STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0016

State of Minnesota,
Respondent,

vs.

William Cleveland Alan Boykin,
Appellant.

Filed July 19, 2021
Affirmed
Worke, Judge

Lyon County District Court
File No. 42-CR-18-668

Keith Ellison, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Rick Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant argues that the district court erred on remand by concluding that appellant acquiesced to his trial attorney's concession of appellant's guilt. Appellant also challenges

the district court's reinstatement of his original sentence that was remanded to determine whether it was supported by severe aggravating factors. We affirm.

FACTS

Appellant William Cleveland Alan Boykin and T.D. lived together as a couple until Boykin became physically abusive. T.D., who was pregnant, and her two children moved in with her mother, K.D., and obtained an order for protection (OFP) prohibiting Boykin from contacting her.

On June 10, 2018, Boykin entered K.D.'s home through a window and attacked T.D. Boykin knew that T.D. was pregnant and that she had received a cornea transplant, yet he punched and kicked her in the stomach and eyes. Boykin yelled that he would "kill [T.D.] and [the] baby." K.D. tried to pull Boykin off T.D., and one of T.D.'s children threw toys at him. T.D. suffered injuries, including the permanent loss of one of her eyes.

Boykin told responding officers that "he had to" assault T.D. and he "did what [he] needed to do," but "he hoped he didn't hurt the baby or kill the baby." Boykin was charged with attempted first- and second-degree murder of an unborn child, first-degree burglary, first-degree assault, threats of violence, and violation of an OFP.

At the close of Boykin's jury trial, his attorney did not specifically address any charge other than the attempted-murder offenses in closing argument. Boykin's attorney stated that "[o]bviously something happened" that night, but the state failed to prove that Boykin intended "to murder an unborn child."

The jury found Boykin guilty of all charges and returned a special verdict finding the existence of aggravating factors—the crime was committed (1) in a place where T.D.

had an expectation of privacy, (2) with particular cruelty, and (3) in the presence of a child. The sentences that the district court imposed included a sentence of 240 months in prison for first-degree assault, which was an upward durational departure based on the aggravating factors.

Boykin appealed, raising two issues. *See State v. Boykin*, A19-0670 (Minn. App. Mar. 16, 2020). First, he argued that his trial attorney inappropriately conceded guilt in closing argument on all elements aside from the intent element of the attempted-murder charges. We determined that Boykin's defense at trial was that he did not intend to kill T.D.'s unborn child, and that in closing argument, his trial attorney explained that the primary issue that the jury needed to resolve was Boykin's intent. We determined that the totality of the circumstances showed that Boykin's attorney impliedly conceded Boykin's guilt, but, given the strength of the state's case, it was objectively reasonable to focus on Boykin's intent and to impliedly concede guilt on the lesser offenses in the hope of obtaining an acquittal on the most serious charges. We concluded that, while the concession was an understandable trial strategy and Boykin did not object, the record failed to demonstrate that Boykin understood that the concession was being made. We remanded for fact-finding as to whether Boykin understood that a concession was being made.

Second, Boykin argued that the district court abused its discretion by imposing a 240-month sentence for the first-degree assault conviction because it constituted a greater-than-double upward departure from the 86-month presumptive sentence and the district court failed to find that it was supported by severe aggravating factors. *See State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981) (stating that "in a case in which an upward departure

in sentence length is justified, the upper limit will be double the presumptive sentence length"). We agreed and reversed Boykin's sentence. Thus, we remanded for two purposes: (1) an evidentiary hearing on the issue of whether Boykin understood that a concession was being made, and (2) the application of *Evans* to the aggravated sentence.

On June 26, 2020, the district court held an evidentiary hearing. Boykin's trial attorney testified that he spoke with Boykin about a "half dozen times" about trial strategy and that their discussions were "extensive." Boykin's trial attorney believed that Boykin understood that it was a "very tough case to try to defend" based on the state's evidence. Boykin did not want to testify, and Boykin's attorney told Boykin that if he did not testify, he "did not have a defense" on the lesser charges; his trial attorney was "very blunt" with Boykin that in this scenario they had a viable defense for only the attempted-murder charges. Boykin's trial attorney testified that Boykin's response was "do what you need to do," and he took that to mean that Boykin "understood what [his attorney] was doing." Thus, Boykin's trial attorney felt that he adequately conveyed to Boykin that he was not going to challenge the other charges, and he told Boykin that his closing argument "was going to be about [Boykin's] intent." Therefore, during closing argument, Boykin's trial attorney focused on the intent element of the attempted-murder charges and did not comment on the other charges.

Boykin testified that his trial attorney told him that the state would have to prove that Boykin intended to kill the unborn child and that T.D. would testify that he hit her in the stomach. Boykin told his attorney that T.D. made that up and it was a "fake charge." Boykin told his attorney to "focus on that charge . . . . just to speak on that charge." Boykin

testified, "I wanted [my attorney] to focus on the [m]urder charges. . . . I was expecting him not to bring up the other crimes."

The district court found that Boykin's trial attorney and Boykin had "extensive" discussions about trial strategy and decided to focus on Boykin's lack of intent. Boykin wanted his attorney to focus on the attempted-murder charges and "not bring up" the other crimes. The district court found that, as it related to trial strategy, "Boykin told [his attorney] words to the effect of 'You do what you need to do.'" Based on these findings, the district court concluded that Boykin understood that a concession was being made. Regarding Boykin's sentence, the district court concluded that the aggravating factors found by the jury were "severe," and the original sentence was reinstated. This appeal followed.

DECISION

Ineffective assistance of counsel

Boykin claims that his trial attorney was ineffective for conceding his guilt. To succeed on an ineffective-assistance-of-counsel claim, an appellant 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." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007); *see also Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984). But when counsel concedes a defendant's guilt without consent, "counsel's performance is deficient and prejudice is presumed." *State v. Prtine*, 784 N.W.2d 303, 317-18 (Minn. 2010).

Appellate courts apply a two-step analysis to ineffective-assistance claims based on an alleged unauthorized concession of guilt. *State v. Luby*, 904 N.W.2d 453, 457 (Minn. 2017). First, this court reviews the record de novo "to determine whether defense counsel made a concession of guilt." *Id.* And second, if counsel conceded guilt, we must determine "whether the defendant acquiesced in that concession." *Prtine*, 784 N.W.2d at 318.

We previously concluded that Boykin's attorney impliedly conceded Boykin's guilt on all elements except for the intent elements of the attempted-murder charges. Thus, we will address the second issue—"whether [Boykin] acquiesced in that concession." *See id.*

"When, as here, there is no evidence of express consent, [appellate courts] look at the entire record to determine if the defendant acquiesced in his counsel's strategy." *Luby*, 904 N.W.2d at 459 (quotation omitted). "Acquiescence may be implied . . . (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." *Id.* (quotation omitted).

Again, we already determined that the concession was an understandable trial strategy and Boykin was present and did not object. We must, therefore, look to the record from the evidentiary hearing and determine whether Boykin understood that a concession was being made.

Boykin's attorney testified that he was "blunt" in explaining to Boykin that if Boykin did not testify, they would not be able to refute the state's evidence on anything other than the intent element of the attempted-murder charges. Boykin's attorney testified

that he adequately conveyed to Boykin that he was going to focus on Boykin's lack of intent and was not going to challenge the other charges. Boykin's attorney testified that Boykin told him to "do what you need to do." While Boykin testified that he did not tell his attorney to do whatever he needed to do, he did testify that he told his attorney to "focus on [the attempted-murder] charge . . . . just to speak on that charge." He testified, "I wanted [my attorney] to focus on the [m]urder charges. . . . I was expecting him not to bring up the other crimes." These comments show that Boykin understood that his attorney was going to focus on Boykin's intent related to the attempted-murder charges and would not defend the other charges in the hope of an acquittal on the most serious charges. Based on this record, we conclude that Boykin understood that the concession was going to be made. He, therefore, did not receive ineffective assistance of counsel.

Sentence

Boykin argues that the district court impermissibly reimposed the original aggravated sentence. Appellate courts "review decisions to depart from the sentencing guidelines only for an abuse of discretion." *State v. Barthman*, 938 N.W.2d 257, 269 (Minn. 2020) (quotation omitted). "A district court abuses its discretion if its reasons for departure are inadequate or improper." *Id.* "[G]enerally in a case in which an upward departure in sentence length is justified, the upper limit will be double the presumptive sentence length." *Evans*, 311 N.W.2d at 483 (emphasis omitted).

Here, the jury found that three aggravating factors were present during the commission of the offense: Boykin invaded the victim's home wherein she had an expectation of privacy, he treated her with particular cruelty, and he committed the offense

in the presence of a child. Based on these findings, the district court imposed a 240-month prison sentence for the first-degree assault conviction, which was a greater-than-double departure. On remand, the district court was required to consider if the aggravating factors were "severe" in order to justify this departure.

A district court may impose a greater-than-double departure if there are "severe aggravating factors." *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009). It is a "rare case" when aggravating factors are so severe as to justify a greater-than-double departure, and a decision to impose such sentence "must be based on our collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts." *State v. Johnson*, 450 N.W.2d 134, 135 (Minn. 1990). The inquiry can depend on a variety of factors, such as the victim's vulnerability, the permanence of the victim's injury, and the presence of multiple aggravating factors. *Dillon v. State*, 781 N.W.2d 588, 597 (Minn. 2010).

Here, the jury found that three aggravating factors existed and, on remand, the district court found that the factors were so severe as to justify the aggravated sentence. First, Boykin invaded T.D.'s home wherein she had an expectation of privacy. *See State v. Kindem*, 338 N.W.2d 9, 17-18 (Minn. 1983) (stating that upward departure is justified when crime committed in victim's zone of privacy); *see State v. Winchell*, 363 N.W.2d 747, 750 (Minn. 1985) (stating that victim's zone of privacy includes victim's home).

Second, Boykin treated T.D. with particular cruelty. He punched her eyes when he knew that she had a cornea transplant, and she suffered the permanent loss of an eye. *See State v. Harris*, 407 N.W.2d 456, 462 (Minn. App. 1987) (stating that infliction of

permanent injuries and lifelong disfigurement is severe aggravating factor), *review denied* (Minn. July 31, 1987). And he kicked her in the stomach knowing that she was pregnant. *See State v. Wickstrom*, 405 N.W.2d 1, 6 (Minn. App. 1987) (stating that pregnant victim is "uniquely compelling" aggravating factor), *review denied* (Minn. June 30, 1987).

Finally, T.D.'s children were present during the offense, and one child attempted to defend T.D. *See Harris*, 407 N.W.2d at 462 (stating that presence of children during offense was severe aggravating factor). Based on this record, the district court properly determined that the aggravating factors were severe and justified the greater-than-double durational departure.

Affirmed.