STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0984

State of Minnesota,
Respondent,

vs.

Jessee Lee Kuhns,
Appellant.

Filed June 16, 2025
Affirmed in part, reversed in part, and remanded
Larson, Judge

Stearns County District Court
File No. 73-CR-22-3443

Keith Ellison, Attorney General, Lisa Lodin, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Joseph McInnis, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larson, Presiding Judge; Cochran, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

LARSON, Judge

In this direct appeal, appellant Jessee Lee Kuhns challenges his conviction for third-degree criminal sexual conduct, arguing that his attorney conceded his guilt and therefore provided ineffective assistance of counsel. Alternatively, Kuhns challenges his sentence,

arguing that the district court incorrectly included two South Dakota convictions when it calculated his criminal-history score. Because we conclude that defense counsel did not concede Kuhns's guilt, we affirm in part. But we reverse and remand for resentencing to allow the state to develop a record to facilitate the district court's assessment of whether to include the two South Dakota convictions in Kuhns's criminal-history score.

FACTS

In April 2022, the Stearns County Sheriff's Office received a report that Kuhns sexually assaulted a minor in his home. The minor allegedly worked for Kuhns's towing company. The state charged Kuhns with third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1a(e) (Supp. 2021). Under that statute, a defendant is guilty of third-degree criminal sexual conduct if: (1) the defendant "engages in sexual penetration with anyone under 18 years of age"; (2) the other person is "at least 16 but less than 18 . . . and the [defendant] is more than 36 months older"; and (3) the defendant is "*in a current or recent position of authority* over [the other person]." Minn. Stat. § 609.344, subd. 1a(e) (emphasis added). The case proceeded to jury trial in October 2023.

During his opening statement, defense counsel commented on the nature of Kuhns's relationship with the minor. Defense counsel stated that Kuhns, his wife, and the minor's mother all thought that if Kuhns needed "a hand with [his] towing business[,] . . . [he] could pay [the minor] a little bit of money." "This [was] an easy arrangement," defense counsel stated, "like hiring the neighborhood kid to shovel your driveway" or "to mow your lawn." Defense counsel said: "I think what the evidence will show is that [the minor] maybe worked somewhere from 10 to 20 hours in total assisting . . . Kuhns with various activities

around the towing business," but "had no set schedule, had no real reporting obligations, [and] decided at will when he wanted to help."

Defense counsel also made a series of comments about the elements of the offense. On the first element, defense counsel stated that Kuhns and the minor had consensual sex.[1] On the second element, defense counsel conceded that the minor was 16 years old. But, on the third element (position-of-authority element) defense counsel told the jury that it would "have to figure out what a 'position of authority' is." Parents, teachers, and law enforcement are "obvious positions of authority," defense counsel stated, because they have "significant control over the situation." By comparison, defense counsel asserted, Kuhns had no responsibility "to take care of [the minor]" and simply "helped him out as a friend."

After defense counsel's opening statement, and out of the presence of the jury, the district court noted on the record that "there was a concession of elements" requiring Kuhns's consent. The district court stated that, while the state still had the burden to prove guilt beyond a reasonable doubt, defense counsel "made some statements that could allow a jury to conclude A) that [Kuhns] had a sexual encounter with an individual; and B) that [the] individual was [over] the age of 16." Kuhns stated that he was comfortable proceeding. Defense counsel explained that he and Kuhns had discussed "the theories of this case," and Kuhns confirmed that the opening statement aligned with their

[1] Under Minn. Stat. § 609.344, subd. 1a(e), "[n]either mistake as to the [minor's] age nor consent to the act by the [minor] is a defense."

conversations. During the exchange, neither the district court, defense counsel, nor Kuhns mentioned the position-of-authority element.

The state then called multiple witnesses, including the minor and an investigative lieutenant. Defense counsel asked both witnesses questions about the relationship between Kuhns and the minor. First, defense counsel asked the minor for details about his employment with Kuhns, including the length of his employment, how much money he made, his work schedule, and the specific tasks he performed.[2] Second, when questioning the lieutenant in reference to a recorded phone conversation between Kuhns and the minor, defense counsel asked: "At any point does [the minor] say, [Kuhns], you made me do this because I thought you were my boss." The lieutenant replied: "From my recollection of that phone call, he does not."

After the state rested its case, Kuhns testified in his own defense. Consistent with the questioning of prior witnesses, defense counsel asked Kuhns questions about his relationship with the minor. First, defense counsel asked: "Did [the minor] make . . . a significant amount of money helping you with [the towing company]?" Kuhns replied: "No." Second, defense counsel asked: "When [the minor] was assisting you . . . would you order him around as though he was some sort of subordinate to you?" Kuhns again replied: "No." Third, defense counsel asked: "Was there ever . . . a formal schedule posted . . . on the wall or anything?" Kuhns denied that he did so. Finally, defense counsel asked Kuhns why he told law enforcement that the minor was "just an employee" and that

[2] Prior to cross-examination, the state asked the minor its own questions about his employment with Kuhns.

the allegations were simply about the towing company. Kuhns replied: "I used the employee bit to try to clear my name. I thought that if I put it off as a disgruntled employee, that it would just go away, not realizing that at the point in time, I was just making things worse."

Kuhns then rested his case, and the trial proceeded to closing arguments. Defense counsel again focused largely on the position-of-authority element. For instance, defense counsel stated:

> What evidence did the State present that . . . Kuhns was charged with the health, welfare, or supervision of [the minor]?
>
> And I don't have any – I'm not aware of any testimony or exhibits that would have imposed such a formal responsibility upon . . . Kuhns. That's my recollection of the evidence is that there's nothing there that specifically says, Look, . . . Kuhns, you're going to take on [the minor], and you're responsible . . . regarding his health, welfare, or supervision.
> . . . .
>
> . . . [W]hen I look at the testimony that I've heard, it seems like he comes and goes as he pleases. So could we really say . . . Kuhns is responsible for supervising [the minor] if he has no control on when he comes there, no control on what he does after he leaves there. No control on when he leaves. Does not provide the transportation to or from, and I think the answer naturally is no. I don't think he's really supervising him.

After deliberation, the jury found Kuhns guilty, and the district court convicted him of the offense.

Prior to the sentencing hearing, Stearns County Community Corrections prepared a presentence investigation report (PSI). According to the PSI, Kuhns had four prior felony convictions in South Dakota, including two sex-offender-registration offenses that he

committed in 2013 and 2014. Using the two sex-offender-registration offenses, the PSI calculated Kuhns's criminal-history score at four.

At the sentencing hearing, regarding the South Dakota convictions, the district court stated:

> There is some research and further evaluation that needs to be done to check to confirm that . . . Kuhns'[s] criminal history score is in fact a four. . . . And I understand the parties are agreeable to still proceeding with sentencing today. In the event his score should be a three, . . . Kuhns' sentence would need to be amended and we can do that in the future.

Defense counsel confirmed that he received the PSI and did not "have any additions or corrections." The state submitted, and the district court received, South Dakota trial-court records with information on Kuhns's prior offenses. Among the records are two documents titled "Judgement of Conviction and Sentence" for the two sex-offender-registration offenses. Both documents state that Kuhns was found guilty of providing false information on his sex-offender registration. For both offenses, the South Dakota district court sentenced Kuhns to two years in prison but suspended the sentence subject to certain terms and conditions.

At the conclusion of the sentencing hearing, the district court calculated Kuhn's criminal-history score at four and sentenced Kuhns to a 109-month prison term and a lifetime conditional-release period.

Kuhns appeals.

DECISION

On appeal, Kuhns argues that defense counsel provided ineffective assistance of counsel when he conceded Kuhns's guilt. In the alternative, Kuhns argues that he is entitled to resentencing because the district court incorrectly calculated his criminal-history score. We address each argument in turn.

I.

Kuhns argues that defense counsel provided ineffective assistance of counsel because he conceded Kuhns's guilt. 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) (citing *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 [their] 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 . . . 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.* Defense counsel may concede guilt either expressly or implicitly. *Id.* Defense counsel makes an express concession when it plainly admits—or clearly states it does not dispute—that the defendant committed one or more elements of the offense. *See id.* at 457-58; *State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992). Defense counsel makes "an implied concession only where a reasonable person viewing the totality of the circumstances would conclude that counsel conceded . . . guilt." *Torres v. State*, 688 N.W.2d 569, 573 (Minn. 2004). Whether a statement is an implied concession depends heavily on the specific context of the statement. *See State v. Vick*, 632 N.W.2d 676, 688 (Minn. 2001). If we determine that defense counsel conceded the defendant's guilt, we move to the second step of the analysis and evaluate whether the defendant consented or acquiesced to the concession. *Luby*, 904 N.W.2d at 459. If the defendant did not do so, the defendant is entitled to a new trial. *Id.* at 457.

As set forth above, under Minn. Stat. § 609.344, subd. 1a(e), the state needed to prove three elements: (1) that Kuhns engaged in sexual penetration with the minor; (2) the minor was "at least 16 but less than 18 . . . and [Kuhns was] more than 36 months older"; and (3) Kuhns was "*in a current or recent position of authority* over" the minor. (Emphasis added.) Here, Kuhns admits that he acquiesced to his defense counsel conceding the first

two elements. Thus, the only question is whether defense counsel conceded the position-of-authority element.

For the purposes of Minn. Stat. § 609.344, subd. 1a(e), a "[c]urrent or recent position of authority"

> includes but is not limited to any person who is a parent or acting in the place of a parent and charged with or assumes any of a parent's rights, duties or responsibilities to a child, or a person who is charged with or assumes any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief, at the time of or within 120 days immediately preceding the act.

Minn. Stat. § 609.341, subd. 10 (2020).

Kuhns argues that defense counsel conceded his guilt because he mistakenly applied a prior definition of the phrase "position of authority." Before 2019, a "position of authority" required a defendant to have certain duties or responsibilities over a minor at the time of the act. *See* Minn. Stat. §§ 609.341, subd. 10, .344, subd. 1(e) (2018). But in 2019, the legislature amended the statute to contain the language applicable here, which encompasses duties or responsibilities over a minor both "at the time" of the act and "within 120 days immediately preceding the act." 2019 Minn. Laws 1st Spec. Sess. ch. 5, art. 4, §§ 2, at 984; 7, at 987-88.

We disagree with Kuhns that defense counsel misapprehended the law governing the case. The record demonstrates that defense counsel contested the position-of-authority element by arguing Kuhns *never* held a position of authority over the minor. As such,

defense counsel did not narrow the scope of the defense to the position Kuhns held over the minor at the time the act occurred. Thus, Kuhns's argument is unavailing.

Kuhns next argues that, even if defense counsel did understand the applicable law, defense counsel implicitly conceded that Kuhns was in a position of authority over the minor when defense counsel admitted Kuhns employed the minor. No precedential Minnesota case has concluded that the position-of-authority definition includes *all* employment relationships. But in *State v. Fero*, we determined that a reasonable factfinder could "conclude that an employer is charged with the duty or responsibility for the health, welfare, or supervision of a child in his or her employ." *See* 747 N.W.2d 596, 598-99 (Minn. App. 2008) (collecting cases to support proposition), *rev. denied* (Minn. July 15, 2008).

After reviewing the totality of the circumstances, and from the perspective of a reasonable person, we conclude that defense counsel did not implicitly concede the position-of-authority element. During both opening and closing statements, while acknowledging that Kuhns employed the minor, defense counsel specifically argued the relationship did not satisfy the position-of-authority element because Kuhns: (1) lacked control over the situation and (2) was not acting in a similar capacity to a parent, teacher, or law-enforcement officer. While examining witnesses, defense counsel consistently sought to undermine the state's case on the position-of-authority element. When cross-examining the minor, defense counsel targeted his questions at the sporadic nature of the minor's employment relationship. When cross-examining the lieutenant, defense counsel did reference an employment relationship between Kuhns and the minor, asking: "At any

point does [the minor] say, [Kuhns], you made me do this because I thought you were my boss?" This question fit into the broader strategy to contest the position-of-authority element; after all, the question drew a negative response from the lieutenant when he replied: "From my recollection of that phone call, he does not." And on direct examination with Kuhns, defense counsel asked questions that allowed Kuhns to deny he was an authority figure over the minor, including that he paid the minor little money, did not give him a set schedule, and did not order him around. Moreover, defense counsel's questioning allowed Kuhns to walk back an earlier statement to police that the minor was an employee, with Kuhns saying he "used the employee bit to try to clear [his] name."

For these reasons, we conclude that defense counsel did not concede the position-of-authority element, and in turn, did not concede Kuhns's guilt.[3] Accordingly, defense counsel did not provide ineffective assistance of counsel.

II.

Kuhns next argues in the alternative that the district court abused its discretion when it used the two sex-offender-registration offenses from South Dakota to calculate his criminal-history score. Under the Minnesota Sentencing Guidelines, a district court may include prior non-Minnesota convictions in a defendant's criminal-history score for sentencing. *See* Minn. Sent'g Guidelines 2.B.5 (Supp. 2021). The guidelines provide:

> An offense may be counted as a felony only if it would both be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence, which includes the equivalent of a stay of imposition.

[3] Because we conclude that defense counsel did not concede guilt, we do not address whether Kuhns acquiesced to a concession. *See Luby*, 904 N.W.2d at 457.

> The offense definitions in effect when the current Minnesota offense was committed govern the designation of non-Minnesota convictions as felonies, gross misdemeanors, or misdemeanors.

Minn. Sent'g Guidelines 2.B.5.b (emphasis omitted).

"The State bears the burden of proof at sentencing to show that a prior conviction qualifies for inclusion within the criminal-history score." *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). To do so, the state must demonstrate by a preponderance of the evidence that "the crime would constitute a felony in Minnesota." *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). To meet its burden, the state may need to both demonstrate the commonalities between the Minnesota and non-Minnesota statutes, *see State v. Pruitt*, 16 N.W.3d 856, 860-62 (Minn. App. 2025), and provide factual information on the precise conduct that led to the defendant's conviction, *see State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *rev. denied* (Minn. July 15, 2008). "The [district] court must make the final determination as to whether and how a prior non-Minnesota conviction should be counted in the criminal history score." Minn. Sent'g Guidelines 2.B.5.a.

We generally review "a district court's determination of a defendant's criminal-history score" for an abuse of discretion. *Pruitt*, 16 N.W.3d at 860. However, when a defendant failed to challenge the inclusion of certain offenses in their criminal-history score in district court, or if the district court never engaged in the analysis that the guidelines prescribe, we reverse and remand for resentencing. *See State v. Reece*, 625 N.W.2d 822, 825-26 (Minn. 2001); *Outlaw*, 748 N.W.2d at 356. This gives the state the

opportunity "to further develop the sentencing record so that the district court can appropriately make its determination." *Outlaw*, 748 N.W.2d at 356.

Here, Kuhns has two convictions for violating S.D. Codified Laws § 22-24B-8(3), (13) (2013). The analogous Minnesota statute is Minn. Stat. § 243.166 (2020 & Supp. 2021). Under S.D. Codified Laws § 22-24B-8 (2013), offender

> registration shall include the following information which unless otherwise indicated, shall be provided by the offender:
> . . .
> (3) Residence, length of time at that residence including the date the residence was established, and length of time expected to remain at that residence; . . .
> (13) Information identifying any internet accounts of the offender as well as any user names, screen names, and aliases that the offender uses on the internet;
> . . . .
>
> Any failure by the offender to accurately provide the information required by this section is a Class 6 felony.

By comparison, Minn. Stat. § 243.166, subd. 4a (2020), provides:

> (a) A person required to register under this section shall provide to the corrections agent or law enforcement the following information:
> (1) the person's primary address; . . .
> (8) all telephone numbers including work, school, and home and any cellular telephone service.
>
> (b) . . . If because of a change in circumstances any information reported . . . no longer applies, the person shall immediately inform the agent or authority that the information is no longer valid.

Furthermore, under Minn. Stat. § 243.166, subd. 5(a) (2020):

> (a) A person required to register under this section who was given notice, knows, or reasonably should know of the duty to register and who:

> (1) knowingly commits an act or fails to fulfill a requirement that violates any provision of this section; or
> (2) intentionally provides false information to a corrections agent, law enforcement authority, or the bureau is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

As Kuhns observes, important differences exist between the South Dakota and Minnesota statutes. *See* Minn. Sent'g Guidelines 2.B.5.b. First, although both Minnesota and South Dakota require offenders to report their "primary address" or "residence," only South Dakota requires offenders to disclose the date the residence was established and how long they expect to be at a residence. *See* Minn. Stat. § 243.166, subd. 4a(1); S.D. Codified Laws § 22-24B-8(3). Second, unlike South Dakota, Minnesota does not require offenders to disclose internet accounts. *See* Minn. Stat. § 243.166, subd. 4a(8); S.D. Codified Laws § 22-24B-8(13). Finally, Minnesota includes "knowing" or "intentional" requirements to prove a felony violation, which may not be the case in South Dakota. *See* Minn. Stat. § 243.166, subd. 5; S.D. Codified Laws § 22-24B-8.[4] In short, while the statutes share commonalities, there are also differences in the punishable conduct. Therefore, the district court must evaluate the precise conduct underlying Kuhns's South Dakota sex-offender-

[4] The state relies on *Hill v. State*, 483 N.W.2d 57 (Minn. 1992), to argue that because the sex-offender-registration statutes in Minnesota and South Dakota prohibit the same crime of failing to make proper disclosures, they share the same general "nature" and are sufficiently similar to each other for the South Dakota offenses to constitute felonies in Minnesota. However, in *Pruitt*, we cautioned against overreliance on *Hill*, emphasizing that the case applied the 1987 sentencing guidelines, and noting that the guidelines had changed substantially since that time, including omission of the language directing sentencing courts to "consider the nature . . . of the foreign offense." *Pruitt*, 16 N.W.3d at 862-63 (quotation omitted).

registration convictions to determine whether that conduct would constitute a felony offense in Minnesota. *See Outlaw*, 748 N.W.2d at 356.

Here, at the sentencing hearing, the state did not submit any indictments, police reports, transcripts, or other information into the record to ascertain what conduct led to Kuhns's convictions. And the district court recognized that "[t]here is some research and further evaluation that needs to be done to check to confirm that . . . Kuhns' criminal history score is in fact a four." The district court readily acknowledged that if Kuhns's criminal-history score should be lower, then his "sentence would need to be amended." We, therefore, conclude that the record lacks sufficient information to determine whether the two sex-offender-registration convictions in South Dakota were properly included in Kuhns's criminal-history score. But because Kuhns did not object to their inclusion during the sentencing hearing, we reverse and remand for resentencing to allow the state "to further develop the sentencing record so that the district court can appropriately make its determination." *Id.*

Affirmed in part, reversed in part, and remanded.