STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP411-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DECARLOS CHAMBERS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Defendant-Appellant Decarlos Chambers forfeit his Sixth Amendment claim by not objecting at trial?

The circuit court did not address this issue.

This Court should answer "yes."

2. If Chambers did not forfeit his claim, does it fail on the merits because his trial counsel never conceded Chambers' guilt during closing argument?

The circuit court answered "yes."

This Court should answer "yes" if it reaches this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the briefs adequately set forth the facts and applicable precedent. *See* Wis. Stat. § (Rule) 809.22(2)(b). The State recommends publication because there is no Wisconsin case law on (1) whether a defendant forfeits a claim under *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), by not objecting to a lawyer's alleged concession of guilt at trial; and (2) what kinds of statements are concessions of guilt under *McCoy*. So, this Court's decision here might "enunciate[ ] a new rule of law" or "appl[y] an established rule of law to a factual situation significantly different from that in published opinions." Wis. Stat. § (Rule) 809.23(1)(a)1.–2.

INTRODUCTION

A jury found Chambers guilty of second-degree reckless homicide and possession of a firearm by a felon. The State charged Chambers with that possession offense and first-degree reckless homicide after a fatal shooting. During closing argument at trial, Chambers' attorney said that the jury should find Chambers not guilty because the State had not

proven beyond a reasonable doubt that he was the shooter. Counsel briefly reminded the jury of the circuit court's instruction to "consider" second-degree reckless homicide if the jury could not agree on the first-degree homicide charge. Chambers did not object to that statement. He now argues that he is automatically entitled to a new trial because that statement was an unauthorized concession of his guilt.

This Court should affirm Chambers' convictions. Chambers forfeited his claim because he did not contemporaneously object to his trial counsel's statement in question. In any event, that claim is meritless because trial counsel did not admit Chambers' guilt.

STATEMENT OF THE CASE

A jury found Chambers guilty of killing Kyle Weary. (R. 140:2.) Weary was shot and killed in Milwaukee in January 2017. (R. 1:1–2.) Weary had a dispute with Chambers because Weary owed Chambers $15 and because Chambers had a pair of Weary's Nike Jordan shoes that Weary wanted back. (R. 137:116–17.) Firefighters found a gun in Weary's hand when they responded to the shooting and tried to perform life-saving measures on him. (R. 1:2.) An eyewitness identified Chambers as the shooter. (R. 1:3.)

Chambers admitted to shooting Weary. Chambers "[b]asically" admitted to his girlfriend that he had shot Weary. (R. 137:64.) Regarding the shooting, Chambers told his girlfriend that "he think he hit him," referring to Weary. (R. 137:63.) Chambers told his girlfriend that Weary had texted Chambers' phone, telling Chambers to come outside because Weary was out there. (R. 137:63–64.) Chambers told his girlfriend that he went outside, heard shots, and shot back. (R. 137:64.) Chambers also admitted to his younger brother that he had shot Weary. (R. 136:130.)

The State charged Chambers with two counts: (1) first-degree reckless homicide as a party to the crime with use of a dangerous weapon, and (2) possession of a firearm by a person adjudicated delinquent for a felony-level offense. (R. 3.)

Chambers had a jury trial. (R. 135–40.) The circuit court instructed the jury that if it could not unanimously agree on the charge of first-degree reckless homicide, it should consider the lesser-included offense of second-degree reckless homicide. (R. 139:6, 9.) The State requested that instruction, and Chambers did not object to it. (R. 138:68.)

Chambers' attorney, Ann Bowe, gave a closing argument. (R. 139:26–37.) She told the jury to disregard the aiding-and-abetting/party-to-a-crime aspect of the homicide charge because "who is the shooter is the issue." (R. 139:31.)

Attorney Bowe summarized some of the court's jury instructions. (R. 139:33–35.) In doing so, she noted that "utter disregard for human life" was one element of the first-degree homicide offense. (R. 139:34.) She argued that "whoever shot" Weary did not act with utter disregard for human life because the shooting happened "at night, in the dark, in the rain, a distance away." (R. 139:34.)

Attorney Bowe then reminded the jury of the instruction about the lesser-included, second-degree homicide offense:

> But the jury instruction tells you to all see if you can agree on first-degree reckless. And only if you can't, then you should go to the second part, which is second-degree reckless, right?
>
> Second-degree reckless is also criminally reckless conduct. Which I think everybody would agree that should you have a gun, shooting in the direction of a house or a person, is criminally reckless conduct.
>
> And I think that under these circumstances, the second-degree reckless -- that does not include

> utter disregard for human life is something you should consider. There's an actual description.
>
> And the jury instructions from the judge say the difference between first and second-degree reckless homicide is that first-degree requires a proof of one additional element. Circumstances of conduct showed utter disregard for human life.
>
> So again, shooting a gun in the dark, when somebody is shooting a gun already, and it's clear that the ShotSpotter evidence is that there is overlapping shots, right? It's not like one person or one gun shoots and then stops, and then another gun shoots, does not support first-degree reckless homicide.

(R. 139:34–35.)

Attorney Bowe then argued that the case was not really about the "utter disregard" element of the homicide charge. She told the jury, "But the real decision you have to make is, is there credible evidence beyond a reasonable doubt that it was Decarlos Chambers who did the crime, right? That's the big decision." (R. 139:35.) Attorney Bowe said that Chambers had consistently "[d]enied each and every element to the crime" when police interviewed him. (R. 139:36.)

Attorney Bowe ended her closing argument by saying that "there's not sufficient evidence beyond a reasonable doubt to convict Decarlos Chambers. I think that you should find him not guilty." (R. 139:37.)

The jury found Chambers guilty of second-degree reckless homicide as a party to the crime with use of a dangerous weapon and possession of a firearm by a felon. (R. 140:2–3.)

The circuit court later sentenced Chambers to ten years of initial confinement followed by eight years of extended supervision on the homicide conviction, with a consecutive sentence of two years of initial confinement followed by three

years of extended supervision on the felon-in-possession count. (R. 141:19–20.)

Chambers filed a motion for postconviction relief, arguing that he was entitled to a new trial because Attorney Bowe had conceded his guilt without his consent. (R. 113.) The circuit court denied the motion, reasoning that Attorney Bowe had not conceded Chambers' guilt. (R. 123:2–3.)

Chambers appeals his judgment of conviction and the order denying postconviction relief. (R. 124.)

STANDARD OF REVIEW

This Court independently reviews whether a defendant adequately preserved an issue for appeal, *State v. Corey J.G.*, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998), and whether a defendant was denied his constitutional right to counsel, *see State v. Drexler*, 2003 WI App 169, ¶ 2, 266 Wis. 2d 438, 669 N.W.2d 182.

ARGUMENT

I. Chambers forfeited his claim that trial counsel impermissibly conceded his guilt.

"The Sixth Amendment guarantees to each criminal defendant 'the Assistance of Counsel for his defence.'" *McCoy v. Louisiana*, 138 S. Ct. 1500, 1507 (2018). The *McCoy* Court recognized a defendant's Sixth Amendment "[a]utonomy to decide that the objective of the defense is to assert innocence." *Id.* at 1508. It thus recognized a defendant's "right to insist that counsel refrain from admitting guilt." *Id.* at 1505.

Relying heavily on *McCoy*, Chambers argues that Attorney Bowe admitted his guilt without his permission. (Chambers' Br. 11–20.) Chambers forfeited that claim by not objecting at trial. He thus is not entitled to a hearing.

A circuit court must hold an evidentiary hearing before granting a defendant relief based on attorney error, unless the State concedes error. *See State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶ 22, 314 Wis. 2d 112, 758 N.W.2d 806; *see also State v. Sholar*, 2018 WI 53, ¶¶ 50–51, 53–54, 381 Wis. 2d 560, 912 N.W.2d 89. But a defendant is not entitled to a postconviction hearing if his claim is forfeited. *See, e.g.*, *State v. Saunders*, 2011 WI App 156, ¶ 29, 338 Wis. 2d 160, 807 N.W.2d 679.

"[A] specific, contemporaneous objection is required to preserve error." *State v. Delgado*, 2002 WI App 38, ¶ 12, 250 Wis. 2d 689, 641 N.W.2d 490. "The [forfeiture] rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal." *State v. Huebner*, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727. "It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection." *Id.* This rule also "prevents attorneys from 'sandbagging' errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Id.* (citation omitted).

This Court should enforce this forfeiture rule here. Had Chambers objected to the alleged *McCoy* violation at trial, Attorney Bowe could have clarified that she was not conceding Chambers' guilt. And the circuit court could have instructed the jury to disregard any possible implication that Attorney Bowe was conceding Chambers' guilt. Chambers could have avoided the need for this appeal had he raised this issue at trial.

There is also a substantial "sandbagging" concern here because Chambers is seeking automatic reversal. "[C]ounsel's admission of a client's guilt over the client's express objection is error structural in kind," which means that "such an error is not subject to harmless-error review." *McCoy*, 138 S. Ct. at

1511. Allowing a defendant to seek "automatic reversal" without a timely objection would "encourage[] gamesmanship." *State v. Pinno*, 2014 WI 74, ¶ 61, 356 Wis. 2d 106, 850 N.W.2d 207. The fact that Chambers is asserting a structural error supports the conclusion that he forfeited this issue by not timely objecting at trial.

Although a litigant cannot forfeit certain claims by failing to object, a *McCoy* claim is not one of them. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612 (citation omitted). "[S]ome rights are not lost by a counsel's or a litigant's mere failure to register an objection at trial. These rights are so important to a fair trial that courts have stated that the right is not lost unless the defendant knowingly relinquishes the right." *Id.* ¶ 31. Those rights include "the decision whether to plead guilty," "the decision whether to request a trial by jury," and "the decision to obtain the assistance of counsel and to refrain from self-incrimination." *State v. Albright*, 96 Wis. 2d 122, 129–30, 291 N.W.2d 487 (1980), *modified on other grounds by State v. Weed*, 2003 WI 85, 263 Wis. 2d 434, 666 N.W.2d 485.

But the right recognized in *McCoy* can be lost even without a defendant's knowing waiver of it. The *McCoy* Court noted that "when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, '[no] blanket rule demand[s] the defendant's explicit consent' to implementation of that strategy." *McCoy*, 138 S. Ct. at 1505 (alterations in original) (citation omitted) (quoting *Florida v. Nixon*, 543 U.S. 175, 192 (2004)).

In other words, because a lawyer's concession of a client's guilt is *not* "the functional equivalent of a guilty plea," the client's explicit acceptance of a concession strategy is not required. *Nixon*, 543 U.S. at 188 (citation omitted). A

defendant still "retain[s] the rights accorded a defendant in a criminal trial" when his lawyer concedes his guilt. *See id.* (citation omitted); *accord State v. Gordon*, 2003 WI 69, ¶ 24, 262 Wis. 2d 380, 663 N.W.2d 765 (concluding that counsel's admission of the defendant's guilt at trial did not waive his trial rights and was not the functional equivalent of a guilty plea).

Indeed, the *McCoy* Court repeatedly emphasized the importance of a defendant's objection to a concession of guilt.[1] The *McCoy* Court distinguished *Nixon* because the defendant in *McCoy* "adamantly objected to any admission of guilt." *McCoy*, 138 S. Ct. at 1505. Specifically, the defendant in *McCoy* objected pretrial when he learned of his attorney's proposed strategy to concede guilt to avoid the death penalty. *Id.* at 1506. The defendant later objected at trial, "out of earshot of the jury," when his lawyer conceded his guilt during opening statement. *Id.*

So, *Nixon* and *McCoy* show that a defendant can lose his Sixth Amendment right to insist on innocence even without an explicit, knowing waiver of that right. A lawyer's concession of guilt is not the functional equivalent of a guilty plea, which does require a defendant's knowing waiver. The right recognized in *McCoy* can thus be forfeited where, as here, a defendant fails to timely object to counsel's alleged concession of guilt at trial.

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[1] *See, e.g.*, *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018) (concluding that "McCoy disagreed with [trial counsel's] proposal to concede McCoy committed three murders, [and] it was not open to [counsel] to override McCoy's objection"); *id.* at 1510 (holding that "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission"); *id.* at 1511 (holding that "counsel's admission of a client's guilt over the client's express objection is error structural in kind"); *id.* at 1512 (concluding that "[t]he trial court's allowance of [trial counsel's] admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment").

II. In any event, trial counsel did not concede Chambers' guilt.

If this Court determines that Chambers did not forfeit his *McCoy* claim, he still is not entitled to a hearing because his claim fails on the merits. "[A]n evidentiary hearing [on a postconviction motion] is not mandatory if the record as a whole conclusively demonstrates that defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts." *State v. Sulla*, 2016 WI 46, ¶ 29, 369 Wis. 2d 225, 880 N.W.2d 659 (citation omitted). The record conclusively shows that Attorney Bowe did not concede Chambers' guilt.

"[C]ounsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." *McCoy*, 138 S. Ct. at 1510. Many courts adopted that holding long before *McCoy*. *See, e.g.*, *id.* at 1507, 1510.

When courts find an admission of guilt by trial counsel, the admission is unequivocal. In one case, for example, the Illinois Supreme Court concluded that "[t]he concession of defendant's guilt by his attorneys was unequivocal. In the opening statement, one of defendant's attorneys told the jury, 'We are not asking you to find Charles Hattery not guilty. . . . [Y]ou will find him guilty of murder.'" *People v. Hattery*, 488 N.E.2d 513, 518–20 (Ill. 1985) (second and third alterations in original). A federal appellate court found a concession of guilt in a similar case where, "[t]hroughout the closing arguments, both attorneys for [the defendant] repeatedly stated to the jury that [the defendant] was 'guilty,' 'guilty as charged,' and 'guilty beyond reasonable doubt.'" *Wiley v. Sowders*, 647 F.2d 642, 649–50 (6th Cir. 1981) (per curiam). Other courts have found concessions of guilt when lawyers told the jury to find the defendant "guilty but mentally ill." *Cooke v. State*, 977 A.2d 803, 843 (Del. 2009); *People v. Fisher*, 326 N.W.2d 537, 538 (Mich. Ct. App. 1982) (per curiam). Other examples of concessions of guilt include

(1) a defense lawyer saying during closing argument that there was no reasonable doubt that his client was the perpetrator, (2) a defense lawyer saying during closing argument that "I think [the defendant] committed the crime of murder," and (3) a defense lawyer's statement that "I don't feel that [the defendant] should be found innocent." *United States v. Williamson*, 53 F.3d 1500, 1511 (10th Cir. 1995) (second alteration in original) (collecting cases).

Here, by contrast, Attorney Bowe did not admit Chambers' guilt. "[A] defendant's counsel's statement must be viewed in context to determine whether the statement was, in fact, a concession of defendant's guilt of a crime." *State v. Perry*, 802 S.E.2d 566, 574 (N.C. Ct. App. 2017) (citation omitted). Attorney Bowe said to the jury, "And I think that under these circumstances, the second-degree reckless -- that does not include utter disregard for human life is something you should consider." (R. 139:35.) Attorney Bowe made that statement in the context of discussing the jury instructions that the court had given. (R. 139:34–35.) Attorney Bowe reminded the jury that one instruction had told the jurors to consider second-degree reckless homicide "only if you can't" agree "on first-degree reckless." (R. 139:34.) Attorney Bowe did not admit Chambers' guilt by repeating that jury instruction any more than the circuit court admitted Chambers' guilt by giving that instruction.

The rest of her closing argument shows that Attorney Bowe did not concede Chambers' guilt. Attorney Bowe argued that "who is the shooter is the issue." (R. 139:31.) Attorney Bowe never said that Chambers was the shooter or that he was even present at the shooting. She said that "whoever shot" the victim did not act with utter disregard for human life, an element of first-degree reckless homicide. (R. 139:34.) After telling the jury to "consider" the second-degree homicide offense, Attorney Bowe said that the jury's "real decision" was deciding whether the State had proven that Chambers

committed the shooting. (R. 139:35.) Attorney Bowe said that Chambers had consistently "[d]enied each and every element to the crime" when police interviewed him. (R. 139:36.) Attorney Bowe ended her closing argument by saying, "[T]here's not sufficient evidence beyond a reasonable doubt to convict Decarlos Chambers. I think that you should find him not guilty." (R. 139:37.) In short, when viewed in context, Attorney Bowe's brief comment about considering the second-degree homicide offense was not an admission of guilt.

Indeed, that passing remark by Attorney Bowe is even further from being an admission of guilt than permissible comments in other cases. As one state supreme court has explained, an "argument that the defendant is innocent of all charges, but if he is found guilty of any of the charges it should be of a lesser crime because the evidence came closer to proving that crime than any of the greater crimes charged, is not an admission that the defendant is guilty of anything." *State v. Harvell*, 432 S.E.2d 125, 128 (N.C. 1993) (citing *State v. Greene*, 422 S.E.2d 730, 733–34 (N.C. 1992)); *accord State v. Gainey*, 558 S.E.2d 463, 476 (N.C. 2002).

Two North Carolina Supreme Court opinions are instructive. In *Harvell*, "the defendant's counsel never conceded that the defendant was guilty of any crime. He merely noted that if the evidence tended to establish the commission of any crime, that crime was voluntary manslaughter." *Harvell*, 432 S.E.2d at 128. The court concluded that "[t]his was not the equivalent of admitting that the defendant was guilty of any crime." *Id.* Similarly, in *Greene*, the defendant's lawyer argued "that the defendant was innocent of all charges but if he were to be found guilty of any of the charges it should be involuntary manslaughter because the evidence came closer to proving that crime than any of the other crimes charged." *Greene*, 422 S.E.2d at 733–34. The court concluded that "[t]his is not the equivalent of

asking the jury to find the defendant guilty of involuntary manslaughter." *Id.* at 734.

The Louisiana Court of Appeals reached a similar conclusion in a case that distinguished the United States Supreme Court's decision in *McCoy*. The defendant's trial lawyer told the jury, "[S]econd degree murder has responsive verdicts.[2] And if you don't want to go along with the justification defense, or the intoxication defense, or the insanity defense, you still have to look at all the elements for each one of those responsive verdicts." *State v. Johnson*, 265 So. 3d 1034, 1048–49 (La. Ct. App. 2019). After arguing that the defendant had been provoked, counsel told the jury, "if our affirmative defenses are not to your satisfaction, at [worst] [the defendant] is guilty of manslaughter, not second degree murder." *Id.* at 1049 (first alteration in original).

The Louisiana Court of Appeals rejected the defendant's claim that "these arguments by trial counsel amount to an admission of Defendant's guilt to the charge of second degree murder." *Johnson*, 265 So. 3d at 1049. The court concluded that "counsel's arguments are not a specific admission of Defendant's specific intent, but are clearly presented as an alternative argument for the jury to consider a responsive verdict of manslaughter." *Id.*

The statement at issue here did not even go as far as the permissible statements in *Harvell*, *Greene*, and *Johnson*. Like the lawyers in those three cases, Attorney Bowe argued that Chambers was "not guilty." (R. 139:37.) Like the lawyer in *Johnson*, Attorney Bowe told the jury to consider a lesser-included offense. But unlike the lawyers in those three cases, Attorney Bowe did *not* say that Chambers was guilty of the lesser homicide offense if he was guilty of anything. She simply told the jury that it "should consider" the lesser

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[2] This reference to "responsive verdicts" referred to lesser-included offenses. *See* La. C. Cr. P. art. 814(a)(3).

homicide offense. (R. 139:35.) That fleeting remark pales in comparison to the lawyers' statements in *Harvell*, *Greene*, and *Johnson*—all of which fell short of being admissions of guilt.

In sum, Chambers forfeited his *McCoy* claim by not objecting at trial, and that claim fails on the merits because his trial attorney did not concede his guilt.

CONCLUSION

This Court should affirm Chambers' judgment of conviction and the order denying postconviction relief.

Dated this 29th day of July 2019.

Respectfully submitted,

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CERTIFICATION

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 3516 words.

_____
SCOTT E. ROSENOW
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

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 29th day of July 2019.

_____
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