STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP192-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

CHRYSTUL D. KIZER,

Defendant-Appellant.

REVIEW OF A COURT OF APPEALS DECISION REVERSING A NON-FINAL ORDER ENTERED IN THE KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE DAVID P. WILK, PRESIDING

PLAINTIFF-RESPONDENT-PETITIONER'S REPLY BRIEF

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INTRODUCTION

Kizer's response focuses on factual issues about whether she was a victim of underage sex trafficking. But that status, even if proven, would not in itself entitle Kizer to a jury instruction on the affirmative defense under Wis. Stat. § 939.46(1m). That statute requires, contrary to Kizer's claim, more than a mere "nexus" between trafficking and the crime at issue. It requires that a trafficking victim's crimes must be "a direct result of the [trafficking] violation." Wis. Stat. § 939.46(1m).

This robust language requires proof that the criminal acts flowed definitively, immediately and largely automatically from the trafficker's illegal actions and that the crimes were marked by the absence of an intervening agency or influence. Furthermore, the Legislature's express decision to place the trafficking defense within the rubric of coercion defenses under Wis. Stat. § 939.46 rather than a standalone defense means that the trafficking defense is subject to the mitigation limitation under Wis. Stat. §§ 939.45(1) and 940.01(2)—the same as the traditional coercion defense under Wis. Stat. § 939.46(1).

FACTUAL CLARIFICATIONS

Up until her response brief to this Court, Kizer's sole attempt to suggest an imminent threat was that, once at Volar's home, "a tote was in her way and so she could not leave without being blocked and she believed that Mr. Volar might jump out at her." (R. 1:6.) Now, for the first time, Kizer asserts that "she was afraid of Volar that night and that he grabbed her and held down her arm; he was trying to have sex with her and she resisted. She told police that Volar lunged or jumped at her." (Kizer's Br. 14 (citation omitted).) These assertions were not made in Kizer's court of appeals brief,

(Kizer's Opening COA Br. 10–12),[1] or supported by the limited evidentiary record that Kizer cites to.

Kizer relies primarily on her motion to compel discovery before the circuit court for these assertions. (Kizer's Br. 14 (citing R. 16:2)). But the discovery motion is not evidence and contains only statements of counsel. (R. 16.) While Kizer did tell police that Volar "touche[d] her" and held one of her arms at one point, she did not allege that she shot him to prevent having to have sex. Instead, she stated that she "got it [his arm] away. I went and got the gun and I ordered him to go sit in the chair by the desk." (R. 71:40.) The physical evidence at the scene was consistent with Volar being shot while he was sitting in a chair. (R. 71:40.) And Kizer did *not* say that she shot Volar *because* he jumped at her; rather "he made a sort of lunging or jumping movement at her *when* she shot him"—i.e. after she ordered him into the chair and was pointing the gun at him. (R. 60:13 (emphasis added).)

The limited evidence presented showed that Kizer planned the crime before she traveled to Kenosha. The day before the homicide, Kizer texted a friend, "I'm going to get a BMW." (R. 71:35.) On the day of the crime, before travelling to Kenosha, Kizer put a handgun in her bookbag and informed her boyfriend she intended to shoot Volar. (R. 1:4.) At Volar's house, Kizer sent text messages to her friends describing that she was planning to kill him. (R. 71:36.)

In short, the limited evidentiary record does not support Kizer's new assertion that she killed Volar in the moment in order to escape a sexual assault. Instead, that record shows she travelled to Volar's home with the premeditated intent to murder him.

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[1] Consistent with current convention, the State refers to the pagination assigned by the court located at the top-right of the court of appeals brief.

ARGUMENT

I. "Direct result of the [trafficking] violation" requires more than a "close nexus."

The parties agree that Kizer is subject to the "some evidence" burden-shifting framework, which she must satisfy to present the trafficking defense to a jury. They disagree as to what proof is required. Kizer's position seems to be that all she needs to do is present some evidence that she was a trafficking victim before she can argue "direct result" to a jury. The State maintains that, in order to present the defense to a jury, Kiser must first present some evidence that her crimes were committed as a direct result of the trafficking violation and that showing a "nexus" is insufficient.

A. The State did not forfeit review of this issue and presented it in its petition for review.

As an initial matter, Kizer repeatedly claims that the State "forfeited" review of the meaning of the statutory language by not challenging the court of appeals' ruling on this issue in its petition for review. (Kizer's Br. 23, 36.) This is incorrect.

The State opened its petition by arguing that "[t]he court of appeals' interpretation of section 939.46(1m) creates an absurd result." (Pet. 17.) While the State first addressed the mitigation issue in its petition, it argued in the alternative that this Court should construe "direct result" in a manner that was more "robust" than the court of appeals' interpretation and in a manner that was "sufficiently tight" so as to preclude application to cases of premeditated first-degree intentional homicide. (Pet. 17–18, 28–29.) And while it is true, as the State recognized in its opening brief to this Court (State's Br. 25 n.10), that the State has refined its argument and taken a more nuanced position that that

articulated in its petition for review, to say that the State "forfeited" review of this issue is incorrect.[2]

Even if the State's presentation had been insufficient, forfeiture is a rule of judicial administration that need not be adhered to with rigidity when a case "presents an important recurring issue," *State v. Anderson*, 2015 WI App 92, ¶ 6, 366 Wis. 2d 147, 873 N.W.2d 82 (citation omitted), or where applying it "would not further its purpose—the fair, efficient, and orderly administration of justice." *State v. Coffee*, 2020 WI 1, ¶ 21, 389 Wis. 2d 627, 937 N.W.2d 579. This case would satisfy both exceptions. This appeal is the first published decision to address the meaning of a new statute with significant statewide public safety implications. And the issue of what "direct result" means has been at the forefront of the parties' briefing throughout this case, including before this Court.

B. The statute does not say "close nexus," and the plain meaning of "direct result" includes concepts of immediacy, proximate cause, and lack of intervening agency.

Kizer accuses the State of trying to rewrite the statute by adding language that is not in the text. (Kizer's Br. 23.) That is not accurate. Section 939.46(1m) does not define the

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[2] Likewise, Kizer's assertion that the State forfeited its argument explaining that the statutory language refers to criminal acts committed as part of or in furtherance of the trafficking violation (Kizer's Br. 39), ignores that this is not a new argument, but merely a more precise articulation of its original argument that the offenses must be "inherently linked to human trafficking," (R. 31:3), and its explanation at the court of appeals that trafficking must be the "immediate" cause of the criminal act. (State's COA Br. 28–29.) At all stages, the State has consistently maintained that the statute does not providing a trafficking victim a complete defense for premeditated first-degree intentional homicide.

phrase "direct result." Nor is that phrase used elsewhere in the statutory scheme. Thus, this language must be "given its common, ordinary, and accepted meaning" and "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." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶ 45–46, 271 Wis. 2d 633, 681 N.W.2d 110.

"Direct" generally means "*marked by absence of an intervening agency, instrumentality*, or influence" or "stemming immediately from a source."[3] And "[w]hen used as an adjective, the relevant meaning of 'direct' is 'without intervening persons, conditions, or agencies; immediate: [as in] direct sunlight [or] direct answer' or 'lacking compromising or mitigating elements.'" *Rock v. Commonwealth*, 610 S.E.2d 314, 319 (Va. Ct. App. 2005) (emphasis added) (quoting *American Heritage Dictionary* 400 (Houghton Mifflin, 2d ed. 1991)).

As the court of appeals recognized, Wisconsin case law has relied on the Black's Law Dictionary definition of the term "direct" to mean "immediate; proximate; by the shortest course; without circuitry; operating by an immediate connection or relation, instead of operating through a medium; the opposite of indirect." *State v. Kizer*, 2021 WI App 46, ¶ 13, 398 Wis. 2d 697, 963 N.W.2d 136 (citations omitted). Thus, contrary to what Kizer claims (Kizer's Br. 37–38), the court of appeals did, in fact, define the phrase "direct result" in relation to concepts of superseding or intervening causes.

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[3] Direct, *Merriam-Webster Dictionary*, *https://www.merriam-webster.com/dictionary/direct* (last visited Nov. 4, 2021) (emphasis added).

It did not adopt Kizer's "close nexus" formulation. *Kizer*, 398 Wis. 2d 697, ¶ 15.

Also contrary to Kizer's claims (Kizer's Br. 38), criminal law *does* recognize the concept of proximate cause. Both cause-in-fact and proximate cause are required "[w]here the statute involves a specified result that is caused by conduct." *State v. Serebin,* 119 Wis. 2d 837, 849, 350 N.W.2d 65 (1984) (citation omitted); *see also Burrage v. United States*, 571 U.S. 204, 210 (2014) (same). Here, the statute requires a specific result (a criminal act by the trafficking victim) caused by conduct (a direct result of the violation of the trafficking laws).

Therefore, the State is not promoting an "unworkable, and overly complicated," (Kizer's Br. 38), reading of the statute; Rather, the State's interpretation is fully supported by the plain meaning of the statutory language and existing concepts under Wisconsin criminal law.

In contrast, Kizer's argument that she only has to "prove a nexus between her victimization and the charged offenses," (Kizer's Br. 43), is not based on the statutory text, is inconsistent with the above definitions of "direct result" and wholly ignores the remainder of the statutory language—i.e. that the charged crimes must be the direct result of the trafficker's actions, not simply the defendant's *status* as a victim.

C. The defense applies only to crimes committed as a direct result of the trafficker's violation of the trafficking laws.

As the State explained in its opening brief (State's Br. 20–21), some states provide trafficking victims with a complete defense to all crimes committed while being a victim of human trafficking. Wisconsin does not. While Kizer accuses the State of mischaracterizing her argument, (Kizer's Br. 42–43), she advocates for victim-status immunity in all but name.

Kizer says she intends to satisfy the statutory criteria for establishing the defense by using expert testimony concerning the nature of the trafficking relationship, power imbalances, and vulnerability—characteristics that will be present in nearly every case of trafficking victimization. (Kizer's Br. 34.) This simply illustrates that, at bottom, Kizer's interpretation provides no meaningful criteria beyond the fact that the defendant was a trafficking victim.

But section 939.46(1m) does not provide a defense to all crimes that a trafficking victim commits while *being trafficked* or crimes committed as a direct result of *being a trafficking victim*. The defense is textually limited to crimes committed as a direct result of the trafficker's criminal conduct—"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." Wis. Stat. § 939.46(1m).

Contrary to what Kizer argues, the State is not attempting to "shoehorn a joint liability concept into the statute." (Kizer's Br. 40.) Instead, the State asks that this Court adhere to the statutory language and give effect to the second clause of the defense, recognizing that the criminal acts at issue must be directly caused by the trafficker's illegal acts—"the violation of s. 940.302(2) or 948.051." Wis. Stat. § 946.46(1m) (paraphrased below as "the [trafficking] violation").

For instance, a trafficking victim who commits crimes at the express direction of the trafficker would be committing an act as "a direct result of the [trafficking] violation." Likewise, a trafficking victim who might otherwise incur criminal liability as a party to a crime by helping her trafficker flee arguably could fall within the purview of the statute. But a trafficking victim is not committing a crime as "a direct result of the [trafficking] violation" when she pre-

plans the murder of her trafficker and theft of his vehicle. Nor does the statute provide a trafficking victim with legal protection to steal the wallet of a bystander to purchase a bus pass (*Cf.* Kizer's Br. 41.)

Thus, the State's argument that the defense applies only to "crimes committed as part of or in furtherance of the underlying trafficking violation," (State's Br. 21), is not an attempt to graft additional requirements into the statute. Rather, it is a shorthand that gives effect to the statutory requirement that the crimes be "a direct result of the [trafficking] violation"—language that focuses on the trafficker's conduct. Wis. Stat. § 939.46(1m).

II. The trafficking defense under section 939.46(1m) is subject to the mitigation limitation that applies to section 939.46 generally.

The parties' positions on the issue of mitigation are fairly well-defined. The State has acknowledged from the beginning that the trafficking defense under section 939.46(1m) lacks the express mitigation language in cases of first-degree intentional homicide that is provided in the related defenses of coercion and necessity.

But this does not end the analysis because the Legislature expressly chose to place the trafficking defense within the framework of section 939.46 generally. As the State set forth in its opening brief, section 940.01(2)(d) expressly states that in cases of first-degree intentional homicide, the privilege of coercion under section 939.45(1) "mitigate[s] the offense to 2nd-degree intentional homicide." And, in turn, section 939.45(1) provides that "[t]he defense of privilege can be claimed . . . [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). These statues thus encompass any subsection of section

939.46 and are not restricted to the traditional defense of coercion under section 939.46(1).

Courts must "presume that the legislature enacts laws with full knowledge of existing statutes." *Faber v. Musser*, 207 Wis. 2d 132, 138, 557 N.W.2d 808 (1997). Thus, when the Legislature chose to create the trafficking defense as a subpart of section 939.46, it understood that it was making the new defense under subsection (1m) subject to the existing limitations that applied to section 939.46—specifically, the mitigation provisions incorporated via section 940.01(2) and section 939.45(1). The Legislature could have made the trafficking defense a complete standalone provision. It could have modified the cross-references in sections 939.45(1) and 940.01(2) to refer *only* to the traditional coercion defense under section 939.46(1). But it chose to do neither; its choice must have meaning. *State v. Lopez*, 2019 WI 101, ¶ 26, 389 Wis. 2d 156, 936 N.W.2d 125.

And, as noted in the State's opening brief, the mitigation limitation for trafficking coercion is accomplished in the same manner as it is for imperfect self-defense, which also does not contain express mitigation language. Mitigation in both cases is established through section 940.01(2), which says that the exercise of either privilege operates to mitigate first-degree intentional homicide charge to second-degree intentional homicide under section 940.05. Kizer does not meaningfully respond to this other than to assert that this similarity in operation somehow supports her position. (Kizer's Br. 46.)

Finally, statutes must be interpreted to avoid absurd results. *Kalal*, 271 Wis. 2d 633, ¶ 46. Kizer's new factual assertions that she shot Volar to ward off a sexual assault demonstrates the absurdity of her interpretation of the trafficking defense. If that new allegation were true, then she seemingly would be able to assert one or more of the

traditional defenses of provocation, necessity, or self-defense. But these defenses are carefully circumscribed in that they require proof of additional elements such as reasonableness, necessity, and proportionality of force; and, except for perfect self-defense, all operate only to mitigate first-degree intentional homicide to second-degree intentional homicide. Wis. Stat. § 940.01(2)(a), (c)–(d).

Thus, Kizer is asking this Court to interpret section 939.46(1m) in a manner that creates a broader defense based on trafficking status than someone could assert in any other self-defense context. But by placing the trafficking defense within the existing structure of coercion defenses under section 939.46 and leaving the cross-references in sections 940.05(1) and 940.01(2) unaltered, the Legislature intended that in cases of first-degree intentional homicide, the trafficking defense would be subject to the same mitigation provisions as the general coercion defenses under section 939.46(1).

CONCLUSION

This court should reverse the decision of the court of appeals. It should conclude that the defense under section 939.46(1m) applies to criminal offenses that are the immediate and proximate result of the underlying trafficking offense, with no intervening factors–i.e., offenses that occur as part of or in furtherance of the underlying trafficking violation. This Court should also hold that, in cases of first-degree homicide, the trafficking defense only mitigates the charge to second-degree intentional homicide.

Dated this 22nd day of December 2021.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,889 words.

Dated this 22nd day of December 2021.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) (2019-20).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 this 22nd day of December 2021.

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