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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2021AP1705-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CEDRIC TUNG,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MARK A. SANDERS (JUDGMENT) AND THE HONORABLE SANDY A. WILLIAMS[1] (ORDER), PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT AND SUPPLEMENTAL APPENDIX

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[1] Ozaukee County Circuit Court Judge Sandy A. Williams heard the postconviction motion by specific assignment. (R. 92:1–2.)

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ISSUE PRESENTED

Before trial, Defendant-Appellant Cedric Tung met with his attorney, then Assistant State Public Defender Reyna Morales, to discuss his defense to a charge of sexually assaulting a child. Tung "adamant[ly]" asserted his innocence to Attorney Morales, explaining to her that while he touched the child's vaginal area, it was accidental.

Based in part on Tung's statement to her, Attorney Morales argued in her opening statement that Tung was innocent because the evidence would show that Tung touched the child on "[p]ure accident." Near the end of the trial, Tung took the stand and unexpectedly asserted that he never touched the child at all. Believing she had an ethical duty not to use testimony she knew or reasonably believed to be false, Attorney Morales did not argue in her closing that Tung never touched the child. She argued that he was innocent because he touched the child unintentionally.

The issue in this case is whether Tung is entitled to a new trial for Attorney Morales's decision not to use in her closing argument Tung's testimony that he never touched the child's vaginal area.

Tung's new trial arguments require the Court to answer the following two questions:

(a) *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), and *State v. Chambers*, 2021 WI 13, 395 Wis. 2d 770, 955 N.W.2d 144, recognize that a defendant has a right to assert a defense of innocence. Where counsel consistently asserted Tung's innocence at trial, is Tung nonetheless entitled to a new trial under *McCoy* and *Chambers* for counsel's decision not to use in her closing argument Tung's trial testimony advancing a new theory of innocence?

The circuit court answered no.

This Court should answer no.

(b) Under *U.S. v. Cronic*, 466 U.S. 648 (1984), a defendant is denied the right to counsel when there is total breakdown in the adversarial process. Did counsel's decision not to use in her closing argument Tung's testimony that he did not touch the victim represent a breakdown in the adversarial process under *Cronic*?

This Court should deem this claim forfeited because it was not raised in the circuit court.

If it reaches the merits, the Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The issue presented may be resolved on the briefs by applying established law to the facts.

STATEMENT OF THE CASE

Crime and Charge

In 2017, Cedric Tung was charged with first-degree sexual assault of a child under the age of 13 for intentionally touching the vaginal area of 7-year-old Samantha over her underwear. (R. 1:1–2.) Samantha's father, Charles,[2] attended the same church as Tung. (R. 42:5.) Charles opened his home up to Tung, and he lived with Charles and his daughters off and on for about two years. (R. 42:5.)

According to the criminal complaint, Tung was home alone with Samantha and her older sister one morning in June 2017 when he invited Samantha to cuddle with him in the living room. (R. 1:1–2.) After she lay down beside Tung, Tung pulled up the child's dress and put his hand under her tights. (R. 1:1–2.) Tung then rubbed the child's vaginal area

[2] The State uses the pseudonyms Tung gives the victim and her father.

over her underwear. (R. 1:1–2.) Samantha told her father what happened the next day, and he contacted police. (R. 1:2; 42:12–13.)

Samantha described the incident to a police officer in a recorded forensic interview. (R. 1:2.) Tung admitted to a detective in a recorded custodial interview that he rubbed Samantha's vaginal area under her tights but over her panties "for 10–15 seconds." (R. 1:1.) At one point, Tung said that Samantha lay down to cuddle with him while he was sleeping, and he woke up to discover that he was touching her. (Ex. 6 CD 33 min. 35 sec.)

Trial

The case was tried to a jury in February 2018. (R. 40:1.) In her opening statement, defense counsel Reyna Morales argued that Tung was innocent because he did not act with sexual intent: "What you're going to see is that the State can't prove that this was intentional." (R. 41:34–35.) "We're having a trial because Cedric never meant to have any type of sexual contact with this child. It was a pure accident. He's sleeping, he's tired." (R. 41:37.)

Samantha testified at trial. (R. 41:63.) She used two dolls to show Tung's position next to her and where his arm went when he touched her. (R. 41:71–75.) Samantha testified that Tung touched what she called her "[f]ront . . . [b]utt" "[i]n the crack" for "a little bit," which made her feel "[w]eird." (R. 41:75–77.) Samantha said her 11-year-old sister was home at the time, but she was on the computer. (R. 41:77–78.) No one else was home. (R. 41:78.)

The video recording of Samantha's forensic interview was also played for the jury. (R. 41:49.) In the video, Samantha said Tung was lying down on the sofa in the living room when he asked her to come and cuddle with him. (Ex. 1 CD 14 min. 5 sec.) Samantha pointed to her lap and said that Tung touched her "private," which she also called her

"bottom." (Ex. 1 CD 11:15.) Gesturing again toward her lap, she said that Tung "dug in" under her tights but over her underwear and "was rubbing it." (Ex. 1 CD 12:40.) She said that this made her "sad, and it kind of felt weird." (Ex. 1 CD 13:20.)

The video recording of Tung's custodial interview was also played at trial. In the video, Tung told the detective that he was asleep when Samantha came to snuggle with him. (Ex. 6 CD 18:40.) Tung said he didn't realize this right away. (Ex. 6 CD 18:50.) He said that he woke up on feeling someone next to him. (Ex. 6 CD 19:50.)

Tung initially denied touching Samantha's vaginal area. (Ex. 6 CD 20:25.) But eventually, when asked if Samantha was lying when she said he touched her, Tung was silent for about 30 seconds and then admitted that she was telling the truth. (Ex. 6 CD 25:15.) Tung said that he touched the child's vaginal area for 10 to 15 seconds over her underwear. (Ex. 6 CD 30:00.) Tung said that he hadn't meant to touch Samantha but "that's what I do" when a girl "cuddles next to me," "it's instinctive." (Ex. 6 CD 33:15.) Tung then said that he was asleep when Samantha cuddled with him, and when he woke up fully, "it was her," and he "realized what [he] was doing," and he "didn't know what to do." (Ex. 6 CD 33:35.)

Tung took the stand in his own defense. On direct, he testified that he did not intend to touch Samantha in a sexual way and that he was not aware of what he was doing at the time:

> [COUNSEL]: Did you ever intend to touch [Samantha] in a sexual way?
>
> [TUNG]: Never.
>
> [COUNSEL]: Okay. Did you ever intend to get sexually aroused or were you even aroused?
>
> [TUNG]: No.

> [COUNSEL]: Okay. Were you aware of what you were doing?
>
> [TUNG]: No.

(R. 31:33.)

On cross-examination, when the prosecutor asked if he had touched Samantha, Tung responded that he had not touched her vaginal area at all:

> [PROSECUTOR]: You did touch her, right?
>
> [TUNG]: Not correct.
>
> [PROSECUTOR]: No? So you talked to [the detective] and you said you touched her over her underwear, that was not correct?
>
> [TUNG]: It's correct that I said that.
>
> [PROSECUTOR]: So, but you didn't do it?
>
> [TUNG]: But I didn't do it.
>
> [PROSECUTOR]: So you lied to [the detective]?
>
> [TUNG]: Yes, I did.

(R. 31:38.)

Tung said that he lied because the detective told him that all the family wanted was for him to admit that he touched the child, and he was willing to "swallow [his] pride" and tell them what they wanted to hear. (R. 31:34.) When asked to elaborate, Tung said: "Anybody who is arrested for sexual assault . . . they are looking out for themselves." (R. 31:45.) The prosecutor then asked, "And you're saying you're doing anything to help yourself, isn't that what you're doing now, just coming up again with other stories to help yourself now?" (R. 31:45–46.) Tung responded, "Correct. That's what I'm doing right now." (R. 31:46.)

In her closing argument, Attorney Morales repeated the assertion in her opening statement that Tung was innocent because he did not intend to touch her in a sexual way:

> [D]id 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 they were cuddling, but Cedric never, ever, ever intended to touch her or to get sexually aroused by touching her.

(R. 31:72–73.)

The jury found Tung guilty of the single count of first-degree sexual assault of a child under the age of 13. (R. 31:83–84.) The court sentenced Tung to seven years of initial confinement and eight years of extended supervision. (R. 25:1.)

Postconviction proceedings

Tung, by appointed counsel, filed a no-merit appeal in July 2019. (R. 53:1.) After counsel filed the no-merit report and a supplemental no-merit report, this Court issued an April 2020 order directing counsel to file a second supplemental no-merit report addressing potential issues suggested by the court's review of the record.[3] (R. 77:1–2.) Counsel responded by moving to dismiss the no-merit appeal because he asserted that he had identified an issue of arguable merit to pursue. (R. 77:2.) The court granted the motion, and counsel filed a new notice of appeal in the circuit court. (R. 77:2.)

In April 2020, Tung filed a Wis. Stat. § (Rule) 809.30 motion alleging that counsel was ineffective for pursuing a defense that was contrary to Tung's expressed wishes and

[3] The March 2020 order does not appear to be in the record.

ultimately his trial testimony. (R. 73:1–2.) Tung alleged in the motion that he told counsel before trial that he did not touch the child's vagina, and he directed counsel to present that defense. (R. 73:2.) Tung subsequently filed a "Revised Postconviction Motion" expressly withdrawing his claim of ineffective assistance. (R. 88:1–2.) Instead, Tung reframed his claim as one that he was denied his right to assert a defense of innocence. (R. 88:1–2.) Citing *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), Tung argued that this right was denied when counsel conceded against his wishes that he touched the victim's vagina, albeit accidentally. (R. 88:1–2.)

The court held an evidentiary hearing on the motion in September 2021. (R. 112:1.) At the hearing, Tung testified that Attorney Morales told him before trial that she wanted to argue that he touched the child, but that he had no sexual intent. (R. 112:9–10.) Tung said that he told her he "wasn't gonna go along with her defense," and that he planned to testify that he did not touch the victim's vagina. (R. 112:9–10.) Tung said that he complained to Attorney Morales after her opening statement, and that he was surprised when she said in her closing argument that he had touched the child, but that it was accidental. (R. 112:12–13.) "I thought that we had an understanding," Tung testified, "and I thought that she would go along with what I had asked of her." (R. 112:13.)

Morales testified that she had worked for the state public defender's office for 23 years prior to her appointment in 2020 to the Milwaukee County Circuit Court. (R. 112:21–22.) Morales testified that she recalled discussing Tung's trial defense with him. (R. 112:24.) She said that Tung had admitted to her that he had touched the child's vaginal area "[b]ut he didn't mean to do it. He kept on saying that . . . . [it] was . . . inadvertent, he was sleeping." (R. 112:32, 35.) She said that Tung was "very adamant that he was innocent, that he never intended to be sexually gratified." (R. 112:34.) She

testified that Tung never told her not to admit that he touched the child's vaginal area. (R. 112:34.)

Morales testified that she said in her closing statement that Tung touched the child accidentally despite Tung's testimony that he had not touched her "[b]ecause he had admitted to me that he had done it." (R. 112:36.) Given Tung's statement to her, she testified that "it would have been unprofessional" and "unethical" for her to argue that he did not touch the child's vaginal area at all. (R. 112:36, 39.) Morales said that she thought Tung was not telling the truth when he testified at trial that he never touched the child's genitals. (R. 112:43–44.)

The circuit court denied Tung's motion at the conclusion of the hearing. The court noted that Morales "did not concede guilt in any way" in the defense presented at trial; she asserted that Tung was innocent. (R. 112:51.) The court found that Morales "was pretty clear" in her recollections of the case, including the evidence against Tung, trial strategy, and her discussions with Tung. (R. 112:52–53.)

The court found that Morales was "more credible" than Tung "in terms of being able to recall in detail what [their] meetings were about, and [that] there was never any objection expressed [by Tung] about the defense." (R. 112:54.)

Tung appeals.

ARGUMENT

Tung is not entitled to a new trial under *McCoy* and *Chambers* or any other authority.

A. Standard of review

Whether a defendant was denied his right under the Sixth Amendment to determine the objective of his defense is a question of constitutional fact. *See State v. Martwick*, 2000 WI 5, ¶ 17, 231 Wis. 2d 801, 604 N.W.2d 552 ("A constitutional

fact is one whose 'determination is "decisive of constitutional rights."'" (citation omitted)). A question of constitutional fact is a mixed question of fact and law to which this Court applies a two-step standard of review. *Id.* ¶ 16. This Court reviews the circuit court's findings of historical fact under the clearly erroneous standard, and it reviews independently the application of those facts to constitutional principles. *State v. Post*, 2007 WI 60, ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634.

B. *McCoy* and *Chambers* establish a right to assert a defense of innocence.

"The Sixth Amendment guarantees to each criminal defendant 'the Assistance of Counsel for his defence.'" *McCoy*, 138 S. Ct. at 1507. But "[t]o gain assistance, a defendant need not surrender control entirely to counsel." *Id.* at 1508. In fact, while "[t]rial management is the lawyer's province . . . . [s]ome decisions . . . are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *Id.*

In *McCoy*, the United States Supreme Court recognized that the "[a]utonomy to decide that the objective of the defense is to assert innocence" is among the decisions the client has a right to make. 138 S. Ct. at 1508. "When a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." *Id.* at 1509.

This requirement does not relieve counsel of the responsibility of "develop[ing] a trial strategy and discuss[ing] it with her client," *McCoy*, 138 S. Ct. at 1509, or impose on counsel the duty to obtain the client's express consent to employ a concession-of-guilt defense. *See id.* (discussing *Florida v. Nixon*, 543 U.S. 175, 181 (2004)) (no violation of right to assert innocence where counsel informed defendant

of plan to concede guilt at trial and defendant did not object or assert a desire to maintain his innocence until after trial).

Rather, the burden is on the client to "expressly assert[ ]" his desire to pursue an innocence defense, and he forfeits that right by acquiescing to counsel's strategy. *McCoy*, 138 S. Ct. at 1508–09 (discussing *Nixon*, 543 U.S. at 181). Implicit in the requirement that the defendant "expressly assert" the right is that he or she do so in a timely manner. Thus, the defendant in *Nixon* who failed to express to counsel his wish to assert an innocence defense when counsel was formulating the defense strategy could not later assert a violation of his right to maintain innocence. *Nixon*, 543 U.S. at 181.

Finally, a claim that counsel ignored her client's express wish to assert innocence implicates "[the] client's autonomy, not counsel's competence." *McCoy*, 138 S. Ct. at 1510–11. Thus, the familiar ineffective assistance standard of *Strickland v. Washington*, 466 U.S. 668 (1984), does not apply. Accordingly, a defendant proceeding under *McCoy* need not prove prejudice; a violation of the defendant's right to assert innocence is structural error, requiring a new trial. *See McCoy*, 138 S. Ct. at 1511; *Chambers*, 395 Wis. 2d 770, ¶ 2.

In 2021, the Wisconsin Supreme Court recognized the *McCoy* right for the first time in *Chambers*. *Chambers*, 395 Wis. 2d 770, ¶ 2. Chambers was charged with first-degree reckless homicide. *Id.* ¶ 1. The court assumed that Chambers had expressly directed counsel to pursue an innocence defense at trial. *Id*. ¶ 22 n.9. But the court concluded that defense counsel did not concede Chambers's guilt in closing argument by asking the jury to "consider" second-degree reckless homicide where counsel argued Chambers's absolute innocence before and after making this statement. *Id.* ¶¶ 23–25.

C. Tung is not entitled to a new trial where Attorney Morales consistently asserted Tung's innocence at trial but declined to use in her closing argument Tung's surprise trial testimony asserting a new *theory* of innocence--because Attorney Morales knew or reasonably believed the testimony was false.

On appeal, Tung expressly declines to challenge the postconviction court's findings and credibility determinations. (Tung's Br. 5–6.)[4] Thus, Tung does not dispute on appeal that he admitted to Attorney Morales before trial that he touched Samantha's vaginal area without sexual intent, and that he did not tell Attorney Morales that he planned to testify that he never touched Samantha's vaginal area, even unintentionally. (R. 112:32, 34–36, 54.)

Instead, Tung argues that, once he testified on cross-examination that he never touched Samantha's vaginal area, counsel's failure to argue in her closing that Tung never touched the child violated his right to autonomy, and thus constituted structural error entitling him to a new trial. (Tung's Br. 17–20.) Tung argues that, while Attorney Morales didn't concede his guilt, "[s]he may as well have" by not changing the defense strategy to repeat in her closing argument Tung's surprise testimony that he never touched the child's vaginal area. (Tung's Br. 18–19.)

Tung's argument is lightly briefed, particularly for a claim that he acknowledges is not controlled by existing precedent. (Tung's Br. 4, 16–20.) *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (this Court may decline to address inadequately briefed issues). But Tung

[4] The pagination of Tung's brief doesn't match the page numbers of the electronically filed brief. The State's cites to Tung's brief are to the electronic page numbers.

relies on two primary sources of law: (1) the *McCoy* and *Chambers* cases discussed above establishing the right to assert innocence; and (2) *Cronic* and *McDowell*[5] for the propositions that counsel's decision not to use Tung's unexpected testimony in the closing argument represented a breakdown in the adversarial process and was contrary to counsel's plain ethical duties.

Neither of these sources is availing.

1. Tung is not entitled to a new trial under *McCoy* and *Chambers*.

Tung recognizes that his case "does not fit neatly under *Chambers* and *McCoy*." (Tung's Br. 16.) As Tung acknowledges, these cases recognize that defendants have the right to claim innocence at trial, and Attorney Morales made such a defense on Tung's behalf by arguing that he did not touch the child with the intent of sexually gratifying himself. *See* Wis. Stat. § 948.02(1)(e) (a person who has sexual contact with a child under the age of 13 is guilty of first-degree sexual assault of a child); Wis. JI–Criminal 2101A (2007) ("sexual contact" is the "intentional touching of" an "intimate part" of the victim by the defendant "with [the] intent to become sexually aroused or gratified").

Tung nonetheless argues that *McCoy* and *Chambers* are "instructive," and they support the conclusion that counsel's alleged error in this case is structural and thus requires a new trial. (Tung's Br. 17.) These cases do not entitle Tung to a new trial.

To repeat, *McCoy* and *Chambers* establish only a right to assert a defense of innocence, *McCoy*, 138 S. Ct. at 1508–09, *Chambers*, 395 Wis. 2d 770, ¶ 2, and Attorney Morales

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[5] *State v. McDowell*, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500.

asserted such a defense on Tung's behalf. These cases do not establish a broader right of defendant autonomy in setting defense strategy. Specifically, *McCoy* and *Chambers* do not go so far as to hold that a defendant has the right to assert *a particular theory of innocence* ("I'm innocent because I didn't touch her, not because I touched her unintentionally") or to demand that counsel not concede an element of the offense ("I don't want to concede that I touched her"). Strategic decisions such as these remain within counsel's purview after *McCoy*. *See McCoy*, 138 S. Ct. at 1509 (counsel continues to have the duty to develop defense strategy).

McCoy and *Chambers* merely hold that defense counsel may not concede the defendant's guilt over his or her express and timely objection. *See McCoy*, 138 S. Ct. at 1508–09; *Chambers*, 395 Wis. 2d 770, ¶ 2. This Court should decline Tung's implicit request to extend *Chambers* to recognize additional autonomy rights beyond the right to assert a defense of innocence. *See Cook v. Cook*, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997) (court of appeals' primary function is error correction).

Even if *McCoy* and *Chambers* included the right to determine a particular theory of innocence, Tung's surprise testimony at the end of trial that he did not touch Samantha's vagina area[6] would not have constituted a timely assertion of that right. *McCoy* and *Nixon* stand for the proposition that the defendant's assertion of the right to pursue an innocence defense must be expressly and timely made. *McCoy*, 138 S. Ct. at 1508–09; *Nixon*, 543 U.S. at 181. Nixon could not later claim a violation of his right to maintain innocence where he

[6] Again, the postconviction court's uncontested findings and credibility determinations established that Tung did not tell Morales that he planned to testify that he never touched the child. (R. 112:32, 34–36, 54.)

failed to express the wish to maintain innocence when counsel was formulating his defense. *Nixon*, 543 U.S. at 181.

This timeliness requirement was recognized in a recent judge-authored opinion citable for persuasive value. *State v. Keyon D. Grant*, No. 2020AP785-CR, 2021 WL 870439 (Wis. Ct. App. Mar. 9, 2021) (unpublished). (R-App. 1–12.) There, Grant did not object before trial when counsel was formulating a defense of conceding guilt to a lesser offense. (R-App. 11.) In fact, he did not assert his desire to claim innocence until the end of trial in an outburst to the court. (R-App. 11.) Where Grant failed to assert a desire to pursue a defense of innocence until the end of trial, this Court upheld the circuit court's order denying Grant's new trial request under *McCoy* because it was untimely. (R-App. 11.)

Like Grant, Tung did not express a desire to assert a defense any different from that pursued by counsel until near the end of the trial, when he took the stand. Thus, even if this were an actual *McCoy/Chambers* case in which counsel had conceded guilt over Tung's eventual objection, his *McCoy* claim would still fail because it was untimely where Tung did not assert the right to claim innocence (or a different theory of innocence) until long after counsel had formulated the defense. *See Nixon*, 543 U.S. at 181; (R-App. 11).

Finally, Tung's argument that this is, practically speaking, a *McCoy/Chambers* case—i.e., counsel didn't concede guilt but "[s]he may as well have" by not adapting her closing argument to Tung's surprise testimony (Tung's Br. 18–19)—is unpersuasive. To be blunt, Tung brought this situation on himself. Tung admitted to his attorney that he touched Samantha's vaginal area but was "adamant" that he was innocent *because the touching was unintentional*. (R. 112:34.) This version of events was at least arguably consistent with his prior statement to the detective (Ex. 6 CD 33:35), and counsel relied on it in formulating Tung's defense. Then, without warning, Tung changed his story on the stand,

testifying in response to the prosecutor's questions that he never touched the child's vaginal area, even unintentionally. (R. 31:38.)

Tung cannot avail himself of *McCoy* and *Chambers* in these circumstances. As shown in detail below, Tung's about face put counsel in an untenable position, and no other authority Tung references warrants relief either.

2. Tung's argument that he is entitled to a new trial under *Cronic* and *McDowell* is forfeited and without merit.

Because this is not a *McCoy* and *Chambers* case, Tung constructs an argument that is a mash-up of the right to assert innocence under *McCoy* and *Chambers*, the right to counsel under *Cronic*, and defense counsel's professional and ethical duties set forth in *State v. McDowell*, 2004 WI 70, 272 Wis. 2d 488, 681 N.W.2d 500. (Tung's Br. 17–20.)

The State understands this argument to be as follows: *McDowell* and Wisconsin's rules of attorney conduct required Attorney Morales to use in her closing argument Tung's unexpected testimony that he did not touch the child's vaginal area. (Tung's Br. 19–20.) Counsel's decision not to make this argument—and to argue instead that Tung was innocent because he touched the child's vaginal area unintentionally—represented a total breakdown of the adversarial process, effectively denying Tung counsel and rendering the conviction unreliable under *Cronic*, 466 U.S. at 656–662. (Tung's Br. 18–20.) Invoking *McCoy* and *Chambers*, Tung then labels counsel's alleged error "structural," arguing that it entitles him to a new trial. (Tung's Br. 18–20.) There are several problems with this argument.

First, Tung never raised a *Cronic* claim in the postconviction court that counsel's decision was a total breakdown of the adversarial process; he only sought relief under *McCoy* and *Chambers*. *See State v. Crute*, 2015 WI App

15, ¶ 19, 360 Wis. 2d 429, 860 N.W.2d 284 (argument not raised in the circuit court is forfeited on appeal).

Second, even if not forfeited, the argument that Attorney Morales's decision not to alter the defense strategy in the closing argument to match Tung's surprise testimony represented a breakdown in the adversarial process is absurd. To repeat, this situation was entirely one of Tung's own making. He told counsel before trial one thing—he touched the child's vagina unintentionally when he was not fully awake—and, without warning, told the jury another version on cross-examination—he never touched the child's vagina.

Despite this unexpected development, Attorney Morales proceeded to make a cogent and reasonable argument for her client's innocence that was grounded in the evidence—namely, Tung's video recorded statements that were played for the jury, and Samantha's testimony that Tung touched her. Further, counsel's argument was consistent with Tung's prior statements to her about what happened. Morales's closing argument was reasonable, and reflected Morales's own reasonable, on-the-fly assessment of her ethical responsibilities under the circumstances, as discussed below in more detail. Moreover, the fact that Attorney Morales made a cogent closing argument after competently representing Tung throughout the trial proceedings belies Tung's claim that the adversarial process broke down in this case. *See Cronic*, 466 U.S. at 657–62.

Of course, the effectiveness of counsel's closing argument was undercut by Tung's testimony—but this was Tung's own doing. After Tung changed his story at the last minute, he forced counsel to make a choice: Stick with the defense that counsel had previewed in the opening statement, one that was consistent with Tung's recorded interview

played for the jury and the child's own testimony.[7] Or change the defense to fit Tung's testimony even though it was contrary to Tung's recorded interview, the child's testimony, counsel's opening statement, and Tung's own statement to counsel. That counsel chose the former option not only wasn't a "breakdown of the adversarial process," it was reasonable. *See Cronic*, 455 U.S. at 658, 662.

Tung argues that, once he testified that he never touched the child, Attorney Morales was compelled by *McDowell* and the ethical rules discussed therein to make a closing argument based on that testimony, and that her decision not to do so rendered the conviction unreliable. (Tung's Br. 18–20.) Tung is wrong.

McDowell addresses the standard of knowledge necessary for a defense attorney to affirmatively act to prevent client perjury. *McDowell*, 272 Wis. 2d 488, ¶¶ 33–48. *McDowell* observed that, when a Wisconsin defendant wishes to testify at trial and directly informs counsel that he or she intends to testify falsely, counsel must allow the witness to testify in a "narrative format" that honors the defendant's right to testify and counsel's ethical duty not to elicit perjury. *See id.* ¶ 43. The court set the standard for knowledge requiring use of the narrative format procedure "extremely high": it should be employed only when the defendant admits directly to counsel in unambiguous terms that he or she plans to testify untruthfully. *Id.* ¶¶ 42, 43.

Tung cites only *McDowell* for his argument that the ethical rules required counsel to use his testimony in the closing argument. (Tung's Br. 19–20.) But this is not a

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[7] Tung asserts that Attorney Morales "argue[d]" in her closing "that Tung's trial testimony was false" and "t[old] the jury that her client, Tung, had lied in this trial testimony . . . ." (Tung's Br. 16–17.) Tung misrepresents the record. Attorney Morales said no such thing. (R. 31:67–72.)

McDowell case; the issue is not whether Tung unambiguously stated to counsel that he intended to testify falsely. Here, Tung kept counsel in the dark; his testimony on cross examination that he did not touch the child was unexpected and contradicted Tung's prior statements to counsel that he touched the child's genitals unintentionally.

No, the question here is whether counsel was required to use in the closing argument testimony that she knew or reasonably believed was false. The answer is no under Wisconsin's rules of professional conduct for attorneys.

These rules support Morales's postconviction testimony that it would have been "unprofessional" and "unethical" for her to argue that he did not touch the child's vaginal area at all. (R. 112:36, 39.) The rule requiring candor toward the tribunal provides that "[a] lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal . . . ." SCR 20:3.3(a). Comment 2 addresses the appropriate line between the duty of zealous representation and the duty of candor: "A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force." Comment 2, SCR 20:3.3. "[A]lthough a lawyer in an adversary proceeding is not required to present an impartial exposition of the law . . . *the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false*." *Id.* (emphasis added).

Here, counsel knew or reasonably believed that Tung's testimony was false. It contradicted the version of events Tung gave when "adamant[ly]" arguing his innocence to her. (R. 112:34.) Morales's belief that it would have been "unethical" and "unprofessional" to use testimony she knew or believed to be false was consistent with SCR 20:3.3(a)(1) and Comment 2. This belief was not, as Tung argues, "shocking and unreasonable." (Tung's Br. 19.)

Based on the foregoing, Tung has forfeited his argument for a new trial under *Cronic* and *McDowell*. This argument is also without merit.

CONCLUSION

The judgment of conviction and the order denying postconviction relief should be affirmed.

Dated this 21st day of March 2022.

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 4,997 words.

Dated this 21st day of March 2022.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 21st day of March 2022.

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