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SUPREME COURT

**State of Wisconsin
Supreme Court
Appeal No. 2021AP001705-CR**

State of Wisconsin,

Plaintiff-Respondent-Respondent,

v.

Cedric Tung,

Defendant-Appellant-Petitioner.

**Petition for Review of an Opinion of the Wisconsin Court of
Appeals, Dated June 20, 2023**

Petitioner's Petition

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Petition

Now comes the above-named petitioner, Cedric Tung, by his attorney, Jeffrey W. Jensen, and pursuant to § 809.62, Stats., hereby petitions the Wisconsin Supreme Court to review this matter.

As grounds, the undersigned alleges and shows to the court that this appeal presents an extremely important constitutional issue that is likely to recur unless the Supreme Court resolves it. That is, whether a defense attorney may formulate and present a theory of defense that is contrary to the defendant's trial testimony, and based, not on the evidence presented at trial, but, rather, based upon attorney-client privileged communications with her client.

Statement of the Issue

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

¹ This is a pseudonym

gratified. Not surprisingly, Tung was convicted.

Tung filed a postconviction motion claiming that he was entitled to a new trial because defense counsel argued a theory of defense that was contrary to his trial testimony. At the hearing on the postconviction motion, defense counsel claimed that, based upon attorney-client conversations she had with Tung prior to trial, it was her belief that Tung did, in fact, touch the child's vagina. This is why she argued in closing that, although Tung touched the girl's vagina, it was accidental (i.e. not for the purpose of sexual gratification)

Thus, the issue presented is whether the constitution permits an attorney to formulate and present a theory of defense that is based not on the evidence in the record; but, rather, which is based upon counsel's belief as to what really happened, even if that belief is contrary to the defendant'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.”

Answered by the court of appeals: There was no structural error because the record does not demonstrate that defense counsel asserted in her closing argument that Tung “lied” in his trial testimony. That is, even though Tung testified that he did not touch Samantha’s vagina at all, counsel’s concession in her closing argument that Tung “accidentally” touched Samantha’s vagina, is not tantamount to asserting to the jury that Tung lied during his testimony. Moreover, at the postconviction motion, Tung failed to establish that he forbade counsel to concede the touching. Finally, according to the court of appeals, defense counsel did not abandon her role as a zealous advocate for Tung.

Statement of the Case

I. Procedural History

On June 15, 2017, the petitioner, 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 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,

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.

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 -- 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 appealed.

The court of appeals affirmed. According to the appellate court, there was no structural error because the record does not demonstrate that defense counsel conceded Tung’s guilt in her closing argument. That is, even though Tung testified that he did not touch Samantha’s vagina at all, counsel’s concession in her closing argument that Tung “accidentally” touched Samantha’s vagina, is not an admission of guilt, and is not tantamount to asserting to the jury that Tung lied during his testimony. Moreover, the court wrote, at the postconviction motion Tung failed to establish that he forbade counsel to concede the touching. Finally, according to the court of appeals, defense counsel did not abandon her role as a zealous advocate for Tung.

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 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

⁴ Not his real name

⁵ Not her real name

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)

Discussion

- I. The Supreme Court should review this matter because this is a substantial issue of federal and state constitutional law, and it ought to be decided by the Supreme Court, rather than by the court of appeals.**

To put this issue in a nutshell, what is presented by this appeal is the question of whether the constitution allows a defense attorney to formulate and to argue a theory of defense that is contrary to her client's trial testimony. In doing so, may the attorney rely upon privileged communication with her client that is not a matter of record.

The lower courts avoided confronting the true issue by contending that defense counsel did not actually argue in closing that Tung lied in his trial testimony. Rather, according to the court of appeals, counsel merely crafted arguments

based upon things that Tung supposedly told her in privileged communications. Again, according to the court of appeals, this is nothing less than what is required of an attorney under SCR 20.3.3 concerning candor to the tribunal.

Trial counsel's statements in her closing argument are not a matter of interpretation. Tung testified that he never touched Samantha's vagina; and defense counsel told the jury that he did, but it was accidental. This statement is incapable of being understood in any way other than it is counsel's belief that Tung's trial testimony was not truthful.

Further, the lower courts avoided the true nature of the issue by holding that Tung failed to prove at the postconviction motion that he specifically forbade counsel to concede that he touched Samantha's vagina.

Again, this is wholly beside the point. Once Tung testified that he did not touch Samantha's vagina, it was incumbent counsel to zealously advocate that position. A defendant should not have to specifically order his attorney to argue his version of the facts. That should go without saying.

Thus, the opinion of the court of appeals, which was recommended for publication, plainly opens the door for defense lawyers to formulate and present a theory of defense that is contrary to the defendant's testimony. The lawyer is even permitted to do so based upon attorney-client privileged

information. Nothing could be more damaging to the attorney-client relationship in a criminal case.

The Supreme Court must grant review.

A. Defense counsel abandoned her role as advocate

The court of appeals' opinion that trial counsel did not concede Tung's guilt is based entirely on the court's assertion that the record does not support Tung's claim on appeal that trial counsel, in effect, suggested that Tung "lied" during his testimony. According to the court of appeals, "While Tung claims trial counsel asserted that Tung had lied in his testimony, the record does not reflect that to be a fair characterization of her closing argument." (Ct. App. opinion ¶ 23) The court's characterization of the record at that point in the opinion is puzzling. It does not appear to support the court's conclusion that, "The postconviction court made a finding that there was no concession." *Id.*

But Tung's argument is a fair characterization of counsel's closing argument. It is all in black-and-white in the trial transcript. Where Tung testified that he *never* touched Samantha's vagina, how else could the jury interpret defense counsel's statement in her closing argument that Tung did, in fact, touch Samantha's vagina? Examination of the record here is not a thought experiment akin to Schrödinger's cat⁶. Tung

⁶ In the thought experiment, a hypothetical cat may be considered simultaneously both alive and dead, while it is unobserved in a closed box.

could not have both “touched” and “not touched” Samantha’s vagina. Defense counsel’s statement in closing that Tung *did* touch Samantha’s vagina can be interpreted only one way by the jury: counsel did not believe Tung’s trial testimony. That is, *he lied*. This is not a matter of the circuit court’s “findings” at the postconviction hearing. This is entirely a matter of the record.

This being the case, no conclusion may be reached other than defense counsel abandoned her role as a zealous advocate for Tung. Rather than advocating Tung’s version of the facts-- based on his trial testimony-- counsel advocated her own belief as to the facts, based on something other than the evidence presented at trial.

B. Whether Tung forbade counsel to concede touching is wholly beside the point

Additionally, the court of appeals held, “Tung failed to show that he instructed trial counsel to pursue an innocence defense objective. In the postconviction hearing, Tung asserted that he professed a defense objective to claim innocence. In contrast, trial counsel testified that Tung had explained to her that the touching was accidental and inadvertent.” (Ct. App. opinion ¶ 24)

This, of course, is wholly beside the point. Once Tung testified during trial that he never touched Samantha’s vagina,

defense counsel was obligated to advocate this position to the jury.⁷ It was not necessary for Tung to prove at the postconviction hearing that he specifically ordered trial counsel to argue his version of the facts. That goes without saying.

To do otherwise, as trial counsel did in this case, is to abandon counsel's role as a zealous advocate for the defendant. This is especially true where counsel's strategy was based upon privileged attorney-client communications that were not in evidence, and certainly did not rise to the level of Tung specifically telling trial counsel that he planned to commit perjury when he testified at trial. It is a slippery constitutional slope indeed if the courts approve of defense counsel making arguments at trial that are based not on the evidence presented, but, rather, based upon counsel's subjective belief as to what really happened, and whether or not counsel believes the defendant's trial testimony. Why would a defendant ever discuss the facts of his case with his trial attorney if the law provides that the attorney is free to formulate the theory of defense based upon whether or not she believes the defendant's story?

⁷ An issue has developed in this case concerning whether trial counsel had some ethical obligation to not advocate Tung's trial testimony to the jury because, supposedly, Tung made other statements-- including attorney-client privileged statements that were not in the record-- admitting that he had touched Samantha's vagina. In its opinion, the court of appeals endeavored to discuss this issue, ultimately concluding that, "We cannot fault [trial counsel's] decision to continue her trial strategy." (Ct. App. opinion ¶ 31) This, despite the fact that counsel's trial strategy was not based on the trial record of Tung's testimony, but, instead, it was based on privileged communications she purported had with Tung.

Conclusion

For these reasons, it is respectfully requested that the Wisconsin Supreme Court grant review.

Dated at Milwaukee, Wisconsin, this 3rd day of July, 2023.

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Certification as to Length and E-Filing

I hereby certify that this petition conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 3215 words.

Dated at Milwaukee, Wisconsin, this 3rd day of July, 2023.

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