**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-2060**

State of Minnesota,
Respondent,

vs.

Limmie Edward Varner,
Appellant.

**Filed December 21, 2020**
**Affirmed**
**Florey, Judge**

Benton County District Court
File No. 05-CR-19-860

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Philip K. Miller, Benton County Attorney, Michael J.G. Schnider, Assistant County Attorney, Foley, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Segal, Chief Judge; and Florey, Judge.

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

**FLOREY**, Judge

Appellant challenges his conviction for felony domestic assault, arguing that he received ineffective assistance of counsel based on several statements made by his defense

attorney during closing argument that contradicted appellant's trial testimony. Because appellant has not shown that defense counsel's performance was deficient or prejudicial, we affirm.

## FACTS

Respondent State of Minnesota charged appellant Limmie Edward Varner with two counts of felony domestic assault. At the bench trial, appellant and victim L.S. testified to different versions of the incident at issue. According to appellant, L.S. had been drinking at a party and at some point became "drunk" and needed a ride home; thereafter, L.S. became "radical" in the car—as was typical when she drank—accusing appellant of looking at other women, throwing his phone out the window, and repeatedly grabbing the wheel and forcing the moving car into park. When they arrived home, L.S. threw her purse at appellant. Appellant tried to get L.S. to go inside but she refused to get out of the car. Appellant maintains that it was only after they parked in the driveway that he noticed a "scrape" on L.S.'s face. He was unsure what had happened but thought the injury might have been caused by the sudden stops that L.S. had caused throughout their drive home.

L.S. testified that she wanted appellant to drive her home from the party because she had a headache. She and appellant argued in the car about leaving the party. During this argument, appellant punched her in the head and said, "Now you're going to have a reason for a headache." She testified that she had consumed two drinks over the span of several hours and was not inebriated. L.S. testified that after appellant hit her, she "blacked out" and could not remember as clearly what happened next. L.S. recalled that once they got home, appellant was angry and yelled at her to get out of the car. He came around the

car, opened the passenger door, grabbed her purse and dumped its contents outside, and then tried to drag her out of the car by pulling on her arm. Eventually appellant "gave up and left." L.S.'s neighbor, E.W., called to check on L.S. after observing the fight. E.W. called the police shortly thereafter.

E.W. testified that she saw the altercation in the driveway from her porch. She saw appellant "hitting and punching and choking [L.S.] and trying to pull her out of the car." E.W. heard appellant calling L.S. "drunk." L.S. denied that she was drunk and accused appellant of being high. E.W. saw appellant throw L.S.'s purse on the ground and order her to get out of the car. E.W.'s young son also testified that he saw appellant attempt to pull L.S.'s legs out of the car and heard L.S. yell out for help.

The three responding police officers also testified at trial. Officer Saulter took photographs of the abrasions on L.S.'s face and took her recorded statement. The state introduced the photographs as evidence.[1] L.S. told the officer that during the drive back from the party, appellant became angry, accused her of throwing his phone out the window, and struck her in the face. She also told the officer that, when they got home, she was upset and refused to get out of the car. Appellant came around to the passenger side of the car and told her to get out. He then grabbed her purse and threw it out of the car. After L.S. still refused to get out, appellant got into another car and left. Officer Saulter could not recall whether there was any evidence of alcohol inside L.S.'s home or whether there was any odor of alcohol on L.S. But she did not believe L.S. was intoxicated at the time.

[1] The state also introduced evidence of appellant's prior domestic-assault conviction from an incident several years earlier involving L.S.

Officer O'Leary did not recall whether there was any evidence that L.S. had been drinking. The third responding office—Officer Anderson—took a statement from E.W. that was generally consistent with E.W.'s trial testimony.

In his closing arguments, defense counsel stated:

> I'm not saying that [L.S.] was drunk. In fact, the evidence wouldn't support that. There are some consistencies about how much she had to drink, maybe that it affected her mood and got her mad at my client because of her thinking that he was going to cheat on her or something like that.

The district court found appellant guilty of both counts. The district court found that L.S. was "very direct in her answers, very sincere, [and] very earnest" and observed that the photographs of her injuries were consistent with her testimony of what had happened. The district court also found E.W. and her son's testimony to be "very direct and consistent as well." The court recognized that "there are some inconsistencies, but that is to be expected in any type of a situation where people recall things differently." Finally, the court found appellant's testimony to be "rambling, nonresponsive, and not credible." The court noted that "[i]f you are to believe [appellant's] version of events he did absolutely nothing wrong on this day, and all of the blame belongs to [L.S.]. While when [L.S.] testified it was the good and the bad of her behavior on that day." This appeal follows.

## D E C I S I O N

Appellant asserts that he received ineffective assistance of counsel because defense counsel's closing argument purportedly contradicted his trial testimony. "To succeed on an ineffective assistance of counsel claim, a defendant must show that (1) his 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. 2007) (quotation omitted); *see also Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984). A failure to establish either prong is fatal to an ineffective-assistance-of-counsel claim. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013).

"When defense counsel concedes the defendant's guilt without his consent, counsel's performance is deficient and prejudice is presumed." *Luby*, 904 N.W.2d at 457 (quotation omitted). "We apply a two-step analysis to ineffective-assistance claims involving an alleged unauthorized concession of guilt." *Id.* We first conduct a de novo review of the record "to determine whether defense counsel made a concession of guilt," and if so, we then determine whether the defendant "acquiesced in that concession." *Id.*

"A concession may be express or implied." *Id.* In assessing whether defense counsel implied a concession of guilt, we consider the challenged statements in the context of the whole trial. *Dukes v. State*, 660 N.W.2d 804, 813 (Minn. 2003). A court should conclude that defense counsel's statements constituted an implied concession of guilt "only where a reasonable person viewing the totality of the circumstances would conclude that counsel conceded the defendant[']s guilt." *Torres v. State*, 688 N.W.2d 569, 573 (Minn. 2004) (quotation omitted).

In his closing statements, defense counsel argued:

> And when we think about [L.S.'s] injuries, they are not consistent with the second statement whatsoever, and that's really, I think, where the problem lies, is that [E.W.] testified that my client hit [L.S.] – I think she said 10 to 15 times in the face.

> If my client did that to the alleged victim we would have – the injuries would be much more substantial, and they would not be isolated to one area, which is much more consistent to something happening in the car.
>
> So I don't think her testimony is credible at all. If there was any sort of grabbing around the neck we would see a sign of it, kicking, hitting. It does not make sense, especially when we look at it in light of what the alleged victim said. Nothing happened. Those don't make sense.
>
> I'm not saying that she was drunk. In fact, the evidence wouldn't support that. There are some consistencies about how much she had to drink, maybe that it affected her mood and got her mad at my client because of her thinking that he was going to cheat on her or something like that.
>
> There is no indication, that I can see, as to why these stories could be so completely different.

Based on these statements, appellant argues that his attorney detrimentally conceded a material fact—that L.S. was not intoxicated—to which his credibility and therefore his innocence hinged. Appellant maintains that defense counsel's statements amounted to an implied concession of guilt.

Reviewing the challenged statements within the context of the entire closing argument and the trial as a whole, we conclude that appellant has not shown that his attorney implicitly conceded his guilt. First, we observe that defense counsel's statement that there were "consistencies about how much [L.S.] had to drink" was consistent with the evidence and did not contradict appellant's own testimony. L.S. stated that she had two cans of spritzers. Appellant also testified that he and L.S. bought two drinks the morning

of the incident.[2] And as defense counsel argued, these drinks could have "affected [L.S.'s] mood and got her mad at [appellant] because of her thinking that he was going to cheat on her." Defense counsel's remark regarding the negative impact of alcohol on L.S.'s mood is consistent with appellant's testimony that L.S.'s demeanor changed when she drank and that her behavior on the drive home caused her injuries.

Second, we conclude that counsel's initial remark—"I'm not saying that she was drunk. In fact, the evidence wouldn't support that."—viewed in context of the trial as a whole, does not amount to an implied concession of guilt. *See Dukes*, 660 N.W.2d at 812 (Minn. 2003) ("[W]e must be cautious in defining an 'implied admission' to not allow the semantics of every questioned word, statement or misstatement of counsel by inadvertence, negligence or perhaps cleverness to be an automatic ground for a new trial."). While this statement, in isolation, may not have been artfully worded, and perhaps even a misstatement, the challenged statements do not negate appellant's purported explanation that L.S. injured herself during the short drive home due to behavioral issues caused by drinking alcohol. There was no implied concession of guilt.

Having concluded that defense counsel did not implicitly concede appellant's guilt, we also conclude that appellant has not demonstrated that defense counsel's performance here was objectively deficient. *See Luby*, 904 N.W.2d at 457 (requiring appellant to

[2] Appellant further testified that he "really [did]n't know what she was drinking," just that he was sure L.S. was "drunk" because that is the only reason he would have driven her home. This statement by appellant also does not necessarily contradict the two-drinks-consumed testimony by the other witnesses at trial.

establish that defense counsel's performance fell below an "objective standard of reasonableness" (quotation omitted)).

Further, appellant has also failed to establish prejudice because these isolated statements had no reasonable impact on the outcome of his bench trial. *See Strickland*, 466 U.S. at 691-92, 104 S. Ct. at 2067. Appellant argues that defense counsel's statements conceding that L.S. was not drunk undermined his credibility with the factfinder (here the district court) because he testified L.S. was "drunk" and because her disorderly behavior was crucial to his version of events. But the district court made extensive findings on witness credibility and, as respondent observes on appeal, "had ample other bases upon which it assessed credibility." Moreover, there was significant evidence presented at trial—beyond the conflicting testimony of L.S. and appellant—to establish appellant's guilt, including two eyewitnesses to a portion of the assault, a history of domestic abuse by appellant against L.S., and photographs of the injuries consistent with L.S.'s version of events. In sum, appellant has not met his burden of establishing ineffective assistance of counsel and is not entitled to a new trial.

**Affirmed.**