STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1822

State of Minnesota,
Respondent,

vs.

Mickey H. Simmons,
Appellant.

Filed January 6, 2009
Affirmed in part, reversed in part, and remanded
Kalitowski, Judge

Hennepin County District Court
File No. 07001339

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Jean E. Burdorf, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55102 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Appellant Mickey Simmons challenges his convictions and sentence, contending 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 kidnapping in the second degree. Appellant also raises several issues pro se, including a challenge to the district court's admission of prior-relationship evidence. Because the district court did not abuse its discretion in admitting prior-relationship evidence under Minn. Stat. § 634.20 (2006), we affirm on that issue. But because there is no evidence in the record that appellant consented or acquiesced in defense counsel's concession of appellant's guilt, we reverse appellant's convictions and remand this matter for further proceedings.

D E C I S I O N

I.

Appellant was charged with four offenses: kidnapping with no release in a safe place (count 1); kidnapping with release in a safe place (count 2); assault in the second degree (count 3); and domestic assault by strangulation (count 4). Appellant waived his right to a jury and agreed to a stipulated facts trial. The district court found appellant guilty of counts 1, 3, and 4. Appellant argues that he was denied effective assistance of counsel when his attorney conceded, in a written closing argument, that appellant was guilty of count 2. We agree.

Generally, in order to show ineffective assistance of counsel, a defendant must affirmatively show that his counsel's representation "'fell below an objective standard of

reasonableness'" and that, "'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). While a defendant must usually prove prejudice to show ineffective assistance, prejudice will be presumed in certain cases. *Dukes v. State*, 621 N.W.2d 246, 254 (Minn. 2001).

Here, we start with the basic principle that a criminal defense attorney cannot admit his client's guilt without first obtaining the client's consent to this strategy. *State v. Wiplinger*, 343 N.W.2d 858, 860 (Minn. 1984). In particular, where counsel admits or concedes a defendant's guilt without the defendant's consent, counsel's performance is considered deficient and prejudice is presumed. *Id.* at 861, *cited in State v. Jorgensen*, 660 N.W.2d 127, 132 (Minn. 2003). That is because the decision to concede guilt is the defendant's decision alone to make. *Dukes*, 621 N.W.2d at 254. Absent consent, a defendant is entitled to a new trial unless the record shows that he acquiesced in the concession. *Id.* And a "defendant should be given a new trial even if it can be said that the defendant would have been convicted in any event." *Wiplinger*, 343 N.W.2d at 861.

Acquiescence in a concession of guilt may be shown when a defense attorney uses the strategy of conceding guilt throughout trial and the defendant fails to object. *State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992). Acquiescence may also be implied when the concession of guilt is an "understandable" strategy, the defendant was present at the time the concession was made, and the defendant admits he understood the implications of the concession but did not object. *Jorgensen*, 660 N.W.2d at 133.

Here, the record fails to show that appellant consented or otherwise acquiesced in his attorney's trial strategy of conceding guilt on count 2, the kidnapping-release-in-safe-place charge. The state argues that defense counsel's concession of guilt to the lesser charge was an objectively reasonable decision made in the hope of persuading the court to acquit appellant of the more serious offense. Although the state is correct that such a concession may be a reasonable decision, it bears emphasizing 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. Moore*, 458 N.W.2d 90, 96 (Minn. 1990) (quoting *Wiplinger*, 343 N.W.2d at 861). Even in cases where the evidence against the defendant is compelling, this court and the supreme court have granted a new trial when defense counsel concedes guilt without the defendant's permission. *See id.* at 95-96 (holding new trial required where attorney conceded that defendant was guilty of heat-of-passion manslaughter without defendant's consent); *Wiplinger*, 343 N.W.2d at 861 (granting new trial where attorney impliedly admitted defendant's guilt without defendant's consent or acquiescence).

The motivation for defense counsel's concession to the lesser charges may be understandable because counsel was likely hoping for a more lenient sentence in light of the state's evidence. This strategy was recognized in *Wiplinger* as a valid reason to concede guilt. 343 N.W.2d at 861. But the decision to concede guilt can only be made by the defendant. *Id.*

The record indicates that appellant made statements on the record that he did not acquiesce or consent to any concession of guilt to the kidnapping charges, and appellant's

counsel made the concession in a written closing argument outside of appellant's presence. Moreover, there is no evidence indicating that appellant directed his attorney to use this trial strategy, or that appellant even knew his attorney would argue that the district court should convict on the less serious kidnapping charge. *Cf. Jorgensen*, 660 N.W.2d at 133 (refusing to grant new trial where appellant knew and understood that defense counsel strategically conceded appellant's intent to kill in an effort to avoid conviction on first-degree murder charge while at same time maintaining credibility and appellant never objected to the strategy).

In addition, there is no evidence that appellant understood the implications of the concession but chose not to object. Appellant's affirmative instructions to his attorney to concede guilt on the two assault charges sharply contrasts with his refusal on the record to plead guilty to the kidnapping charges. Appellant was given the opportunity to plead guilty to all of the charges and chose not to. Although he could have chosen to concede guilt after the state was put to its burden of proof, there is no evidence that he acquiesced in the concession of guilt. And his attorney cannot make the choice to concede guilt for him.

We reject the state's argument that *Wiplinger* is not controlling because of the Supreme Court's holding in *Florida v. Nixon*. 543 U.S. 175, 125 S. Ct. 551 (2004). The *Nixon* Court addressed the question of "whether counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial automatically renders counsel's performance deficient." *Id.* at 186, 125 S. Ct. at 560. The Court answered in the negative, but distinguished a capital case from "a run-of-the-

mine trial" because, "the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategy calculus." *Id.* at 190-91, 125 S. Ct. at 562. "Counsel therefore may *reasonably* decide to focus on the trial's penalty phase . . . ." *Id.* at 191, 125 S. Ct. at 563. Thus, the Court concluded that in a capital murder case, the Court would not presume prejudice where defense counsel conceded guilt as part of its trial strategy. *Id.* at 192, 125 S. Ct. at 563. The *Nixon* holding is inapplicable here because this is not a murder case, nor is the death penalty at stake.

II.

Although we reverse appellant's convictions, we address one of the claims raised by appellant in his pro se brief because the issue may recur. Appellant contends the district court erred in admitting, under section 634.20, limited testimony by the complainant about prior acts of domestic abuse because the state did not provide notice to appellant before trial of its intent to use this evidence. We agree with the state that this testimony was properly admitted as relationship evidence of conduct and that the state was not required to give notice of this evidence under section 634.20.

Evidentiary rulings are committed to the sound discretion of the district court and those rulings will only be reversed when that discretion has been clearly abused. *State v. Hooks*, 752 N.W.2d 79, 83 (Minn. App. 2008). The statute governing complainant's domestic-abuse testimony states:

> Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is

> substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. "Similar conduct" includes, but is not limited to, evidence of domestic abuse . . . .

Minn. Stat. § 634.20 (2006). The Minnesota Supreme Court has refused to extend to section 634.20 relationship evidence the three procedural safeguards that govern 404(b) evidence: (1) limiting instructions; (2) a minimum burden of proof; and (3) notice. *State v. Bell*, 719 N.W.2d 635, 638-40 (Minn. 2006). The *Bell* court further declined to require that district courts engage in an independent analysis of the state's need for section 634.20 evidence before it is admitted. *Id.* at 639. Thus, here, the state was not required to provide notice to appellant of its intent to admit relationship evidence. The supreme court did note that, "as with 404(b) evidence, the need for section 634.20 evidence is naturally considered as part of the assessment of the probative value versus prejudicial effect of the evidence." *Id.* And the record here shows that the district court considered appellant's arguments and concluded that under section 634.20, the complainant's testimony about the nature of her prior relationship with appellant was admissible. Therefore, the district court did not err in admitting this evidence.

Appellant raises six other issues in his pro se brief. An assignment of error in a party's brief based on "mere assertion" and unsupported by argument or authority and not raised in the district court, cannot be considered on appeal. *State v. Wilson*, 594 N.W.2d 268, 271 (Minn. App. 1999) (citing *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290

Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971))). Because appellant's other pro se claims are unsupported by argument or authority and were not presented to the district court, we decline to address these issues.

Affirmed in part, reversed in part, and remanded.