STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1710

State of Minnesota,
Respondent,

vs.

Justin Joseph Huisman,
Appellant.

Filed September 23, 2019
Reversed and remanded
Slieter, Judge

Steele County District Court
File No. 74-CR-17-1425

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Dan McIntosh, Steele County Attorney, Owatonna, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam S. Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Reilly, Judge; and Slieter, Judge.

U N P U B L I S H E D O P I N I O N

SLIETER, Judge

Appellant Justin Joseph Huisman challenges the judgment of conviction for criminal sexual conduct on the ground that he was denied his right to effective assistance of counsel when his trial counsel conceded his guilt on three elements of the charged

offenses in a written closing statement and without his consent or acquiescence. The law dictates a unique application of the *Strickland* standard in the context of a defense counsel conceding a client's guilt without the client's consent or acquiescence. This standard presumes a deficient performance and, therefore, a new trial is required. Because appellant's counsel made a concession of guilt for which the record demonstrates neither consent nor acquiescence by the appellant, we reverse and remand for a new trial.

FACTS

On August 11, 2017, the state charged Huisman with first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2016), and third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(b) (2016). The case proceeded to trial. Huisman waived his right to a jury trial.

At the bench trial, M.A.H. and O.J.H. testified that they were 12 and 13, respectively, on or about August 5 and 6, 2017. M.A.H. and O.J.H. met with Huisman and his friend on the afternoon of August 5 and exchanged phone numbers. M.A.H. and O.J.H. recalled Huisman saying he was in his 20s, which later law enforcement investigation revealed his birthdate was October 10, 1990. Later that evening, Huisman met with M.A.H., O.J.H., and O.J.H.'s step-brother, and the group went to Huisman's residence in Owatonna, Steele County. Huisman told O.J.H.'s step-brother to wait outside the home, and M.A.H. and O.J.H. testified that they went into the basement of the residence with Huisman and that he penetrated their vaginas with his penis. Additionally, O.J.H. described other sexual conduct between her and Huisman. The group eventually left the residence, but O.J.H. returned to Huisman's residence later and Huisman engaged in

similar sexual conduct with O.J.H. The state submitted additional evidence to support M.A.H.'s and O.J.H.'s allegations including a video from Huisman's cell phone appearing to depict Huisman receiving oral sex from O.J.H., a vaginal swab from O.J.H. that showed the presence of Huisman's DNA, and text messages between Huisman and the two victims.

The parties agreed to submit written closing statements following receipt of the trial evidence. In his written closing argument, appellant's counsel conceded the victims' ages, Huisman's age, and venue—three of the four elements the state was required to prove beyond a reasonable doubt. The record does not indicate that Huisman agreed to these concessions.

The district court adjudicated Huisman guilty of both counts in the complaint. On review of the district court's order, it is clear that it did not rely upon these concessions in reaching its verdict. Specifically, the district found:

> 2. All relevant events in this case occurred in Owatonna, Steele County, Minnesota.
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> . . . .
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> 4. M.A.H. credibly testified that her date of birth is November 4, 2004.
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> . . . .
>
> 18. O.J.H. credibly testified that her date of birth is July 20, 2004.
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> . . . .
>
> 43. Detective Hunt accessed [Huisman's] Facebook page, which listed a date of birth of October 10, 1990. When Detective Hunt collected [Huisman's] DNA, he filled out a form in [Huisman's] presence that contained [Huisman's] date of birth.

The district court sentenced Huisman to 234 months' imprisonment for the first-degree criminal sexual conduct offense, and it imposed a concurrent sentence of 140

months' imprisonment for the third-degree criminal sexual conduct offense. This appeal follows.

D E C I S I O N

Generally, for a criminal defendant to succeed on an ineffective-assistance-of-counsel claim, the defendant must show that: (1) "his [or her] attorney's performance fell below an objective standard of reasonableness[,]" and (2) "a reasonable probability exists that the outcome would have been different, but for counsel's errors." *State v. Luby*, 904 N.W.2d 453, 457 (Minn. 2017) (quoting *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007)) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 692, 104 S. Ct. 2052, 2064, 2067 (1984)). However, in the context of a defense counsel conceding a client's guilt without consent or acquiescence, the court presumes the performance was deficient and prejudicial. *See, e.g.*, *id.* at 457; *State v. Prtine*, 784 N.W.2d 303, 317-18 (Minn. 2010); *see also McCoy v. Louisiana*, 138 S. Ct. 1500, 1510-11 (2018) (recognizing that an improper concession of guilt conflicts with a defendant's autonomy and constitutes a structural error where the *Strickland* standard for ineffective-assistance-of-counsel jurisprudence does not apply). This unique standard applies because "[t]he decision to admit guilt is the defendant's decision to make" and if a defendant is deprived of this decision, then "the defendant is entitled to a new trial, regardless of whether he [or she] would have been convicted without the admission." *Luby*, 904 N.W.2d at 457 (quotations omitted).

When a criminal defendant asserts an ineffective-assistance-of-counsel claim based on an alleged unauthorized concession of guilt, Minnesota courts apply a two-step analysis. *Id.* We perform "a de novo review of the trial record to determine whether [a criminal

defendant's] counsel conceded guilt *on any element* of the [charged offenses]." *See State v. Torres*, 688 N.W.2d 568, 573 (Minn. 2003) (emphasis added). If defense counsel concedes guilt, "the defendant is entitled to a new trial unless he [or she] acquiesced in that concession." *Luby*, 904 N.W.2d at 457 (quotation omitted). With no evidence of express consent, appellate courts "look at the entire record to determine if the defendant acquiesced in his [or her] counsel's strategy." *See id.* at 459 (quotation omitted); *Prtine*, 784 N.W.2d at 318 (applying entire record review to determine acquiescence). "Acquiescence may be implied in certain circumstances, such as (1) when defense counsel uses the concession strategy throughout trial without objection from the defendant, or (2) when the concession was an 'understandable' strategy and the defendant was present, understood a concession was being made, but failed to object." *Luby*, 904 N.W.2d at 459.

The parties agree, as do we, that Huisman's trial counsel made a concession. Our *de novo* review of the record shows that Huisman's trial counsel explicitly conceded three elements of each offense in the written closing argument: (1) the victims' ages, (2) Huisman's age, and (3) venue. *See* Minn. Stat. §§ 609.342, subd. 1(a), .344, subd. 1(b); 10 *Minnesota Practice*, CRIMJIG 12.05, .25 (2015). Counsel stated that Huisman conceded each of these elements based on evidence presented at trial.

Having determined that counsel conceded guilt, we next must determine whether Huisman consented to the concession, either expressly or through acquiescence. The record lacks any suggestion to find that Huisman expressly consented to his trial counsel's concession when counsel made the concession or any time before this direct appeal. *See State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992) (refusing to require "a

'contemporaneous' record made of the defendant's consent to his counsel's strategy of admitting guilt to a lesser charge"). As the supreme court noted in *Luby*, "[w]hen, as here, there is no evidence of express consent, we look at the entire record to determine if the defendant acquiesced in his [or her] counsel's strategy." 904 N.W.2d at 459 (quotation omitted).

Until the concession appeared in counsel's written closing, Huisman's trial counsel made no references throughout the trial that the defense's theory of the case involved conceding any elements of the charged offenses. When, as occurred here, trial counsel does not explicitly make a concession until closing argument, appellant cannot be found to have acquiesced to a concession strategy. *See id.* ("[D]efense counsel did not concede the element of premeditation until closing argument, as Luby observes, after defense counsel had been consistently silent on this element, making it difficult to conclude that Luby somehow acquiesced in a strategy that manifested itself only at the end of trial.").

The only remaining basis for Huisman to have acquiesced to his trial counsel's concession would be if "the concession was an 'understandable' strategy and the defendant was present, understood a concession was being made, but failed to object." *Id.* at 459. The record does not support such a conclusion. Huisman's trial counsel made the concession in a written closing argument filed with the court. Nothing in the record indicates that Huisman received the written closing argument prior to its submission to the court or knew its contents, thereby making it impossible for him to have acquiesced. In summary, Huisman's trial counsel conceded guilt without Huisman's consent or acquiescence.

The state acknowledges the existing supreme court precedent and that this is the law we are bound to apply. But the state argues that the concession-of-guilt analysis "should be abandoned and that a defendant is not entitled to an automatic new trial unless he [or she] objects to the concession." This court cannot change the supreme court's precedent. Minn. Const. art. VI, § 2 (identifying this court's appellate jurisdiction "over all courts, except the supreme court, and all other appellate jurisdiction as proscribed by law"); *State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) ("The court of appeals is bound by supreme court precedent, as it has repeatedly acknowledged."); *see also State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010).

The state also contends that if we determine the elements of a concession-of-guilt analysis are met, then the remedy should be for this court to remand for an evidentiary hearing because the record does not clearly establish that Huisman did not acquiesce. We do not agree with the state's assertion. Consistent with *Luby*, the record before us clearly establishes that Huisman's trial counsel did not have Huisman's consent, whether expressly or via acquiescence, to concede to any elements of the offenses. 904 N.W.2d at 459. *But cf. Provost*, 490 N.W.2d at 97 (refusing to adopt a contemporaneous record of defendant's consent requirement). The state relies on *Prtine* in which the supreme court "remand[ed] to the district court for fact-finding" as the appropriate resolution for a record to be developed. 784 N.W.2d at 318. We determine that remanding is not necessary based on the review of the record.

These facts are even starker than those in *Luby*, where the supreme court declined to order an evidentiary hearing stating that "the record clearly establishes that [Luby] did

not acquiesce in defense counsel's concession." 904 N.W.2d at 459. Because appellant's counsel made a concession of guilt for which the record demonstrates neither consent nor acquiescence by the appellant, we reverse and remand for a new trial.

Reversed and remanded.