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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0774
A18-1846**

State of Minnesota,
Respondent,

vs.

Troy Lewis,
Appellant.

**Filed June 10, 2019
Affirmed in part, reversed in part, and remanded; motion denied as moot
Florey, Judge**

Ramsey County District Court
File Nos. 62-CR-15-4516; 27-FA-15-4145

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Considered and decided by Florey, Presiding Judge; Connolly, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

A jury convicted appellant of felony kidnapping, felony false imprisonment, and
misdemeanor violation of a domestic-abuse-no-contact order (DANCO). The district court

formally adjudicated the kidnapping conviction; the other convictions were deemed lesser-included offenses.

In this appeal, appellant seeks a new trial. He argues that his trial counsel performed ineffectively by abandoning exculpatory evidence and conceding guilt to the DANCO violation. He also argues that the district court erred by using certain out-of-state convictions in computing his criminal-history score. Because appellant's trial counsel performed ineffectively by abandoning exculpatory and impeachment evidence, and appellant was prejudiced thereby, we reverse appellant's kidnapping and false-imprisonment convictions and remand for further proceedings. Because appellant was not prejudiced in regard to the DANCO conviction, and he impliedly acquiesced to the concession of guilt to that offense, we affirm that conviction. We do not reach appellant's criminal-history-score argument.

FACTS

The state charged appellant Troy Lewis by amended complaint with five criminal counts: (1) second-degree assault of a woman, K.J., using a dangerous weapon (a knife); (2) false imprisonment of K.J.; (3) false imprisonment of K.J.'s minor son, C.J.; (4) violation of a DANCO protecting K.J.; and (5) kidnapping K.J. for the purpose of causing her terror.

The complaint alleged that on June 15, 2015, a concerned citizen, B.S.S., called 911 to report that "a male in a black Mercedes drove up to a female, picked her up, put her in his car, and drove away with her." B.S.S. reported that the female was screaming and appeared to be trying to escape. Another 911 caller reported that a second person may have

gotten into the car as well. Subsequent tips led officers to appellant's residence. When they arrived, officers heard screaming, but no one answered the door. Officers entered the home and found K.J. and C.J. coming up from the basement. Both appeared distraught.

K.J. said that appellant had held them captive since June 13, 2015. She worked at a restaurant, and appellant was at the restaurant on June 13 when she and C.J. went to pick up her paycheck. She tried to leave, but appellant grabbed her, forced her into his Mercedes, and drove her to his home, where he held her and C.J. captive. She could not call for help because he broke her phones.

K.J. said that two days after the abduction, she escaped with C.J., and they were running down the block when appellant pulled up in his Mercedes and grabbed her. She reported that she tried to escape, but appellant punched her head several times and pinned her against her seat. He drove her and C.J. to his home, holding her at knifepoint. K.J. told officers that appellant continued to assault her at his home.

Appellant was initially represented by a public defender. Before trial, the defense uncovered evidence that refuted K.J.'s assertion that she was held against her will since June 13. This evidence included surveillance footage, witness observations, and inconsistent allegations made by K.J.

In August 2015, appellant obtained a private attorney (trial counsel). After appellant's arrest, appellant's sister, D.L., discovered two cellphones at appellant's residence. D.L. mailed the phones to trial counsel, at his request, in mid-September 2015. An investigation into the contents of the phones revealed additional evidence that refuted K.J.'s assertion that she was held against her will.

The district court had set a deadline of November 13, 2015, for witness and exhibit lists. The state moved to exclude evidence from the cellphones, as well as certain witness testimony, based upon appellant's failure to timely disclose that evidence "which would likely be used for impeachment of [K.J.]." In the alternative, the state sought a continuance. The state asserted that, after the district court's discovery deadline, "defense counsel—for the first time—raised the issue of being in possession of telephones which contain information believed relevant to the defense."

On November 30, 2015, following chambers discussions, which were not placed on the record, a hearing was held on the state's motion. The judge stated:

The first matter deals with the [s]tate's motion to exclude evidence, or in the alternative, a motion for a continuance; and as I understand it . . . this relates to a late disclosure with respect to telephones and the contents of telephones. And as I understand it, the [s]tate was unable to view anything that was on the telephones given the late disclosure and the nature of the disclosure. And then the second issue relates to three witnesses I understand that all of these issues, based on my discussions with counsel, have been resolved because there will be no mention of the telephones during the trial and none of these witnesses are going to be called as witnesses. Do I have a correct understanding of the discovery issues and the resolution here?

Trial counsel informed the court, "Based on our discussion in the back it was the defense's opinion that the [s]tate was going to talk about specifically June 15th of 2015. With that being the focus of the case, then those witnesses listed and those phones are not relevant." The prosecutor stated:

The parties agree that there will be no conversation at all through direct or cross concerning the events occurring on the 13th and 14th of June, 2015. With the exception

of . . . relationship [history] unrelated to those dates, the [s]tate will be getting into some history, otherwise the entire focus of the trial will be on the 15th of June.¹

Trial commenced that afternoon. The first witness was B.S.S. She testified that, on June 15, 2015, she saw “a lady and a young boy throwing a football to each other.” She then saw a black Mercedes “pull up going at high speeds.” B.S.S. testified that it was driven by a black male, though she did not see his face. B.S.S. testified that “the female was very upset,” but “the young boy just got in the car.” B.S.S. saw the man get out of the Mercedes, pick up the female, and throw her in his car. The car sped off, and B.S.S. observed the female open the car door and yell out “a horrific scream.” B.S.S. followed the Mercedes, but it evaded her pursuit. B.S.S. called 911, and the call was played for the jury.

During the call, B.S.S. reported that “there was a black Mercedes,” and “I think she stole a girl. She picked her up and threw her in the car.” B.S.S. reported, “She tried to open the door and he sped off. I tried to follow him and I couldn’t stick to him.” B.S.S. stated during the call that she thought there were “two girls.” She testified at trial, however, that she was simply nervous during the call and she “knew it was a male, [she] knew it was a girl or a lady and a boy.”

The next witness was C.O. She testified that she was going out for dinner with B.S.S., and was walking to B.S.S.’s car, when she saw “a black car that was blocking the apron of [her] driveway, and there was a football in the middle of [her] driveway as a car

¹ Prior to trial, the state moved for permission to introduce relationship evidence concerning appellant and K.J.

like sped off.” C.O. noticed a black male throw a woman into the passenger side of his car. She testified that the woman “let out this really loud screech like something was wrong.” C.O. testified that, as she observed the incident, she said to B.S.S., “Oh my god . . . [w]as that girl kidnapped?”

The alleged victim, K.J., testified that she met appellant in 2014, and they started an intimate relationship. She moved in with him. K.J. testified that appellant became physically abusive, and she obtained a DANCO on March 4, 2015. K.J. testified that, although the DANCO was in place, appellant continued to contact her. She testified that, on June 15, 2015, appellant was upset. She testified that he “jumped on [her] inside the house,” and he “wouldn’t let [her] leave to go to her mother’s,” and when he went upstairs, K.J. and her son “went outside with the football.” K.J. testified that, as she and C.J. walked toward the park, appellant “pulled up on the side and he told [her] to get in the car and [she] said no, I’m not going anywhere with you.” Appellant “put [her] in the car, threw [her] in the car and he started punching [her] and kicking [her].” C.J. “got in the car because he was scared.” K.J. screamed and tried to get out of the car, but appellant would not let her escape. K.J. testified that appellant had a knife in his hand, but she “wasn’t sure if he was going to use it, because he was too busy hitting [her].”

K.J. further testified that, when they got back to appellant’s residence, appellant picked her up by one leg and “threw [her] in the house.” He “fixed” the lock on the door so that she could not escape. K.J. testified that law enforcement then arrived and arrested appellant. The prosecutor asked K.J., “Before you left the house that day with your son to play with the football, was [appellant] kind of holding you in the house or not?” K.J.

replied, yes, “[b]ecause he doesn’t want me to go nowhere.” K.J. testified that she could not call police because appellant broke “[e]very phone [she] had.”

The next witness was C.J., who was nine years old at the time of trial. He testified that he was walking outside with the football “[t]o get away” from appellant because appellant was hitting K.J. C.J. testified that appellant “drove up and threw [his] mom in the car.” He testified that he got in the back seat and observed appellant punch K.J. in the head. C.J. was asked by the prosecutor if appellant kept any weapons in his car, and C.J. did not mention a knife, but rather a “flashlight.” C.J. testified that, once they returned to appellant’s home, he and his mom hid in the basement and cried.

Appellant’s neighbor, D.S., testified that on June 15, 2015, it was K.J. who was driving. She testified that “[K.J.] came home in her vehicle, or a vehicle, and pulled in like all the way to the back of the driveway.” D.S. heard screaming and an argument, and she called 911 because she was concerned about C.J. The 911 recording was admitted into evidence and played for the jury. During the call, D.S. reported that she believed a woman was being beaten.

The jury also heard testimony from one of the responding officers. He testified that he heard yelling and a woman crying when he arrived at appellant’s residence. After entering the residence, the officer saw “a female and young child walk up the stairs,” and “[t]hey were both visibly upset.”

The sergeant who interviewed appellant also testified. He testified that appellant stated he had not seen K.J. “for three weeks prior to the incident,” and she returned to his

home with C.J. “the afternoon of the 15th of June.”² Appellant said that “he did not leave the house on the 15th of June.”³

The defense did not present any witnesses. During the defense’s closing argument, trial counsel discussed the events of June 15, and stated, “What happened that day? One thing for sure happened was that there was a violation of a [DANCO]. No way around that, no way of talking your way out of it, no way of saying I didn’t do it.”

The jury returned verdicts of not guilty on the charges of false imprisonment of C.J., and second-degree assault, and verdicts of guilty on the charges of false imprisonment of K.J., kidnapping, and violating a DANCO. The state had filed a notice of its intent to seek an upward sentencing departure based upon aggravating factors. The jury returned a special-verdict form and found three aggravating factors.

Appellant was sentenced to 141 months’ imprisonment on the kidnapping charge. He filed a direct appeal and then moved to stay his appeal pending postconviction proceedings. We stayed the appeal. In December 2016, appellant filed a postconviction petition raising an ineffective-assistance-of-counsel claim. In March 2017, he moved to correct his sentence, arguing that his criminal-history score was incorrectly calculated.

The postconviction court held an evidentiary hearing. In July 2018, the postconviction court filed an order denying relief. The court characterized appellant’s ineffective-assistance-of-counsel claim as having three parts: (1) trial counsel’s failure to

² The sergeant testified that, due to “[h]uman error or equipment malfunction,” the interview was not successfully recorded.

³ Testimony was received from two additional officers.

comply with discovery deadlines; (2) trial counsel’s failure to present evidence regarding events that took place on days other than June 15; and (3) trial counsel’s concession of guilt on the DANCO violation. The court concluded that appellant’s first two arguments failed to satisfy the prejudice prong of the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The court was “not convinced that the result of the trial would have been any different” had evidence concerning the days preceding June 15 been admitted. The court did not believe that K.J.’s testimony was central to the case. As for trial counsel’s concession of guilt on the DANCO violation, the court concluded that appellant implicitly acquiesced to the concession. The court concluded that appellant “understood his guilt was being conceded with respect to the violation of a DANCO.”

In September 2018, we dissolved the stay and reinstated the direct appeal. In October 2018, the district court filed an order denying appellant’s motion

to correct his sentence. The court found that the state met its burden of proof on the criminal-history score. Appellant appealed and moved to consolidate his two appeals. We granted that motion.

D E C I S I O N

I. The postconviction court abused its discretion by denying appellant’s ineffective-assistance-of-counsel claim premised on trial counsel’s untimely disclosure and decision to exclude events outside of June 15.

Appellant argues that the postconviction court erred by denying his ineffective-assistance-of-counsel claim premised on trial counsel’s failure to abide by a pretrial discovery order and agreement to exclude from trial events outside of June 15. Appellant asserts that trial counsel’s performance “fell below an objective standard of reasonableness

when he abandoned the use of critical, exculpatory evidence at trial,” and without that error, “there is a reasonable probability the result of the trial would have been different.”

To prevail on an ineffective-assistance-of-counsel claim, a defendant ordinarily must establish that his attorney’s performance fell below an objective standard of reasonableness and that there is a reasonable probability that the outcome would have been different if not for the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). Regarding the performance prong, there is a strong presumption that counsel’s performance was reasonable. *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016). Regarding the prejudice prong, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.” *Id.* (quotation omitted). When we review a postconviction court’s denial of relief on a claim of ineffective assistance of counsel, we consider the factual findings that are supported by the record, conduct a de novo review of their application, and determine whether the court abused its discretion by denying relief. *State v. Nicks*, 831 N.W.2d 493, 503-04 (Minn. 2013).

The first performance issue is trial counsel’s failure to abide by the scheduling order. Trial counsel received the phones in mid-September 2015, gave the phones to an investigator, and received a report on the phones later that month. The report informed trial counsel that there was evidence on one of the phones that conflicted with K.J.’s version of events. The report stated:

The cell phone showed a text message[] from [K.J.] directed to her grandmother on June 14, 2015. The text message read, “Grandma, I’m coming. I’m running late.” The text message

was in response to a voice message left by [K.J.]’s grandmother stating that [K.J.] needed to bring a change of clothes because [K.J.]’s son had an accident. This message implies that [K.J.]’s son, [C.J.], was with the grandmother on June 14, 2015 and not being held against his will as the complaint against [appellant] alleges.

There are also outgoing phone calls documented in the call log of the cell phone [K.J.] used detailing numerous calls being made during the dates [K.J.] alleges [appellant] held her against her will—but, no attempted calls to 911 for help are logged.

Trial counsel was required to disclose witness and exhibit lists by November 13, 2015, and he was aware of that deadline. *See* Minn. R. Crim. P. 9.02, .03; *see also State v. Patterson*, 587 N.W.2d 45, 50 (Minn. 1998) (stating that all defense witnesses must be disclosed). He was also aware of the exculpatory nature of the phone evidence. The record suggests that trial counsel intended to offer evidence from those phones at trial. We conclude that the untimely disclosure constitutes performance that falls below an objective standard of reasonableness.

The second performance issue is trial counsel’s agreement to limit the trial to the events of June 15. We generally do not review ineffective-assistance-of-counsel claims based on trial strategy, which includes the selection of what evidence and witnesses will be presented. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013); *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). However, trial counsel’s agreement to limit the trial to the events of June 15 escapes the bounds of reasonable trial strategy.

At the postconviction evidentiary hearing, trial counsel initially testified that he did not agree to limit the trial to the events of June 15. Rather, according to trial counsel’s

testimony, the district court agreed with the prosecutor “back in chambers that the defense evidence, including phone records and witnesses, could not be brought up and then granted the [s]tate’s motion to exclude on the record.” However, after being presented with the trial transcript, trial counsel acknowledged during the postconviction hearing that he agreed to limit the trial to the events of June 15. Despite this acknowledgement, trial counsel testified at the postconviction hearing that, in fact, he “did not agree with the decision to limit the trial to only June 15,” and he was “unable to recall why he did not object to that decision on the record.”

Trial counsel’s actions do not constitute reasonable trial strategy. For reasons that remain elusive, trial counsel agreed to exclude virtually all of the defense’s exculpatory and impeachment evidence, evidence that potentially would have undermined K.J.’s testimony. To compound matters, although trial counsel agreed to exclude evidence outside of June 15, he agreed to allow the state to present damaging evidence regarding appellant and K.J.’s relationship. Trial counsel’s conduct fell below an objective standard of reasonableness.

Moving to the prejudice prong, the postconviction court concluded that there was insufficient prejudice because K.J.’s testimony was not central to the state’s case due to testimony from other witnesses. Indeed, there were independent witnesses who observed appellant grab K.J. and throw her into his car, and based upon their observations, K.J. appeared upset and screamed. This evidence supports the conviction. However, we disagree with the postconviction court’s conclusion that K.J.’s testimony was not central to the case.

The kidnapping offense required proof of a purpose, on the part of appellant, to terrorize K.J. or another. *See* Minn. Stat. § 609.25, subd. 1(3) (2014). It also required proof of a lack of K.J.’s consent. *Id.* Likewise, the false-imprisonment offense required proof of intentional confinement and a lack of K.J.’s consent. *See* Minn. Stat. § 609.255, subd. 2 (2014). To that end, K.J.’s state of mind during the events of June 15 was crucial. *See State v. Dokken*, 312 N.W.2d 106, 108 n.3 (Minn. 1981) (indicating a finding of consent involves an evaluation of one’s state of mind). D.S., an independent witness, testified that she saw K.J. drive herself home. This suggests that K.J. was not being held against her will. While the observations of the independent witnesses provided circumstantial evidence of an intent to terrorize and a lack of consent, there is a reasonable probability that the outcome of the trial would have been different had evidence concerning the events prior to June 15 been admitted.

II. The postconviction court did not abuse its discretion by denying appellant’s ineffective-assistance-of-counsel claim premised on trial counsel’s concession of appellant’s guilt to the DANCO violation.

Appellant next argues that trial counsel was ineffective because he conceded appellant’s guilt to the DANCO violation in his closing argument without first obtaining appellant’s consent. The state asserts that appellant impliedly acquiesced in the concession.

“When defense counsel concedes the defendant’s guilt without consent, counsel’s performance is deficient and prejudice is presumed.” *State v. Luby*, 904 N.W.2d 453, 457 (Minn. 2017) (quotation omitted). Whether to admit guilt is the defendant’s decision to make. *Id.* “[I]f that decision is taken from the defendant, the defendant is entitled to a new

trial, regardless of whether he would have been convicted without the admission.” *Id.* (quotation omitted).

Reviewing courts apply a two-step analysis to an ineffective-assistance claim premised on 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.” *Id.* Here, trial counsel clearly conceded guilt to the DANCO violation. *See id.* (involving counsel’s concession of client’s guilt in closing argument).

Moving to the second step of the analysis, we must determine whether appellant acquiesced in trial counsel’s concession. *See id.* “When, as here, there is no evidence of express consent, we look at the entire record to determine if the defendant acquiesced in his counsel’s strategy.” *Id.* at 459 (quotation omitted). “Acquiescence may be implied in certain circumstances, such as (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). Trial counsel did not use a concession strategy throughout the trial, and we therefore focus on whether trial counsel’s concession was an understandable strategy, and whether appellant was present, understood a concession was being made, but failed to object. *Id.*

The postconviction court found that the concession was an understandable strategy. It found that “[t]he evidence to support this count at trial was overwhelming,” and an admission of guilt on this charge would potentially build credibility with the jury. “Whether it was an understandable trial strategy to concede guilt is a legal determination

that we review de novo.” *State v. Prtine*, 799 N.W.2d 594, 599 (Minn. 2011); *see also* *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984) (stating that it might be a reasonable strategy “to admit that defendant is guilty of one of two charges in the hope of increasing his credibility with the jury”). “[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.” *Prtine*, 799 N.W.2d at 599. Given the facts and circumstances of this case, including the strong evidence indicating that appellant violated the DANCO, trial counsel’s concession to the misdemeanor DANCO violation was an understandable and objectively reasonable strategy which might have increased the chances of an acquittal on the more serious charges.

We next ask whether appellant was present, understood a concession was being made, but failed to object. Appellant was present for the concession and failed to object. We therefore focus on whether appellant understood that a concession was being made by his counsel. The postconviction court found that appellant understood that guilt was being conceded. “This is a finding of historical fact that is reviewed under a clearly erroneous standard of review.” *Id.* at 601. The postconviction court found that appellant was present for the concession, the concession was made more than once, and trial counsel had discussed conceding guilt with appellant, which made him aware of that possibility. Based upon our review of the record, the postconviction court did not clearly err in concluding that appellant understood that guilt was being conceded. Because appellant impliedly acquiesced, the postconviction court did not abuse its discretion by denying appellant’s ineffective-assistance-of-counsel claim premised on trial counsel’s concession of guilt.

Lastly, because we reverse and remand on appellant's kidnapping and false-imprisonment convictions, and appellant's criminal-history score would not be applicable to any sentencing on the misdemeanor DANCO conviction, we do not reach appellant's criminal-history-score argument. *See State v. Campbell*, 814 N.W.2d 1, 6 (Minn. 2012) ("An offender's criminal history is not factored into misdemeanor and gross misdemeanor sentencing.").

Affirmed in part, reversed in part, and remanded; motion denied as moot.⁴

⁴ The state moved to strike portions of appellant's reply brief concerning statements made by K.J. in two order-for-protection (OFP) affidavits. The state argued that the affidavits were not part of the district court record. Under Minn. R. Civ. App. P. 110.01, the record on appeal consists solely of "[t]he papers filed in the trial court, the exhibits, and the transcript of the proceedings." Our review of the record indicates that the affidavits in question were filed in district court on January 11, 2016. Regardless, we have not relied on the affidavits. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying as moot motion to strike because challenged material was not relied upon).