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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0041**

State of Minnesota,
Respondent,

vs.

Robert Allen Johnson,
Appellant.

**Filed January 27, 2020
Affirmed
Bjorkman, Judge**

Sherburne County District Court
File No. 71-CR-17-1325

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Dawn R. Nyhus, Assistant County Attorney, Elk River, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Bjorkman, Judge; and Cochran, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

In this direct appeal, appellant challenges his convictions of criminal vehicular homicide, criminal vehicular operation, and driving while impaired (DWI). He argues that

he is entitled to a new trial because he received ineffective assistance of counsel. We affirm.

FACTS

On September 11, 2017, appellant Robert Allen Johnson drove his vehicle into an office building. The crash killed one person and injured four others. Johnson had consumed multiple alcoholic beverages before the accident; a blood draw conducted within two hours revealed an alcohol concentration of 0.10. The state charged Johnson with two counts of criminal vehicular homicide under Minn. Stat. § 609.2112, subd. 1(a) (2016), ten counts of criminal vehicular operation under Minn. Stat. § 609.2113, subds. 1-3 (2016), and two counts of DWI under Minn. Stat. § 169A.20, subd. 1 (2016).

Johnson was represented by counsel throughout the district court proceedings and waived his right to a jury trial. On the first day of the court trial, Johnson entered into a written stipulation with the state regarding certain underlying facts that satisfied most of the elements of the charged offenses. He stipulated that (1) he drove his vehicle into the building on the relevant date, (2) he consumed three alcoholic drinks within two hours before the accident, (3) he had an alcohol concentration of 0.10 as measured within two hours of the accident, (4) the accident caused one death and four other victims sustained bodily harm, and (5) no defect or malfunction in the vehicle contributed to the accident. The stipulation extended to the admission of 34 exhibits, including medical records and photographs. The district court carefully reviewed the stipulation with Johnson. Johnson indicated that he was freely and voluntarily waiving his trial rights with respect to the facts outlined in the stipulation.

During the trial, defense counsel did not call any witnesses. But he did cross-examine the state's witnesses on a variety of issues, including whether the scuff marks on the curb could have been caused by other vehicles, whether Johnson overcorrected before he crashed into the building, whether Johnson could have tried to apply the brakes in the vehicle but was unsuccessful, and whether Johnson's flat emotional response immediately after the accident was caused by the accident as opposed to intoxication. The parties agreed to provide their closing arguments in writing. In his submission, defense counsel stated that "Johnson presented a Stipulation to the court at the beginning of trial in which he stipulated to virtually every element of the charged offenses" and that "the defendant admitted the facts necessary to establish his guilt of all these charges, beyond a reasonable doubt, before the trial even started." Defense counsel then stated that Johnson had taken full responsibility for the tragedy and awaited the court's judgment.

In written findings of fact and conclusions of law, the district court found Johnson guilty on all 14 counts. But it only entered convictions on five of the counts and imposed one executed sentence—81 months for criminal vehicular homicide with an alcohol concentration of 0.08 or more as measured within two hours of driving (Minn. Stat. § 609.2112, subd. 1(a)(4)). Johnson appeals his convictions.

D E C I S I O N

Johnson argues that he is entitled to a new trial because he received ineffective assistance of counsel. We generally analyze ineffective-assistance claims under the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn.

2003). To prevail on such a claim, the defendant must show that “counsel’s performance was deficient” and that “the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. On the first prong, counsel’s representation is deficient when it falls below an objective standard of reasonableness. *Id.* at 688, 104 S. Ct. at 2064. On the second prong, deficient representation is prejudicial when “there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Id.* at 695, 104 S. Ct. at 2068-69.

There is a narrow exception to the prejudice requirement that applies when counsel commits a structural error. *State v. Dalbec*, 800 N.W.2d 624, 627 (Minn. 2011). A structural error occurs when the circumstances “are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” *Id.* (quoting *United States v. Cronin*, 466 U.S. 648, 658, 104 S. Ct. 2039, 2046 (1984)). The defendant has the burden of showing that counsel’s error was structural. *Id.* at 628.

Johnson contends that defense counsel committed structural error by failing to subject the state’s case to meaningful adversarial testing. Such a failure is a type of structural error. *Cronin*, 466 U.S. at 659, 104 S. Ct. at 2047. But counsel’s failure must be complete—extending to all aspects of the prosecution’s case—not merely a failure to challenge the state at specific points in the proceeding. *Dalbec*, 800 N.W.2d at 628.

Johnson’s challenge rests on counsel’s advice to enter into the stipulation, which allegedly “proved all of the charges and foreclosed any possible defense,” and the written closing argument that referenced Johnson’s stipulation to every element of the charged

offenses. We are not persuaded that either of these actions demonstrates a complete failure to subject the state's case to meaningful adversarial testing.

First, counsel is not ineffective simply because he advises the defendant to stipulate to underlying facts. *See Dereje v. State*, 837 N.W.2d 714, 723-24 (Minn. 2013) (holding that defense counsel did not commit structural error by stipulating to submission of particular evidence with defendant's consent). Johnson cites no authority to the contrary. And the record shows Johnson understood what he was doing when he entered into the stipulation. Before accepting the stipulation, the district court thoroughly explained its legal effect. And the court questioned Johnson at length to ensure that he entered into the stipulation freely, voluntarily, and with advice of counsel.

Second, any purported failure to meaningfully test the state's case in the written closing argument is not a complete failure to challenge the state throughout the proceeding. *See Dalbec*, 800 N.W.2d at 628 (indicating that failure to submit a written closing argument is not a structural error). As noted above, defense counsel cross-examined the state's witnesses as to whether Johnson hit the curb, whether he overcorrected before crashing into the building, whether he tried to apply the brakes, and whether his emotional response to the accident reflected something other than intoxication. Those questions were designed to demonstrate that Johnson was not negligent or under the influence of alcohol at the time of the accident—elements of half of the charged offenses. *See* Minn. Stat. §§ 169A.20, subd. 1(1), 609.2112, subd. 1(a)(2)(i), 609.2113, subds. 1(2)(i), 2(2)(i), 3(2)(i). While counsel's closing argument appears more focused on sentence mitigation than acquittal,

we are not persuaded that defense counsel failed to subject the prosecution's case to meaningful adversarial testing.

The outcome of this appeal would be different if Johnson's convictions flowed from closing arguments that went beyond the concessions Johnson made in the pretrial stipulation. Counsel is ineffective and prejudice is presumed when counsel admits the defendant's guilt without his consent. *Dukes v. State*, 621 N.W.2d 246, 254 (Minn. 2001) ("The decision to admit guilt is the defendant's decision to make. In situations when counsel admits guilt without the consent of the defendant, the defendant is entitled to a new trial, regardless of whether he would have been convicted without the admission." (citation omitted)). In evaluating an ineffective-assistance-of-counsel claim based on a concession of guilt, we determine whether counsel in fact conceded the defendant's guilt and whether the defendant acquiesced to that concession. *State v. Prtine*, 784 N.W.2d 303, 318 (Minn. 2010).

Defense counsel's written concession encompassed all of the charged offenses, stating, "As the court noted during trial, the defendant admitted the facts necessary to establish his guilt of all these charges, beyond a reasonable doubt, before the trial even started." This exceeded Johnson's stipulation, which only conceded the elements of the offenses charged in counts 2, 4, 6, 8, 10, 12, and 14.¹ But the district court only entered

¹ Those offenses require that the defendant (1) operate a motor vehicle; (2) cause a certain level of harm to another person (either death, great bodily harm, substantial bodily harm, or bodily harm, depending on the particular offense); and (3) have an alcohol concentration of 0.08 or more, as measured within two hours of the time of driving. Minn. Stat. §§ 169A.20, subd. 1(5), 609.2112, subd. 1(a)(4), 609.2113, subds. 1(4), 2(4), 3(4). By stipulating that he operated a motor vehicle, caused the death of and varying degrees of

convictions on these counts. The district court did not formally adjudicate the remaining counts.² In other words, the district court did not convict or sentence Johnson for any offenses to which he did not stipulate. Accordingly, we need not consider whether defense counsel's concession of guilt for the other charged offenses was ineffective assistance of counsel. *Cf. State v. Ashland*, 287 N.W.2d 649, 650 (Minn. 1979) (stating that appellate courts need not decide whether the evidence was sufficient to support convictions on counts for which the defendant was not formally adjudicated guilty or sentenced).

In his pro se supplemental brief, Johnson insists that the accident was caused by a medical condition unrelated to his consumption of alcohol. He faults defense counsel for failing to present medical records or to call witnesses who could have supported his theory. This argument is unavailing. Counsel has wide discretion to decide which witnesses to call and what evidence to present at trial. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Furthermore, any such errors would require Johnson to show that he was prejudiced as a result, and there is no evidence of prejudice.

Affirmed.

bodily harm to certain victims, and had an alcohol concentration of 0.10 as measured within two hours of the accident, Johnson conceded every element of those offenses.

² Even though the district court found Johnson guilty of all counts, a conviction does not occur until the court records its finding of guilt. Minn. Stat. § 609.02, subd. 5(2) (2018); *State v. Walker*, 913 N.W.2d 463, 467 (Minn. App. 2018). As such, the district court did not enter a conviction for the other counts. Indeed, to enter a conviction for those counts would have violated Minn. Stat. § 609.04 (2018). *See State v. Clark*, 486 N.W.2d 166, 170-71 (Minn. App. 1992) (holding that the district court violated section 609.04 by entering a conviction for both driving under the influence of alcohol and driving with an alcohol concentration of 0.10 when they occurred during a single behavioral incident).