

FILED**09-24-2020****CLERK OF WISCONSIN
COURT OF APPEALS**

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

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

CHRYSTUL D. KIZER,

Defendant-Appellant.

**NON-PARTY BRIEF OF LEGAL ACTION OF
WISCONSIN, INC., AND LOTUS LEGAL CLINIC,
INC., IN SUPPORT OF DEFENDANT-APPELLANT
CHRYSTUL KIZER**

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

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INTRODUCTION

This year marks the 20th anniversary of the Trafficking Victims Protection Act of 2000 (TVPA),¹ the first comprehensive federal legislation designed to prevent human trafficking and protect trafficking victims. Two decades later, every state across the nation has adopted variations of the TVPA to criminalize human trafficking. Recognizing that the exploitation of human trafficking victims often exposes them to criminal liability, the majority of states have created affirmative defenses for trafficking victims who face criminal charges as a result of their being trafficked. Wisconsin is among 31 states² to have enacted a such a law.³

Ms. Kizer's case presents the first opportunity for a Wisconsin court to confirm when this defense may be employed. Her case illustrates the complexity of human trafficking, how the criminal justice system can fail trafficking victims, and why the Wisconsin legislature therefore provided an affirmative defense under Wis. Stat. § 939.46(1m) for trafficking victims charged with "any offense" as a direct result of their being trafficked.

ARGUMENT

This Court should reverse the lower court's erroneous conclusion that Wisconsin's human trafficking affirmative defense applies only to the charge of human trafficking. This

¹ Trafficking Victims Protection Act of 2000, S. 2414, 106th Cong.

² See *Human Trafficking State Laws*, National Conference of State Legislatures, <https://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx#tabs-2> (last visited Sept. 17, 2020).

³ Wis. Stat. § 939.46(1m).

brief agrees with Ms. Kizer that the plain language of Wis. Stat. § 939.46(1m) creates an affirmative defense for “any offense” committed as a direct result of being trafficked. Other closely-related anti-trafficking statutes, and the reasonableness of making the affirmative defense available to “any” such offense in light of the unique trauma that trafficking inflicts on its victims, show that the legislature intended for this defense to apply in a case such as this.

I. Closely-Related Human Trafficking Statutes Support Ms. Kizer’s Plain Language Interpretation of Wis. Stat. § 939.46(1m).

We concur with Ms. Kizer that the plain language of Wis. Stat. § 939.46(1m) provides that “the affirmative defense is available in any prosecution of a trafficking victim whose crime was a direct result of their victimization.” (*See* Appellant’s Brief at 10.) Because “[c]ontext is important to meaning,” even in the plain language analysis of a statute, this Court must consider other “closely-related statutes.” *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶¶ 45–46, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124.

Statutes are “closely-related” “when they are in the same chapter, reference one another, or use similar terms” or are within the “same statutory scheme.” *State v. Reyes Fuerte*, 2017 WI 104, ¶ 27, 378 Wis.2d 504, 520–21, 904 N.W.2d 773, 780–81 (internal citations omitted). Under the doctrine of *in pari materia*, “courts read, apply, and construe together statutes and regulations relating to the same subject matter or having a common purpose.” *State v. Lasecki*, 2020 WI App 36, ¶ 33, 392 Wis. 2d 807, 829–30, 946 N.W.2d 137, 148

(internal citations omitted). This doctrine “applies with particular force to statutory provisions enacted in the same legislative act on the same subject.” *Id.*

Because they are “closely-related” to Wis. Stat. § 939.46(1m), this Court should consider the anti-trafficking laws passed in the same Act as this affirmative defense,⁴ as well as Wis. Stat. § 973.015(2m), which authorizes courts to vacate the records of sex trafficking victims, thus sharing a common purpose and subject matter as this affirmative defense.⁵ *See Kalal*, 2004 WI 58, ¶¶ 45–46; *Reyes Fuerte*, 2017 WI 104, ¶ 27; *Lasecki*, 2020 WI App 36, ¶ 33.

A. The Act that passed Wis. Stat. § 939.46(1m) shows the legislature’s aim to rehabilitate victims of human trafficking.

The legislature enacted Wis. Stat. § 939.46(1m) as part of a suite of statutes designed to prevent human trafficking and protect its victims. Notably, the Act first criminalized the human trafficking of adults and children.⁶ Beyond penalties for traffickers, the Act created and increased protections for trafficking victims: enhancing emergency services and support,⁷ establishing child protective interventions,⁸ and expanding restitution to cover victims’ psychological care.⁹ These laws, passed alongside Wis. Stat. § 939.46(1m), reflect a national trend of laws recognizing the unique psychological

⁴ 2007 Wisconsin Act 116 (2007 S.B. 292).

⁵ Wis. Stat. § 973.015(2m) (providing that a sex trafficking victim may petition the court to expunge or vacate a prostitution conviction resulting from their trafficking victimization); 2013 Wisconsin Act 362 (2013 A.B. 620).

⁶ Wis. Stats. §§ 940.302, 948.051.

⁷ Wis. Stat. § 250.04(a).

⁸ Wis. Stat. § 48.02(1)(cm).

⁹ Wis. Stat. § 973.20(4m).

damage caused by trafficking, as well as the heightened risk that victims will be exposed to criminal liability by the very nature of their victimization.¹⁰

B. Wisconsin's vacatur statute demonstrates the legislature's efforts to prevent victims of human trafficking from sustaining a criminal record as a result of their being trafficked.

Along these lines, two Wisconsin statutes address the intersection of trafficking victimization and a resulting criminal record: the affirmative defense presented in Ms. Kizer's case and the vacatur statute. The former prevents trafficking victims from incurring a record by giving victims an affirmative defense to "any offense" that results directly from their being trafficked.¹¹ The latter provides victims of sex trafficking a way to clear their names from prostitution convictions that resulted from their being trafficked.¹² Although enacted six years apart and situated in different chapters of the law, both statutes provide recourse to victims who face criminal consequences because they were trafficked. Together, these statutes show that the legislature intends for trafficking victims facing subsequent criminal repercussions to have the opportunity to present relevant evidence in court about their victimization so that the legal system can fully and fairly assess their culpability.¹³

¹⁰ See *Working Solutions for Criminal Record Relief: Recommendations for Prosecutors Serving Victims of Human Trafficking*, American Bar Association Commission on Domestic & Sexual Violence (2019), <https://freedomnetworkusa.org/app/uploads/2020/06/SRP-Workable-Solutions-November-2019.pdf>.

¹¹ Wis. Stat. § 939.46(1m).

¹² Wis. Stat. § 973.015(2m).

To this end, unlike in Wis. Stat. § 939.46(1), Wis. Stat. § 939.46(1m) does not merely mitigate charges.¹⁴ Wisconsin's vacatur statute does not mitigate, but rather *vacates* a victim's resulting record. Likewise, here, the legislature intends to provide trafficking victims the opportunity for a complete defense to any crimes charged as a result of their being trafficked. The legislature chose not to include mitigation language in Wis. Stat. § 939.46(1m), as it did in § 939.46(1), a neighboring and thus closely-related statute.

Further, vacatur for human trafficking victims only applies to prostitution charges, emphasizing the error of the trial court in finding that Wis. Stat. § 939.46(1m) only applies to trafficking charges. Vacatur acknowledges the possibility that someone could face prostitution charges as a result of being trafficked. Given this, it is incongruous to believe that the legislature would have provided an affirmative defense in a sister statute for "any offense" directly resulting from trafficking without making that defense available, at a minimum, to prostitution charges. Accordingly, the legislature could not have intended "any offense" in Wis. Stat. § 939.46(1m) to only apply to trafficking charges, as the trial court found.

These closely related statutes show that the legislature seeks to rehabilitate trafficking victims, not to punish them for activities resulting from circumstances that they, by

¹⁴ Wis. Stat. § 939.46(1).

definition, did not control.¹⁵ The Court should thus interpret Wis. Stat. § 939.46(1m) exactly as written: this affirmative defense is available to victims for literally “any offense.”

II. Moreover, It Is Not Absurd That the Legislature Intended for Wis. Stat. § 939.46(1m) to Be a Complete Defense to Any Offense Resulting from Being Trafficked Because Trafficking, by Definition, Removes the Power from Victims to Control Their Resulting Circumstances.

Under *Kalal*, the Court must discern the statute’s plain meaning by reading the language “reasonably, to avoid absurd or unreasonable results.” 2004 WI 58, ¶¶ 45-46. The litany of anti-trafficking laws in Wisconsin show that the legislature recognizes the overwhelming consensus that trafficking imposes a uniquely grave trauma and vicious cycle on its victims. These dynamics further demonstrate the reasonableness of the legislature providing under Wis. Stat. § 939.46(1m) a complete defense to any offense committed as a direct result of trafficking. The State asks the Court to ignore this, suggesting that the Court should interpret Wis. Stat. § 939.46(1m) more so in the context of the coercion and necessity defenses.

A. Coercion in the context of sexual exploitation generally involves a prolonged victimization vastly different than what is contemplated by Wis. Stat. § 939.46(1).

In the context of human trafficking, “coercion” is not comparable to a “threat” which causes a person to believe

¹⁵ See Francisco Zornosa, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 177 (2016); see also Jessica Aycock, *Criminalizing the Victim: Ending Prosecution of Human Trafficking Victims*, 5 CRIM. L. PRAC. 5, 16 (2019).

their “act is the only means of preventing imminent death or great bodily harm.”¹⁶ Coercion in the trafficking context involves control asserted through manipulation, deception, and/or physical force. The “threat” is not necessarily a single episode—it can involve a sustained period of traumatic episodes akin to the experience of torture victims.

Coercion often begins with a trafficker identifying and manipulating a victim’s vulnerabilities, for instance the need for financial stability or for love and belonging.¹⁷ Child sex traffickers have been said to be especially attuned to how these vulnerabilities can manifest in young people.¹⁸

Often, sex traffickers recruit victims by first acting as a romantic partner.¹⁹ Ultimately, the trafficker takes advantage of that emotional bond to manipulate their victim into performing acts that they otherwise would not choose to perform. The line erodes between “choice” and “force.”²⁰ Once victims lose autonomy over their choices and bodies, for example through repeated sexual and emotional violence, their will, too, can diminish.²¹ Still, the dynamic can create a

¹⁶ Wis. Stat. § 939.46(1).

¹⁷ See Representative Ann Wagner & Rachel Wagley McCann, *Policy Essay: Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 701, 707 (2017).

¹⁸ See e.g., Juliana Spano, *Prevention Not Punishment: Child Victims of Sex Trafficking Must Be Treated Not Detained*, 48 HOFSTRA L. REV. 253, 269 (2019); Alyssa N. Daniels, *Limping Toward Decriminalization: The Case Act, De Facto Decriminalization of Domestic Minor Sex Trafficking Victims, and 2-Way CCTV*, 88 S. CAL. L. REV. 1421, 1431 (2015); Jasmine Phillips, *Black Girls and the (Im)Possibility of a Victim Trope: The Intersectional Failures of Legal and Advocacy Interventions in the Commercial Sexual Exploitation of Minors in the United States*, 62 UCLA L. REV. 1642, 1648 (2015).

¹⁹ See *supra*, Wagner & McCann, note 17.

²⁰ *Id.*

²¹ *Id.*

“trauma-bond,” much like the complex PTSD syndrome torture victims can develop with their assailants.²²

These realities can become so consuming and treacherous that a trafficking victim feels they have no way out of the relationship with their trafficker, nor the acts to which the trafficking leads. Reasonably, the legislature tailored an affirmative defense for trafficking victims to address this unique pattern of coercion. Doing so, the legislature created a complete defense to liability for trafficking victims in order to confront the grave, ongoing nature of the threat and potential resulting criminal charges that would not fit neatly into the overly narrow legal standard for coercion that previously existed.

B. Ms. Kizer’s interpretation of Wis. Stat. § 939.46(1m) reflects the victim-offender duality common to the crime of sex trafficking.

Ms. Kizer’s interpretation of the statute also reflects an understanding of the difficulties sex trafficking victims have accessing justice in the criminal legal system.

Just this year, the Wisconsin Department of Justice (DOJ) itself released a report documenting the extent of human trafficking in Wisconsin and the challenges combatting it. The report found that Wisconsin law enforcement struggles to see trafficking victims as victims, instead often mistaking them as criminals.²³ Racist

²² See Brittany Salinas, *Why Don’t Victims of Trafficking Just Run Away?*, Operational Underground Railroad (Mar. 31, 2018), <http://ourrescue.org/log/dont-victims-trafficking-just-run-away/>.

²³ Wisconsin Department of Justice (Bureau of Justice Information and Analysis, Division of Criminal Investigation, & Office of Crime Victim Services), *2019 Law Enforcement Assessment of Sex Trafficking in Wisconsin*, at 3-4, 6, 16-17, 26.

stereotypes often exacerbate this problem, particularly for Black girls, who disproportionately shoulder the violence of sex trafficking in this country.²⁴ Some trafficking victims even face sexual exploitation or other physical violence from law enforcement officers.²⁵

Traffickers often use this dynamic against their victims, telling them that authorities will not help them or retaliating against their victims if they do try to report.²⁶ Victims in such circumstances face an impossible dilemma: continue to live under the threat of power and violence at the hands of their trafficker, or risk the threat of power and violence at the hands of the state.

As the DOJ states, victims under these circumstances “often do not believe they have the power, means or opportunity to disengage.”²⁷ They may feel that the only way to escape is to take matters into their own hands. Sometimes, killing a trafficker or other abuser can emerge as the most viable path for overpowering them in order to get out—even though this path, by its nature, requires the victim to use greater force.²⁸

Stereotypes about how a victim should look and act can limit our understanding about the circumstances that can

²⁴ See Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1482-87, 1496-1502 (2015); see also Linda Smith & Samantha Healy Vardaman, *Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 267 (2010).

²⁵ See e.g., Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Victims*, 24 WM. & MARY J. WOMEN & L. 39, 69-76, 82, 87-89 (2017).

²⁶ See Butler, *supra* note 24, at 1498 (citing U.S. DEPT STATE, TRAFFICKING IN PERSONS REPORT 2013); Aycock, *supra* note 15, at 5, 20.

²⁷ Wisconsin Department of Justice, *supra* note 23, at 18.

²⁸ See Lauren Danice Shuman, *Pulling the Trigger: Shooting down Mandatory Minimum Sentencing for Victims Who Kill Their Abuser*, 56 HOWARD L.J. 983, 985-86 (2013).

compel a victim to act in self-defense. We do not expect victims to present as empowered, even or especially if they have overcome the power exerted onto them by their abuser.²⁹ In fact, if a victim fights back, they can lose sympathy and credibility in the eyes of the legal system.³⁰ This is especially true for Black victims, and can be particularly true for victims of trafficking, who are often thought to need rescuing.³¹

The Wisconsin legislature creating a coercion defense for a trafficking victim who kills their trafficker reasonably accounts for such a dilemma, as encompassed by the language chosen by lawmakers: the defense applies to “any offense” committed by a victim as a direct result of their trafficking. It is not absurd that legislators provided an affirmative defense that could apply to violent crimes, including homicide. In fact, it is reasonable that they did so, recognizing that some victims might need to establish that their victimization led to the violence. The peculiar dynamics of trafficking thus inform the meaning of Wis. Stat. § 939.46(1m), which this Court should consider under *Kalal*. 2004 WI 58, ¶¶ 45-46.

²⁹ Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 325 (1992).

³⁰ Jacobs, *supra* note 25, at 91-92.

³¹ See Walker, *supra* note 29, at 329-330; Butler, *supra* note 24, at 1505 Jacobs, *supra* note 25, at 91-92, 95-96.

CONCLUSION

The full context of other anti-human trafficking laws, alongside the impossible dilemmas that victims face when coerced by their traffickers, illuminates why and how Wisconsin's legislature provided an affirmative defense for trafficking victims charged with "any offense" that arose as a direct result of trafficking, including those charged here.

For these reasons, and those argued in Ms. Kizer's brief, this Court should reverse the circuit court's order and remand with instructions for the court to correctly apply Wis. Stat. § 939.46(1m).

Dated this 18th day of September, 2020.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,651 words.

Dated this 21st day of September, 2020.

Legal Action of Wisconsin, Inc.
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I further certify that a copy of this certificate has been served with this brief, filed with the Court, and served on all parties either by electronic filing or by paper copy.

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