

STATE OF MINNESOTA
IN SUPREME COURT

A18-1710

Court of Appeals

Lillehaug, J.

State of Minnesota,

Appellant,

vs.

Filed: June 10, 2020
Office of Appellate Courts

Justin Joseph Huisman,

Respondent.

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

Daniel McIntosh, Steele County Attorney, Owatonna, Minnesota, for appellant.

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant State Public Defender, Saint Paul, Minnesota, for respondent.

S Y L L A B U S

Defense counsel's allegedly unconsented-to concession of elements of the crimes charged but not disputed during trial was not a concession of guilt requiring a new trial.

Reversed.

O P I N I O N

LILLEHAUG, Justice.

This case asks us to decide whether the court of appeals erred in holding that an unconsented-to concession in a written closing argument of undisputed elements of the crimes charged amounts to a concession of guilt that requires a new trial. We reverse the court of appeals.

FACTS

On August 5, 2017, Justin Huisman and his friend, R.W., met two girls, M.H. and O.H., at Manthey Park in Owatonna, in Steele County. M.H. was 12 years old, and O.H. was 13 years old. Huisman was 26 years old.

Conversation ensued and cellphone numbers were exchanged. The men left the park and went to the liquor store. Upon returning to the park, they resumed talking to M.H. and O.H. M.H. and O.H. then left the park. Huisman started texting them separately about meeting him again.

Huisman met with M.H. and O.H. later that night at Manthey Park. Huisman was living close to the park at his mother's house. He took M.H., O.H., and O.H.'s stepbrother who accompanied O.H. to the park, to the house. Huisman led M.H. and O.H. downstairs; O.H.'s stepbrother stayed upstairs. Huisman vaginally penetrated the girls. Huisman orally penetrated O.H.

Huisman, M.H., O.H., and O.H.'s stepbrother left the house and started walking around the neighborhood. Huisman split off from the group and went back to his mother's

house. He texted O.H. and told her to return to the house. She did so. Huisman sexually penetrated her again.

An investigation of what happened to M.H. and O.H. began the next day. M.H. told paramedics that she could be pregnant because she had been with an adult. O.H. submitted to a sexual assault examination during which she said that Huisman had vaginally and orally penetrated her. A vaginal swab had a sperm cell fraction that matched a male DNA profile sample later taken from Huisman.

The police found other evidence. Both girls identified their assailant as “Justin.” O.H. gave the police Huisman’s phone number that was linked to his Facebook profile. The police seized Huisman’s cellphone and reviewed his texts about the sexual assaults. They also found that he had taken three videos of his oral penetration of O.H.

Huisman was charged with one count of criminal sexual conduct in the first degree for sexually penetrating M.H., in violation of Minn. Stat. § 609.342, subd. 1(a) (2018), and one count of criminal sexual conduct in the third degree for sexually penetrating O.H. in violation of Minn. Stat. § 609.344, subd. 1(b) (2018). Huisman waived his right to a jury trial and a bench trial was held.

In the opening statement, defense counsel argued that there were inconsistencies that would call the witnesses’ credibility into question. M.H. and O.H. testified at trial about Huisman sexually penetrating them. Their testimony included their ages, dates of birth, and that all of the relevant events took place in Owatonna. Huisman’s ex-girlfriend testified at trial that, before he was arrested, he said that he had cheated on her and that the girl might have been younger than he thought.

The Owatonna detective who arrested Huisman testified that, during his arrest, Huisman stated that he thought M.H. and O.H. were 16 or 17 years old. The detective also testified that he had verified that Huisman was 26 years old. No trial testimony or exhibits questioned the ages of M.H., O.H., or Huisman. Nor was there any dispute that the alleged events took place in Owatonna in Steele County.

At the close of the evidence, the parties submitted written closing arguments. Defense counsel argued that the State had failed to meet its burden of proof that Huisman was guilty of first- and third-degree criminal sexual conduct because the State had not shown that Huisman had sexually penetrated M.H. or O.H.

Addressing Count I, counsel argued that the testimony of M.H. was inconsistent and was not credible. Counsel also argued that there was no DNA evidence connecting M.H. and Huisman. The State had thus failed to prove beyond a reasonable doubt that Huisman had sexually penetrated M.H., he concluded.

Addressing Count II, defense counsel argued that the testimony of O.H. was not credible. He also argued that the video and DNA evidence were inconclusive. The State had thus failed to prove beyond a reasonable doubt that Huisman had sexually penetrated O.H., he concluded.

In the written argument, defense counsel made concessions as to both Count I and Count II. As to Count I, defense counsel conceded “based on the testimony of [M.H.] . . . that she would have been 12 years old on August 5-6, 2017, and that she was indeed under 13 years of age.” He also conceded Huisman’s age, by writing “[t]he Defendant concedes that based on the testimony of the investigating officers . . . that he would have been 26

years of age as of August 5-6, 2017; and that he was more than 36 months older than [M.H.].” Finally, defense counsel wrote: “If the Court finds that the State has proven beyond a reasonable doubt that the acts alleged in [the] first element occurred, then the Defendant would concede that based on the testimony of the girls, and the investigating officers that the acts occurred on or about August 5-6, 2017, in Steele County.”

Defense counsel made similar concessions about the ages and venue as to Count II. Defense counsel ended his written closing argument by asserting that the State had failed to prove Huisman guilty beyond a reasonable doubt on both counts and that the court should acquit him and release him from custody immediately.

The district court found Huisman guilty on both counts. The district court made specific factual findings about the age differential and the county of the alleged crimes. The district court found that both girls credibly testified about their dates of birth, and that Huisman was born in 1990, making him 26 at the time of the assaults. The district court found further that the events occurred in Steele County, Minnesota. The district court also made specific, detailed factual findings that Huisman had sexually penetrated both M.H. and O.H.

Huisman appealed. The court of appeals reversed the conviction on the ground that Huisman was denied the right to effective assistance of counsel because, by conceding elements of the crimes charged, his attorney conceded guilt without Huisman’s consent or acquiescence. The State appealed, and we granted review.

ANALYSIS

Huisman contends that he was denied the effective assistance of counsel when his attorney conceded certain elements of the crimes charged without Huisman's consent or acquiescence. Huisman was charged with first-degree and third-degree criminal sexual conduct. The elements of the first-degree offense are: (1) sexual contact with a person; (2) the person is under 13 years of age; and (3) the actor is more than 36 months older than the person. Minn. Stat. § 609.342, subd. 1(a); *State v. Sahr*, 812 N.W.2d 83, 85 (Minn. 2012). The elements of the third-degree offense are: (1) sexual penetration with another person; (2) the person is at least 13 but less than 16 years of age; and (3) the actor is more than 24 months older than the person. Minn. Stat. § 609.344, subd. 1(b); *State v. Hodes*, 784 N.W.2d 827, 829 n.1 (Minn. 2009). Generally, a crime must be tried in the county where the offense was committed. Minn. R. Crim P. 24.01. Huisman's attorney conceded the victims' ages, the age differential, and the venue.

The right to assistance of counsel in a criminal prosecution arises from the Sixth Amendment. U.S. Const. amend. VI. Under the Sixth Amendment, “ ‘the right to counsel is the right to the effective assistance of counsel.’ ” *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation omitted) (internal quotation marks omitted).

Generally, an ineffective-assistance claim requires that a defendant 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*, 466 U.S. at 687–88. But a case in which defense counsel concedes the client’s guilt without

the client's consent or acquiescence is different. In that event, "counsel's performance is deficient and prejudice is presumed." *State v. Prtine*, 784 N.W.2d 303, 317–18 (Minn. 2010); *see also United States v. Cronic*, 466 U.S. 648, 659 (1984). A showing of prejudice is not required because "[t]he decision to admit guilt is the defendant's decision to make." *Dukes v. State*, 621 N.W.2d 246, 254 (Minn. 2001). Thus, "the defendant is entitled to a new trial, regardless of whether he would have been convicted without the admission." *Prtine*, 784 N.W.2d at 318.

In this case, the court of appeals reasoned that defense counsel's concession of one or more *elements* of a crime is a concession of *guilt*, and it follows that an unconsented-to concession requires a new trial. In so reasoning, the court of appeals primarily relied on our statement in *Torres v. State*, that "we first conduct a de novo review of the trial record to determine whether Torres['] trial counsel conceded guilt on any *element* of the two charges." 688 N.W.2d 569, 573 (Minn. 2004) (emphasis added).

The court of appeals read our statement in *Torres* out of context. We observed that the analysis of whether guilt was conceded was, necessarily, based on an analysis of whether elements had been conceded. We did not say—and clarify today that we did not mean to say—that an unconsented-to concession on any single element necessarily is a concession of guilt. We decline Huisman's invitation to announce that rule of law. Such a rule would be a disincentive for the parties to focus on the issues in dispute, and would prevent defense counsel from making what may well be appropriate, tactical concessions.

See Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons

rather than through sheer neglect.”); *Darden v. United States*, 708 F.3d 1225, 1229–30 (11th Cir. 2013) (“To retain credibility, defense counsel must often make concessions that, viewed narrowly, may appear detrimental to the client’s cause.”).

At the same time, we decline the State’s invitation to announce a rule of law that only a concession on each and every element of the crime is a concession of guilt. Here, we need not reach that question. Based on the facts of this case, defense counsel’s concessions of fewer than all of the elements was not a concession of guilt.¹ The elements that defense counsel conceded were undisputed at trial. The girls’ ages and Huisman’s age were undisputed, and the resulting age differential was a matter of simple arithmetic. And it was undisputed that, if the events occurred, they occurred in Steele County.

What was disputed was whether Huisman sexually penetrated M.H. and/or O.H. On that element, defense counsel mounted a vigorous defense. Counsel argued throughout the trial and during the closing argument that Huisman did not sexually penetrate either M.H. or O.H. He defended against the State’s strong evidence connecting Huisman to the crime by arguing that M.H. and O.H. were unreliable, and their testimony was not to be trusted. He also argued that the other evidence, including DNA and video evidence, was unreliable. Huisman’s counsel did not concede his client’s guilt. Therefore, no new trial is required.

Huisman contends, in the alternative, that his counsel’s concessions amounted to trial error under the *Strickland* ineffective-assistance test. We disagree; Huisman has

¹ We assume, solely for the purpose of this analysis, that Huisman did not consent to, or acquiesce in, counsel’s concessions. The record on that issue is undeveloped. Huisman does not contend that he affirmatively instructed his counsel not to make the concessions.

satisfied neither prong of the *Strickland* test. The first prong is not satisfied because defense counsel's performance did not fall below an objective standard of reasonableness. The concessions about undisputed elements were patently reasonable. Counsel focused his attention on the disputed element in each count and zealously argued that the State failed to meet its burden of proof that Huisman sexually penetrated M.H. and O.H. His performance was not deficient.

Nor is the second prong satisfied. Defense counsel's concession of undisputed elements was not prejudicial. In any event, the district court's findings did not rely on the concessions and were well-supported by the evidence.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals.

Reversed.