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COURT OF APPEALS

**State of Wisconsin
Court of Appeals
District 1
Appeal No. 2021AP001705-CR**

State of Wisconsin,

Plaintiff-Respondent,

v.

Cedric Tung,

Defendant-Appellant.

**On appeal from a judgment of the Milwaukee County
Circuit Court, The Honorable Mark A. Sanders, and the
Honorable Sandy A. Williams, presiding**

Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issue presented by this appeal is not controlled by settled law. Therefore, the appellant recommends both oral argument and publication.

Statement of the Issue

In, *State v. Chambers*, 2019AP411, in accord with *McCoy v. Louisiana*, 584 U.S. ___, 138 S. Ct. 1500 (2018), the Wisconsin Supreme Court held that it is structural error for defense counsel to concede guilt where such a concession is contrary to the defendant's express wishes. Here, Tung was charged with sexual assault of a child, "Samantha"¹. It was alleged that he touched Samantha's vagina for the purpose of sexual gratification. Tung testified at trial that he, in fact, *never touched the child's vagina*. Nevertheless, in her closing argument, defense counsel conceded that Tung did touch Samantha's vagina, but argued that, in doing so, he never formed the intent to be sexually gratified. Not surprisingly, Tung was convicted.

In this case, defense counsel did not expressly concede guilt, but she may as well have. Counsel conceded a crucial fact that was entirely contrary to Tung's trial testimony. In

¹ This is a pseudonym

effect, counsel told the jury that Tung lied when he testified that he never touched Samantha's vagina..

Thus, the issue is: Was it structural error for defense counsel to concede a fact that was critical to the state's case (touching Samantha's vagina), where the concession is wholly contrary to Tung's trial testimony?

Answered by the circuit court: There was no structural error. According to the circuit court, defense counsel did not concede guilt "in any way". Further, the court found defense counsel's testimony at the postconviction to be more credible than Tung's testimony. According to defense counsel's testimony, Tung never objected to the theory of defense (lack of consent) proposed by counsel. Even after Tung's trial testimony, according to the circuit court, defense counsel's closing argument was consistent "with everything else, in terms of being able to explain all the other evidence that had been presented."

Summary of the Argument

The appellate court's decision on this issue does not depend in any way upon the circuit court's "finding of fact" that defense counsel's motion testimony was more credible than Tung's testimony on the factual issue of whether, prior to trial, Tung ever expressed an objection to counsel's proposed theory

of defense (lack of intent). It simply does not matter whether, prior to the start of trial, Tung ever objected to counsel's proposed theory of defense (lack of intent for sexual gratification). Once Tung testified at trial, it became abundantly clear to defense counsel that Tung objected to the "lack of intent" theory of defense. Tung testified that he never touched the girl's vagina. Nevertheless, in her closing argument, counsel forged ahead and conceded that Tung's testimony that he never touched Samantha's vagina *was false*. Counsel instead argued that, despite compelling circumstantial evidence to the contrary, the state had failed to prove that Tung ever formed the intent to be sexually gratified. Counsel's "explanation" at the postconviction motion for her decision to argue contrary to her client's trial testimony is as shocking as it is unreasonable. According to counsel, she conceded the touching because, in her pretrial conferences with Tung, he admitted to her that he had touched the girl's vagina. In other words, counsel made explicit what was merely implicit in her closing argument: she was of the opinion that Tung's trial testimony about not touching Samantha's vagina was false. Counsel's "explanation" represents a total abandonment of her role as advocate for Tung. By the end of the trial, then, Tung had no counsel zealously advocating his position. This is a structural error.

Statement of the Case

I. Procedural History

On June 15, 2017, the defendant-appellant, Cedric Tung (hereinafter “Tung”), was charged with first degree sexual assault of a child (sexual contact with a child under the age of thirteen) arising out of an incident that allegedly occurred in Milwaukee on June 10, 2017. (R:1)

Following a preliminary hearing, Tung was bound over for trial, and he entered a not guilty plea to the charge. (R:35-8)

Tung demanded a speedy trial. (R:5; R:43-2)

There were no substantive pretrial motions filed by the defense. The case was originally set for trial within the speedy trial parameters; however, Tung later waived the speedy trial because his attorney was unavailable due to family leave.

The case came on for trial beginning on February 5, 2018). At trial, Tung testified that he never touched Samantha in a “sexual way” or to become sexually gratified. (R:31-33) On cross-examination, Tung was even more clear. He said:

Q You did touch her, right?

A Not correct.

Q No? So you talked to Detective Wells and you said you touched her over her underwear, that was not correct?

A It's correct that I said that.

Q So, but you didn't do it?

A But I didn't do it.

Q So you lied to Detective Wells?

A Yes, I did.

(R:31-38)

Despite Tung's trial testimony, though, in her closing argument, defense counsel pursued a different theory of defense. She said, "So when you look at that and when you look, did this guy have the intent to touch this child in any sexual way? No. *Did he touch her accidentally because he's like in the middle of sleeping or whatever? Yeah.* I think that she was cuddling. I think maybe he grabbed her, maybe he pulled her, but just like the state is saying, well, tights, he dug in."

(R:31-72)

The jury returned a verdict finding Tung guilty. (R:31-83)

Thereafter, the court sentenced Tung to fifteen years in prison, bifurcated as seven years of initial confinement followed by eight years of extended supervision. (R:25)

Tung filed a notice of intent to pursue postconviction relief. (R:27)

Tung filed a postconviction motion concerning the burden of proof instruction. (R:47) However, the supreme court's decision in *State v. Trammell*, 2017AP1206-CR rendered the motion frivolous. Thus, the motion was withdrawn.

Postconviction counsel subsequently filed a no merit report. The court of appeals directed appellate counsel to address the issue of whether, in her closing argument, defense

counsel conceded guilt without Tung's consent. After further consideration, appellate counsel withdrew the no merit report, and Tung was granted an extension of time to file a postconviction motion.

Tung then filed a postconviction motion alleging that it was structural error for defense counsel, Reyna Morales, to concede that Tung had touched Samantha's vagina when this was entirely contrary to Tung's trial testimony. (R:73; R:88)²

Eventually, the motion was set for a hearing.³ At the motion hearing, Tung testified that he and Morales had discussed their trial strategy. (R:112-7) Tung said that he made it clear to Morales that he never touched Samantha's vagina in any way. (R:112-9)

According to Tung, "[Morales] told me that, in her opinion, she wanted to argue intent. She said that if she could convince the Court that I had no intent, whether or not there was an actual action taken, she thought that if she could argue intent, prove that there was no intent, then I wouldn't be found guilty." (R:112-10). Tung told Morales that he was going to testify, and that he was not going to say that he ever touched Samantha's vagina. (R:112-10) Tung said, "I told her that I wasn't gonna go

² The original motion argued that defense counsel was ineffective. Tung later revised the motion to allege that counsel's concession was structural error. (R:88)

³ The hearing was originally set before the Hon. Stephanie Rothstein in Milwaukee County; however, Judge Rothstein recused herself because she had a relationship with Tung's trial attorney, Reyna Morales. After Tung's trial, but before the hearing on the postconviction motion, Morales was appointed to the Milwaukee County Circuit Court. Consequently, the postconviction motion heard by the Hon. Sandy Williams in Ozaukee County.

-- I wasn't gonna go along with her defense." *Id.*

Morales also testified at the postconviction motion hearing. She admitted that Tung told her that he wanted to maintain his innocence. (R:112-24) However, when asked whether Tung ever told her that he was going to testify that he never touched Samantha, Morales at first said, "I don't recall. I don't think so, no." (R:112-25) Later, Morales claimed that Tung told her that, in fact, he did touch Samantha on her vagina. (R:112-32) This comment, though, was not recorded in any file note; rather, Morales claimed that she simply remembered Tung telling her that. (R:112-32)

Further, Morales denied that, after her opening statement and during the course of trial, Tung ever told her that she was not to concede that he touched Samantha's vagina. (R:112-35)

Morales admitted that she heard Tung's trial testimony that he never touched Samantha's vagina. Nevertheless, in her closing argument, she conceded that he did touch the child's vagina. When asked why she did so, Morales said, "Because he had admitted to me that he had done it. He also had admitted to the father that he had had some touching to the child, and a -- it would have been unprofessional for me to make a statement *that was inconsistent with the evidence.*" (emphasis provided; R:112-36) Morales, of course, recognized that her confidential discussions with Tung were not in evidence. (R:112-37) Rather, Tung's trial testimony that he

never touched Samantha's vagina was the evidence. Nevertheless, Morales gave a closing argument in which she told the jury that Tung had, in fact, touched Samantha on the vagina. (R:112-37) Morales conceded that her closing argument was contrary to Tung's trial testimony. (R:112-38) Her explanation for deciding to argue that Tung's testimony was false was because she claimed that she was "ethically prohibited" from arguing that Tung's trial testimony was accurate. (R:112-42) At this point, the following exchange took place:

Q What-- What rule of ethics would prohibit you from advocating your client's trial testimony?

A I don't know if there's any specific rule, you know, I'm just -- I can only do so much with the information that I have.

Q We -- We, as defense lawyers, have an obligation, an ethical obligation, to zealously advocate for our clients in front of the jury, correct?

A Right.

Q And we may personally suspect that our clients were less than truthful during their trial testimony, right?

A Right

Q But we still, unless we know that for a fact [that the defendant intends to lie under oath], we still have an obligation to zealously advocate . . . the client's position, to the jury, right?

A Correct.

(R:112-42) Although Tung never specifically told Morales that he intended to lie under oath, Morales claimed that she did not think Tung was being truthful in his trial testimony because,

“[T]hat's not what he had told me, and that's not what he had disclosed to the father when the father confronted him before getting the police involved.” (R:112-44)

The circuit court denied Tung's motion for a new trial. (R:112-55; R:104) Tung now appeals.

II. Factual Background

Tung, who was nineteen years old at the time, was staying at the home of Charles⁴, the pastor of the church Tung attended. Tung stayed at Charles' home on an intermittent basis. (R:42-5)

On June 10, 2017, Tung was at Charles's home, and he was left alone with Charles's two daughters while Charles attended his sister's graduation. (R:45-8) Tung was asleep on the couch, and Charles's seven year old daughter, Samantha⁵, got onto the couch and cuddled with Tung. He pushed her away. He then fell back asleep and she cuddled with him again. She was wearing a dress and tights. Samantha testified that Tung put his hand over her tights, touched her vagina for about fifteen seconds, was “digging in”, and then he pushed her off the couch.

Samantha reported this to her father the following day. Charles called the police, and he texted Tung. (R:45-12) Tung

⁴ Not his real name

⁵ Not her real name

replied with a series of texts in which he describes himself as “a monster” and being embarrassed about what happened. (R:45-20)

As part of the investigation, Tung was interviewed by a police detective, and Tung admitted to touching Samantha in her vaginal area. (R:45-42)

Tung testified at trial. He told the jury that he never intended to touch Samantha in a sexual way. (R:45-31) He claimed that he admitted touching Samantha on the vagina because he wanted to give the police what they wanted to hear. (R:31-34) As mentioned in greater detail in the preceding section, Tung also testified that he never touched Samantha’s vagina at all. (R:45-42)

Argument

I. Defense counsel wholly abandoned her role as zealous advocate when she argued that Tung had lied when he denied touching the child's vagina.

A criminal trial is designed to be a confrontation between adversaries. When defense counsel abandons her role as zealous advocate for her client, the very structure of the proceeding is implicated. This is precisely what defense counsel did in this case. She gave a closing argument in which she asserted that Tung had lied during his trial testimony. With an advocate like that, who needs an opponent?

Counsel's "explanation" for doing so is completely incoherent. She said that, based on her confidential discussions with Tung, none of which were in evidence, she had formed the opinion that Tung lied about not touching Samantha's vagina in his trial testimony. Consequently, counsel asserted, she was "ethically prohibited" from arguing Tung's testimony in closing.

This is simply wrong. The only exceedingly rare circumstance where defense counsel is excused from zealously advocating her client's position is when the client specifically informs counsel that he intends to commit perjury. Tung never told Morales that he intended to commit perjury. Attorneys who

adopt the role of determining whether the defendant's testimony is true or not absolutely deprive the defendant of the zealous and loyal advocacy required by the Sixth Amendment. It is structural error.

A. Standard of appellate review

In making its decision on the postconviction motion, the circuit court relied, in part, upon a "factual finding" that, prior to trial, Tung never objected to defense counsel's proposed theory of defense. To the extent that this finding of fact is pertinent to the decision, it is subject to the clearly erroneous standard of appellate review. *See, e.g. State v. Denson*, 335 Wis. 2d 681, 699, 799 N.W.2d 831, 840 (2011).

However, as will be developed below, this "finding of fact" is wholly irrelevant to the issue. Once Tung testified that he never touched Samantha's vagina, defense counsel was constitutionally obligated to advocate that position in her closing argument. The error here is that, in her closing argument, defense counsel wholly abandoned her role as zealous advocate for Tung. She asserted that Tung had lied in his testimony. Tung's testimony and counsel's closing argument are matters of record and cannot be disputed. There is no "issue of fact" that is relevant to the issue.

Whether it was structural error for defense counsel to tell the jury that Tung's trial testimony was false is a question of

law. "Whether a particular error is structural and therefore not subject to a harmless error review is a question of law for our independent review." *State v. Nelson*, 2014 WI 70, ¶18, 355 Wis. 2d 722, 849 N.W.2d 317. Whether an error is harmless is also a question of law for the appellate court. *Id.*

B. It is a structural error for defense counsel to argue that Tung's trial testimony was false.

Recently, the Wisconsin Supreme Court held that:

[T]he United States Supreme Court announced its decision in *McCoy v. Louisiana*, 584 U.S. ___, 138 S. Ct. 1500 (2018). In *McCoy*, the Court held that trial counsel cannot concede a client's guilt when a client expressly asserts that the objective of the defense is to maintain innocence and the client objects to the concession of guilt. *Id.* at 1509. The Court also held that this error is structural, and one for which a new trial is required. *Id.* at 1512.

State v. Chambers, 2021 WI 13, P2, 395 Wis. 2d 770, 773, 455 N.W.2d 144, 145, 2021 Wisc. LEXIS 16, *2, 2021 WL 684267

In *McCoy v. Louisiana*, 138 S. Ct. 1500, 1510-1511, 200 L. Ed. 2d 821, 833, (2018) the supreme court explained why this is structural error rather than ineffective assistance of counsel. The court wrote, "Because a client's autonomy, not counsel's competence, is in issue, *we do not apply our ineffective-assistance-of-counsel jurisprudence.*" (emphasis provided)

Here, the issue does not fit neatly under *Chambers* and *McCoy*. That is, defense counsel did not expressly concede

guilt in her closing argument. Rather, she made a guilty verdict a rather foregone conclusion by telling the jury that her client, Tung, had lied in this trial testimony when he said he never touched Samantha's vagina.

Nevertheless, *Chambers* and *McCoy* are instructive concerning the question of whether this issue ought to be analyzed under the ineffective assistance of counsel rubric, or whether it is structural error. As in the situation where counsel concedes guilt, where defense counsel tells the jury that the defendant lied in his trial testimony, it is not a question of counsel's competence. Rather, it is a question of the defendant's *autonomy*.

As the United States Supreme Court has explained:

The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client . . . Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision.

Von Moltke v. Gillies, 332 U.S. 708, 725-26 (1948).

When defense counsel's conduct contravenes her duty of loyalty to the client, a criminal proceeding loses its character as a confrontation between adversaries. *See, e.g. United States v. Cronin*, 466 U.S. 648, 655-57 (1984); *see also, Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997); *Spisak v. Mitchell*, 465 F.3d 684, 704-5 (6th Cir. 2006) *vacated and remanded sub nom. Hudson*

v. Spisak, 552 U.S. 945 (2007), *reinstated on remand sub nom. Spisak v. Hudson*, 512 F.3d 852 (6th Cir. 2008).

The cases cited above discuss this issue in terms of ineffective assistance of counsel. Here, Tung claims that it was structural error for defense counsel to abandon her duty to zealously advocate his position. There is support in these cases for Tung's proposition. In *Cronic*, the court noted that, when an attorney acts more for the benefit of-- and with more apparent sympathy for-- the prosecution than the defendant, *prejudice is presumed*. See, *Cronic*, 466 U.S. at 659 (holding that no specific showing of prejudice is required when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing.")

C. Defense counsel wholly abandoned her obligation to be a zealous advocate for Tung; and her explanation for doing so is shockingly unreasonable.

In denying Tung's postconviction motion, the circuit court remarked that, "The defense attorney did not concede guilt *in any way*." (emphasis provided; R:112-51)

To be sure, defense counsel never explicitly used the words, "Tung is guilty". She may as well have, though. She did the next best thing. She told the jury that Tung's trial testimony that he never touched Samantha's vagina was false; and then she evidently expected the jury to believe that, despite

lying about whether he touched the child's vagina, Tung never formed the intent to be sexually gratified. That is absurd. Once defense counsel told the jury that her client had lied in his testimony, a guilty verdict was a foregone conclusion. The fact that counsel never used the words "Tung is guilty" ought not mean that *Chambers* and *McCoy* are wholly inapplicable.

Defense counsel's explanation for pursuing this strategy is equally shocking and unreasonable. According to defense counsel, in her pretrial conferences with Tung, he had admitted to her that he had touched Samantha's vagina. Thus, counsel asserted that she was "ethically prohibited" from arguing that Tung's trial testimony was accurate. (R:112-42) In other words, Morales did not believe Tung's trial testimony, and, therefore, she could not advocate Tung's position to the jury.

The Wisconsin Supreme Court has recognized that, in such a situation, not only is counsel not ethically prohibited from zealously arguing the defendant's position to the jury; the failure to do so poses a constitutional danger to the client. The Wisconsin Supreme Court explained that, "[A]ny standard we adopt should be a high one given the constitutional considerations involved. We are mindful that . . . attorneys who adopt 'the role of the judge or jury to determine the facts,' pose a danger of depriving their clients of the zealous advocacy and loyal advocacy required by the Sixth Amendment." *State v.*

McDowell, 2004 WI 70, P41, 272 Wis. 2d 488, 514, 681 N.W.2d 500, 512-513, 2004 Wisc. LEXIS 438, *28

The only exception to this rule is where the defendant specifically informs counsel ahead of time that he intends to present perjured testimony. “On those occasions when a defendant informs counsel of the intention to testify falsely, the attorney's first duty shall be ‘to attempt to dissuade the client from the unlawful course of conduct . . . “ *McDowell*, 2004 WI 70, P45, 272 Wis. 2d 488, 515, 681 N.W.2d at 513. If that does not work, then counsel must allow the defendant to testify in a narrative fashion.⁶

None of that occurred here. Morales did not claim that Tung told her ahead of time that he intended to commit perjury. Rather, Morales claimed that, after she heard Tung's trial testimony, she did not believe it. She then chose to do exactly what the supreme court has characterized as a danger to the constitution: she argued to the jury that Tung's testimony was false, and she then expected the jury to find him not guilty because, purportedly, he never formed the intent to become sexually gratified.

This is a structural error.

⁶ Only when the attorney invokes the “narrative testimony” procedure is she prohibited from advocating the defendant's position in closing argument.

Conclusion

For these reasons, it is respectfully requested that the court of appeals reverse the order of the circuit court denying Tung's postconviction motion for a new trial, and to remand the matter to the circuit court with instructions that Tung's postconviction motion be granted.

Dated at Milwaukee, Wisconsin, this 20th day of December, 2021.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 4019 words.

Dated at Milwaukee, Wisconsin, this 20th day of December, 2021.

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