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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-531**

State of Minnesota,
Respondent,

vs.

Robert John Sherman,
Appellant.

**Filed March 12, 2012
Affirmed
Minge, Judge**

Ramsey County District Court
File No. 62-CR-09-13864

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
Michelle J. Fischer, Certified Student Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Minge, Judge; and Crippen,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges his conviction for possessing a firearm while being ineligible to do so. Appellant argues that he received ineffective assistance of counsel because in asserting self-defense against a related second-degree felony-murder charge, his attorney admitted, without his consent, that he used a firearm. Because appellant acquiesced in this self-defense strategy in defending against the more serious murder charge and this strategy was reasonable, we affirm.

FACTS

On July 24, 2009, a home-invasion incident occurred at the residence of Roberto Flores. On July 26, 2009, Roberto asked his brother to drive him to the St. Paul residence of the individuals whom Roberto believed had invaded his home. Appellant Robert Sherman was staying at the St. Paul location. As the brothers approached the St. Paul address, Roberto saw Sherman outside. Roberto, who had a gun, exited the vehicle and verbally confronted Sherman about the incident at Roberto's residence. After some arguing with Roberto, Sherman yelled towards the house, then removed a handgun from his waistband, cocked the gun, and returned it to his waistband. At that point, at least two men, one of whom had a gun, came out of the house towards the altercation. The altercation became physical, with Sherman grabbing Roberto's arm. Roberto's brother then grabbed Sherman around the head and neck and threw Sherman to the ground.

In the same timeframe, one of the men involved in the incident began shooting. After the shooting began, Roberto was walking back towards his brother's vehicle while

firing his weapon towards Sherman and the other men in the lot. Sherman, who was still on the ground, rose to his knees and fired towards Roberto, hitting him. Roberto got into his brother's vehicle, and the brothers fled the scene. Roberto died in the vehicle when it was stopped by the police as his brother was driving him to the hospital.

Sherman was charged with one count of second-degree felony murder; the felony underlying this charge was a second-degree assault of Roberto. The district court granted the state's joinder motion to try Sherman with an accomplice. In May 2010, the state amended the complaint against Sherman to include a charge of firearm possession by an ineligible person. In a trial that began in September 2010, a jury found Sherman not guilty of second-degree felony murder but guilty of possession of a firearm by an ineligible person. Sherman was sentenced to 66 months. This appeal follows.

D E C I S I O N

The primary issue on appeal is whether Sherman received ineffective assistance of trial counsel. Sherman asserts that his trial counsel argued, as a defense to the murder charge, that Sherman fired his pistol in self-defense, thereby implicitly admitting that Sherman possessed a firearm. Sherman argues that he never agreed to such an admission and that this unauthorized concession by his counsel constituted ineffective assistance. Because Sherman stipulated that he was ineligible to possess a firearm, whether he actually did possess a firearm was the sole disputed element of that charge. The state argues that Sherman's counsel did not concede the possession element of the firearms charge, and even if he did, that Sherman acquiesced.

In deciding ineffective-assistance-of-counsel claims, this court reviews whether “representation fell below an objective standard of reasonableness” and whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Opsahl v. State*, 677 N.W.2d 414, 420–21 (Minn. 2004). Claims of ineffective assistance of trial counsel involve mixed questions of fact and law and are reviewed de novo. *Id.* at 420.

A. Admission of Guilt by Counsel

“When counsel for the defendant admits a defendant’s guilt without the defendant’s consent, the counsel’s performance is deficient and prejudice is presumed.” *State v. Prtine (Prtine I)*, 784 N.W.2d 303, 317–18 (Minn. 2010). “The decision whether or not to admit guilt at trial belongs to the defendant, and a new trial will be granted where defense counsel, explicitly or implicitly, admits a defendant’s guilt without permission or acquiescence.” *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991). “In evaluating whether defense counsel made an improper concession, we first perform a de novo review of the record to see if counsel in fact conceded the defendant’s guilt and, if so, we must proceed to the second prong of the inquiry and determine whether the defendant acquiesced in that concession.” *Prtine I*, 784 N.W.2d at 318; *see also Torres v. State*, 688 N.W.2d 569, 572–73 (Minn. 2004). “[E]ven implied concessions require client consent.” *Dukes v. State*, 660 N.W.2d 804, 812 (Minn. 2003). This court “will find an implied concession only where a reasonable person viewing the totality of the circumstances would conclude that counsel conceded the defendant[’]s guilt.” *Torres*, 688 N.W.2d at 573 (quotations omitted).

Sherman asserts that counsel admitted possession of a firearm in his opening statement and closing argument. During his opening statement, Sherman's counsel previewed his theory of the case for the jury:

Mr. Sherman, seeing [Roberto] coming, shows him he's armed. Why? Because he knows why he needs to show him that. He cocks his gun. He doesn't point it. Doesn't threaten anybody with the gun. He doesn't commit any second degree assault. He simply cocks his own gun on his own property and puts it back in his pants.

....

He yelled for help. Help. [Roberto] is here with a gun out. Then he was thrown to the ground. And as he's getting up, he's being shot at, so he returns fire in self-defense.

Sherman did not object to this statement at the time it was made. Before closing arguments, the district court confirmed Sherman understood the proceedings thus far and did not wish to exercise his right to testify at trial. During his closing argument, Sherman's legal counsel again offered his theory of the events of the day, including the following:

As [Roberto] sees [Sherman] is getting up, puts that gun up, he's gonna finish this off. He shot two of them. The third one is going down. And even if, *arguendo*, which I don't think this is the way it happened and I don't think you do either, but if Robert Sherman put his gun up first, that is still self-defense, because he's got [Roberto] with his gun up pointing at him. Now you're going to retreat? How? No one outruns a bullet. Did he use reasonable force? He saved his own life. Maybe it'll make you think about this a little differently.

Following that closing argument, the prosecutor gave a closing rebuttal argument.

During the prosecutor's closing argument, the following exchange occurred:

Ms. Hudson [Prosecutor]: . . . Robert Sherman wants you to believe that he acted in self-defense. He's essentially admitting, and he should, based upon the evidence presented, that he had a gun.

Mr. McCormick [Sherman's counsel]: I object, Your Honor. We have not admitted anything. That's improper.

The Court: Sustained.

Ms. Hudson: Based upon the evidence that was submitted, he's claiming self-defense because he has to, because the evidence establishes that he had a gun and that he was shooting at [Roberto].

The question is whether these two statements, coupled with the objection to the prosecutor's statement, amounted to an admission that Sherman possessed a firearm while being ineligible to do so. Although Sherman's defense counsel did not use the words "admit," "concede," or otherwise directly state that he was conceding that point and although the objection during the prosecutor's closing argument reflects that Sherman's trial counsel did not wish to explicitly or directly concede the issue of possession of a firearm, Sherman's counsel argued that he shot in self-defense and repeatedly used the phrase "his gun" in referring to Sherman. There were no qualifiers in Sherman's counsel's statement and restatement of the evidence in the case. The defense simply presented a unified story of self-defense with a gun. We conclude that it is clear that defense counsel conceded that Sherman possessed a firearm, the sole disputed element of the charge of possession of a firearm by an ineligible person. Thus, this was a concession of guilt on that charge.

B. Sherman's Acquiescence

The second inquiry is whether Sherman consented or acquiesced to this concession of his guilt. *Prtine I*, 784 N.W.2d at 318. Sherman correctly notes, and the

state does not dispute, that there is no evidence that he explicitly consented to this concession of his guilt. However, there is no requirement “that there must be a contemporaneous record made of the defendant’s consent to his counsel’s strategy of admitting guilt to a lesser charge.” *State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992). Rather, when an admission is made by trial counsel without the express consent of the defendant, the question is whether the defendant acquiesced to the admission. Acquiescence has been found “when trial counsel uses the same strategy from beginning to end of trial and the defendant does not object” and “when admitting guilt was an ‘understandable’ strategy, [the defendant] was present at the time the concessions were made, [the defendant] understood that his guilt was being conceded, and he did not object.” *Prtine I*, 784 N.W.2d at 318 (citing *Provost*, 490 N.W.2d at 97 and *Pilcher*, 472 N.W.2d at 337). “[W]hether it is an understandable trial strategy to concede guilt depends on whether it would be objectively reasonable to do so, given the facts and circumstances of the particular case,” and “is a legal determination that we review de novo.” *State v. Prtine (Prtine II)*, 799 N.W.2d 594, 599 (Minn. 2011).

In this case, the self-defense strategy was used throughout the trial. The record indicates that this strategy was asserted as early as the second appearance of Sherman’s trial counsel at a pre-trial hearing on the state’s motion for joinder. Self-defense and the use of a gun or deadly force was also discussed during jury selection, during Sherman’s motion in limine in advance of trial, twice during voir dire, during a second motion in limine, during a pre-trial discussion of the presentation of the law, and during the prosecutor’s opening statement. Sherman was present at each of these events where the

self-defense argument was asserted. After these references to the self-defense claim, the prosecution presented its case, including a number of witnesses who testified directly to Sherman possessing a gun in precisely the manner described by his trial counsel during the statements at issue. Sherman does not assert that there is any defense to the charge that he had had possession of a gun. There is no possible argument that Sherman could have shot at and killed Roberto Flores unless he possessed a firearm.

Sherman's self-defense argument in this case is objectively reasonable. The penalty for second-degree felony murder is far greater than the penalty for illegal possession of a firearm. There is no evidence in the record that Sherman objected in any form or fashion to the use of the self-defense strategy before, during, or after the trial. An objection first occurs on appeal, after acquittal on the murder charge. Indeed, the only testimony on the record from Sherman is about his decision to exercise his right to remain silent. During his testimony, Sherman acknowledged that he was "present [] through this entire trial and heard all the evidence" and that he did not want to testify, even with the knowledge "that you have the absolute right to testify in your defense and explain anything you want to the jury." This indicates that Sherman acquiesced in the strategy of arguing that he acted in self-defense in shooting Roberto Flores, and to the necessary logical adjunct that he possessed a firearm in so acting.

Because Sherman's trial counsel used the self-defense strategy throughout the proceedings, because the possession of a firearm is a necessary incident to the self-defense argument, and because Sherman was present for and did not object to his

counsel's many statements asserting this defense, we conclude that the record is clear that Sherman acquiesced in his counsel's admission that he possessed a firearm.

Sherman also raises a number of issues in a pro se supplemental brief to this court. These arguments are not accompanied by any legal support or citation and thus are waived. *See State v. Bartylla*, 755 N.W.2d 8, 22–23 (Minn. 2008) (“We will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority.”). Moreover, our review of these arguments leads to the conclusion that they are without merit.

Affirmed.

Dated: