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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1220**

State of Minnesota,
Respondent,

vs.

John Arlo Bowen Omaha,
Appellant.

**Filed May 24, 2021
Affirmed
Reyes, Judge**

Beltrami County District Court
File No. 04-CR-19-2310

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

David Hanson, Beltrami County Attorney, Ashley A. Nelson, Assistant County Attorney,
Bemidji, Minnesota (for respondent)

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

Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Reyes,
Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this direct appeal from his judgment of conviction of and sentence for conspiracy to commit assault in the first degree, appellant argues that (1) he received ineffective assistance of counsel because his attorney conceded all elements of the offense without his

consent and (2) the district court abused its discretion by imposing an upward durational departure based on facts unrelated to the offense of conviction. We affirm.

FACTS

In the early morning of June 10, 2018, law-enforcement officers responded to a report of a person shot at the Pine Ridge Apartments in Bemidji, Beltrami County, Minnesota. Officers found R.T., after he was shot multiple times while lying in his recliner in his apartment. They observed that the perpetrator fired numerous shots from the hallway into R.T.’s apartment and from the lawn into R.T.’s and another apartment. Multiple people, including a three-year-old child, were present in the building. R.T. was airlifted to a hospital in critical condition, but ultimately survived his injuries.

In August 2019, after extensive investigation, respondent State of Minnesota charged appellant John Arlo Bowen Omaha with one count of conspiracy to commit assault in the first degree under Minn. Stat. § 609.175, subd. 2 (2018), with reference to Minn. Stat. § 609.221, subd. 1 (2018). The state filed an amended *Blakely* motion¹ asserting as grounds for an aggravated sentence that (1) appellant’s conduct could have injured persons other than the intended victim and (2) appellant used a firearm in committing the offense.

At a contested omnibus hearing, defense counsel stated “[i]deally we would be entering a [guilty] plea” but expressed reluctance due to the nature of the evidence and the effect of the crime on the community. The parties therefore agreed to proceed with a stipulated-evidence trial under Minn. R. Crim. P. 26.01, subd. 3. Because of the potentially

¹ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004) (establishing notice requirements for prosecutor to seek aggravated sentence).

voluminous evidence, the district court asked both parties to prepare proposed orders as closing arguments. Both parties hesitated over submitting closing arguments in that form. The district court agreed to discuss the issue further at a later hearing.

In December 2019, the district court held the stipulated-evidence trial, at which appellant waived his right to a jury trial on the issues of guilt and the existence of facts to support an aggravated sentence. The district court again asked the parties if they planned to submit written closing arguments. The state confirmed that it would submit a narrative-form written argument. Defense counsel said she discussed submitting a proposed order with appellant and he agreed to do so. The parties also waived the seven-day timeline for the district court's decision on the stipulated evidence. The parties then submitted their written closing arguments.

In February 2020, the district court issued an order, finding in part that “[defense counsel] seems to have waived elements in her closing statement. [Appellant] did not waive these elements on the record.” At another hearing in March 2020, defense counsel asked appellant questions on the record, showing that he agreed to her written closing argument and that they had discussed a concession strategy.

The district court then issued findings of fact, conclusions of law, and an order finding appellant guilty of conspiracy to commit first-degree assault and finding that facts existed supporting the aggravating factors. At sentencing, defense counsel argued that both aggravating factors related to the uncharged assault, rather than the charged conspiracy-to-commit-assault-in-the-first-degree, and that the district court therefore could not rely on those factors. The district court rejected that argument and found that the evidence

supported both aggravating factors. It convicted appellant and sentenced him to 120 months in prison, representing an upward durational departure.² This appeal follows.

DECISION

I. Defense counsel’s concession of guilt does not constitute ineffective assistance of counsel because appellant acquiesced to the concession.

Appellant argues that he received ineffective assistance of counsel because his attorney conceded all three elements of the offense without his consent. We disagree.

“To 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) (quoting *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007)). But “[w]hen defense counsel concedes the defendant’s guilt without consent, ‘counsel’s performance is deficient and prejudice is presumed.’” *Id.* (quoting *State v. Prtine*, 784 N.W.2d 303, 317-18 (Minn. 2010) (*Prtine I*)). In determining whether counsel impermissibly conceded guilt, we apply a two-step analysis. First, we ask “whether defense counsel made a concession of guilt.” *Id.* Second, we ask whether the defendant “acquiesced in that concession.” *Id.* (quoting *Prtine I*, 784

² The presumptive sentence for conspiracy is one-half of the appropriate sentence for the underlying offense. Minn. Sent. Guidelines 2.G.2 (Supp. 2017). Appellant’s presumptive sentence, based on his criminal-history score and the severity level of the offense, was 67 months, so that a double upward departure would be 134 months. But the district court capped appellant’s sentence at 120 months because of the statutory maximum. Minn. Stat. § 609.221, subd. 1 (capping first-degree-assault sentence at 20 years).

N.W.2d at 318). We review both inquiries de novo. *Id.* at 457. But we review the district court's findings of fact for clear error. *Prtine I*, 784 N.W.2d at 312.

A. Defense counsel conceded all three elements of conspiracy.

Appellant argues that defense counsel conceded all three elements of conspiracy. We agree.

A concession of guilt may be express or implied. *Luby*, 904 N.W.2d at 457. In assessing whether counsel impliedly conceded guilt, we consider counsel's challenged statements in the context of the whole trial. *Dukes v. State*, 660 N.W.2d 804, 813 (Minn. 2003). Counsel's statements constitute an implied concession of guilt only when "a reasonable person viewing the totality of the circumstances would conclude that counsel conceded the defendants [sic] guilt." *Torres v. State*, 688 N.W.2d 569, 573 (Minn. 2004) (quotation omitted).

The elements of conspiracy to commit assault in the first degree are the following: (1) defendant conspired with another to commit assault in the first degree; (2) defendant or another party to the conspiracy committed an overt act in furtherance of the conspiracy; and (3) either defendant entered into the conspiracy in the venue or an overt act took place in the venue. 10 *Minnesota Practice*, CRIMJIG 5.07, 13.03 (2020); Minn. R. Crim. P. 24.01 (stating case must be tried in county where offense committed).

Here, defense counsel expressly conceded the first and second elements of conspiracy in her written closing argument. Although she stated in her proposed conclusions of law that the state failed to prove venue in Beltrami County, in her proposed findings of fact, she stated that appellant went to Beltrami County to scout out R.T.'s

apartment and he drove with J.H. to Bemidji, in Beltrami County, on the night the incident occurred. Because these proposed findings recount overt acts in furtherance of the conspiracy in Beltrami County, they satisfy the venue requirement and implicitly concede venue. CRIMJIG 5.07 (requiring that defendant “entered the agreement, or an overt act took place” in venue); *see Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 385 (Minn. 1999) (noting that “or” is generally disjunctive). By conceding all three elements of conspiracy, defense counsel conceded appellant’s guilt.

B. Appellant acquiesced to defense counsel’s concession of guilt.

Appellant argues that he did not consent to defense counsel’s concession of venue and that no understandable trial strategy supported counsel’s concession. We are not persuaded.

We first recite the facts relevant to whether appellant consented to the concession strategy. Defense counsel presented the concession strategy early in the case, noting “[i]deally we would be entering a [guilty] plea.” She expressed concern about appellant having to testify in front of an emotional community in order to enter a plea. Further, defense counsel stated that appellant would be “happy to discuss his role since it’s a conspiracy charge, but as a matter of honor he [did] not want to implicate anyone else, so that’s why we feel that the stipulated evidence trial is the best option.” The parties therefore proceeded with a stipulated-evidence trial to avoid those concerns. Appellant never objected to that strategy, even though he objected to other matters not raised on appeal.

Additionally, defense counsel stated that appellant “agree[d] that [her] argument was proper as far as admitting the elements of the offense” and that she had discussed the

defense strategy with appellant. Defense counsel made a record of that agreement at the March 5 hearing:

COUNSEL: [A]s part of [my written argument] we said the State has proven that the Defendant conspired with another to commit the crime of assault in the first degree, correct?

APPELLANT: Yes.

Q: And you agree that it's okay for me to make that argument.

A: Yes.

Q: And then we also agreed that an overt act was made in furtherance of that conspiracy, correct?

A: Yes.

Q: And we've discussed the strategy of why I've made that argument, correct?

A: Yes.

Q: So you're comfortable with what I've submitted to the Court?

A: Yes.

Q: And . . . I did lay out findings of fact . . . and you agree with the factual findings except for number 17,³ correct?

A: Yes.

This colloquy shows that appellant expressly consented to counsel's concession of guilt for elements one and two, but not the third element of venue. We must therefore analyze whether the record shows that appellant impliedly consented to counsel's concession of the venue element.

³ Proposed finding 17 states "Defendant assaulted the victim by firing multiple rounds of ammunition through the wall of the victim's apartment. The victim was ultimately struck several times and required extensive emergency care. Three other individuals were present in the apartment at the time of the shooting, but none were injured."

A defendant impliedly consents to concession if (1) conceding guilt is an “understandable strategy”; and the defendant (2) was present when counsel conceded guilt; (3) understood that counsel conceded guilt; and (4) did not object to the concession (four-factor test).⁴ *Luby*, 904 N.W.2d at 459; *Prtime I*, 784 N.W.2d at 318. We look to “the entire record to determine if the defendant acquiesced” to the concession strategy. *Prtime I*, 784 N.W.2d at 318.

First, a concession strategy is understandable if the totality of the circumstances show that conceding guilt is objectively reasonable. *State v. Prtime*, 799 N.W.2d 594, 599 (Minn. 2011) (*Prtime II*). The strength of the state’s evidence is relevant in determining whether a concession strategy is understandable. *Id.* (citation omitted).

Here, the record shows that appellant planned to plead guilty to the conspiracy charge but wanted to avoid testifying in front of an emotional community, implicating his coconspirators, or admitting the assault. Conceding guilt on the conspiracy charge in a stipulated-evidence trial, thereby avoiding extensive testimony by appellant, is an understandable strategy to achieve those goals. Further, the state had overwhelming evidence on each element, including the venue element, showing the reasonableness of conceding guilt.

Appellant argues that defense counsel’s concession strategy does not fit within three specific examples set out by the supreme court indicating when such a strategy is

⁴ Appellate courts may also look to whether counsel used a concession strategy consistently throughout trial without objection from the defendant to determine whether a defendant impliedly consented. *Luby*, 904 N.W.2d at 457. Because we conclude that appellant consented under the four-factor test, we need not address this test.

“understandable.” *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984). But *Wiplinger* provides *examples*, not an exhaustive list, of when a concession strategy is understandable. We therefore conclude that conceding guilt is an understandable strategy in this case, and this factor supports acquiescence.

Second, appellant stated on the record that he reviewed the proposed order. He attended the March hearing when the district court noted that defense counsel waived “a couple of” elements in the proposed order. Appellant nevertheless approved of the proposed order. In the unique context of a stipulated-evidence trial with written closing arguments which appellant reviewed and approved, we conclude that he was present when the concessions were made. This factor supports acquiescence.

Third, appellant affirmed on the record that defense counsel’s argument, including conceding elements of the offense, was proper. Although he explicitly denied finding of fact 17, he approved of all others, including those that recount his presence in Beltrami County on two occasions while carrying out the conspiracy. Appellant also reviewed the 93 stipulated exhibits and agreed to submit them. Some of those exhibits also show appellant’s presence in Beltrami County during the conspiracy. And the record reflects that defense counsel discussed the defense strategy with appellant and indicated, on the record and with appellant present, the reasons for that strategy. These facts show that appellant understood he was conceding the elements of the offense, including venue, and this factor therefore supports acquiescence.

Fourth, appellant did not object to the concessions at any time throughout the proceedings. This factor also supports acquiescence. In sum, all four factors are met. We

conclude that appellant acquiesced to counsel conceding his guilt and therefore affirm his conviction.

II. The district court did not abuse its discretion by imposing an upward durational departure due to aggravating factors.

Appellant argues that the district court impermissibly relied on aggravating factors, specifically risk to others in the apartment and use of a firearm, that are unrelated to the conspiracy to support an upward durational departure. We disagree.

We review the district court’s decision to depart from a presumptive guidelines sentence for an abuse of discretion. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). The district court abuses its discretion if its reasons for departure are improper or insufficient evidence exists to justify departure. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). It may exercise its discretion to depart only if aggravating factors that “provide [] substantial and compelling reason[s]” to do so exist. *Id.* Substantial and compelling reasons are those that show the defendant’s conduct was “significantly more . . . serious than that typically involved in the commission of the crime in question.” *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotation omitted). Aggravating factors generally must relate to the offense of conviction. *Id.* at 157, 162.

Here, in order to justify an upward departure based on the aggravating factors of risk to others in the apartment and use of a firearm, these aggravating factors must relate to the conspiracy.⁵ Whether these aggravating factors, which are most closely tied to

⁵ We note that Minn. Stat. § 244.10, subd. 5a(b), allows the district court to rely on aggravating factors “arising from the same course of conduct” as the offense of conviction.

appellant's conduct of shooting into R.T.'s apartment, relate to the conspiracy requires us to address whether a conspiracy is a continuing offense that encompasses the shooting. This is a matter of statutory construction that we review de novo. *Longoria v. State*, 749 N.W.2d 104, 106 (Minn. App. 2008). A crime is not continuing unless the legislature clearly so indicates, *State v. Lawrence*, 312 N.W.2d 251, 253 (Minn. 1981) (citing *Toussie v. United States*, 397 U.S. 112, 115, 90 S. Ct. 858, 860 (1970)), or the nature of the offense is such that the legislature "must assuredly have intended that it be treated as a continuing one." *Toussie*, 397 U.S. at 115, 90 S. Ct. at 860.

"Whoever conspires with another to commit a crime and[,] in furtherance of the conspiracy[,] one or more of the parties does some overt act in furtherance of such conspiracy" is guilty of the offense of conspiracy. Minn. Stat. § 609.175, subd. 2. The conspiracy statute does not clearly indicate that conspiracy is a continuing crime. *See id.* Because we discern no clear indication of the legislature's intent in the statutory language, we must therefore decide whether the nature of a conspiracy is such that the legislature must have intended it as a continuing crime. *See Toussie*, 397 U.S. at 115, 90 S. Ct. at 860.

Like other continuing crimes such as possession and concealment of stolen property, conspiracy involves ongoing activity rather than a single act. *See Lawrence*, 312 N.W.2d at 253 (comparing "receiving," which "connotes a single act," with possession and concealment, which are ongoing); *State v. Fleming*, 883 N.W.2d 790, 797 (Minn. 2016) (stating that possession offense continued during assault). "It is in the nature of a

But because we conclude that the aggravating factors relate to the offense of conviction, here, conspiracy, we need not rely on this statute.

conspiracy that each day's acts bring a renewed threat of the substantive evil [the legislature] sought to prevent." *Toussie*, 397 U.S. at 122, 90 S. Ct. at 864. In other words, conspiracies involve planning and execution, which continue until the participants actively terminate the conspiracy, the participants achieve their objective, or the conspiracy is terminated for other reasons.

Appellant argues that a conspiracy is complete upon the first overt act in furtherance of the conspiracy. But just because a conspiracy may be charged upon the first overt act does not mean that the conspiracy terminates at that point. Possession of contraband begins when a person first obtains the item, but that does not mean the crime of possession terminates upon the instance of obtaining the item. *See Fleming*, 883 N.W.2d at 797 (noting that after obtaining a gun, Fleming "continued to commit the possession offense when he fired the gun"). Rather, the person continues to commit the offense of possession as long as the person remains in possession of the item. *Id.* Similarly, while the initial acts of agreement and an overt act meet the definition of conspiracy, those acts do not exhaust it. *Cf. Lawrence*, 312 N.W.2d at 253 (stating that "while the initial act of concealing may meet the definition of the proscribed conduct, it does not exhaust it"); *see also United States v. Kissel*, 218 U.S. 601, 607, 31 S. Ct. 124, 126 (1910) (stating with regard to conspiracy that "the unlawful agreement satisfies the definition of the crime, [] it does not exhaust it").

Additionally, the facts of this case demonstrate the nature of conspiracy as a continuing offense. The district court found that, after a physical fight with R.T., appellant told J.H. that J.H. "need[ed] to pop out on this lil issue" and asked others on Facebook for R.T.'s address. J.B. provided R.T.'s address at the Pine Ridge Apartments to appellant.

Appellant and two other men went to the Pine Ridge Apartments on June 9 and took pictures and videos of the exterior and interior of the apartment building. In the early morning of June 10, J.H. and K.A. drove appellant from Cass Lake to Bemidji where he transferred to a van with “Ty.” “Ty” brought appellant to the Pine Ridge Apartments where appellant carried out the shooting. After the incident, K.A. reported to law enforcement that appellant said that he “shot off so many rounds” and that he knocked on the door and started shooting after he heard footsteps inside. Each of these acts are overt acts in furtherance of the same conspiracy. It is nonsensical to separate them into independent conspiracies or say that later conduct supporting the conspiracy is not relevant because it occurs after the first overt act. *Kissel*, 218 U.S. at 607, 31 S. Ct. at 126.

Three reasons in addition to the nature of conspiracy support our conclusion that conspiracy is a continuing offense. First, the definition of the intransitive verb “conspire” includes “scheme.” *Merriam-Webster’s Collegiate Dictionary* 267 (11th ed. 2014). “Scheme” in turn means “to form plans,” which connotes ongoing action. *Id.* A plain and ordinary meaning of “conspire” therefore shows that it is an ongoing activity.

Second, Minnesota’s conspiracy statute is similar to the federal conspiracy statute in that both require an agreement and an overt act. *Compare* Minn. Stat. § 609.175, subd. 2, with 18 U.S.C. § 371 (2016). Although only persuasive,⁶ federal caselaw states that

⁶ *State v. McClenton*, 781 N.W.2d 181, 191 (Minn. App. 2010) (addressing authorities from other states and federal courts), *review denied* (Minn. June 29, 2010); *State v. Eichers*, 840 N.W.2d 210, 216-17 (Minn. App. 2013) (addressing Eighth Circuit in particular), *aff’d on other grounds*, 853 N.W.2d 114 (Minn. 2014).

“[c]onspiracy is a continuing offense that continues through the last overt act committed in furtherance of the conspiracy.” *Ashraf v. Lynch*, 819 F.3d 1051, 1053 (8th Cir. 2016).⁷

Third, a number of overt acts may occur in a conspiracy, and jury members need not agree on which overt act establishes guilt. *State v. Ayala-Leyva*, 848 N.W.2d 546, 554-55 (Minn. App. 2014). *Ayala-Leyva* shows that a conspiracy continues beyond the first overt act. In sum, we conclude that conspiracy is a continuing offense. Further, we conclude that it continues until “the last overt act committed in furtherance of the conspiracy,” *Ashraf*, 819 F.3d at 1053, up to and including conduct completing the target offense, *Fishman*, 645 F.3d at 1195.

Having established that conspiracy is a continuing offense, we turn to whether the aggravating factors here relate to the conspiracy. Appellant shooting into R.T.’s apartment constitutes the last overt act committed in furtherance of, or more specifically, completing, the conspiracy to commit first-degree assault. See *Ashraf*, 819 F.3d at 1053; *Fishman*, 645 F.3d at 1195. Just as in *Fleming*, when the continuing offense of possession continued while the defendant committed an assault by firing six shots in a public park, so the conspiracy here continued while the appellant committed the uncharged assault by firing numerous shots into R.T.’s and a neighboring apartment. 883 N.W.2d at 797. That conduct

⁷ Other circuits agree. See, e.g., *United States v. Payne*, 591 F.3d 46, 69 (2d Cir. 2010) (“Conspiracy is a continuing offense . . . that involves a prolonged course of conduct; its commission is not complete until the conduct has run its course.”); *United States v. Fishman*, 645 F.3d 1175, 1195 (10th Cir. 2011) (“A conspiracy . . . continues to exist until it is abandoned, succeeds, or is otherwise terminated.”).

endangered others in the apartment and involved use of a firearm. Therefore, the aggravating factors relate to the last overt act of the conspiracy.

Appellant points out that conspiracy is a separate, substantive crime from the uncharged assault, *State v. Burns*, 9 N.W.2d 518, 520 (Minn. 1943), and that the elements of the assault need not be proved to establish a conspiracy, *see State v. Tracy*, 667 N.W.2d 141, 146 (Minn. App. 2003). We acknowledge and reaffirm these well-established principles. But these principles do not prevent facts constituting elements of the assault from overlapping with overt acts in furtherance of the conspiracy. *Cf. United States v. Felix*, 503 U.S. 378, 390, 112 S. Ct. 1377, 1384 (1992) (stating that “overt acts charged in a conspiracy count may also be charged . . . as substantive offenses”); *State v. McAlpine*, 352 N.W.2d 101, 104 (Minn. App. 1984) (noting that evidence of possession of controlled substance submitted in prior conspiracy trial could be submitted in subsequent possession trial). And because the shooting constitutes an overt act in furtherance of the conspiracy, the aggravating factors associated with the shooting can therefore relate both to the charged conspiracy and the uncharged assault.

In sum, because a conspiracy is a continuing offense encompassing the acts to which the aggravating factors here relate, the district court did not abuse its discretion by relying on these aggravating factors to impose an upward departure on the conspiracy conviction.

Finally, appellant appears to argue that the evidence does not support the district court’s determination that his conduct was “significantly more . . . serious than that typically involved” in a conspiracy. *Hicks*, 864 N.W.2d at 157. But in *State v. Blanche*, the supreme court upheld an upward departure when the defendant sprayed bullets in a

residential area, endangering multiple people and killing a child. 696 N.W.2d 351, 379-80 (Minn. 2005). The aggravating factors here are similar to *Blanche*: here, the district court found that multiple people, including a child, were present in the apartment when appellant “spray[ed] bullets inside of a residential apartment building showing a degree of recklessness that appropriately justifies an upward departure.” *See id.*; *see also Fleming*, 883 N.W.2d at 797 (noting that firing gun six times in park filled with children made possession-of-firearm offense more serious than usual). A review of Minnesota conspiracy cases shows that a typical conspiracy does not endanger multiple people besides the intended victim. Nor does a typical conspiracy involve using a firearm, let alone using one in such a reckless manner. We therefore conclude that the district court did not abuse its discretion by determining that these factors made appellant’s conduct “significantly more . . . serious than that typically involved” in a conspiracy, and it therefore did not abuse its discretion by imposing an upward departure in this case.

Affirmed.