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SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2020AP000192-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

CHRYSTUL D. KIZER,

Defendant-Appellant.

RESPONSE IN OPPOSITION
TO PETITION FOR REVIEW

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REASONS FOR DENYING RELIEF

This Court should deny review because the claims raised by the state do not meet the criteria for review and the court of appeals correctly interpreted the plain language of Wis. Stat. § 939.46(1m).

The state asks this Court to accept review and reverse the court of appeals decision where it held, based on the plain language of s. 939.46(1m), that the affirmative defense for trafficking victims provides a complete defense for first-degree intentional homicide. Alternatively, the state argues, for the first time in its petition for review, that this Court should conclude the “direct result” language in s. 939.46(1m) is “sufficiently robust so as to preclude application of the defense to a charge of first-degree intentional homicide that is not otherwise subject to the statutory defenses of coercion, provocation, necessity, or self-defense,” despite no such language in the statute. (State’s petition, 4).

The state’s first argument relies heavily on legislative history, as opposed to the language of the statute, which is a good illustration of the true issue. The state does not like the law enacted by the legislature, and therefore, is asking this Court to rewrite the statute. Of course, the state’s legislative history argument does not actually support its position and is confusing, at best. And, the state’s alternative argument is an even more blatant

attempt to subvert the language of the statute. This Court should decline the state's invitation to rewrite s. 939.46(1m), as the court of appeals correctly concluded the plain language permits a complete defense for first-degree intentional homicide.

A. Facts.

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. 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*¹ hearing. The state's alleged facts are generally not relevant to the statutory interpretation question it raises, as it has agreed throughout the appeal that Ms. Kizer has not yet had the opportunity to present "some evidence" to support the elements of the affirmative defense. *See State v. Steinz*, 2017 WI 58, 375 Wis. 2d 572, 895 N.W.2d 796.

Still, in the state's alleged facts it minimizes child sex trafficking by again citing the prosecutor's description of the allegations here involving no sex trafficking "beyond him being a person postured as a customer or what we used to call a john." (State's petition, 7, citing 68:13). The state has not disputed that police were aware of Volar's numerous crimes against children, including Ms. Kizer. (68:14-

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966); *State ex. rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

17). In February 2018, four months before the alleged incident here, Kenosha Police executed a search warrant on Volar's home. (71:30). They seized evidence of child sexual assault and child pornography. (16:2-3; 68:4). Yet, Volar was never charged. Although the extent of Ms. Kizer's victimization is not at issue at this stage, as the facts have not yet been adjudicated, the state's narrow view of child sex trafficking victims is important context in interpreting s. 939.46(1m). It highlights why the legislature would enact laws protecting victims.

B. The statutory language.

Section 939.46(1m) states,

A victim of a violation of s. 940.302 (2) [human trafficking] or 948.051 [trafficking a child] 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). As is clear from the language of the statute, the defense applies to "any offense," which necessarily includes first-degree intentional homicide.

By contrast, the statutes defining the coercion defense, the necessity defense, and adequate provocation, explicitly limit the defense for first-degree intentional homicide. The coercion defense states,

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.**

Wis. Stat. § 939.46(1) (emphasis added). Notably, the coercion defense immediately precedes the affirmative defense for trafficking victims, yet the latter has no such qualifying language.

Likewise, the necessity defense states,

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 2nd-degree intentional homicide.**

Wis. Stat. § 939.47 (emphasis added). And, adequate provocation states,

(2) Adequate provocation is an affirmative defense only to first-degree intentional homicide and mitigates that offense to 2nd-degree intentional homicide.

Wis. Stat. § 939.44(2) (emphasis added).

The state argues the affirmative defense for trafficking victims does not provide a complete defense for first-degree intentional homicide when viewed in the context of other related statutes. Yet, it does not address the fact that the other affirmative defenses expressly state first-degree intentional homicide is mitigated to second-degree, unlike s. 939.46(1m). This omission when asking this Court to accept review is especially telling given that the court of appeals concluded, “[t]he absence of such limiting language for subsec. (1m) affirmative defense **compellingly indicates** that the legislature did not intend to limit the trafficking affirmative defense in the way that it limited the affirmative defenses of §§ 939.44, 939.46(1), and 939.47.” *State v. Kizer*, 2020AP192-CR, 2021 WL 2212719, ¶23 (Ct. App. June 2, 2021) (emphasis added).

The state relies on a winding trail through Wis. Stat. §§ 940.01(2)(d) and 949.45(1), to argue first-degree intentional homicide must be mitigated to second-degree even though s. 939.46(1m), does not limit the defense. Ultimately, the state’s argument boils down to s. 939.45(1) (privilege) referring to s. 939.46 rather than 939.46(1). It states, “[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.” Wis. Stat. § 939.45(1)

The court of appeals quickly dismissed this argument because when s. 939.45(1) was enacted in 1955, there were two subsections but the only relevant subsection was coercion, as defined in

s. 939.46(1), thus s. 939.45(1) did not specify a subsection. Meaning, when s. 939.45(1) was enacted, and cited s. 939.46, generally, it only applied to s. 939.46(1). Now is no different. *See Kizer*, ¶¶20-21.

The state's legislative history argument is confusing, speculative, and does not support its interpretation of s. 939.46(1m). And, legislative history may not be used to contradict the plain meaning of a statute, which is abundantly clear here. *Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶51, 271 Wis. 2d 633, 681 N.W.2d 110. The state also conflates immunity from prosecution with an affirmative defense. Those concepts are not the same, but regardless, the state's argument in that respect adds nothing to the analysis.

The court of appeals decision correctly interpreted the plain language of s. 939.46(1m), and therefore, this Court should not accept review in this pre-trial case to rehash a properly decided and straightforward statutory interpretation question.

C. The state's alternative theory.

For the first time in this appeal, the state asks for this Court to conclude the statutory language, "direct result,"² precludes the use of the affirmative

² The state asserts the court of appeals "largely adopted the [its] proposed meaning of 'direct result' as requiring both actual and proximate causation and rejected Kizer's more lax 'close relationship' standard." (State's petition, 21). As it did in the court of appeals, the state mischaracterizes Kizer's arguments related to the "direct result" language. More importantly, it mischaracterizes the court of appeals decision.

defense for trafficking victims in homicide cases unless another privilege can be asserted. There is *nothing* in s. 939.46(1m), to support such a restriction. It is a blatant request for this Court to rewrite the statute. It is the legislature's duty to enact laws. See e.g. *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶35-36, 387 Wis. 2d 511, 929 N.W.2d 209. If the legislature intended for the affirmative defense for trafficking victims to be limited beyond requiring the alleged offense to be a "direct result" of the trafficking victimization, it would have said so. It did not.

The notion that the legislature did not contemplate that the affirmative defense could be a defense for first-degree intentional homicide is speculative and unreasonable. 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

Unlike the state's assertion, the court never adopted – or even mentioned – requiring actual and proximate cause, with the absence of intervening factors. Regardless, the state did not petition on any issue related to the definition of "direct result."

victims, Wis. Stat. § 973.20(4m). Thus, the legislature was well-versed in the complex evil of human trafficking when it enacted s. 939.46(1m).

To be clear, the state has the opportunity to argue at both the “some evidence” stage and at trial – if the court allows it to go to the jury – that the offenses charged were not a “direct result” of Ms. Kizer’s (or any future defendant’s) trafficking victimization. As the court of appeals explained, at the initial “some evidence” stage,

a court should consider whether there is “some evidence” to support such a finding based on whether the victim’s offense arises relatively immediately from the trafficking violation of which the victim is a victim, is motivated primarily by the trafficking violation, is a logical and reasonably foreseeable consequence of that violation, and is not in significant part caused by events, circumstances or considerations other than that violation. This is not intended as an exhaustive list of factors for a court to consider in making such a determination; rather, it is merely intended to provide some guidance.

Kizer, at ¶15 (citation omitted). “Direct result” is how the legislature limited the defense. And that question is dependent on the facts in any given case.

Simply because a defense exists does not mean it automatically applies in a particular case. Like other defenses, such as self-defense, coercion, etc., the ability to use the affirmative defense for trafficking victims is fact-dependent. The state, as advocates, have the opportunity to argue against use of the defense in every case it is proposed. That is the role

of the prosecutor. This Court should not accept review to rewrite the statute and limit the affirmative defense in a way the legislature did not simply because the state is concerned about making fact-specific arguments in individual cases.

CONCLUSION

Because the state did not present any issues that satisfy the criteria for review, Chrystul D. Kizer respectfully requests that the court deny the state's petition for review.

Dated this 16th day of July, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 1,963 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated this 16th day of July, 2021.

Signed:

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