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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

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

In its response brief, the State backtracks on its concession that Ms. Kizer is a victim of Volar's child sex trafficking. It denies Ms. Kizer's victimhood, instead treating her as just a prostitute and her abuser as simply a "john." (Response, 11). Volar was using children for commercial sex, including Ms. Kizer. Using a child for commercial sex is the definition of child sex trafficking under Wis. Stat. § 948.051.[1] The State has not disputed that police and prosecutors were aware of Volar's numerous crimes against children, including Ms. Kizer because they collected photo and video evidence of Volar filming himself in the act of sexually abusing minors. (68:14-17). Still, the State did not protect those victims. The extent of Ms. Kizer's victimization is not at issue here, as the facts have not yet been adjudicated. However, the State's narrow view of child sex trafficking victims is important context in interpreting s. 939.46(1m).

[1] In the trial court, the State agreed that Volar violated this statute, but minimized it as a "consumer" and "customer" situation. (68:13).

The State's position exemplifies why the legislature enacted special human trafficking offenses and protections for trafficking victims. Myths and misconceptions about human trafficking persist. The State often fails to see trafficking victims, especially Black girls, as victims in need of protection. *See* Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1496-1502 (2015). Given this failure, the DOJ itself has emphasized the need to provide police and prosecutors with specialized training to identify and treat victims of trafficking as *victims*, not criminals. Wisconsin Department of Justice, 2019 Law Enforcement Assessment of Sex Trafficking in Wisconsin, 4 (2019).

The affirmative defense statute for trafficking victims should be interpreted according to its plain meaning. The statute is not ambiguous, nor is its plain meaning absurd. On remand, Ms. Kizer should be permitted to present evidence in support of her defense and if she meets her showing, the defense should be presented to the jury. The jury is then free to accept the defense or reject it.

A. Agreement between the parties.

The following are points of agreement between the parties:

(1) the circuit court's interpretation of s. 939.46(1m) is incorrect because:

(a) the defense is not limited to prosecution of human trafficking offenses under s. 940.302(2). Instead, it potentially applies to any charged offense; and

(b) direct result does not mean sole cause;

(2) the affirmative defense is subject to the "some evidence" burden-shifting analysis; and

(3) there has been no evidentiary hearing, therefore, on remand Ms. Kizer should be permitted to present evidence in support of her defense.

(Response, 10).

Still, some clarification is needed on the latter two points. Although the State agrees that there has been no evidentiary hearing (Response, 3, n. 2), it still argues the State has "strong evidence" to support its theory of the case and "all the evidence" suggests the State's theory is correct. This case is pre-trial. The State has made its allegations, but Ms. Kizer has not had her day in court to defend against those allegations or tell her side of the story. The State refers to testimony from the preliminary hearing, but this testimony was introduced for a strictly limited purpose. It did not result in any factual findings, only a finding that the State's charges were plausible. *State v. O'Brien*, 2014 WI 54, ¶24, 354 Wis. 2d 753, 850 N.W.2d 8. Preliminary hearings are not "mini-trials." *Id.* (citations omitted).

At this point, no evidence has been deemed admissible for trial, including Ms. Kizer's alleged statements. For those statements to be admissible, the State must meet its considerable burden of proof at a *Miranda*/*Goodchild*[2] hearing. Therefore, the State's claims that "all the evidence" supports its theory are either disingenuous or very misguided. The State faults Ms. Kizer for not making a formal offer of proof. (Response, 3, n.3). The court ruled that the defense was not legally available in her case due to the charged offenses. The court thus did not reach the point of accepting an offer of proof.

As the State agrees, this Court should not make any factual findings. It is for the circuit court to decide whether Ms. Kizer can present "some evidence" to support her affirmative defense. That decision will not be based on the State's theory of the case. Instead, the court will view the proffered evidence in the light most favorable to Ms. Kizer. *State v. Head*, 2002 WI 99, ¶115, 255 Wis. 2d 194, 648 N.W. 2d 413. Once the court determines that some evidence supports Ms. Kizer's defense, the jury will apply the defense to its findings of fact.

Although the parties agree on these points, there are two primary points of disagreement: (1) whether the affirmative defense is a complete defense to any charged offense (it is); and (2) whether

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966); *State ex. rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d753 (1965).

"direct result" is defined by tort law concepts of physical causation (it is not).

B. The plain language of s. 939.46(1m) constitutes a complete defense to "any offense."

The affirmative defense for trafficking victims does not treat certain charged offenses differently than others. Instead, it applies to "any offense," and applies to those offenses in the same manner. The State argues that first-degree intentional homicide warrants different treatment. Its argument relies on the interplay of two statutes: the first-degree intentional homicide statute, s. 940.01, and the privilege statute, s. 939.45. The first-degree intentional homicide statute contains mitigation language for certain situations. One situation is where the privilege statute, s. 939.45(1), applies. Subsection 940.01(2)(d) provides: "*Coercion; necessity*. Death was caused in the exercise of a privilege under s. 939.45(1)." In turn, the privilege provision, s. 939.45(1), applies "[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."

The question is: what is "coercion . . . under s. 939.46?" The State argues it is the entire section, i.e. all four subsections, including sub. (1m), the human trafficking defense at issue here. (Response, 13). This is wrong for several reasons. Instead, "coercion" is common law coercion, which was codified in s. 939.46(1).

The privilege statute, s. 939.45, was enacted in the same act that created s. 939.46. Ch. 696, § 1, Laws of 1955. Originally, s. 939.46 only contained the common law coercion defense, which 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." *Moes v. State*, 91 Wis. 2d 756, 764-65, 284 N.W.2d 66 (1979) (explaining that s. 939.46 was a codification of common law coercion).

The affirmative defense here, s. 939.46(1m), was enacted more than 50 years later in 2008. The State suggests that its placement under 939.46 means it is a specific application of s. 939.46(1) coercion. (Response at 13-15). The problem with this argument is that it renders s. 939.46(1m) superfluous. If the trafficking defense met the pre-existing coercion defense in s. 939.46(1), it would add nothing to the law. "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *State ex. rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. The trafficking defense involves the use of power and control thus making it similar to, but not the same as, the coercion defense.

This explains why both the coercion defense and the trafficking defense are positioned under s. 939.46.[3]

Application of the first-degree intentional homicide mitigation language to each of the s. 939.46 subsections would be nonsensical. Consider sub. (3). This provision, enacted in 2018,[4] is also under the same statute as coercion, but it would be unreasonable to argue that the mitigation of first-degree intentional homicide to second-degree applies. This is because the defense does not apply to the crime of first-degree intentional homicide at all. Instead, it explicitly **excludes** all crimes **except** for certain firearm possession offenses brought against a petitioner in an injunction proceeding. Wis. Stat. § 939.46(3). It would not make sense for the first-degree intentional homicide and privilege statutes' reference to "coercion" to include this provision. Instead, the privilege statute's reference to "coercion. . . under s. 949.46" refers to the coercion defense in sub. 939.46(1).

The State does not explain why, if the legislature sought to create a trafficking defense that provided a complete defense to some charges but a mitigation defense to first-degree intentional homicide, it would not have included mitigation language, as it chose to do with coercion and

[3] Section 4.11 of the Wisconsin Bill Drafting Manual instructs drafters to place new statutes where they fit best, while avoiding creating new sections.

[4] 2017 Wis. Act 145 (published Mar. 29, 2018).

necessity. The mitigating language used in the coercion and necessity statutes is conspicuously missing in s. 939.46(1m). *See* Wis. Stat. §§ 939.46(1) and 939.47 ("except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide."). Unlike coercion and necessity, the trafficking defense applies to "**any offense** committed as a direct result of the violation of s. 940.302(2) or 948.051," without limitation. Wis. Stat. § 939.46(1m) (emphasis added).

The plain meaning of the statute is clear; however, Ms. Kizer will briefly address what she can discern from the State's argument regarding legislative history and the Polaris Model's affirmative defense. (Response, 15-18). The State acknowledges that the Legislature was aware of this model defense and chose not to adopt it. (Response, 16). But notably, the Polaris Model defense uses the terms "coercion" and "duress," whereas Wisconsin's statute does not. To explain this difference the State asserts that, "unlike the Polaris Model, Wisconsin law expressly incorporates coercive behavior into the very definition of criminal trafficking." (Response, 17). But in fact, the Polaris Model **also** expressly incorporates coercive behavior into their definitions of trafficking crime.[5] *See, also,* 22 U.S.C. § 7102(9) (force, fraud,

[5] Polaris Project, *Model Elements of Comprehensive State Legislation to Combat Trafficking in Persons*, http://www.markwynn.com/trafficking/model-comprehensive-state-legislation-to-combat-trafficking-in-persons-2006.pdf (Nov. 2006).

coercion, inducement). The State's attempt to use legislative history to undercut the plain language of s. 939.46(1m) is unpersuasive.

The State's reliance on proposed legislation is even farther afield, and the State wisely only argues it in passing. (Response, 26). The proposed self-defense bill failed to pass in April 2020—likely because Wisconsin already has an affirmative defense for trafficking victims: s. 939.46(1m). The affirmative defense for victims of human trafficking applies to "any offense" that is a direct result of the trafficking, without exception. As explained next, it is the "direct result" element that limits the defense.

C. "Direct Result" is not defined by tort law causation. It is a fact-intensive inquiry based on the common, ordinary definition of direct result.

The State agrees that "direct result" does not mean the trafficking victimization was the sole cause of the alleged offense. (Response, 21). However, it argues "direct result" should be defined by reference to tort law causation. The State posits that direct result means both: (1) 'but-for" cause and (2) proximate or legal cause – without intervening factors – of the alleged offense. (Response, 19-20). This approach unnecessarily complicates the straightforward language of the statute – "direct result" – and will confuse rather than assist the jury.

Wisconsin criminal law does not discuss proximate cause. This is a tort law principle – or at least it used to be. In Wisconsin, proximate cause has been replaced with consideration of six public policy factors, not relevant here. These policy factors are evaluated by a judge, not a jury. In a criminal case a defendant has a constitutional right to a trial by jury on all elements of the offense. *United States v. Gaudin*, 515 U.S. 506, 522–23 (1995). Juries are not instructed on "policy factors" or how to apply them.

As part of its argument on proximate cause, the State discusses "intervening factors."[6] (Response, 21-22). The State's citation on this point is to *State v. Serebin*, 119 Wis. 2d 837, 849, 350 N.W.2d 65 (1984). (Response, 21). However, *Serebin* does not discuss intervening factors. This is because Wisconsin's test for criminal causation is the substantial factor test, which does not involve consideration of intervening factors. *See State v. Below*, 2011 WI App 64, ¶33, 333 Wis. 2d 690, 799 N.W.2d 95 (affirming denial of intervening cause instruction and reiterating the substantial factor test). To the extent the State relies on federal law, it forgets that Wisconsin has its own substantive body of common law that is not subservient to federal law, except on matters of federal constitutional right. (*See* response at 20).

[6] Wisconsin tort law no longer uses this term either. *Fandrey ex rel. Connell v. American Family Mut. Ins. Co.*, 2004 WI 61, ¶12 n. 8, 272 Wis. 2d 46, 680 N.W.2d 345.

The State's proffered concepts of causation are inapt because they deal with physical causation (e.g. the injuries from a car crash). *See Serebin*, 119 Wis. 2d at 842-51 (considering whether physical harm was caused by the defendant's act or omission). Although the term direct result involves a question of causation, it is not about physical causation. It is about the results of complex trauma and abuse on human behavior. As amici explain, trafficking victims "are at particular risk of 'severe and potentially life-threatening' physical and mental health problems, including complex PTSD, dissociation, and self-injurious behaviors." (Amici Curiae Brief of Legal Momentum and Harvard Law School's Gender Violence Program, 4-5) (citations omitted). This trauma "profoundly alters victims' cognitive functioning and ability to make autonomous decisions" and is especially pronounced in child trafficking victims. (*Id.* at 5). Therefore, the factfinder will need to evaluate more than just physical causation. It must also evaluate the effects of trauma on the trafficking victim as it relates to the charged offenses, which will often be explained through an expert witness.

As Ms. Kizer argued in her appellant's brief in this context, direct result should simply be given its common and ordinary meaning.[7] Were the charged

[7] The State mischaracterizes Ms. Kizer's definition of direct result. She did not argue she only had to show a close relationship or substantial factor. Her citation to substantial factor was simply to demonstrate that Wisconsin does not view

offenses a direct result of the trafficking victimization? The answer to this question depends entirely on the evidence presented at trial as viewed through the lens of the jury's collective standard of reasonableness.

The jury can apply the affirmative defense without a complicated instruction on concepts of physical causation. Juries are commonly asked to apply common and ordinary terms to the facts of the case. *See E.g.,* WIS JI-CRIMINAL 1250 (first-degree reckless injury) (directing the jury to determine whether the defendant caused an "unreasonable" risk). Ms. Kizer suggested some relevant factors to consider when assessing whether the charged offense was a direct result of her victimization at Volar's hands. (Appellant's brief, 17). The State does not dispute Ms. Kizer's proposed factors but chooses to ignore them in favor of its false narrative that Ms. Kizer advocates for a get-out-of-jail-free card for opportunistic crime.

D. The plain meaning of the statute does not lead to absurd results.

Throughout its brief, the State argues Ms. Kizer's interpretation of s. 939.46(1m) provides a get-out-of-jail-free card for trafficking victims or her interpretation creates an "opportunity" for trafficking victims to commit crimes. Ms. Kizer does not argue that her status as a victim alone suffices to meet the

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causation as requiring proof that a cause was the "sole" cause. (Appellant's brief at 15-16).

affirmative defense. Instead, there must also be a nexus – direct result – between her victimization and the charged offenses.

In arguing the plain language of s. 939.46(1m) creates an absurd result, the State ignores the ongoing and complex trauma caused by traffickers and demonstrates why such a defense is necessary: trafficking victims are often not appropriately understood, identified or protected. It is not unthinkable that the legislature intended the result of the statute it enacted. *See State v. Matthews*, 2019 WI App 44, ¶17, 388 Wis. 2d. 335, 933 N.W.2d 152 (for plain meaning to be absurd, it must be "unthinkable" for the legislature "to have intended the result").

It is the State's position, not Ms. Kizer's, that is unreasonable. The State attempts to limit the defense beyond the "direct result" language of the statute by inserting language into s. 939.46(1m) about **when** Ms. Kizer needed to be victimized by Volar in order to present the affirmative defense. It argues Ms. Kizer "will need to present evidence that Volar solicited, enticed, or transported her to Kenosha *on* June 4, 2018, 'for the purpose of commercial sex acts, as defined by s. 940.302(1)(a).'" (Response, 11) (emphasis in original). This interpretation requires this Court to alter the language of s. 939.46(1m), such as: "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~~ during the violation of s. 940.302(2) or

948.051….” Although when, and how often, Ms. Kizer was abused are factors that may be considered, Ms. Kizer does not need to show that Volar was literally in the act of sexually abusing her when the charged offenses occurred. A victim does not suddenly become a non-victim during intermission or cessation of abuse.

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 this 9th day of October, 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 2,973 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief of appellant, including the appendix as a separate attachment, if any, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 9th day of October, 2020.

Signed:

Electronically signed by Katie R. York
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