See *Moes*, 91 Wis. 2d 756, at 764-65 (the 1955 criminal code incorporated the common law defense of coercion in Wis. Stat. § 939.46).

⁷ Both Wis. Stat. §§ 939.45 and 939.46 were enacted in 1955. See § 1, ch. 696, Laws of 1955. The mention of “coercion” in Wis. Stat. § 939.45 should be

Coercion, as defined by common law and codified in Wis. Stat. § 939.46(1), is “[a] threat by a person other than the actor’s coconspirator which causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm to the actor or another and which causes him or her so to act.” The coercion defense, as explained in Wis. Stat. §§ 940.01(2)(d) and 939.46(1), mitigates first-degree intentional homicide to second-degree intentional homicide.⁸

Consistent with Wis. Stat. §§ 940.01(2)(d) and 939.45(1), the statute defining the necessity defense, Wis. Stat. § 939.47, uses the same language excepting first-degree intentional homicide from a complete necessity defense.⁹ Again, the affirmative defense for human trafficking victims, Wis. Stat. § 939.46(1m), does not include any such language.

interpreted to refer to sub. (1), “coercion,” which is the codification of the common law defense of coercion.

⁸ Notably, sub. (1m) is not a paragraph under sub. (1). Instead, it is an independent subsection. Had the legislature sought to modify sub. (1), it would have inserted a paragraph.

⁹ Pressure of natural physical forces which causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to the actor or another and which causes him or her so to act, *is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to second-degree intentional homicide.* Wis. Stat. § 939.47 (emphasis added).

Subsection 939.46(1m) created a complete defense for “any offense committed as a direct result” of the trafficking violation. This is supported by the plain language of Wis. Stat. § 939.46(1m), and a comparison to closely-related statutes.

D. The plain meaning of Wis. Stat. § 939.46(1m) does not lead to absurd results.

There are instances in which courts will not apply a statute according to its plain language if doing so would lead to absurd results, but this will occur only rarely. “Absurd results include results the legislature could not have intended.” *Blasing v. Zurich Am. Ins. Co.*, 2013 WI App 27, ¶13, 346 Wis. 2d 30, 827 N.W.2d 909.

“The standard is high. . .”:

It is not enough for a court to find that upon application of the plain meaning of a statute, a given outcome is foolish. Instead, a court so finding must be convinced that the result is so absurd that [the legislature], not the court, could not have intended such a result.

State v. Matthews, 2019 WI App 44, ¶17, 388 Wis. 2d. 335, 933 N.W.2d 152. “Stated another way, it must be ‘unthinkable’ for the legislature ‘to have intended the result commanded by the words of the statute.’” *Id.* (citation omitted).

Here, the circuit court provided the following comparison as a purported absurd result:

[A] victim of repeated sexual assault, a Class B felony, who kills their abuser under circumstances where they reasonably believe that their actions are the only means of preventing imminent or great bodily harm, under those circumstances that person would be afforded a defense that merely turns a first-degree intentional homicide into a second-degree second – excuse me – a second-degree intentional homicide. Compare that to a victim of sexual trafficking who is threatened with financial harm. Even if the harm never occurs, that person would have available to them the affirmative defense that the prior victim did not.

(70:4; App. 106).

The circuit court's comparison is flawed. The court's first example contemplates self-defense but misunderstands the law of self-defense. There are two forms of self-defense: imperfect and perfect. Compare Wis. Stat. § 940.01(2)(b) with Wis. Stat. § 939.48. See also, *State v. Peters*, 2002 WI App 243, 258 Wis. 2d 148, 653 N.W.2d 300. Imperfect self-defense applies where the actor believed there was imminent danger and that the use of deadly force was necessary to terminate the danger, but those beliefs were *unreasonable*. Imperfect self-defense mitigates first-degree intentional homicide to second-degree intentional homicide. By contrast, perfect self-defense applies where the actor's beliefs were *reasonable*.

Perfect self-defense is a complete defense. So, if as the circuit court's example assumes, the actor "reasonably believed" their actions were the only means of preventing imminent or great bodily harm, the actor would be afforded a complete defense.

Regardless, the affirmative defense at issue here is not the same as self-defense. The legislature could have created a self-defense provision specific to trafficking victims, but it did not. Instead, it created a provision that asks whether the actor was a victim of trafficking, and if so, whether the alleged offenses were a direct result of the victimization. As explained earlier, this is consistent with the package of legislation increasing criminal liability for trafficking offenses while adding protections for trafficking victims.

The court's second example overlooks the "direct result" requirement of Wis. Stat. § 939.46(1m). A victim of human trafficking who tries to justify a homicide by saying they were threatened with financial harm will still be required to show that the homicide was a "direct result" of their victimization. A direct result inquiry will involve reasonable consideration of all of the relevant circumstances. The factfinder is not bound by the victim's purported justification for a crime.

The State also argues that Ms. Kizer's interpretation of the statute is absurd, but for a different reason. It submits that it would be absurd for sub. (1m) of Wis. Stat. § 939.46 to be a complete

defense to first-degree intentional homicide while sub. (1) mitigates first-degree intentional homicide to second-degree homicide. (31:3). This is not an absurd result because the subsections apply to different factual circumstances. Subsection (1) contemplates that a “threat” was made toward the actor. By contrast, sub. (1m) contemplates that the actor was the victim of human trafficking and the crime was a direct result of that victimization. By definition, human and trafficking involve egregious criminal conduct. All violations of Wis. Stat. §§ 940.302(2) and 948.501 are Class D and C felonies. It makes sense to treat a “threat” differently than completed trafficking crimes that directly result in the charged offense.

Had R.V. been charged for his horrific crimes, he would have been facing not just one life sentence, but many. His crimes against Ms. Kizer alone, putting aside his many other victims, include child enticement (Wis. Stat. § 948.07, D felony), soliciting a child for prostitution (Wis. Stat. § 948.08, D felony), exposing genitals to a child (Wis. Stat. § 948.10, I felony), sexual exploitation of a child (Wis. Stat. § 948.501), C felony), possession of child pornography (Wis. Stat. § 948.12, D felony), and sex trafficking a child, (Wis. Stat. § 948.05(1), C felony).

It is not “unthinkable” for the legislature to have intended to create an affirmative defense unique to the trafficking context to protect victims of trafficking from criminal liability for any offense committed as a direct result of their victimization. *See Matthews*, 388 Wis. 2d. 335, ¶17 (for plain

meaning to be absurd, it must be “unthinkable” for the legislature “to have intended the result”). If, on remand, Ms. Kizer meets her threshold showing that she was a victim of human trafficking and the charged offenses are a direct result of her victimization, the jury should be permitted to consider the Wis. Stat. § 939.46(1m) affirmative defense.

CONCLUSION

Ms. Kizer respectfully asks the Court to reverse the circuit court’s order and remand with directions consistent with the Court’s decision.

Dated and filed by U.S. Mail this 2nd day of June, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,958 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated and filed by U.S. Mail this 2nd day of June, 2020.

Signed:

KATIE R. YORK
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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APPENDIX

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