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**STATE OF MINNESOTA
IN COURT OF APPEALS**

A16-0683

A16-0684

State of Minnesota,
Respondent,

vs.

Anthony K. Adams,
Appellant.

Filed March 6, 2017
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

Nobles County District Court
File Nos. 53-CR-15-705, 53-CR-15-377

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

Kathleen A. Kusz, Nobles County Attorney, Matt O. Loeffler, Assistant County Attorney,
Worthington, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Schellhas, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Anthony K. Adams was convicted of violating a domestic-abuse no-
contact order (DANCO). Based on the DANCO violation, his probation in a prior assault

case was revoked and his sentence of 120 months' imprisonment was executed. In this consolidated appeal, Adams challenges his DANCO-violation conviction, arguing that he is entitled to a new trial because his trial counsel conceded guilt without his consent or acquiescence. He also challenges the revocation of probation in the assault case and asserts that the sentence in that case must be reversed because the sentencing court failed to provide a valid reason for departing from the sentencing guidelines. Because Adams acquiesced in his trial counsel's strategy in the DANCO-violation case, we affirm that conviction. As for the assault case, we conclude that the the district court did not abuse its discretion in revoking probation; however, because the sentencing court in that case did not provide a valid reason for the upward durational departure when sentencing Adams to 120 months in prison, we reverse that sentence and remand for resentencing.

FACTS

On July 17, 2015, pursuant to a plea deal, Adams pleaded guilty to second-degree assault with a dangerous weapon inflicting substantial bodily harm (district court file number 53-CR-15-377). Adams received a stayed prison sentence of 120 months, which was both an upward durational departure and a downward dispositional departure from the presumptive executed prison sentence of 60 months. The district court did not state a reason for departure during the sentencing hearing. The terms of probation included following a DANCO that prohibited Adams from having any contact with Z.M.

On August 6, 2015, less than 24 hours after he was released from jail to begin his probation, Adams was charged with violating the DANCO (district court file number 53-CR-15-705).

A jury trial on the DANCO-violation charge was held on January 8, 2016. In his opening statement, defense counsel implied that Adams violated the DANCO but asked the jury to find him not guilty for an extralegal reason. He stated:

Gandhi once said, “Where there is love, there is life.” Love is the reason we’re here today. Anthony Adams stands accused of violating a no contact order with [Z.M.] Anthony Adams has been in love with [Z.M.] from the day they met. She is the last thing he thinks about at night before he goes to sleep, the first thing he sees in the morning when he gets up. He isn’t just a little bit in love with her, he’s madly and deeply in love with her.

Defense counsel went on to identify the elements the state would have to prove and then identified the witnesses that the state was going to bring in to testify “[i]n order to do that.”

He continued:

As the evidence is being presented today, Anthony Adams is asking you to look at it in the light of what his actions were. He was a man in love spending time with the woman he loved. At the end of the day, that’s what happened here today—that’s what happened, and that’s what brought [us] into the courthouse. So, when the State’s finished and the Defense is finished presenting the case, it is going to be put in your hands. What Anthony Adams is asking for is that you find him not guilty because everything he did was for love, and there can’t be anything wrong with love.

The state offered a copy of the DANCO and called a court employee to testify that, according to court records, Adams was given a copy of the DANCO and it had not been cancelled or modified at the time of the alleged violation. Z.M. testified that she and Adams spoke on the phone and went to Walmart together on August 6, 2015. The state offered Walmart surveillance video and a still photo showing Adams and Z.M. together, and a Walmart employee testified that the video and photo were recorded on August 6. A

police officer testified that on August 6 he responded to a report that Adams had been in contact with Z.M. and arrested Adams after confirming that the DANCO was in effect. Another witness, B.S., testified that he saw Adams in Z.M.'s car outside of B.S.'s residence on August 6 while Z.M. was inside B.S.'s residence.

Adams did not testify or offer any evidence.

In his closing argument, Adams's trial counsel stated:

Anthony Adams went to Walmart with [Z.M.] That's a fact. You've seen the photographs. You heard the testimony. Anthony Adams knew of the no contact order. That, too, is a fact, and you've heard the testimony. The question that needs to be answered is why would he do these things?

....

[Z.M.] stated that Anthony Adams was her boyfriend. That's why [Adams] was at Walmart that day, not because he was willfully disobeying the order, but because he was a man in love spending time with his girlfriend. Anthony wants a verdict of not guilty, not because he is innocent, but because he feels love shouldn't be wrong, and that's what he's asking for today, is just a verdict of not guilty.

The state objected, stating that "to just blatantly ask for jury nullification I don't think is appropriate. Why he did it isn't an element of the offense. . . . [I]t's not a fact in evidence. It's not based upon an element. It's just—it's not proper."¹ The district court asked defense counsel to "step back" but did not rule on the state's objection.

¹ "Jury nullification, also called jury lenity, is the extraordinary power of the jury to issue a not-guilty verdict even if the law as applied to the proven facts establishes that the defendant is guilty." *State v. Hooks*, 752 N.W.2d 79, 86 (Minn. App. 2008).

The jury found Adams guilty of violating the DANCO. The district court sentenced Adams to 33 months in prison for the DANCO violation.

Immediately after sentencing for the DANCO violation, a contested probation-violation hearing was held in the assault case. Adams admitted to violating a probation condition by having contact with Z.M. The district court decided to revoke probation, resulting in the execution of the 120-month prison sentence for the assault conviction. The district court reasoned that revoking probation was appropriate because of Adams's "significant criminal history," the fact that his "violations were consistent with [his] prior criminal behaviors," and the fact that he "committed this violation almost immediately upon [his] release from custody."

Adams appeals.

DECISION

I. Adams is not entitled to a new trial because he acquiesced in his trial counsel's strategy of conceding guilt.

Adams argues that he must be granted a new trial because his trial counsel provided ineffective assistance of counsel by conceding his guilt without his consent or acquiescence. We review ineffective-assistance-of-counsel arguments *de novo*. *State v. Edwards*, 736 N.W.2d 334, 338 (Minn. App. 2007), *review denied* (Minn. Sept. 26, 2007).

To prevail on an ineffective-assistance-of-counsel argument, a defendant must show that the "representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn.

1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). When defense counsel admits a defendant's guilt without the defendant's consent, "the counsel's performance is deficient and prejudice is presumed." *State v. Jorgensen*, 660 N.W.2d 127, 132 (Minn. 2003). This is because the decision to admit guilt at trial can only be made by the defendant. *State v. Prtine*, 784 N.W.2d 303, 318 (Minn. 2010). "[E]ven implied concessions require client consent." *Dukes v. State*, 660 N.W.2d 804, 812 (Minn. 2003). An implied concession occurs when the statement, in context, "would lead a reasonable person to conclude" that the attorney admitted the defendant's guilt. *Id.* If the defendant's attorney concedes the defendant's guilt without the defendant's consent, the defendant "is entitled to a new trial unless he acquiesces in the concession." *Jorgensen*, 660 N.W.2d at 132.

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. *Prtine*, 784 N.W.2d at 318. To convict Adams of the DANCO violation, the state was required to prove beyond a reasonable doubt that (1) there was an existing DANCO at the time of the violation; (2) Adams knew of the existence of the DANCO; (3) Adams violated a term or condition of that DANCO; and (4) Adams's actions took place on or about August 6, 2015, in Nobles County, Minnesota. See Minn. Stat. § 629.75, subd. 2 (2014). Adams's trial counsel explicitly conceded three of the elements—that there was a DANCO and Adams was aware of it but had contact with Z.M. anyway—when he said during closing argument, "Adams went to Walmart with [Z.M.] That's a fact. . . . Adams knew of the no contact order. That, too, is a fact." Adams's trial counsel also at least

impliedly conceded guilt on the entire charge by stating that Adams “wants a verdict of not guilty, not because he is innocent, but because he feels love shouldn’t be wrong.” We conclude that Adams’s trial counsel conceded Adams’s guilt and thus Adams would be entitled to a new trial unless he consented to or acquiesced in the concession. *Jorgensen*, 660 N.W.2d at 132; *Dukes*, 660 N.W.2d at 812.

The record contains no evidence that Adams consented to his trial attorney’s concession of guilt. We must therefore “look at the entire record to determine if the defendant acquiesced in his counsel’s strategy.” *Prtine*, 784 N.W.2d at 318. A defendant acquiesces in the concession “when defense counsel uses the strategy of conceding the defendant’s guilt throughout the trial and the defendant fails to object.” *Jorgensen*, 660 N.W.2d at 132.

The state argues that this case is similar to *Jorgensen*, in which defense counsel stated in the opening statement and closing argument that the defendant killed his fiancée and that the only issue for the jury was whether the act was premeditated. *Id.* at 130. The supreme court in *Jorgensen* concluded that the defendant acquiesced in his counsel’s concessions because the record showed that he understood that “his trial counsel was using the strategy of conceding his intent to kill [the victim] in an effort to avoid conviction on the first-degree murder charge while at the same time maintaining credibility, that the strategy was used throughout trial, and that *Jorgensen* never objected.” *Id.* at 133.

Adams argues that he did not acquiesce because his trial counsel did not use the concession strategy until closing argument. He asserts that his trial counsel, with his consent, stipulated to one element of the offense so the jury would not hear about Adams’s

prior convictions,² challenged the state's pretrial motion in limine to introduce evidence of Adams's postarrest conduct, and participated in some cross-examination "directed at weakening the state's case." Adams argues that his trial counsel thus "actively tried to put doubt in the jurors' minds" and it was not until the closing argument that his counsel conceded his guilt. Adams argues that under these circumstances he could not have been expected to understand that his attorney was conceding his guilt and to object during trial.

But Adams's characterization of the concession as a surprise emerging in the closing argument is not accurate; his trial counsel introduced the concession and jury nullification strategy in his opening statement when he stated that Adams "was a man in love spending time with the woman he loved" and asked for acquittal "because everything he did was for love." Furthermore, Adams's trial counsel's attempts to "weaken[] the state's case" with respect to the actual elements of the crime were limited. He did not challenge the existence of the DANCO or Adams's knowledge of the DANCO, and he did not attempt to impeach the witnesses who said Adams was with Z.M. or to challenge the authenticity of the video and photo that showed Adams and Z.M. together.

Because Adams's trial counsel conceded that Adams had contact with Z.M. in the opening statement and closing argument and made only minor efforts to challenge the state's case during trial, we conclude that Adams's trial counsel used the strategy of conceding guilt and arguing for acquittal because Adams was motivated by love

² Adams stipulated to the fact that he had been convicted of two other domestic-violence-related offenses within ten years, a factor that elevated the penalty to the felony level under Minn. Stat. § 629.75, subd. 2(d)(1).

“throughout trial” within the meaning of *Jorgensen*. 660 N.W.2d at 132. Because Adams’s trial counsel conceded guilt throughout trial and Adams did not object, we conclude that Adams acquiesced in the concession and is not entitled to a new trial based on ineffective assistance of counsel. *Id.*

II. The district court did not abuse its discretion in revoking Adams’s probation.

Adams asserts that we must reverse the district court’s revocation of probation in the assault case because it was an abuse of discretion. The district court has broad discretion in determining whether there is sufficient evidence to revoke probation. *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). We reverse a district court’s decision to revoke probation only for a clear abuse of discretion. *Id.*

When a defendant violates a condition of probation, the district court may revoke probation and execute the previously stayed sentence. Minn. Stat. § 609.14, subd. 3 (2014). Before revoking probation, the district court must: (1) designate the specific condition that was violated; (2) find that the violation was intentional or inexcusable; and (3) find that the need for confinement outweighs the policies favoring probation. *Austin*, 295 N.W.2d at 250. When evaluating the third *Austin* factor, the district court should not conclude that the need for confinement outweighs the policies favoring probation unless

the court finds on the basis of the original offense and the intervening conduct of the offender that: (i) confinement is necessary to protect the public from further criminal activity by the offender; or (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.

Id. at 251. “The decision to revoke probation cannot be ‘a reflexive reaction to an accumulation of technical violations but requires a showing that the offender’s behavior demonstrates that he or she cannot be counted on to avoid antisocial activity.’” *State v. Osborne*, 732 N.W.2d 249, 253 (Minn. 2007) (quoting *Austin*, 295 N.W.2d at 251).

The district court found that Adams violated the condition that he not have contact with Z.M. The district court found that this violation was intentional and inexcusable. The district court found that Adams had been in court and heard the condition, but nevertheless violated that condition less than 24 hours after his release. The district court found that confinement is necessary to protect the public from further criminal activity by Adams and that it would unduly depreciate the seriousness of the violation if probation were not revoked because Adams’s actions showed that “what a judge tells [him], and what [he] agree[s] to as a condition of [his] probation didn’t seem to matter much at all to [him].” The district court reasoned that confinement was needed because Adams had a “significant criminal history,” his “violations were consistent with [his] prior criminal behaviors,” and he “committed this violation almost immediately upon [his] release from custody.” Thus, the district court concluded that the need for confinement outweighs any policies favoring probation in this case.

Adams argues that the district court abused its discretion in making the third finding, that the need for confinement outweighs policies favoring probation, because that finding was “reflexive” and “overstated the seriousness of the violation.”

First, Adams asserts that his violation was “peaceful in nature and done with the consent of Z.M., who did not want the DANCO issued in the first place,” so it should have

been “treated as more of a contempt-of-court situation rather than a serious criminal offense.” Adams does not cite, and we have not found, any authority supporting the assertion that it was a clear abuse of discretion to treat this probation violation like any other probation violation that may trigger revocation of probation.

Second, Adams asserts that the district court “ignored the fact that the overwhelming majority of Adams’ prior convictions occurred in 2003 or earlier.” The district court’s decision not to weigh this fact more heavily than all of the others that did not favor Adams is not a clear abuse of discretion.

Finally, Adams asserts that it was an abuse of discretion to revoke probation and execute the 120-month sentence after imposing a separate 33-month sentence for the felony DANCO violation, as the 33-month sentence is enough to protect the public and allow for rehabilitation. Given the district court’s broad discretion in deciding whether to revoke probation, the decision to revoke probation in the assault case after imposing a separate sentence for the DANCO violation is not a clear abuse of discretion.³

III. The 120-month sentence in the assault case must be reversed and the matter remanded because district court did not state a reason for the upward durational departure at sentencing.

Adams asserts that his sentence must be reversed and the presumptive sentence imposed because the district court failed to state a reason for the upward durational departure on the record at the time of sentencing.

³ As explained in Section III below, however, the 120-month sentence was error.

The Minnesota sentencing guidelines establish sentencing ranges that are presumed to be appropriate. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). The district court must impose a sentence within the presumptive range unless substantial and compelling circumstances distinguish the offender or the offense. *Id.* When the district court departs from a presumptive sentence, it must make findings supporting the departure. Minn. R. Crim. P. 27.03, subd. 4(C). If the district court has upwardly departed without a finding of substantial and compelling circumstances, the matter must be remanded to the district court for imposition of the presumptive sentence. *State v. Rannow*, 703 N.W.2d 575, 580 (Minn. App. 2005). “[A]bsent a statement of the reasons for the sentencing departure placed on the record at the time of sentencing, no departure will be allowed.” *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003) (holding that the court of appeals erred in remanding to allow the district court to state its reasons for departure after sentencing, and that the presumptive sentence must be imposed). Even if the defendant agrees to the departure as part of a plea agreement, the district court must state substantial and compelling circumstances for departure. *State v. Haggins*, 798 N.W.2d 86, 91-92 (Minn. App. 2011).

Here, the district court imposed a sentence that was an upward durational departure and a downward dispositional departure, but the district court did not state its reasons on the record or make findings of fact supporting the departures at that time.⁴

⁴ In the departure report completed the day after sentencing, the district court gave only an invalid reason to support the upward durational departure: “The sentence was consistent with the plea agreement. The upward durational departure was agreed to by Defendant in return for the downward dispositional departure.” A plea agreement alone does not create substantial and compelling circumstances and cannot form the sole basis of a sentencing departure. *State v. Misquodace*, 644 N.W.2d 65, 71 (Minn. 2002).

We reverse the sentence in district court file number 53-CR-15-377 and remand for resentencing within the presumptive range. *Geller*, 665 N.W.2d at 517. However, because the error in this case resulted from a plea agreement, the district court on remand is “‘free to consider the effect that changes in the sentence have on the entire plea agreement’ and could entertain motions to vacate the conviction and the plea agreement.” *State v. Montermini*, 819 N.W.2d 447, 455 (Minn. App. 2012) (quoting *State v. Lewis*, 656 N.W.2d 535, 539 (Minn. 2003)), *review denied* (Minn. Aug. 11, 2009); *see also Johnson v. State*, 877 N.W.2d 776, 779 (Minn. 2016) (noting that if an appellate court permits a reduction in a bargained-for sentence, the district court on remand may allow the state to withdraw from the agreement and move forward to trial on the original charges).

Affirmed in part, reversed in part, and remanded.