

*This opinion is nonprecedential except as provided by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
A22-1030**

State of Minnesota,
Respondent,

vs.

John Lee Littlejohn,
Appellant.

**Filed May 22, 2023
Affirmed
Bryan, Judge**

Hennepin County District Court
File No. 27-CR-21-6846

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

Mary F. Moriarty, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wheelock, Presiding Judge; Bryan, Judge; and Hooten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this direct appeal, appellant argues that he was denied effective assistance of counsel when his attorney, in a written closing argument, argued that the district court should find appellant guilty of criminal sexual conduct in the fifth degree. Because the record is insufficient to determine whether appellant acquiesced to this concession, we affirm appellant's conviction. This opinion does not prevent appellant from pursuing a claim of ineffective assistance of counsel in a petition for postconviction relief.

FACTS

Respondent State of Minnesota charged appellant John Lee Littlejohn with criminal sexual conduct in the second degree. During plea negotiations, the state offered to argue for a stay of imposition in exchange for a plea to second-degree criminal sexual conduct. Littlejohn did not agree. Instead, he offered to plead guilty to fifth-degree criminal sexual conduct. The state declined that counteroffer, and the parties proceeded via a stipulated-evidence trial under Minnesota Rule of Criminal Procedure 26.01, subdivision 3.

Littlejohn waived certain trial rights and stipulated to the evidence that the district court would review, including a video recording of the victim's interview at CornerHouse. The parties submitted written closing arguments. The state summarized the exhibits and argued that the evidence established each element of the charged offense beyond a reasonable doubt. Littlejohn's counsel also submitted a written closing argument to the district court. In the written argument, defense counsel conceded that the victim was credible, stating that "the child is credible because she is the alleged victim and her

statements are not hearsay.” Littlejohn’s counsel asked the court to find Littlejohn not guilty of the charged second-degree offense and suggested that the district court find him guilty of fifth-degree criminal sexual conduct instead, even though the state had not charged Littlejohn with that offense.¹

In its oral findings, the district court noted that “the defense also agrees that [victim] was credible; that her report in the CornerHouse video was credible and believable.” The district court found Littlejohn guilty of the charged second-degree offense, stayed imposition of the sentence, required Littlejohn to serve 120 days in the county jail, and placed Littlejohn on probation for five years. This appeal follows.

DECISION

Littlejohn argues that he is entitled to a new trial because he was denied effective assistance of counsel when his attorney argued that the district court should find him guilty of fifth-degree criminal sexual conduct. Because the record is insufficient to determine whether appellant acquiesced to this concession, we affirm Littlejohn’s conviction.

A criminal defendant is constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016). Generally, to prevail on a claim of ineffective assistance of counsel, “the defendant must show that

¹ Specifically, counsel made the following request: “The Defendant asks the Court to review the evidence and find that the evidence is sufficient to sustain a charge of Criminal Sexual Conduct in the Fifth Degree.” Counsel for Littlejohn then referenced the version of the fifth-degree criminal sexual conduct statute in effect at the time of the closing argument. Minn. Stat. § 609.3451 (2021 Supp.).

counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687; *see also State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (applying *Strickland*). However, when counsel concedes guilt without the defendant's consent, as Littlejohn alleges occurred in this case, counsel's performance is deficient, and prejudice is presumed. *State v. Prtine*, 784 N.W.2d 303, 317-18 (Minn. 2010) (*Prtine I*). When presented with such arguments, reviewing courts first determine whether defense counsel made a concession of guilt. *State v. Luby*, 904 N.W.2d 453, 457 (Minn. 2017). Second, courts next determine whether the defendant "acquiesced in that concession." *Id.* (quotation omitted). "When . . . there is no evidence of express consent, [courts] 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). An evidentiary hearing may be necessary to determine acquiescence, *see id.*, in part because "whether 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." *State v. Prtine*, 799 N.W.2d 594, 599 (Minn. 2011) (*Prtine II*).

When a claim of ineffective assistance requires examination of evidence outside the trial record or additional fact-finding, it is appropriate to proceed with a postconviction petition. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). "Generally, an ineffective

assistance of counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal.” *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). Appellate courts may decline to address the merits of an ineffective-assistance claim if the record is insufficient. *Id.*

In this case, Littlejohn was charged with second-degree criminal sexual conduct. In written closing argument, defense counsel conceded that “the child is credible.” Defense counsel also conceded that Littlejohn was guilty of fifth-degree criminal sexual conduct, asking the district court to “find that the evidence is sufficient to sustain a charge of Criminal Sexual Conduct in the Fifth Degree.” The parties agree that the only pertinent difference between the elements of the charged second-degree offense and the elements of the uncharged fifth-degree offense referenced by defense counsel relates to the ages of Littlejohn and the victim,² and the stipulated evidence clearly established the age of both individuals. The state agrees that Littlejohn’s defense counsel conceded his guilt.

We next consider whether Littlejohn acquiesced to the concession of guilt. On this point, the state argues that the trial record is “undeveloped” and “[a] remand for fact-finding regarding attorney-client communications is therefore necessary before a decision can be made on the merits of [Littlejohn’s] ineffective-assistance-of-counsel claim.” After

² We note that since the beginning of the date range for the charged offense, the Minnesota Legislature has twice amended the elements of fifth-degree criminal sexual conduct, including amendments that took effect on August 1, 2019. *See* 2019 Minn. Laws 1st Spec. Sess. ch. 5, art. 4, § 9, at 991; 2021 Minn. Laws 1st Spec. Sess. ch. 11, art. 4, § 20, at 2049-50. Given the arguments as presented to us, we need not address whether there are any pertinent differences other than the ages of Littlejohn or the victim or whether the differences in the statutory provisions impact any analysis of counsel’s concession.

reviewing the trial record presented on appeal, we agree that the record does not contain sufficient facts for this court to determine whether it would be “objectively reasonable” to concede guilt, *Prtine II*, 799 N.W.2d at 599, and we decline to consider his claims further in this direct appeal. Littlejohn’s right to assert ineffective-assistance-of-counsel claims and develop the factual record through a future postconviction petition is preserved.

Affirmed.