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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0670**

State of Minnesota,
Respondent,

vs.

William Cleveland Alan Boykin,
Appellant.

**Filed March 16, 2020
Reversed in part and remanded
Larkin, Judge**

Lyon County District Court
File No. 42-CR-18-668

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

Richard R. Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his convictions of attempted first- and second-degree murder of an unborn child, first-degree burglary, first-degree assault, threats of violence, and violation of an order for protection (OFP), arguing that his trial counsel inappropriately conceded his guilt at trial. He also challenges his sentence for first-degree assault, arguing that the district court erred by imposing a greater-than-double upward departure from the presumptive sentence. Because the record is inadequately developed regarding appellant's concession-of-guilt claim, we remand for an evidentiary hearing and additional findings to facilitate further appellate review of that claim. And because it is not clear that the district court applied the rule of *State v. Evans*, 311 N.W.2d 481 (Minn. 1981), which generally limits an upward durational departure to double the presumptive-sentence length, we reverse appellant's sentence for first-degree assault and remand for resentencing.

FACTS

Respondent State of Minnesota charged appellant William Cleveland Alan Boykin with several offenses after he attacked T.D. in her mother's home. At trial, T.D. testified that she began dating Boykin in January 2018, that she later lived with him, and that she moved out of their apartment after he became physically abusive. T.D. obtained an OFP prohibiting Boykin from contacting her, and she and her two children moved in with her mother, K.D. T.D. was pregnant at that time.

In the early morning hours of June 10, 2018, T.D. woke and saw Boykin standing outside the window of her mother's home. Boykin entered the home through the window

and attacked T.D. Boykin knew that T.D. was pregnant and that she had received a cornea transplant, yet he punched and kicked her in the stomach and eyes. All the while, Boykin yelled that he would “kill [T.D.] and [the] baby.” T.D. sustained injuries during Boykin’s attack, including the permanent loss of one of her eyes.

K.D. testified that she heard Boykin “screaming” at T.D., telling her that he would kill T.D. and the baby. She testified that as Boykin yelled, he continued “hitting [T.D.] between the eye and her stomach.” K.D. explained that there “was just no stopping him,” that she tried to pull Boykin off T.D., and that one of T.D.’s children threw toys at him.

Marshall Police Department Officers Martin Jensen and Alicia Popowski responded to the scene. Officer Jensen testified that Boykin told him that “he had to” assault T.D. because of “miscommunication, a lack of respect, and because of the OFP that she had placed on him” but that “he hoped he didn’t hurt the baby or kill the baby.” Officer Popowski testified that Boykin told her that he would cooperate with jail staff because he “did what [he] needed to do.”

Boykin’s counsel did not give an opening statement at trial, and he did not cross-examine T.D. Boykin’s counsel asked K.D. only one question during cross-examination, which regarded the length of Boykin’s attack. Boykin’s counsel cross-examined the responding officers, primarily focusing on what the officers had observed at K.D.’s home. Boykin’s counsel did not call any witnesses in his defense.

During closing argument, Boykin’s counsel stated:

I’m not going to insult your intelligence and tell you nothing happened on June 10, 2018 Obviously something happened. There’s testimony and evidence during the course

of this trial. Hard testimony. Graphic evidence. It's hard not to be moved by the testimony of [T.D.] about what happened. [K.D.'s] testimony was compelling. I acknowledge that. . . .

. . . .

The Judge will give you Instructions on how to interpret what you saw and what you heard. *Your primary question, I think, is you're going to have to answer his intent.* Not necessarily what happened, because I think that's fairly clear. But, what was the intent? What was Mr. Boykin's intent? The State is submitting, primarily, that he intended to cause harm to [T.D.], and that he intended to kill the unborn child. People say and do things in the heat of passion, heat of the moment, when they're upset. In certain situations, people say and do things. It doesn't make them right. Doesn't make them good. But do what people say and what people do in the heat of passion accurately portray their intent at the time, or is [it] just that; passion, emotion; saying things and doing things people don't mean. Did Mr. Boykin say and—say and do things? That's a decision you need to make. *Were his actions—his primary actions towards [T.D.], did they—did they convey an intent to murder an unborn child? I don't think the State has proven that.*

. . . If you make that determination, that Mr. Boykin took certain steps towards the completion of a crime, you still have to answer that question, what was his intent in doing that? *I think it's clear that his intent was not to harm—not to murder an unborn child.*

To the extent there is evidence—exculpatory evidence on Mr. Boykin's behalf, there's a statement from Officer Jensen indicating that Mr. Boykin was concerned about the unborn child; asked if—he made the statement that he hoped the child would be okay. It's not dismissing other actions by no means. Not dismissing other actions.

(Emphasis added.)

Defense counsel did not specifically address any charge other than the attempted-murder offenses.

The jury found Boykin guilty of attempted first- and second-degree murder of an unborn child, first-degree burglary, first-degree assault, threats of violence, and violation of an OFP. Because the state sought an upward durational departure, the jury was instructed to determine whether there were aggravating factors to support a departure. The jury returned a special verdict finding the existence of certain aggravating factors.

The district court sentenced Boykin to serve 365 days in jail for the OFP violation and concurrent terms of imprisonment of 88 months for first-degree burglary and 220 months for first-degree attempted murder of an unborn child. The district court sentenced Boykin to a term of imprisonment of 240 months for first-degree assault, an upward durational departure, consecutive to Boykin's attempted-murder sentence. The district court explained that it departed based on the presence of aggravating factors "as contained in the Special Jury Verdict," specifically, the crime was committed in a place where T.D. had an expectation of privacy, was committed with particular cruelty, and was committed in the presence of a child. The district court's sentences resulted in a total term of imprisonment of 460 months.

Boykin appeals.

D E C I S I O N

I.

Boykin contends that he "is entitled to a new trial because his trial counsel conceded guilt on several elements of the two attempted murder charges as well as the other four charges in their entirety and the record does not reflect [that he] either consented to or acquiesced in the concessions."

Generally, “[t]o succeed on an ineffective assistance of counsel claim, a defendant must 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.” *State v. Luby*, 904 N.W.2d 453, 457 (Minn. 2017) (quotation omitted) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 692, 104 S. Ct. 2052, 2064, 2067 (1984)). But when defense counsel concedes the defendant’s guilt without his consent, “counsel’s performance is deficient and prejudice is presumed.” *State v. Prtine*, 784 N.W.2d 303, 317-18 (Minn. 2010) (*Prtine I*). “[T]he decision to admit guilt is the defendant’s decision to make” and “if 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.” *Luby*, 904 N.W.2d at 457 (quotations omitted).¹

Appellate courts apply a two-step analysis to ineffective-assistance claims based on an alleged unauthorized concession of guilt. *Luby*, 904 N.W.2d at 457. First, this court reviews the record de novo “to determine whether defense counsel made a concession of

¹ The state acknowledges the relevant Minnesota Supreme Court precedent and that this court is bound by that precedent. Nonetheless, the state argues that Minnesota appellate courts should “reconsider the application of the automatic new trial rule” because “applying the automatic new trial rule in cases where a defendant did not object to his attorney’s concession is inconsistent with precedent from the Supreme Court of the United States.” The state notes that it has asked the Minnesota Supreme Court to reconsider the application of the automatic-new-trial rule based on *Florida v. Nixon*, 543 U.S. 175, 125 S. Ct. 551 (2004), and *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). See *State v. Huisman*, No. A18-1710 (Minn. App. Sept. 23, 2019), review granted (Minn. Nov. 19, 2019). This court cannot “reconsider” binding precedent from the Minnesota Supreme Court. See Minn. Const. art. VI, § 2 (identifying this court’s appellate jurisdiction over “all courts, except the supreme court, and other appellate jurisdiction as prescribed by law”); *State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) (“The court of appeals is bound by supreme court precedent, as it has repeatedly acknowledged.”).

guilt.” *Id.* “A concession may be express or implied.” *Id.* This court exercises “great caution when defining an implied concession” and “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 v. State*, 688 N.W.2d 569, 573 (Minn. 2004) (quotation omitted).

Second, if counsel conceded guilt, we determine “whether the defendant acquiesced in that concession.” *Prtine I*, 784 N.W.2d at 318. “The absence of a personal, on-the-record consent to counsel’s strategy of admitting guilt to a lesser charge is not dispositive.” *Id.* When there is no evidence of express consent, appellate courts “look at the entire record to determine if the defendant acquiesced in his counsel’s strategy.” *Luby*, 904 N.W.2d at 459 (quotation omitted). “[T]he defendant is entitled to a new trial unless he acquiesced in that concession.” *Id.* at 457 (quotation omitted).

Boykin argues that defense counsel “impliedly conceded [his] guilt [on] the four charges not related to attempted murder as well as the elements of first- and second-degree attempted murder other than intent” by “telling the jury that ‘what happened’ on June 10 was ‘fairly clear’ and that [defense counsel] was not dismissing [Boykin’s] other actions.” The state responds that Boykin’s counsel “did not concede guilt to any offense or any element of the charged offenses” because “the full context of the argument indicates counsel sought to hold the state to its burden of proof on all the charged offenses.” For the reasons that follow, Boykin has the better argument.

The only defense theory that Boykin’s counsel presented at trial was that Boykin’s conduct did not demonstrate intent to kill T.D.’s unborn child.² Counsel did not make an opening statement, much less one suggesting any flaws in the state’s case or any potentially viable defense theory. On cross-examination, counsel did not challenge the credibility of the state’s witnesses. Counsel did not call any witnesses in Boykin’s defense. During closing argument, counsel did not argue that the state’s witnesses were not credible or that the state’s evidence was insufficient to prove any element other than the intent element of the attempted-murder charges, and counsel did not argue for an acquittal on the other charges

Instead, counsel told the jury that he was “not going to insult [their] intelligence and tell [them] nothing happened.” Counsel acknowledged that there was “compelling,” “[h]ard testimony” and “[g]raphic evidence.” Counsel explained that the “primary question” the jury needed to answer was “[n]ot necessarily what happened, because . . . that’s fairly clear. But, what was the intent?” Counsel argued that “it’s clear that [Boykin’s] intent was not to harm—not to murder an unborn child.”

Boykin argues that by telling the jury that it only needed to decide intent, defense counsel vocally accepted “the facts as presented by the state” and by doing so, “impliedly conceded [his] guilt of the four charges not related to attempted murder as well as the

² See Minn. Stat. § 609.2661(3) (2016) (providing that whoever “causes the death of an unborn child with intent to effect the death of the unborn child” is guilty of murder of an unborn child in the first degree); Minn. Stat. § 609.2662(1) (2016) (providing that whoever “causes the death of an unborn child with intent to effect the death of that unborn child or another, but without premeditation” is guilty of murder of an unborn child in the second degree).

elements of first- and second-degree attempted murder other than intent.” Given counsel’s failure to comment on the state’s case during opening statements, his failure to challenge the state’s evidence during cross-examination, and his singular focus on Boykin’s intent during closing argument, a reasonable person viewing the totality of the circumstances would conclude that counsel impliedly conceded Boykin’s guilt.

Having determined that counsel conceded guilt, we must next determine whether Boykin consented to the concession, either expressly or through acquiescence. See *Prtine I*, 784 N.W.2d at 318. The record lacks any indication that Boykin expressly consented to his trial counsel’s concession. “When, as here, there is no evidence of express consent, [appellate courts] look at the entire record to determine if the defendant acquiesced in his counsel’s strategy.” *Luby*, 904 N.W.2d 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).

The Minnesota Supreme Court has found acquiescence based on a trial-long strategy where “[f]rom his opening statement through his closing argument, defense counsel consistently took the position that [the] defendant had caused the victim’s death.” *State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992). The state asserts that Boykin acquiesced to the concession here because it was “part of a trial-long strategy that sought to direct all of the jury’s attention on the intent-to-kill element, without specially challenging any of the other allegations.” The record does not reveal a trial-long concession strategy similar to the one

in *Provost*. Again, Boykin’s counsel did not give an opening statement. And he did not consistently take the position that Boykin lacked the intent necessary to commit attempted murder. Indeed, Boykin’s trial counsel did not refer to the intent element until closing argument. The circumstances here are more like those in *Luby*, where defense counsel did not concede an element of the charged offense until closing argument. 904 N.W.2d at 459. In *Luby*, the supreme court reasoned that it was difficult to conclude that the defendant had “somehow acquiesced in a strategy that manifested itself only at the end of trial.” *Id.*

Because Boykin’s counsel did not use the concession strategy throughout trial, we consider whether “the concession was an understandable strategy and the defendant was present, understood a concession was being made, but failed to object.” *See id.* (quotation omitted). Whether a concession of guilt was an understandable trial strategy is a legal determination that an appellate court reviews de novo. *State v. Prtine*, 799 N.W.2d 594, 599 (Minn. 2011) (*Prtine II*). In doing so, the appellate court considers “whether it would be objectively reasonable to do so, given the facts and circumstances of the particular case.” *Id.*

A concession of guilt is an understandable strategy when

the defense attorney desires to admit that [the] defendant is guilty of one of two charges in the hope of increasing his credibility with the jury and increasing the chance that the jury will acquit [the] defendant on the other charge. [It is also an understandable strategy when] defense counsel admits that [the] defendant is guilty of some lesser-included offense in the hope of persuading the jury to acquit [the] defendant of the greater charged offense.

Id. (quoting *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984)). The strength of the state’s case is relevant when determining whether a concession of guilt was an understandable trial strategy. *Id.*

Given the strength of the state’s case, it was objectively reasonable to focus on the intent element of first- and second-degree attempted murder, which were the most serious charges, and to impliedly concede guilt on the lesser offenses in the hope of obtaining an acquittal on the most serious charges. See *State v. Moore*, 458 N.W.2d 90, 96 (Minn. 1990) (recognizing that conceding guilt on a lesser-included offense to persuade the jury to acquit on the most-severe offense is a reasonable strategy). Thus, the record establishes that defense counsel’s concession was an understandable trial strategy.

The record also establishes that Boykin was present during the implied concession and that he did not object. The remaining consideration is whether Boykin understood the concession was being made. As to that factor, *Prtine II* is instructive. In *Prtine II*, trial counsel argued in closing, “The lesser charges are . . . murder in the second degree. There are two different counts of murder in the second degree. And here [the medical examiner] has furnished one of the key elements. He said that there was definitely an intent to cause the death” 799 N.W.2d at 597. Counsel further argued, “We understand that in order to raise the defense of self-defense, you have to, first of all, admit that you intentionally caused the death of someone. *That’s never been missing.*” *Id.* (emphasis added).

The Minnesota Supreme Court concluded that the *Prtine* defendant understood that a concession was being made, reasoning:

The record establishes that trial counsel talked to Prtine about how his defense of self-defense applied to intentional killings. Thus the concession related to an issue with which Prtine was familiar. In addition, Prtine provided testimony relevant to his intent when he essentially testified that he had to kill [the victim] because he thought [the victim] would have killed him if he got the knife back.

Id. at 601. The supreme court explained that “[those] facts support the reasonable conclusion [that] Prtine heard and understood his attorney’s concession in closing argument that the killing was intentional.” *Id.*

The facts here are unlike those in *Prtine II*. The record does not indicate that defense counsel talked to Boykin about the significance of the intent element such that the concession related to an issue with which Boykin was familiar. And Boykin did not provide testimony regarding his intent or otherwise indicate that he understood the significance of the intent element. The record is entirely silent regarding Boykin’s understanding of the intent element and the concession strategy.

“When the record is unclear as to whether the defendant acquiesced in his counsel’s concession, [the supreme court has] found a remand to the district court for fact-finding is the appropriate resolution.” *Prtine I*, 784 N.W.2d at 318; *see also Luby*, 904 N.W.2d at 459 (same). Boykin and the state agree that a remand for additional fact-finding is necessary if the existing record does not clearly show whether Boykin acquiesced.³

³ The state argues that if a new trial is ultimately ordered, that remedy should not apply to the attempted-murder convictions because defense counsel allegedly conceded some, and not all, of the elements of those offenses. The state argues that the law “treats [such] complete and partial concessions differently” and that the automatic-new-trial rule does not apply to partial concessions. The state cites two dissenting Minnesota Supreme Court opinions as support. *See Luby*, 904 N.W.2d at 460 (Chutich, J., dissenting)

Because it is unclear whether Boykin understood that a concession of guilt was being made at trial, a remand to district court for fact-finding on this issue is appropriate.⁴ *See Dukes*, 621 N.W.2d at 255 (“The claim of whether [the defendant] consented to his counsel’s admission of [his] guilt to aggravated robbery is exactly the type of claim that needs additional factfinding before it can be resolved.”); *see also Prtine I*, 784 N.W.2d at 318 (“Because the record is unclear, a remand to the district court is necessary to determine whether Prtine acquiesced.”).

II.

Boykin contends that his 240-month sentence for first-degree assault constitutes a greater-than-double upward departure and that the sentence must be vacated because it is not supported by severe aggravating circumstances.

(“Consequently, we have applied the per se rule when defense counsel has conceded every element of the charged offense and left nothing in dispute.”); *Prtine I*, 784 N.W.2d at 320 (Gildea, J., dissenting) (arguing that additional proceedings were unwarranted because the attorney conceded intent to kill while pursuing a self-defense theory and did not concede his client’s “guilt”). The state notes that “[t]he state’s petition for review in *Huisman* asks the [Minnesota] Supreme Court to consider distinguishing between partial and complete concessions.” On this record, we cannot determine whether Boykin is entitled to any relief. It is therefore premature to decide the appropriate scope of relief.

⁴ We note that “claims that require a court to explore conversations between attorney and client are best handled on a petition for postconviction relief.” *Dukes v. State*, 621 N.W.2d 246, 255 (Minn. 2001); *see State v. Christian*, 657 N.W.2d 186, 194 (Minn. 2003) (“The preferred procedure is to raise the issue of ineffective assistance in a petition for postconviction relief in the district court.”); *see also* Minn. R. Crim. P. 28.02, subd. 4(4) (providing that if “after filing a notice of appeal, a defendant determines that a petition for postconviction relief is appropriate, the defendant may file a motion to stay the appeal for postconviction proceedings”). Consistent with Minnesota Supreme Court precedent, we will remand this case for an evidentiary hearing to develop the necessary factual record. But in the future, we encourage defense counsel to develop the necessary factual record in a postconviction proceeding.

“Although the Sentencing Guidelines are advisory to the district court, the court shall follow the procedures of the guidelines when it pronounces sentence in a proceeding to which the guidelines apply” Minn. Stat. § 244.09, subd. 5 (2016). “Departures are warranted only when substantial and compelling circumstances are present,” which are circumstances “demonstrating that the defendant’s conduct in the offense of conviction was *significantly* more or less serious than that typically involved in the commission of the crime in question.” *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008) (quotation omitted); *see also* Minn. Sent. Guidelines 2.D.1 (Supp. 2017) (stating that the district court may only depart from a presumptive sentence if “there exist identifiable, substantial, and compelling circumstances to support a departure”).

“Despite having general discretion to make departure decisions, the district court has less discretion to decide the length of the upward departure than it does to decide whether to depart” *Dillon v. State*, 781 N.W.2d 588, 596 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). “When a sentencing court departs from the presumptive sentence, it must still strive to determine a sentence that is proportional to the severity of the offense.” *State v. Spain*, 590 N.W.2d 85, 89 (Minn. 1999). Generally, “in a case in which an upward departure in sentence length is justified, the upper limit will be double the presumptive sentence length.” *Evans*, 311 N.W.2d at 483. A greater than double upward departure is warranted only in the rare case where severe aggravating circumstances exist. *Dillon*, 781 N.W.2d at 596.

After submission of this case, the Minnesota Supreme Court decided *State v. Barthman*, in which it declined to “overturn or modify the *Evans* rule.” ___ N.W.2d ___,

___ , 2020 WL 563360, at *8 (Minn. Feb. 5, 2020). The supreme court reiterated that under *Evans*, “generally in a case in which an upward departure in sentence length is justified, the upper limit will be double the presumptive sentence length,” that is, “twice the upper end of the presumptive sentencing range.” *Id.* (quoting *Evans*, 311 N.W.2d at 483). The supreme court explained:

Double the presumptive sentence length is generally the *upper limit* for an upward durational departure. Out of the small number of cases in which a sentencing departure is appropriate, there are rare cases in which the facts are so unusually compelling that a greater-than-double durational departure is justified. Similarly, we have stated that cases when a greater-than-double departure is justified are extraordinary cases. A district court may impose a greater-than-double durational departure only if there are severe aggravating factors.

Id. at *10 (citations and quotations omitted).

In *Barthman*, the jury found the defendant guilty of six counts of criminal sexual conduct and answered “yes” to the following questions on a special verdict form:

(1) “[d]id [C.B.] have a chromosomal defect;” (2) “[d]id [C.B.] have a cognitive developmental delay;” (3) “[d]id the Defendant know about these vulnerabilities;” (4) “[w]as [C.B.] subjected to multiple forms of sexual penetration;” and (5) “[w]as [C.B.] subjected to multiple forms of sexual contact.”

Id. at *3. The district court imposed sentences on two of the criminal-sexual-conduct offenses. *Id.* Based on the jury’s factual findings, the district court concluded that the victim, C.B., was particularly vulnerable and had been treated with particular cruelty, and it imposed a greater-than-double upward departure on each of the offenses. *Id.* at *3-4.

In affirming the greater-than-double upward departure for one of the offenses, the supreme court reasoned:

The facts of this case demonstrate that C.B.'s vulnerability was substantial. As we previously explained, because of her chromosomal defect and cognitive delays, C.B. was several grade levels below her peers and had difficulty communicating. She also scored in the lowest percentile for independent living skills, such as managing her time, caring for herself without assistance, and managing a routine. As the district court found, C.B.'s "significant cognitive delays greatly compounded her already limited ability, as a young girl, to escape or seek help." And Barthman treated C.B. with particular cruelty when he committed this offense. We have affirmed greater-than-double durational departures when multiple aggravating factors are present, including a particularly vulnerable victim and treating the victim with particular cruelty. Based on the facts of this case and these prior cases, we hold that the district court did not abuse its discretion when it imposed a greater-than-double durational departure on Barthman's sentence for count one.

Id. at *11 (citations omitted).

In this case, Boykin asserts, and the state agrees, that the presumptive term of imprisonment for his first-degree assault offense was 86 months and that the district court's sentence of 240 months was a greater-than-double upward departure. Boykin also asserts, and the state agrees, that the district court did not say that severe aggravating factors existed to justify the greater-than-double upward departure. As Boykin notes, the district court did not even acknowledge that the 240-month sentence constituted a greater-than-double upward departure. Boykin states that the district court and the parties appear to have disregarded the *Evans* rule, possibly because they "overlooked the fact that pursuant to the

sentencing guidelines, [Boykin's] sentence for first-degree assault . . . needed to be calculated based on a zero criminal history score.”

To be clear, Boykin does not assert that the record does not support an upward durational departure. He acknowledges that “the district court justifiably concluded that the circumstances provided adequate bases to depart from the presumptive guidelines sentence.” He challenges only the length of the departure, arguing that it may not exceed twice the presumptive sentence length, that is, 172 months, because this case does not involve severe aggravating factors. Boykin argues that this court should reverse his sentence for first-degree assault, remand for proper application of the *Evans* rule, and direct that his sentence be no longer than 172 months.

The state counters that this court should affirm the 240-month sentence based on the severe and unusually compelling aggravating circumstances that were described at trial. Alternatively, the state asks this court to remand for resentencing on the first-degree assault conviction, “so that the district court can make findings on the severity of those factors in the first instance, and then impose the appropriate sentence.”

Our review of the sentencing record does not indicate that the district court, or the parties, were guided by the *Evans* rule at sentencing. Indeed, neither the district court nor the parties mentioned that rule or discussed its application to this case. Because we must remand for further proceedings to determine the validity of Boykin's convictions, we agree with the state that the district court should apply the *Evans* rule in the first instance on remand. We therefore reverse the sentence for Boykin's first-degree assault and remand for resentencing consistent with the *Evans* rule.

On remand, the parties and the district court should be mindful of the method that the supreme court used when reviewing the greater-than-double upward departures in *Barthman*. Compare *id.* (affirming greater-than-double upward departure based on evidence in the trial record and the existence of two aggravating factors), with *State v. Stanke*, 764 N.W.2d 824, 828 (Minn. 2009) (“After *Blakely*, we no longer independently review the record for evidence to justify a departure because the issue of whether additional facts exist to support the departure is a question of fact for a *Blakely* jury, unless the defendant has waived his or her right to a *Blakely* jury.”), and *State v. Ayala-Leyva*, 848 N.W.2d 546, 549 (Minn. App. 2014) (“A greater-than-double durational sentencing departure must be supported by severe aggravating factors, and factual findings to support those factors must be found by a sentencing jury absent waiver of *Blakely* proceedings by a defendant.”), review granted (Minn. Aug. 5, 2014) and order granting review vacated (Minn. Aug. 11, 2015).

In conclusion, because the record lacks factual findings regarding whether Boykin understood that his attorney was making a concession of guilt at trial, we cannot determine whether Boykin is entitled to a new trial based on that concession. We therefore remand for an evidentiary hearing and findings on that issue to facilitate further appellate review. And because the record does not indicate that the district court applied the *Evans* rule when sentencing Boykin’s first-degree assault, we reverse his sentence for that offense and remand for resentencing pursuant to the *Evans* rule, as recently applied in *Barthman*.

Reversed in part and remanded.