

*This opinion is nonprecedential except as provided by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
A24-0753**

John Lee Littlejohn, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 30, 2024
Reversed and remanded
Larson, Judge**

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

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

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

Mary F. Moriarty, Hennepin County Attorney, Robert I. Yount, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Tracy M. Smith, Presiding Judge; Bratvold, Judge; and
Larson, Judge.

NONPRECEDENTIAL OPINION

LARSON, Judge

Appellant John Littlejohn challenges the postconviction court’s decision to deny his petition for postconviction relief. On appeal, Littlejohn argues he received ineffective assistance of counsel at trial because his attorney improperly conceded his guilt. Because

the postconviction court's findings reflect that Littlejohn did not expressly consent to his trial counsel's concession, and Littlejohn has shown that he did not impliedly acquiesce to the concession, we conclude the postconviction court abused its discretion when it denied his petition for postconviction relief and reverse and remand for a new trial.

FACTS

Respondent State of Minnesota charged Littlejohn with second-degree criminal sexual conduct (CSC) under Minn. Stat. § 609.343, subd. 1(a) (2018), which requires the complainant to be under 13 years old and the actor to be more than 36 months older than the complainant.¹ The charge stemmed from 2019 incidents involving Littlejohn's former stepdaughter's child, Q.K., who was 11 or 12 years old when the incidents occurred.

The state offered Littlejohn a stay of imposition of the 48-month presumptive sentence in exchange for his guilty plea to second-degree CSC. Littlejohn counteroffered to plead guilty to fifth-degree CSC, which the state rejected. Littlejohn ultimately agreed to a stipulated-evidence bench trial, and the parties submitted written closing arguments. *See* Minn. R. Crim. P. 26.01, subd. 3. In her closing argument, Littlejohn's trial counsel asked the district court to find Littlejohn guilty of fifth-degree CSC and conceded Q.K.'s credibility. Thereafter, the district court found Littlejohn guilty of second-degree CSC. The district court reasoned that: the state did not charge Littlejohn with fifth-degree CSC;

¹ We note that the incidents resulting in the charged offense occurred between May 1, 2019, and September 30, 2019. The legislature amended the relevant statute to include amendments that took effect on August 1, 2019. *See* 2019 Minn. Laws 1st Spec. Sess. ch. 5, art. 4, § 6, at 986-87. But the subdivision under which the state charged Littlejohn was not affected by the amendments.

prior to closing argument, Littlejohn did not request that the district court consider fifth-degree CSC; and Littlejohn failed to explain any basis for finding him guilty of fifth-degree CSC rather than second-degree CSC. The district court stayed imposition of Littlejohn's sentence, placed him on probation for five years, and required him to serve 120 days in county jail with two days of credit for time served.

Littlejohn filed a direct appeal, arguing that he received ineffective assistance of counsel because his trial counsel conceded his guilt to second-degree CSC. *See State v. Littlejohn*, No. A22-1030, 2023 WL 3574677, at *1-2 (Minn. App. May 22, 2023). We agreed with Littlejohn that his trial counsel's closing argument conceded his guilt to second-degree CSC. *Id.* at *2. We reasoned that because the only pertinent difference between second-degree CSC and fifth-degree CSC related to the parties' ages, and the stipulated evidence established the parties' ages, trial counsel conceding that Littlejohn was guilty of fifth-degree CSC amounted to a concession that he committed second-degree CSC. *Id.* Yet, we determined that the record was undeveloped regarding whether Littlejohn acquiesced to the concession. *Id.* We, therefore, affirmed the conviction, but preserved Littlejohn's right to pursue postconviction relief. *Id.*

Thereafter, Littlejohn filed a petition for postconviction relief. At the evidentiary hearing, trial counsel testified that Littlejohn had directed her to concede Q.K.'s credibility and his guilt to fifth-degree CSC, but not to second-degree CSC. Trial counsel also testified that Littlejohn expressed a desire to mitigate conflict with his family by being "held accountable" for fifth-degree CSC. Based on this testimony, the postconviction court found that Littlejohn did not want to be convicted of second-degree CSC. Nevertheless,

the postconviction court concluded that Littlejohn expressly consented to his trial counsel conceding his guilt to second-degree CSC and denied his petition for postconviction relief.

Littlejohn appeals.

DECISION

Littlejohn challenges the postconviction court's decision to deny his petition for postconviction relief, arguing that he received ineffective assistance of counsel. We review a postconviction court's decision to deny a petition for postconviction relief for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). A postconviction court abuses its discretion if its decision is arbitrary or capricious, based on an error of law, or based on clearly erroneous factual findings. *Id.* We review the postconviction court's legal determinations de novo and its factual findings for clear error. *Id.*

Ordinarily, we review an ineffective-assistance-of-counsel claim by applying the *Strickland* test. *See Nissalke v. State*, 861 N.W.2d 88, 93-94 (Minn. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)). Under *Strickland*, an ineffective-assistance-of-counsel claim requires a defendant to prove: “(1) that his counsel’s representation fell below an objective standard of reasonableness; and (2) there is a reasonable possibility that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 94 (quotations omitted).

But we apply a different standard when a defendant claims that his counsel was ineffective for conceding guilt. “When defense counsel concedes the defendant’s guilt without consent, counsel’s performance is deficient and prejudice is presumed.” *State v. Luby*, 904 N.W.2d 453, 457 (Minn. 2017) (quotation omitted). This rule stems from the

well-established principle that “whether or not to admit guilt at a trial is a decision that under our system can only be made by the defendant.” *State v. Wiplinger*, 343 N.W.2d 858, 860-61 (Minn. 1984). Consequently, “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 (quotation omitted).

We apply a two-step analysis to review ineffective-assistance-of-counsel claims based on an unauthorized concession of guilt. *Id.* “First, we review the record de novo to determine whether defense counsel made a concession of guilt.” *Id.* In this case, we already concluded on direct appeal that trial counsel conceded Littlejohn’s guilt to second-degree CSC. *See Littlejohn*, 2023 WL 3574677, at *2. We, thus, move to the second step.

Under the second step, “the defendant is entitled to a new trial unless he acquiesced in that concession.” *Luby*, 904 N.W.2d at 457 (quotation omitted). There are two ways a defendant can acquiesce: (1) express consent or (2) implied acquiescence. *See id.* at 459.

Here, the postconviction court concluded that Littlejohn expressly consented to trial counsel conceding his guilt to second-degree CSC. Yet, the postconviction court’s own findings do not support that conclusion. The postconviction court explicitly found it was “clear that [Littlejohn] did not wish to be convicted of second-degree [CSC].” And although the postconviction court found that Littlejohn “insisted that [trial counsel] should concede his guilt to [fifth-degree CSC],” we already determined that trial counsel’s concession to fifth-degree CSC constituted a concession to second-degree CSC. *Littlejohn*, 2023 WL 3574677, at *2. And nothing in the postconviction court’s findings indicate that Littlejohn understood that a concession to fifth-degree CSC was, in fact, a concession to

second-degree CSC. We, therefore, conclude that the postconviction court abused its discretion when it determined that Littlejohn expressly consented to trial counsel conceding his guilt to second-degree CSC.

Therefore, we must evaluate whether the record shows that Littlejohn impliedly acquiesced to trial counsel's concession. *See Luby*, 904 N.W.2d at 459. "Acquiescence may be implied in certain circumstances," including, as relevant here, "when the concession was an 'understandable' strategy and the defendant was present, understood a concession was being made, but failed to object." *Id.* When evaluating whether a concession was an understandable strategy, we consider "whether it would be objectively reasonable to [concede], given the facts and circumstances of the particular case." *State v. Prtine*, 799 N.W.2d 594, 599 (Minn. 2011). One such circumstance wherein a concession might be an understandable strategy is 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." *Wiplinger*, 343 N.W.2d at 861.

We conclude that Littlejohn's express consent to his trial counsel conceding his guilt to fifth-degree CSC is not sufficient to show implied acquiescence to conceding his guilt to second-degree CSC. Implied acquiescence requires trial counsel to be employing an "understandable strategy." Here, the record does not support that conclusion. In her closing argument, trial counsel conceded both (1) Q.K.'s credibility (the last remaining fact issue) and (2) the elements necessary to find Littlejohn guilty of second-degree CSC. Thus, the only decision available to the district court based on the stipulated evidence and trial counsel's concession was to find Littlejohn guilty of second-degree CSC. *Littlejohn*, 2023

WL 3574677, at *2. In the context of this case, we cannot discern any strategy in trial counsel's concession because it essentially amounted to Littlejohn entering a straight guilty plea to second-degree CSC. *See id.*; Minn. Stat. § 609.343, subd. 1(a); Minn. Stat. § 609.3451 (2018). Therefore, trial counsel's concession was not an understandable strategy, and we cannot conclude Littlejohn impliedly acquiesced to the concession.

For these reasons, we conclude the postconviction court abused its discretion when it denied Littlejohn's petition for postconviction relief. Because the record demonstrates that Littlejohn neither expressly consented nor impliedly acquiesced to trial counsel's concession that he was guilty of second-degree CSC, we reverse and remand for a new trial.

Reversed and remanded.