

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0107**

State of Minnesota,
Respondent,

vs.

Wade Allen Sorensen,
Appellant.

**Filed September 27, 2021
Affirmed
Slieter, Judge**

St. Louis County District Court
File No. 69DU-CR-18-753

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

Mark S. Rubin, St. Louis County Attorney, Victoria Wanta, Assistant County Attorney,
Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Mark D. Nyvold, Special Assistant Public Defender, Fridley, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Cochran, Judge; and Slieter,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this appeal following a remand to determine whether he acquiesced to his
counsel's concession of guilt, appellant argues that the district court's factual findings that

appellant acquiesced are clearly erroneous. The district court's factual findings that the concession of guilt was 1) an understandable strategy, 2) made in the appellant's presence, 3) with appellant's understanding, and 4) made without appellant's objection, are supported by the record and we therefore affirm.

FACTS

Respondent the State of Minnesota charged appellant Wade Allen Sorenson with aiding and abetting first-degree murder, aiding and abetting third-degree assault, aiding and abetting kidnapping, and aiding and abetting attempted second-degree murder following a series of events in which appellant and several others kidnapped, beat, and attempted to kill the victim, R.B. *State v. Sorensen*, No. A19-1028, 2020 WL 3957231, at *1 (Minn. App. Jul. 13, 2020).

The case proceeded to a five-day jury trial during which appellant was represented by two attorneys acting as co-counsel. One attorney primarily handled the witness questioning during trial while the other handled closing argument. During closing argument, appellant's trial counsel told the jury in relation to the third-degree assault charge, "I'm submitting to you, when you get down to the end, when you've talked about the evidence . . . you should find [appellant] guilty of aiding and abetting third-degree assault. There's—there's no controversy to that evidence. We're not here asking you that you should determine that [appellant] did nothing wrong." Trial counsel then directed the jury to mark "guilty" on the assault verdict form, as "[appellant] is guilty of aiding and abetting third degree assault against [victim]." The jury found appellant guilty of all four counts. *Id.* at *4.

Appellant directly appealed his judgment of conviction, arguing in part that he was deprived of effective assistance of counsel because his counsel conceded guilt without consent. *Id.* at *10. We remanded “for the district court to hold an evidentiary hearing and make a finding on whether appellant acquiesced in the concession [to the charge] and, depending [on] that finding, to order the appropriate remedy (namely, sustaining the conviction for third-degree assault if appellant acquiesced or vacating the conviction if appellant did not acquiesce).” *Id.* at *12.

Following an evidentiary hearing in which the district court heard testimony from appellant’s trial counsel, appellant’s fiancée, and appellant, the district court found that appellant had acquiesced to his counsel’s concession of guilt of third-degree assault and denied a new trial on that charge. This appeal follows.

DECISION

Appellate courts apply a “two-step analysis” in reviewing an alleged unauthorized concession of guilt. *See State v. Luby*, 904 N.W.2d 453, 457 (Minn. 2017). Step one requires “review [of] the record de novo to determine whether defense counsel made a concession of guilt.” *Id.* If such a concession was made, step two directs that “the defendant is entitled to a new trial unless he ‘acquiesced in that concession.’” *Id.* (quoting *Prtine*, 784 N.W.2d at 318). Because appellant’s counsel did concede appellant’s guilt to third-degree assault during closing argument, we need only consider step two. When defense counsel concedes a defendant’s guilt without consent, “counsel’s performance is deficient and prejudice is presumed,” as “[t]he decision to concede guilt is the defendant’s decision alone to make.” *State v. Prtine*, 784 N.W.2d 303, 317-18 (Minn. 2010).

Acquiescence may be express or implied. *Luby*, 904 N.W.2d at 457. Because the record reflects conflicting testimony as to whether appellant expressly agreed to counsel conceding his guilt, we must “look at the entire record to determine if the [appellant] acquiesced in his counsel’s strategy.” *Id.* at 458 (quotation omitted).

“Acquiescence may be implied . . . (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.* (quoting *State v. Jorgensen*, 660 N.W.2d 127, 132-33 (Minn. 2003) (emphasis added)). The district court correctly found and the parties do not dispute, based on the trial record, that “the first *Luby* circumstance does not apply” because it would be “difficult to conclude that [defendant] somehow acquiesced in a strategy that manifested itself only at the end of the trial.” Consequently, we address only the second *Luby* circumstance.

The second *Luby* circumstance demonstrating acquiescence requires that “the concession was an understandable strategy and the defendant was present, understood a concession was being made, but failed to object.” *Luby*, 904 N.W.2d at 457 (quotation omitted). The district court made several detailed findings, each supported by the record, that the concession was a “reasonable” legal strategy, that appellant was present at the time the concession was made, understood the concession was being made, and failed to object.

With regard to legal strategy and being present at the time of concession, the district court made the following findings:

- “Conceding a lesser charge to gain credibility with the jury in the hopes of receiving a not-guilty on other charges is a reasonable trial strategy. Here, [appellant] was on trial for [three other charges] besides the third degree assault, all of which carry heavier sentences than third degree assault”;
- “[Counsel] ignor[ed] the assault [charge] to a large extent” during trial and instead “challenged the more serious charges”;
- “[Counsel] chose to reserve an opening statement to prevent stating anything [appellant] may not have said should he have chosen to testify”;
- “The lack of challenge to the assault charge shows counsel’s belief that they would concede guilt on that charge to garner credibility with the jury”; and
- “Conceding to a lesser charge is an understandable and objectively reasonable trial strategy given the strong evidence presented by the State. [Appellant] was present during the whole trial, most importantly during closings. He understood his guilt on the assault charge was being conceded and did not object, instead only bringing the claim on appeal.”

With regard to appellant understanding the concession, the district court found that “[appellant’s counsel] continually reminded [appellant] of the strength of the State’s case, which included testimony from experts, the victim, and at least one accomplice; forensic evidence, including a sweatshirt with both Defendant’s and the victim’s blood present when tested; 911 calls; and accompanying documents and photographs” and that the “strength of the State’s case is a factor in determining whether concession to a lesser charge is a reasonable trial strategy.” The district court’s findings are supported by the record. Appellant’s counsel testified that he had discussed concession with appellant the morning of closing argument and that appellant had at that time “agreed” to the concession. Though

appellant disputed this account in his testimony during the evidentiary hearing, the district court recognized the “lack of credibility” of appellant’s testimony. As an appellate court, we defer to the factfinder’s determinations of credibility. *See State v. Moore*, 438 N.W.2d 101, 107-08 (Minn. 1989). In sum, the district court’s findings that appellant understood the concession are supported by the record and not erroneous.

Finally, regarding appellant’s failure to object to his co-counsel’s concession of guilt during the closing argument, the district court found that appellant “understood his guilt on the assault charge was being conceded and did not object, instead only bringing the claim on appeal.” The district court found that appellant “had his second attorney with him and could have spoken to him to object” at the time of concession, or “could have waited until [his counsel] finished speaking and then objected himself so as not to interrupt the flow. An objection to a concession is a circumstance which permits a defendant to speak without an attorney.” These findings support the district court’s conclusion that appellant had failed to object to the concession.

The district court summarized its findings by stating that the “strength of the State’s case, the lack of challenge to the assault charge during the course of trial, the frequent and lengthy meetings with counsel, [appellant’s] lack of credibility, the lack of objection, and [appellant’s] behavior show [appellant] impliedly acquiesced.”

In sum, the district court’s findings regarding the second *Luby* circumstance support its conclusion that appellant acquiesced to the concession of guilt. The district court did not err in its findings and we affirm.¹

Affirmed.

¹ Appellant also argues that a new trial is warranted because he “could not reasonably have been expected to have an awareness of collateral consequences . . . that could attach to the concession, and which if known could prompt an objection to the concession.” This argument, however, conflates the law related to pleading guilty as set forth in cases like *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983) (requiring that a plea be “accurate, voluntary and intelligent”), with concession of guilt during trial. Other than potential immigration consequences, no scenario exists requiring an attorney to discuss collateral consequences of guilt with a client. See, e.g., *Kaiser v. State*, 641 N.W.2d 900, 903-04, 907 (Minn. 2002) (stating defendant must be informed of direct consequences but not collateral consequences).