IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

QUINTON ANDREW PRESCOTT BEZON,
Defendant-Appellant.

Supreme Court Case No.: CRA17-015
Superior Court Case No.: CF0650-15

OPINION

Cite as: 2018 Guam 28

Appeal from the Superior Court of Guam
Argued and submitted on June 12, 2018
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

MARAMAN, C.J.:

[1] Defendant-Appellant Quinton Andrew Prescott Bezon appeals a final judgment convicting him of Third Degree Criminal Sexual Conduct and Fourth Degree Criminal Sexual Conduct, sentencing him to a total of four years' incarceration, and ordering him to pay a fine of $2,000.00, plus court costs, and to register as a Level I Sex Offender. Bezon argues that the trial court denied him the opportunity to allocute and that he should be resentenced as a result. Following oral arguments, we *sua sponte* ordered additional briefing on whether Bezon's trial counsel violated Bezon's Sixth Amendment right to make his own defense by telling the jury that Bezon had had consensual sexual intercourse with the victim, even though Bezon insisted that he and the victim had not had sexual intercourse. For the reasons discussed below, we hold that trial counsel's alleged concession did not violate Bezon's Sixth Amendment right to make his own defense and hold that the trial court committed plain error in not providing Bezon an opportunity for allocution. We reverse and remand for resentencing.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Bezon was convicted of Third Degree Criminal Sexual Conduct ("CSC") and Fourth Degree CSC. During opening statements, Bezon's counsel stated:

> And you will have to decide, ladies and gentlemen, *is this rape or was this consensual*, and then someone who was in trouble decided to say it was rape. Someone who perhaps did something inappropriate the night before, a married woman, whose spouse was upset with her, and she claims to be raped.

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Transcripts ("Tr.") at 16 (Jury Trial, Apr. 21, 2017) (emphasis added). In a written statement included in the presentence investigation report ("PSI"),[1] Bezon contended that his defense attorney had misrepresented him by arguing at trial that the sexual intercourse was consensual, while Bezon maintained that no sexual intercourse occurred. However, at his sentencing hearing, Bezon's counsel stated that Bezon "regret[ted] some of the things he said in [the written statement]." Tr. at 8 (Sentencing Hr'g, July 13, 2017).

[3] At the sentencing hearing, Bezon's counsel argued for a suspended sentence. After hearing arguments from counsel, the trial court proceeded to sentencing without first personally addressing Bezon or inquiring whether Bezon wanted to make a statement to the court before sentencing was imposed. The trial court sentenced Bezon to four years' incarceration, none suspended, for Third Degree CSC and one year's incarceration, not suspended, for Fourth Degree CSC, to be served concurrently for a total of four years' incarceration. It also ordered Bezon to pay a fine of $2,000.00, plus court costs, and to register as a Level I Sex Offender once out on parole, among other conditions. Bezon timely filed his Notice of Appeal.

[4] In his appeal, Bezon challenged only his sentence on the basis that he was not given an opportunity for allocution at his sentencing hearing. After oral arguments, we ordered supplemental briefing on the issue of whether Bezon's trial counsel violated Bezon's Sixth Amendment right to make his own defense in light of *McCoy v. Louisiana*, -- U.S. --, 138 S. Ct. 1500 (2018).

[1] Although PSIs are not public documents, we have previously held that we may access and review a PSI "where relevant to an issue on which an appeal has been taken." *People v. Roby*, 2017 Guam 7 ¶ 46 (quoting 9 GCA § 80.14(a) (2005)). The PSI is relevant, and therefore reviewable, as the People argue that Bezon's substantial rights were not affected by the alleged error in this case because of a written statement included in the PSI.

II. JURISDICTION

[5] This court has jurisdiction over an appeal from a final judgment of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-281 (2018)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[6] We review *de novo* alleged violations of a defendant's constitutional rights. *People v. Ongiil*, 2016 Guam 34 ¶ 16 (collecting cases). Where no timely objection is made at a sentencing hearing, allocution errors are subject to plain error review. *People v. Meseral*, 2014 Guam 13 ¶ 15 (collecting cases).

IV. ANALYSIS

A. Bezon's Sixth Amendment Right to Make His Own Defense Was Not Violated

[7] The Sixth Amendment guarantees to each criminal defendant "the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also* 48 U.S.C.A. § 1421b(g) (Westlaw through Pub. L. 115-281 (2018)). The U.S. Supreme Court has made clear that "[t]rial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" *McCoy*, 138 S. Ct. at 1508 (quoting *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)). However, certain 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.* A "[v]iolation of a defendant's Sixth Amendment-secured autonomy" is a structural error. *Id.* at 1511.

[8] In *McCoy*, defendant McCoy appealed a denial of his motion for a new trial, which he had brought on the basis that the trial court violated his constitutional rights by allowing his trial

counsel to concede the defendant's guilt, over the defendant's objection. *Id.* at 1507. The Court ruled that "[a]utonomy to decide that the objective of the defense is to assert innocence" is a decision reserved for the client. *Id.* at 1508. It ruled that "[w]hen 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 (quoting U.S. Const. amend. VI). The Court ultimately held that "[t]he trial court's allowance of [counsel's] admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment" and ordered a new trial. *Id.* at 1512.

[9] Applying *McCoy*, the court in *United States v. Rosemond*, 322 F. Supp. 3d 482 (S.D.N.Y. 2018), held that defense counsel did not violate defendant Rosemond's right to autonomy where counsel conceded that Rosemond "directed a shooting and focus[ed] instead on whether the government proved beyond a reasonable doubt that [the defendant] possessed the requisite intent to *kill*." 322 F. Supp. 3d at 486. The court found that "the concession by itself was insufficient to establish Rosemond's guilt as to any one of the four counts in the indictment." *Id.* The court declined to extend *McCoy* to counsel's choices "other than the defendant's decision to maintain innocence or concede guilt." *Id.* The court noted that such an extension of *McCoy* "could lead to endless post-conviction litigation concerning what transpired between defendants and their lawyers and how the defendants' unsuccessful defenses were conducted." *Id.* at 487. We find this reasoning persuasive and shall apply *Rosemond* to the case at hand.

[10] Bezon argues that his Sixth Amendment right to autonomy was violated because he "wanted his trial counsel to deny that he engaged in the *actus reus*," but his trial counsel nevertheless conceded this point in front of the jury. Appellant's Suppl. Br. at 8 (Sept. 13, 2018). The only statement by Bezon's trial counsel that could be construed to be an admission

that Bezon had sexual intercourse with the victim is the following made during opening statements:

> And you will have to decide, ladies and gentlemen, *is this rape or was this consensual*, and then someone who was in trouble decided to say it was rape. Someone who perhaps did something inappropriate the night before, a married woman, whose spouse was upset with her, and she claims to be raped.

Tr. at 16 (Jury Trial, Apr. 21, 2017) (emphasis added). Trial counsel's defense strategy was not to admit that sexual intercourse had occurred and that it was consensual. Rather, counsel called into question the credibility of the victim and the People's expert witness. *See, e.g.*, Tr. at 32-33, 34-36 (Closing Args., Apr. 25, 2017). Also, counsel specifically stated:

> So the questions that you have to come up with and the answers that you're going to have to reach are: *Was there intercourse?* Did he touch her breast? Did he touch her vagina with his penis, while he was inserting his penis into her vagina? Those are the three charges against him. Did those things happen?

Id. at 38 (emphasis added). Counsel also highlighted Bezon's version of events: that he had asked the victim whether she wanted to have sexual intercourse and when she answered in the negative, he stopped. *Id.* at 39.

[11] Assuming, *arguendo*, that trial counsel conceded that Bezon had sexual intercourse with the victim, this concession did not violate Bezon's Sixth Amendment right to make his own defense. The determination of which arguments to strategically advance at trial to achieve acquittal falls within the purview of defense counsel. *See McCoy*, 138 S. Ct. at 1508. In *McCoy*, the defendant's right to autonomy was violated where he "expressly assert[ed] that the objective of '*his* defence' [wa]s to maintain innocence of the charged criminal acts" and his counsel "overr[o]de it by conceding guilt." *Id.* at 1509 (quoting U.S. Const. amend. VI). Here, Bezon and his trial counsel's objectives were identical—both sought a judgment of acquittal. The disagreement, assuming there was one, was simply over the best course to attempt to avoid

conviction. Moreover, this case is similar to the facts of *Rosemond* in that Bezon's trial counsel's alleged concession that Bezon had sexual intercourse with the victim did not amount to a concession that Bezon had committed any of the charged crimes or any lesser offense. *See Rosemond*, 322 F. Supp. 3d at 486 (emphasizing fact that trial counsel's "concession by itself was insufficient to establish Rosemond's guilt as to any one of the four counts in the indictment"). Therefore, trial counsel did not violate Bezon's right to autonomy in conceding that Bezon had sexual intercourse with the victim.

B. The Trial Court Erred in Not Affording Bezon the Opportunity to Allocute

[12] We have previously ruled on issues surrounding allocution errors in *People v. Meseral*, 2014 Guam 13. Consistent with our prior precedent in *Meseral*, we will reverse Bezon's sentence. Title 8 GCA § 120.26 requires the trial court, before imposing sentence, to "address the defendant personally and ask him if he wishes to make a statement on his own behalf and to present any information in mitigation of punishment." 8 GCA § 120.26 (2005). The trial court did not afford Bezon such an opportunity. *See* Tr. at 11-14 (Sentencing Hr'g, July 13, 2017). Since Bezon did not object at the sentencing hearing to the trial court not affording him the opportunity to allocute, *see* Tr. at 11-14 (Sentencing Hr'g, July 13, 2017), we will review for plain error, *see Meseral*, 2014 Guam 13 ¶ 15. Under plain error review, "we will not reverse unless '(1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.'" *Meseral*, 2014 Guam 13 ¶ 16 (quoting *People v. Quitugua*, 2009 Guam 10 ¶ 11).

[13] Both parties agree that the failure by the trial court to personally address Bezon was erroneous and that the error was clear and obvious under Guam law. *See* Appellant's Br. at 6-7

(Mar. 26, 2018); Appellee's Br. at 6 (Apr. 2, 2018). At issue is whether the error affected Bezon's substantial rights and, if so, whether reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process.

[14] Under the third prong of plain error review, a defendant must show that "he was prejudiced, that is, that the error affected the outcome of the proceedings." *Meseral*, 2014 Guam 13 ¶ 77 (citation omitted). In *Meseral*, we acknowledged that there may be a "special category of forfeited errors" that must be corrected regardless of a showing of prejudice, to preserve and protect "the fairness and the reputation of the [judicial] process." *Id.* (quoting *Quitugua*, 2009 Guam 10 ¶ 31 n.8). We held that allocution errors do not fall into this special category and declined to adopt a presumption of prejudice. *Id.* ¶ 80. Instead, we adopted the Fourth Circuit's case-by-case approach for determining whether an allocution violation is prejudicial. *Id.* ¶ 81 (citing *United States v. Muhammad*, 478 F.3d 247, 249 (4th Cir. 2007)).

[15] Bezon argues that he was prejudiced by not being afforded a final opportunity to address the court before it imposed a sentence because it may have impacted the ultimate outcome. Appellant's Br. at 7. The People argue that Bezon was not prejudiced because he provided a detailed, written statement directly to the court in connection with the PSI. Appellee's Br. at 7. In *Meseral*, we noted that "the absence of a statement by [the defendant] in the [PSI] . . . weighs in favor of finding prejudice." 2014 Guam 13 ¶ 82. Relying on this language, the People suggest that statements in a PSI may provide an effective substitute for oral allocution. Appellee's Br. at 7. Whether the defendant filed a statement in a PSI is a factor to consider in determining prejudice, but it is not determinative. A PSI and an allocution are individually required by separate statutes—9 GCA § 80.12 and 8 GCA § 120.26, respectively—and, therefore, a PSI is not a substitute for allocution. Moreover, in *United States v. Noel*, 581 F.3d

490 (7th Cir. 2009), the Seventh Circuit held that a defendant's substantial rights were affected where a defendant's written statement was read aloud at a sentencing hearing by counsel because the judge did not ask the defendant directly whether he would like to address the court. 581 F.3d at 502-03. The court held that although the defendant "ha[d] not submitted that he would have said anything different than what he wrote in his letter, allowing counsel to speak in [the defendant]'s stead [did] not cure the prejudice stemming from the violation of his rights." *Id.* at 503 (citing *Green v. United States*, 365 U.S. 301, 304 (1961)). Similarly, Bezon providing a written statement to the court in connection with the PSI did not cure the prejudice stemming from the violation of his right to allocute.

[16] The People also cite to *United States v. Covington*, 681 F.3d 908 (7th Cir. 2012), to support their argument that the error did not affect Bezon's substantial rights. *See* Appellee's Br. at 7. In *Covington*, the court held that a district court interrupting a defendant during allocution did not violate the defendant's right of allocution and that even if the interruption was error, the error did not affect the defendant's substantial rights. 681 F.3d at 910-11. The court held that the error did not affect the defendant's substantial rights because the topics that the defendant argued he would have offered details about, had he not been interrupted, had already been touched on during his allocution. *Id.* at 911. Unlike the defendant in *Covington*, Bezon may have discussed topics that he did not touch upon in his written statement. This is likely, given that—as noted by Bezon's counsel—Bezon "regret[ted] some of the things he said in [the written statement]." Tr. at 8 (Sentencing Hr'g, July 13, 2017). Therefore, Bezon's written statement did not cure the prejudice stemming from the violation of his right to allocute.

[17] In appellate review of allocution errors, we will not "speculate as to what [the defendant] may have said, nor will we try to ascertain whether it would have been persuasive." *Meseral*,

2014 Guam 13 ¶ 82. At the sentencing hearing, Bezon's counsel argued for a suspended sentence. Tr. at 7 (Sentencing Hr'g, July 13, 2017). The trial court did not impose this argued-for sentence. Rather, it sentenced Bezon to four years' incarceration, none suspended, for Third Degree CSC and one year of incarceration, none suspended, for Fourth Degree CSC, to be served concurrently for a total of four years' incarceration. Record on Appeal ("RA"), tab 93 at 3 (Judgment, Aug. 31, 2017). Given that we do not know what Bezon may have said during allocution, we cannot conclude that Bezon would have received the same sentence had he been afforded the opportunity to allocute. *See Meseral*, 2014 Guam 13 ¶ 82. Therefore, the trial court's failure to address Bezon personally was an error that affected his substantial rights.

[18] Under the fourth prong of the plain error test, we may reverse a trial court's decision if we find that reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process. *Id.* ¶ 84 (citations omitted). In *Meseral*, we noted that the U.S. Supreme Court has stated that an allocution-related error "is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." *Id.* ¶ 85 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). However, we also noted that "the denial of the right to allocution is the kind of error that undermines the fairness of the judicial process" and that "the right has value in terms of maximizing the *perceived equity* of the process." *Id.* ¶ 86 (quoting *United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007)).

[19] Bezon's counsel stated that Bezon regretted some of the things that he included in his written statement. Therefore, his ability to express himself to the trial court in this previous statement does not excuse or cure the trial court's error, as Bezon likely would have said something different during allocution than what he included in his written statement. There is

nothing in the record that "indicates that the denial of [Bezon's] right to allocution did not implicate the core values in the sentencing procedures," and, therefore, we find plain error, as the error seriously affected the integrity of the judicial process. *Id.* ¶ 87. "[R]esentencing is the appropriate remedy for [an] allocution error." *Id.* As we find no controlling differences between this case and *Meseral*, we will reverse and remand for resentencing consistent with this prior precedent. *See* 2014 Guam 13.

V. CONCLUSION

[20] The alleged concession by Bezon's trial counsel did not violate Bezon's Sixth Amendment right to make his own defense. Accordingly, we **AFFIRM** Bezon's conviction of Third Degree CSC and Fourth Degree CSC. However, the trial court committed plain error when it failed to personally address Bezon and failed to ask him whether he wished to make a statement before pronouncing the sentence, in violation of 8 GCA § 120.26. We **REVERSE** Bezon's sentence and **REMAND** for resentencing.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice