STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0587

State of Minnesota,
Respondent,

vs.

Boyd Jerome Morson, II,
Appellant.

Filed September 14, 2020
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-17-14451

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Mark D. Nyvold, Fridley, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Bryan, Judge.

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

BJORKMAN, Judge

Appellant challenges his conviction of unlawful possession of a firearm, arguing that he received ineffective assistance of counsel. We affirm.

FACTS

Just before 1:00 a.m. on June 10, 2017, a Minneapolis police officer learned from a confidential informant that a man matching the description of appellant Boyd Jerome Morson, II had a firearm in his vehicle and was at a bar where the officer was working security. Approximately 40 minutes later, the officer saw Morson leave the bar and drive away. The officer followed and, after observing several traffic violations, executed a traffic stop. A search of the vehicle revealed a backpack behind the driver's seat that contained several of Morson's belongings and a semi-automatic handgun.

Morson was charged with unlawful possession of a firearm. At trial, the officer testified about the informant's report, his recovery of the gun from Morson's vehicle, Morson's arrest, and an interview he conducted with Morson a couple days later. When asked whether Morson "ma[d]e any reference" during the interview "to anything that [the officer] found in the car," the officer indicated that Morson "kept telling me that he was going to have somebody call me, and he didn't specify as to who that was," but the officer "felt it was regarding someone taking ownership or claiming the firearm is theirs." In defense, Morson presented the testimony of his friend, D.M., who said that he owned the gun. D.M. explained that he placed the gun in Morson's backpack, which he also used sometimes, on June 9, but he did not inform Morson he was doing so and he forgot it there. D.M. also testified that he tried multiple times to retrieve his gun from police.

The jury found Morson guilty, and the district court sentenced him to 60 months' imprisonment. Morson appealed, then requested a stay for postconviction proceedings.

Morson filed a petition for postconviction relief, arguing, in relevant part, that he received ineffective assistance of counsel. After an evidentiary hearing at which defense counsel was the principal witness, the district court denied relief. The court concluded that counsel's representation was not constitutionally deficient in most respects, and that his unreasonable failure to make required discovery disclosures did not prejudice Morson. At Morson's request, we reinstated the appeal.

D E C I S I O N

Criminal defendants have a constitutional right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (quotation omitted). *Strickland* establishes a two-part standard for claims of ineffective assistance of counsel. *State v. Vang*, 847 N.W.2d 248, 266 (Minn. 2014). To obtain reversal under *Strickland*, a defendant must demonstrate both that (1) counsel's performance "fell below an objective standard of reasonableness," and (2) there is "a reasonable probability" that the outcome would have been different without counsel's errors. *Id.* A failure as to either prong may be dispositive. *Id.* Whether a defendant received ineffective assistance of counsel involves mixed questions of law and fact, which we review de novo. *Dereje v. State*, 837 N.W.2d 714, 721 (Minn. 2013).

Morson contends that defense counsel was prejudicially ineffective by: (1) conceding guilt by admitting to the jury that Morson knew a gun was in his vehicle; (2) failing to make a required discovery disclosure, resulting in the exclusion of a statement that would have bolstered D.M.'s credibility; (3) failing to object to informant hearsay

testimony that Morson had a firearm in his vehicle; and (4) failing to cross-examine the officer on key points. We address each argument in turn.

I. Defense counsel did not concede guilt.

Morson's primary ineffective-assistance claim centers on counsel's alleged admission of the knowledge element of the offense. He contends counsel improperly conceded guilt, without his consent, by admitting during closing argument that he knew the gun was in his car.

"[A] criminal defense attorney cannot admit his client's guilt to the jury without first obtaining the client's consent to this strategy." *State v. Wiplinger*, 343 N.W.2d 858, 860 (Minn. 1984); *but see State v. Huisman*, 944 N.W.2d 464, 468 (Minn. 2020) (clarifying that an unconsented-to concession on a single element is not necessarily concession of guilt because counsel may make "appropriate, tactical concessions"). Doing so is deemed ineffective assistance of counsel, and "prejudice is presumed." *State v. Luby*, 904 N.W.2d 453, 457 (Minn. 2017) (quotation omitted). We review de novo whether counsel conceded guilt and, if so, whether the defendant acquiesced in that concession. *Id.*

A concession of guilt may be express or implied. *Id.* In assessing whether counsel implied a concession of guilt, we consider the challenged statements in the context of the whole trial. *Dukes v. State*, 660 N.W.2d 804, 813 (Minn. 2003). A court should conclude that counsel's statements constituted an implied concession of guilt "only where 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 convict Morson, the state was required to prove that he constructively possessed the gun found in his vehicle by "knowingly exercising dominion and control over it." *See State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017).[1] Morson argues defense counsel conceded that Morson knew the gun was in his vehicle, and thereby conceded constructive possession, in the following segment of closing argument:

> And then, finally, the State has suggested that somehow that because Mr. Morson didn't use the word gun that he was trying to distance himself from the gun. That's natural. He knows there's a gun there, right, based on what the investigator is telling him. Does his knowledge of that gun make him in possession of it? It doesn't. Does knowledge of that iPad [on counsel table, referenced earlier in the argument] make you in possession of it? It doesn't.
>
> A gun is a difficult thing to talk about. It evokes a lot of emotions, but we're just talking about possession of a piece of property. Does the knowledge of a piece of property in the back of your car make it yours? If your friend leaves something in the back of your car, does that make it yours? It doesn't. You're not in possession of it. Possession means dominion and control. Dominion and control.

We discern no concession of guilt in this argument. As defense counsel explained, he was responding to the state's argument that Morson's refusal to "use the word" gun during his post-arrest interview indicated that he was trying to "distance himself" from a gun he knew was in his vehicle. Counsel posited two alternative arguments regarding Morson's knowledge of the gun, neither of which conceded that Morson possessed it.

[1] The district court also instructed the jury that it could find constructive possession if the gun was in a place under Morson's "exclusive control to which other people normally did not have access," *see Harris*, 895 N.W.2d at 601, but the prosecutor urged a theory of knowing dominion and control.

First, counsel argued that Morson's statements to the officer reflected his knowledge of the gun after and because of his arrest, not before. As counsel stated, Morson knew there was a gun in his vehicle "based on what the investigator is telling him." Morson contends the jury could not reasonably have understood this statement to refer to Morson's post-arrest knowledge of the gun because the interview was not admitted in evidence. We are not persuaded. While the jury was not privy to the interview itself, the officer testified that he told Morson he was under arrest "for a firearm." That testimony justified defense counsel's statement that Morson knew at the time of the interview that a gun was found in his vehicle because that is what the officer told him. And that statement, far from conceding guilt, clarified that Morson's post-arrest knowledge of the gun does not prove that he previously knew it was in his vehicle.

Second, counsel used rhetorical questions to present an alternative argument that even if Morson knew before his arrest that the gun—D.M.'s gun—was in his vehicle, that mere awareness of its presence does not mean that he knowingly exercised dominion and control over it. In doing so, counsel referenced an earlier portion of his argument, in which he compared the gun to the iPad he used during trial to illustrate the limits on constructive possession with respect to an item that belongs to another. Counsel asserted that his iPad would not be in the prosecutor's possession, for him to exercise dominion and control over it by doing things like using it or selling it, just because counsel placed it next to the prosecutor and the prosecutor knew it was there. This argument may have posed some risk—counsel acknowledged that the jury might be hesitant to apply the same logic with

respect to the gun because "[a] gun is a difficult thing to talk about"—but it did not concede that Morson possessed the gun.

Moreover, the determination whether counsel conceded guilt encompasses the trial record as a whole, *Dukes*, 660 N.W.2d at 813, and our comprehensive review confirms that counsel did not concede guilt. Throughout trial, counsel urged a consistent defense theory that the gun belonged to D.M., who placed the gun in the backpack without Morson's knowledge, and that the state had no evidence tying Morson directly to the gun. In particular, defense counsel noted that nobody ever saw Morson with a gun, the officer was not aware of Morson having any history with guns, and the police did not find Morson's DNA on the gun. And counsel emphasized the state's burden to prove "every single element" beyond a reasonable doubt, urging the jury to find the evidence of possession insufficient.

On this record, we cannot conclude that a reasonable person would believe counsel conceded Morson's guilt. Accordingly, this claim of ineffective assistance of counsel fails.

II. Defense counsel's failure to disclose D.M.'s statement did not prejudice Morson.

Morson next argues that defense counsel was ineffective in failing to disclose a statement D.M. gave to a defense investigator on June 14, before defense counsel joined the case, in which D.M. indicated that the gun was his. The district court agreed that counsel's failure to disclose the statement was objectively unreasonable. *See* Minn. R. Crim. P. 9.02, subd. 1(4)(a) (requiring defendant to disclose written or recorded statements of defense witnesses). But the court determined that the error did not prejudice Morson.

To demonstrate that counsel's errors resulted in prejudice, a defendant must show "that a reasonable probability exists that the outcome would have been different but for [the] errors." *Dereje*, 837 N.W.2d at 721 (quotation omitted). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* (quotation omitted). We consider the totality of the evidence in determining whether the result of the proceeding probably would have been different without the error. *Id.* at 721-22.

Morson argues that exclusion of the June 14 statement was prejudicial because it was crucial to bolstering D.M.'s claim that the gun was his. And he contends that "[u]nless the jury believed [D.M.]," he "had little chance of being found not guilty." We are not persuaded that the exclusion of D.M.'s statement had the effect Morson urges.

D.M. testified that he bought the gun in April 2017, and there is other evidence he possessed it shortly before Morson's arrest.[2] But the jury had compelling reasons to discredit his claim of ownership. D.M. did not provide any documentation for the purchase, and police records indicate the gun was stolen in 2016. Police discovered the gun in Morson's vehicle, in a backpack full of Morson's belongings. And D.M. acknowledged that even when he tried to recover possession of the gun, he never told police that it was his. In light of this evidence, D.M.'s unsworn statement to a member of the defense team several days after his friend's arrest likely would have done little to redeem or even bolster D.M.'s claim of ownership.

[2] The jury saw a video of D.M. with the gun, which he testified he took on June 1. Morson notes that the district court erroneously found the video was from June 9. The factual error is undisputed but does not bear on the evidence that undermines D.M.'s claim of ownership and does not affect our de novo review of counsel's performance.

Moreover, even if the jury believed that D.M. owned the gun, it could still have reasonably believed that Morson constructively possessed it on June 10. The excluded statement regarding ownership had little bearing on that issue. *See State v. Salyers*, 858 N.W.2d 156, 161 (Minn. 2015) ("[A] person may possess property even if another person owns that property."). And the evidence as a whole points to Morson's possession of the gun—the gun was in Morson's vehicle, in a backpack behind the driver's seat that contained many of Morson's other possessions.

In sum, the totality of the evidence convinces us that there is no reasonable probability that the outcome of the trial would have been different without counsel's discovery error. Absent the required showing of prejudice, Morson is not entitled to relief.

III. Defense counsel's decision not to object to the officer's hearsay testimony regarding the informant's tip was strategic and not constitutionally deficient.

In assessing the reasonableness of counsel's performance, we consider whether counsel exercised "the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Vang*, 847 N.W.2d at 266 (quotation omitted). But we presume that counsel's performance was reasonable. *Id.* We afford defense counsel "wide latitude to determine the best strategy for the client," *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013), and will not second-guess counsel's strategic decisions, *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007).

Morson argues that defense counsel was ineffective by failing to object to the officer's testimony that he received a tip that a person matching Morson's description "had possession of a firearm" inside his vehicle. He cites *State v. Litzau*, 650 N.W.2d 177, 182

(Minn. 2002), for the proposition that the state may present evidence that police acted based on a tip but may not present any evidence as to the tip's content, which is hearsay. This argument is unavailing for two reasons.

First, Morson does not challenge counsel's competence, but his trial strategy. The decision whether to object to hearsay testimony is a matter of trial strategy. *Leake*, 737 N.W.2d at 542. While trial strategy is not "an impregnable barrier to ineffective-assistance claims," defense counsel's choices "made *after* conducting a thorough investigation of the law and the facts are virtually unchallengeable." *Nicks*, 831 N.W.2d at 507, 508 (quotation omitted).

Second, defense counsel's decision not to object to the officer's testimony was not objectively unreasonable. Admittedly, the officer's testimony went beyond merely explaining that he stopped Morson based on a tip to indicate the substance of the tip, that Morson had a firearm in his vehicle. But unlike in *Litzau*, the officer's testimony did not encourage the jury to rely on the informant's statement—he did not assert that the informant was reliable and only briefly described the substance of the tip. *Cf. Litzau*, 650 N.W.2d at 183 (noting that officer described informant as "reliable source" and his testimony about the tip "pointed directly to [the defendant's] guilt"). The focus of his testimony was his personal knowledge; he found the gun in Morson's vehicle in a backpack with Morson's belongings. On this record, Morson has not demonstrated that counsel was constitutionally deficient by not objecting to the officer's testimony about the informant's tip.

IV. Defense counsel's cross-examination of the officer was strategic and not constitutionally deficient.

Finally, Morson contends defense counsel was ineffective because he failed to cross-examine the officer on "key points." He points to the officer's testimony about the post-arrest interview. When asked whether Morson "ma[d]e any reference to anything that [he] found in the car," the officer stated: "The defendant just kept telling me that he was going to have somebody call me, and he didn't specify as to who that was." The officer explained that he "felt it was regarding someone taking ownership or claiming the firearm is theirs." Morson contends this testimony misled the jury by inviting an inference that he "believed that if he said a gun was in the vehicle, he would be admitting he knew he had committed a crime." He argues that what he "actually said" during the interview "would have left the jury with a much different impression" and counsel unreasonably failed to elicit that information on cross-examination. This argument is unavailing.

Morson again invites us to second-guess defense counsel's trial strategy, contrary to binding Minnesota caselaw. *Nicks*, 831 N.W.2d at 506; *see State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) ("The court of appeals is bound by supreme court precedent."). That forbearance extends to decisions regarding whether and how to cross-examine a witness. *Francis v. State*, 781 N.W.2d 892, 898 (Minn. 2010); *cf. United States v. Orr*, 636 F.3d 944, 952 (8th Cir. 2011) (reviewing cross-examination only when it appears counsel utterly failed to "subject the prosecution's case to . . . meaningful adversarial testing," such as by failing to cross-examine a witness who made "grossly inconsistent prior statements" (quotations omitted)).

Moreover, our review of the interview transcript, which Morson offered as a postconviction exhibit, reveals no support for Morson's claim that the officer misled the jury. During the interview, Morson obliquely referenced the gun numerous times—variations on "whose sh-t it is was supposed to called you"—but never actually said the word "gun" or otherwise expressly acknowledged that there was a gun in his vehicle. Indeed, Morson does not dispute that the officer accurately related his statements during the interview. He merely asserts that defense counsel should have provided context for his statements by eliciting the officer's testimony that he also said: "I heard what you found in my car. . . . And I know what's going on here." But these statements likewise involve Morson attempting to discuss the gun while simultaneously distancing himself from it by refusing to expressly acknowledge it. On this record, Morson has not demonstrated that defense counsel was ineffective in cross-examining the officer.

Affirmed.