

*This opinion is nonprecedential except as provided by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
A23-1301**

State of Minnesota,
Respondent,

vs.

Lionell Bailey,
Appellant.

**Filed February 3, 2025
Affirmed
Cochran, Judge**

Olmsted County District Court
File No. 55-CR-22-3946

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

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

Paul J. Maravigli, Special Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Ross, Judge; and Harris, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

Following a jury trial, appellant was convicted of attempted first-degree murder, attempted second-degree murder, drive-by shooting toward a person, second-degree

assault, and unlawful possession of a firearm. In this appeal, appellant argues that the evidence was insufficient to support each of his convictions except for the unlawful-possession conviction. He also contends that he received ineffective assistance of counsel because his trial counsel improperly conceded his guilt during closing argument. We affirm.

FACTS

Following a shooting at a gas station parking lot, respondent State of Minnesota charged appellant Lionell Bailey by amended complaint with several offenses including attempted first-degree murder, attempted second-degree murder, drive-by shooting toward a person, assault, and unlawful possession of a firearm. In the amended complaint, the state alleged that Bailey shot at the victim by reaching his arm out through the window of a parked car and shooting a gun as the victim ran by him. Bailey pleaded not guilty and the case proceeded to a jury trial. The state's evidence at trial included testimony from the victim; gas station employees; investigating police officers; and J.B., who was the driver of the car. The state also introduced several exhibits, including surveillance video from the gas station and a body-worn-camera video from a police officer's interview with J.B. Bailey did not testify in his own defense. The testimony and exhibits at trial established the following.

Shortly after midnight on June 15, 2022, the victim left the gas station and began walking to his car, which was parked across the street. As he walked through the parking lot, he "heard the pop, pop, pop." The victim initially believed someone was exploding firecrackers. However, after walking a few more steps into the road and hearing additional

shots, the victim realized that someone was firing a gun. He then began running away. While he was running, the victim thought he “felt something come right close to [his] gut” two times. The victim estimated that he heard about seven shots in all, but he did not see who fired the gun.

Investigating police officers later searched the area to look for forensic evidence, including damage from the bullets. Officers did not find any bullets or shell casings in the parking lot. However, officers discovered that some of the bullets from the shooting struck a house across the street from the gas station, and they found one bullet lodged in an interior door of the home. Forensic analysis identified it as a .38 caliber bullet, but officers could not determine what kind of gun had discharged this bullet.

A gas station employee saw the shooting through the store window. He stated that he saw a car pull into the parking lot and park “right in front of the entrance door of the store.” The employee testified that “someone in the [front passenger seat] pulled a gun out of the window and started shooting towards the road.” According to the employee, the car left after the shooting. The employee called 911 to report the shooting and gave the dispatcher the license plate number. The store manager provided police officers with surveillance video from the gas station, including footage from the parking lot showing the man seated in the front passenger seat of the car apparently shooting a gun. Shortly after the shooting, the driver leaves the convenience store and returns to the car. The car then drives away.

The investigating officers learned that the car involved in the shooting was associated with J.B., and that Bailey was staying at J.B.’s home. Two days after the

shooting, a police officer interviewed J.B. The officer's body-worn camera recorded this conversation. The recording reflects that J.B. told the officer that he went to the gas station with Bailey. He was the driver and Bailey was the only person with him in the car. J.B. stated that he went into the store to buy some tobacco products, Bailey stayed in the car, and then J.B. "heard gun shots" while he was still in the store. J.B. left the store, got into the car, and drove the car back to his house. The officer asked J.B. if Bailey told him about the shooting after they left the parking lot and J.B. responded, "I didn't even know he had it on him." The officer then stated, "I don't know why he shot at somebody." J.B. replied, "I think it's paranoia I don't know. It's fear, I don't know." The officer asked J.B. if he saw the gun. J.B. said, "[the] only time I seen it is when I got back in the car and he had it . . . in his hand. Like on his lap. Like when you're sitting in the car. He had it [gesturing to his lap]. . . . And then it transpired that he was shooting[.]"

At trial, J.B. testified that he drove to the gas station with Bailey and that no one else was in the car with them. J.B. stated that he went inside the store and that the "[n]ext thing you know I heard shots go off." While he was still in the store, J.B. heard Bailey honk the horn. J.B. then returned to the car and drove home. He also testified that he did not see the shooting.

Certain other aspects of J.B.'s trial testimony differed from his prior statement to the officer. During direct examination, J.B. denied that he saw Bailey holding a gun upon returning to the car. Later in his testimony, J.B. acknowledged that he originally told the officer that he saw Bailey with a gun in his lap after the shooting. J.B. explained that he told the officer that he saw Bailey with a gun "out of fear" and "[a]nxiety." But he

maintained that he did not recall seeing Bailey with a gun when he returned to his car after the shooting.

During cross-examination, defense counsel asked J.B. if he was afraid to admit that Bailey was in possession of a gun while in J.B.'s car because J.B. was on probation for a prior criminal offense at the time and it would have been unlawful for J.B. to be in possession of a firearm. J.B. acknowledged that he had a prior conviction and did not want to face "a new crime" for unlawful possession of a firearm. He also agreed that he did not call 911 or report the situation himself. And during closing, defense counsel attempted to impugn J.B.'s credibility as a witness by noting that J.B. had a "prior conviction for lying," was "using narcotics . . . while on probation," and did not want to admit that he had been in the presence of a gun due to a prior conviction. Defense counsel also argued that J.B. was a "scared and self-interested getaway driver." Defense counsel told the jury that Bailey was "an easy scapegoat" for J.B. and that there was "[n]othing tying Bailey to [the shooting] but the word of [J.B.]."

Following deliberations, the jury found Bailey guilty of all five counts. The district court sentenced Bailey to 187 months in prison for attempted first-degree murder and to a concurrent 60 months in prison for unlawful possession of a firearm. The district court did not adjudicate on the remaining three charges, which were lesser-included offenses. Bailey appealed his convictions to this court. We stayed the appeal to allow Bailey to pursue postconviction relief on a claim of ineffective assistance of trial counsel. In his postconviction petition, Bailey asserted that his trial counsel improperly conceded Bailey's

guilt to two of the charged offenses: drive-by shooting toward a person and second-degree assault. Following a hearing, the postconviction court denied Bailey's petition.

We dissolved the stay and reinstated this direct appeal.

DECISION

Bailey argues that four of his five convictions must be reversed because the state failed to present sufficient evidence to prove each of them. He also argues that he received ineffective assistance of trial counsel. We address each argument in turn.

I. Sufficient evidence supports Bailey's convictions.

Bailey challenges the sufficiency of the evidence of his convictions of attempted first-degree murder, attempted second-degree murder, second-degree assault, and drive-by shooting toward a person. He does not challenge the sufficiency of the evidence of his conviction of unlawful possession of a firearm.

A. Standard of Review

To evaluate the sufficiency of the evidence, "appellate courts carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). An appellate court reviews the evidence "in the light most favorable to the conviction" and "assume[s] the jury believed the State's witnesses and disbelieved any evidence to the contrary." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted).

When a defendant’s intent is proved by circumstantial evidence, as was done here, an appellate court applies a “heightened two-step test.” *State v. McInnis*, 962 N.W.2d 874, 890 (Minn. 2021) (quotation omitted). First, we identify the “circumstances proved” by the state. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). In identifying the circumstances proved, “we assume that the jury resolved any factual disputes in a manner that is consistent with the jury’s verdict.” *State v. Loveless*, 987 N.W.2d 224, 247 (Minn. 2023) (quotation omitted). “This is especially true [when] resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the jury.” *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). Next, we independently examine “the reasonableness of all inferences that might be drawn from the circumstances proved,” including “inferences consistent with a hypothesis other than guilt.” *Andersen*, 784 N.W.2d at 329 (quotation omitted). In so doing, we consider the evidence as a whole and do not examine any piece of evidence in isolation. *Id.* at 332. To affirm a conviction, “the circumstances proved must be consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* at 330. “But we will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.” *Id.* (quotation omitted).

B. Offenses Charged

We first discuss the elements of each of the four challenged offenses and then determine whether the evidence is sufficient to sustain the convictions under the two-step test. To convict a defendant of a crime, the state has the burden to prove each element of the offense beyond a reasonable doubt. *State v. Burg*, 648 N.W.2d 673, 677-78

(Minn. 2002). As discussed above, the state charged Bailey with (1) attempted first-degree murder while committing a drive-by shooting of a person, Minnesota Statutes sections 609.17, subd. 1, .185(a)(3) (2020); (2) attempted second-degree murder, Minnesota Statutes sections 609.17, subd. 1, .19, subd. 1(1) (2020); (3) drive-by shooting toward a person, Minnesota Statutes section 609.66, subd. 1e(a)(3) (Supp. 2021); and (4) second-degree assault with a firearm, Minn. Stat. § 609.222, subd. 1 (2020).

The first two offenses involve attempted murder. The statute criminalizing first-degree murder provides, in relevant part, that whoever “causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit . . . a drive-by shooting” is guilty of murder in the first degree. Minn. Stat. § 609.185(a)(3). As to second-degree murder, the relevant statute provides whoever “causes the death of a human being with intent to effect the death of that person or another, but without premeditation” is guilty of murder in the second degree. Minn. Stat. § 609.19, subd. 1(1). The phrase “[w]ith intent to” is defined to mean “that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result.” Minn. Stat. § 609.02, subd. 9(4) (2020). A person is guilty of attempted first- or second-degree murder when the person “with intent to commit [the] crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime.” Minn. Stat. § 609.17, subd. 1.

To prove felony drive-by-shooting, the state must prove beyond a reasonable doubt that the person, “while in or having just exited from a motor vehicle, recklessly discharges a firearm at or toward . . . a person.” Minn. Stat. § 609.66, subd. 1e(a)(3); *see also*

State v. Cole, 542 N.W.2d 43, 51-52 (Minn. 1996) (noting that the recklessness element refers to the actor’s “conscious disregard” of the likely result of his action, and is not inconsistent with a finding that a person also had the specific intent to cause the result of his action).

Finally, for second-degree assault, the state must prove that Bailey assaulted another person with a dangerous weapon. Minn. Stat. §§ 609.02, subd. 10 (2020) (defining assault as “(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another”), .222, subd. 1.

Bailey argues that, for each of these four offenses, the state failed to meet its burden to prove that he shot at or towards the victim. Both attempted-murder charges require the state to prove beyond a reasonable doubt that Bailey intended to cause the victim’s death. Minn. Stat. §§ 609.185(a)(3), .19, subd. 1(1). “Assault” is an act done with the intent to cause the victim fear or harm. Minn. Stat. § 609.02, subd. 10. As to the drive-by shooting offense, a showing of intent is not required for conviction. *See Cole*, 542 N.W.2d at 52 (noting that the term “‘reckless’ refers to the risk created, not the mental intent which resulted in an act which produced fear or injury”). However, the drive-by-shooting offense does require a showing that the defendant recklessly shot a gun “toward . . . a person.” Minn. Stat. § 609.66, subd. 1e(a)(3). Bailey contends that the evidence is insufficient for each of these offenses because there is no evidence that he “was shooting at” the victim. Bailey does not challenge any other element of the four offenses.

C. Circumstances Proved

We now turn to the circumstances proved. Assuming that the jury credited the testimony of the state's witnesses, and construing the evidence in the light most favorable to the verdict, the circumstances proved are as follows. J.B. drove to the gas station with Bailey. No one else was in the car. J.B. was the driver and Bailey was in the front passenger seat. While J.B. was inside the store, Bailey fired several shots out of the passenger-side car window. The victim heard someone shooting as he passed by J.B.'s car. He was only a few steps into the road from the gas station parking lot when he realized that someone was shooting at him and began running. The victim perceived that the bullets passed close to him, as he "felt something come right close to [his] gut." By the time the victim looked behind him to see who was shooting, the car was gone. The victim heard about seven shots. While still in the store, J.B. heard the shots and then heard Bailey honk the horn. J.B. returned to the car and drove away. J.B. saw Bailey holding a gun on his lap or at his side while in the car.

D. Reasonable Inferences from the Circumstances Proved

Next, we independently examine the reasonable inferences that may be drawn from these circumstances "to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt." *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (quotation omitted). "Intent can be inferred from the words and acts of the [defendant] before and after the incident, and from the idea that a person intends the natural consequences of his or her actions." *Stiles v. State*, 664 N.W.2d 315, 320 (Minn. 2003).

We conclude that the circumstances proved are consistent with guilt and that no reasonable inference other than guilt exists. The circumstances proved show that Bailey fired a gun toward the victim as the victim was walking from the gas-station parking lot across the street to his parked car. When the victim realized that someone was firing a gun, he began running. As he was running to his car, the victim felt bullets pass “close to [his] gut.” At trial, the victim analogized the feeling of the bullets passing by to playing baseball and stated that, “[w]hen a ball came too close, you could feel it. That’s just what it felt like to me.” These circumstances proved support a reasonable inference that Bailey intended to shoot at the victim.

Bailey’s actions after the shooting provide further support for this conclusion. When Bailey stopped shooting, he immediately started honking the horn of J.B.’s car. J.B. came out of the convenience store and drove away before the victim could see who fired the gun. In sum, Bailey’s intent to shoot the victim can be inferred from his actions.

Bailey argues that, while these circumstances proved may support a finding of guilt, the circumstances equally support a reasonable inference that he was aiming at the houses across the street from the gas station, rather than at the victim. In support of this argument, he emphasizes that one of the bullets hit a house across the street. We are not persuaded. Bailey’s argument ignores that the circumstances proved also show that Bailey began shooting as the victim was walking from the parking lot to his car across the street and continued shooting as the victim ran away. This argument is also inconsistent with Bailey’s actions immediately after the shooting, described above. Finally, the circumstances proved

do not support the inference that Bailey was aiming at the houses in light of the victim's testimony that he felt the bullets pass close to his body.

Bailey also challenges the victim's testimony that he felt the bullets pass by him. Bailey asserts that "[b]ullets move incredibly fast" and argues that the victim could not have felt the bullets pass near his body. But Bailey points to no circumstance proved to support this contention. *See Andersen*, 784 N.W.2d at 329 (noting that, in the second step, an appellate court examines "the reasonableness of all inferences that might be drawn from the *circumstances proved*" (emphasis added (citation omitted))). Instead, Bailey notes that the victim acknowledged during his testimony that the sensation of feeling something pass by his body "could have been [due to] running and [his] shirt" or his hand. But, because this statement is inconsistent with the jury's verdict finding Bailey guilty, we must assume that the jury did not believe that the sensation was due to the victim's shirt or hand. *See State v. Hawes*, 801 N.W.2d 659, 670-71 (Minn. 2011) (noting that, when evaluating convictions based on circumstantial evidence, appellate courts do not consider testimony rejected by the jury). Accordingly, we do not consider this testimony relied on by Bailey as part of the circumstances proved by the state.

We also reject Bailey's reliance on this testimony because the circumstantial-evidence standard does not allow us to "analyze and parse each fact" in a "piecemeal" fashion to conclude that a hypothesis is reasonable. *State v. Cox*, 884 N.W.2d 400, 415 (Minn. 2016). And "[w]e do not set aside verdicts based on speculation." *State v. Al-Naseer*, 788 N.W.2d 469, 480 (Minn. 2010). As such, we reject Bailey's attempts to focus on one particular detail while ignoring the broader picture. *See State v. Robertson*,

884 N.W.2d 864, 872 (Minn. 2016) (stating that, “[w]hen viewed in isolation, the facts cited by [the defendant] might support a rational inference other than guilt. But we view the circumstances proved as a whole”).

In sum, it is not reasonable to infer from the circumstances proved that Bailey was firing at the homes across the street and that the victim was merely in the vicinity of the shooting. The only reasonable inference, given the totality of the circumstances, is that Bailey fired a gun at the victim. We therefore conclude that the circumstantial evidence is sufficient to support the jury’s verdict that Bailey is guilty of attempted first-degree murder, attempted second-degree murder, assault, and drive-by shooting.

II. Bailey received effective assistance of trial counsel.

We next consider Bailey’s argument that the postconviction court erred when it concluded that Bailey had not demonstrated that he received ineffective assistance of trial counsel.

A. Legal Standard

Under the United States and Minnesota Constitutions, a criminal defendant is entitled to the assistance of counsel at trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. This right includes the guarantee that counsel’s assistance be effective. *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001).

Appellate courts examine ineffective-assistance-of-counsel claims under the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 685-87 (1984). *See State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). To satisfy this test, an appellant “must demonstrate that (1) his counsel’s performance fell below an objective

standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). When trial counsel concedes guilt without the defendant's consent, counsel's performance "is deficient," "prejudice is presumed," and "the defendant is entitled to a new trial, regardless of whether [they] would have been convicted without the admission." *State v. Luby*, 904 N.W.2d 453, 457 (Minn. 2017) (quotations omitted). Under these circumstances, a new trial would be required because counsel's unauthorized concession of guilt attacks "the fundamental legal principle that a defendant must be allowed to make [their] own choices about the proper way to protect [their] own liberty," and creates a "fundamental unfairness." *McCoy v. Louisiana*, 584 U.S. 414, 427-28 (2018) (quotation omitted).

A concession of guilt may be express or implied. *Luby*, 904 N.W.2d at 457. An implied concession of guilt occurs only when "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).

To determine whether trial counsel conceded a defendant's guilt without consent, this court conducts a two-step review. *Luby*, 904 N.W.2d at 457. We first conduct a de novo review of the record "to determine whether defense counsel made a concession of guilt." *Id.* If so, we next determine whether the defendant "acquiesced in that concession." *Id.* In conducting this review, we examine the postconviction court's findings of fact for clear error. See *State v. Prtine*, 799 N.W.2d 594, 599 (Minn. 2011) ("[T]he factual

elements of this legal question related to the underlying facts and circumstances of the case are reviewed for clear error.”).

B. Defense Counsel Did Not Concede Guilt

Bailey contends that he received ineffective assistance of trial counsel because his trial counsel conceded that an assault and a drive-by shooting of the victim had occurred. To support this argument, he points to a portion of the closing argument in which trial counsel discussed the assault and drive-by-shooting offenses while arguing that the state failed to show intent for the attempted-murder offenses. During this discussion, trial counsel stated:

[T]he target the shooter is firing at . . . is across the street, a significant distance away from the shooter. The shooter never steps out of the car and fires. Never pursues [the victim]. So the question becomes did this shooter ever specifically mean to kill anyone. No, obviously not. Because if there was that intent, the shooter would have taken actual steps to ensure that he even hit the target instead of just firing in the direction. Meant to kill the target. Gotten out of the car. Ran after [the victim]. Fired more rounds. *Did this shooter commit a drive by shooting? Yes. No question. Did this shooter commit assault in the second degree? Yes. No question. But is this anywhere near attempted murder? No, absolutely not. Where's the gun. Where's the shooter.*

(Emphasis added.)

Relying on *Torres*, Bailey argues that conceding “even a single element of an offense without the defendant’s consent” amounts to a concession of a guilt, regardless of whether defense counsel identifies the defendant as the person who committed the offense. He notes that, in *Torres*, the supreme court considered “whether [the defendant’s] trial counsel conceded guilt on any element of the two charges.” 688 N.W.2d at 573. Bailey

contends that, under *Torres*, if defense counsel concedes that an element of a crime occurred, then a concession has been made regardless of whether the defendant was named.

A more recent supreme court opinion, which Bailey does not address in his briefing, clarifies *Torres* and suggests that Bailey's interpretation of *Torres* goes too far. *State v. Huisman*, 944 N.W.2d 464 (Minn. 2020). In *Huisman*, the defendant was charged with two criminal-sexual-conduct offenses. *Id.* at 466. Defense counsel conceded the ages of the victims and the venue in closing, which were elements of the charged offenses. *Id.* at 466-67. But counsel ended his closing by asserting that the state failed to prove that the defendant was guilty beyond a reasonable doubt. *Id.* On appeal, the defendant argued that he was denied effective assistance of counsel because his attorney conceded elements of the offenses without his consent or acquiescence. *Id.* at 467. The supreme court disagreed, holding that a concession on an element of an offense is not necessarily a concession of guilt, even without the defendant's consent. *Id.* at 468.

In reaching this conclusion, the supreme court addressed the language of *Torres* and explained that “[we] did not say—and clarify today that we did not mean to say—that an unconsented-to concession on any single element necessarily is a concession of guilt.” *Id.* The supreme court reasoned that “[s]uch a rule would be a disincentive for the parties to focus on the issues in dispute, and would prevent defense counsel from making what may well be appropriate, tactical concessions.” *Id.* At the same time, the supreme court declined to adopt a rule that “only a concession on each and every element of the crime is a concession of guilt.” *Id.* Instead, it reviewed the facts in the record and concluded, based on those facts, that “defense counsel’s concessions of fewer than all of the elements was

not a concession of guilt.” *Id.* In reaching this conclusion, the supreme court noted that defense counsel conceded certain elements that were undisputed at trial and “mounted a vigorous defense” on the contested issues. *Id.* And it further noted that defense counsel argued throughout the trial and during closing that the defendant was not guilty of the crimes. *Id.* The supreme court concluded that, in light of these circumstances, there was no concession of guilt. *Id.*

Here, like in *Huisman*, the record reflects that defense counsel did not concede Bailey’s guilt. While defense counsel did concede certain elements of the assault and drive-by-shooting offenses in his closing argument, he did not concede that Bailey was the shooter. Without naming Bailey as the shooter, we conclude there can be no concession of guilt as to these offenses by defense counsel because a finding of guilt is necessarily tied to a specific individual. *See* Minn. Stat. §§ 609.222, subd. 1 (requiring the state to prove *that the defendant* acted with intent to cause fear of bodily harm with a dangerous weapon for an assault crime), .66, subd. 1e(a)(3) (providing that the state must show *that the defendant* “recklessly discharge[d] a firearm at or toward . . . a person” in a drive-by-shooting offense); *see also State v. Crump*, No. A15-1690, 2016 WL 6826235, at *2 (Minn. App. Nov. 21, 2016) (determining that, even if counsel’s statements implicitly conceded that the victim was assaulted, “they do not suggest *that [the defendant]* was the person who assaulted [the victim]”) (emphasis added)), *rev. denied* (Minn. Feb. 14, 2017).¹

¹ “Nonprecedential opinions . . . are not binding authority except as law of the case, res judicata, or collateral estoppel, but . . . may be cited as persuasive authority.” Minn. R. Civ. App. P. 136.01, subd. 1(c).

Instead, Bailey's counsel "mounted a vigorous defense" on the issue of the shooter's identity. *Huisman*, 944 N.W.2d at 468. Counsel consistently argued throughout trial, including in opening and closing arguments, that Bailey was not the shooter. For example, counsel asserted in opening that Bailey was a "convenient scapegoat for a scared and self-interested getaway driver." And defense counsel elicited testimony from a police officer that investigators did not find the firearm involved in the shooting, did not conduct gunshot residue testing on Bailey, and did not collect any shell casings from the scene relevant to the shooting. Counsel also challenged the credibility of the state's witnesses identifying Bailey as the shooter and confirmed, through the testimony of a police officer, that officers did not conduct a photo lineup of the eyewitnesses. Additionally, the victim testified that he did not see who shot at him. Finally, counsel unequivocally asserted in closing that "Mr. Bailey is innocent of these charges unless and until the State proves beyond a reasonable doubt that Mr. Bailey was the shooter." Counsel concluded his closing by stating, "I am confident you will find the State did not prove beyond a reasonable doubt that Mr. Bailey was the shooter."

Given the facts of this case, we are satisfied that counsel's acknowledgement that a shooting occurred at the gas station by "the shooter" was not a concession that Bailey was guilty of the crimes. The record as a whole demonstrates that counsel's primary strategy throughout trial was to deny that Bailey was the shooter and assert that the state failed to satisfy its burden of proof. Counsel's partial concession was reasonable as a trial strategy to "focus on the issues in dispute." *See Huisman*, 944 N.W.2d at 468. This decision falls within the "wide latitude" afforded to trial counsel. *State v. Nicks*, 831 N.W.2d 493, 506

(Minn. 2013) (“We give trial counsel wide latitude to determine the best strategy for the client.”). Thus, we conclude that counsel did not concede guilt and the postconviction court did not err when it concluded that Bailey is not entitled to a new trial on the ground that he received ineffective assistance of counsel.²

Affirmed.

² Because we conclude that trial counsel did not concede guilt, we need not consider Bailey’s argument that he did not acquiesce in his counsel’s trial strategy. *See Luby*, 904 N.W.2d at 457 (noting that if “defense counsel made a concession of guilt,” then “the defendant is entitled to a new trial” unless he acquiesced to the concession).