

*This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A15-1326**

State of Minnesota,  
Respondent,

vs.

Dale David Lott,  
Appellant.

**Filed March 26, 2018  
Affirmed  
Jesson, Judge**

Stearns County District Court  
File No. 73-CR-14-4326

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Jesson, Judge; and Bratvold, Judge.

**UNPUBLISHED OPINION**

**JESSON**, Judge

On May 25, 2014, appellant Dale Lott and his girlfriend spent much of the afternoon on a car ride during which he repeatedly punched her in the face, threatened her life, and

refused to let her out of the car. Lott now contends that his 40-year prison sentence for kidnapping unfairly exaggerates the criminality of his conduct that afternoon. He also argues, on appeal from a denial of postconviction relief, that his trial counsel misadvised him, leading him to reject a more favorable plea offer of 180 months, and failed to seek severance of a fifth-degree assault charge against the girlfriend's mother. This, Lott contends, amounts to ineffective counsel in violation of the Sixth Amendment. In his pro se supplemental brief, Lott raises three additional issues. We affirm.

### **FACTS**

Lott and C.S. began dating in August of 2013 and moved in together shortly thereafter. The relationship was fraught with conflict, particularly over Lott's ongoing relationship with a second girlfriend. During a fight on May 25, 2014, C.S. threatened to end the relationship because of Lott's second girlfriend. The couple had been drinking and ended up traveling in a 1993 Chevrolet Corsica. At first C.S. drove, but after Lott began hitting her in the face, Lott left the car (with C.S. in it) near the Mississippi River in St. Cloud, Minnesota. When he returned, he resumed hitting C.S. and moved to the driver's seat. C.S. begged him to drive her home. But Lott, who was in possession of her cell phone, drove them in the opposite direction of their home.<sup>1</sup>

As Lott drove, the two began to argue again and Lott punched C.S. in the face multiple times. Her nose began to bleed and he told her to clean it up. Lott then told her

---

<sup>1</sup> When C.S. asked where they were headed, Lott did not answer her question and instead offered her the options of calling her mother or getting dropped off at her mother's house. C.S. said she did not want to get her mother involved, and Lott told her that she had made her choice.

that he was going to drop her off in the middle of nowhere to walk home. Later during the drive he threatened to smash the car into an electrical pole and a road sign. C.S. was scared and thought Lott was going to kill her.

Despite the ongoing violence during the car ride, Lott told C.S. that he loved her and wanted to work things out. C.S. responded that she never wanted to be with him again, which angered Lott. He then punched C.S. in the mouth, knocking out three of her front teeth. C.S. spit them out into her hand and stuffed her shirt in her mouth to stop the bleeding. Lott got upset when he saw what he had done, slammed his hands on the car, and told her that it was not supposed to happen that way.

Lott asked C.S. what they should do. She told him that she was in pain and wanted to go to the hospital. But Lott did not take her to the hospital. Instead, he took her back to their house and told her he loved her, wanted to work things out, and was sorry.

After they returned home, C.S. used her other roommate's cell phone to call her mother, B.M. C.S. told her mother what had happened and said that she needed to go to the hospital. Lott overheard their conversation and left the house. He then called C.S. and told her that he should have killed her, but that he still loved her.

Shortly after the call, C.S.'s mother B.M. drove her to the hospital. But on the way, B.M. noticed Lott's vehicle in a nearby grocery store parking lot. She stopped and got out of her car, yelled at Lott, and punched him in the arm. Lott leaned back and punched her in the eye, which eventually blackened.

After they arrived at the hospital, C.S. was treated for a concussion, a broken jaw and clavicle, and the loss of three upper incisors and roots.<sup>2</sup> While at the hospital, C.S. met with a police officer and reported that her boyfriend assaulted her while they were driving near St. Augusta two or three hours earlier.

The police arrested Lott the next day. The state charged Lott with first-degree assault, in violation of Minnesota Statutes section 609.221, subdivision 1 (2012), and kidnapping, in violation of Minnesota Statutes section 609.25, subdivision 1(3) (2012), for assaulting and kidnapping C.S. The state also charged Lott with fifth-degree assault, in violation of Minnesota Statutes section 609.224, subdivision 1(2) (2012), for assaulting B.M. Prior to trial, the state amended the complaint to include third-degree assault, in violation of Minnesota Statutes section 609.223, subdivision 1 (2012).

Before trial, the state offered Lott two plea deals. The first was for 180 months' imprisonment and the second was for a number of months within the guidelines for first-degree assault, between 138 and 192 months' imprisonment. Lott rejected both plea offers. The state advised Lott that, in the absence of a plea deal, it would seek the statutory maximum for any conviction. It also advised him that it would seek to sentence him as a dangerous offender, which carries a sentence of 240 months for first-degree assault and 480 months for kidnapping. When asked if he wanted to proceed to trial and if he

---

<sup>2</sup> C.S.'s teeth were beyond repair. She had them replaced with implants. During the surgery, the oral surgeon put two screws in her mouth. She also had a broken alveolar process, which is the bone that forms the border of the upper and lower jaws and contains the socket of the teeth. The bone eventually healed on its own.

understood the potential prison exposure, Lott replied “yes” and rejected the plea offers on the record.

Lott’s jury trial began on February 17, 2015, but ended in a mistrial.<sup>3</sup> A second jury trial began on March 16, 2015, and the jury found him guilty of all charges. The state then filed a motion seeking to sentence Lott as a dangerous offender pursuant to Minnesota Statutes section 609.1095, subdivision 2 (2012), which permits aggravated sentences that exceed the presumptive sentences under the Sentencing Guidelines. Lott waived his right to have a jury decide whether he met the statutory factors to be sentenced as a dangerous offender. On March 20, 2015, after a bifurcated trial, the district court entered a dangerous-offender verdict, finding that Lott is a danger to public safety and should be sentenced to an upward durational departure up to the statutory maximum sentence. The district court then sentenced Lott to 480 months’ imprisonment for the kidnapping conviction and 240 months’ imprisonment for the first-degree assault, to be served concurrently.<sup>4</sup>

Lott appeals. He claimed, in his postconviction petition, that he received ineffective counsel based upon erroneous legal advice which led him to reject a more favorable plea offer as well as counsel’s failure to seek to sever the fifth-degree assault charge. After holding an evidentiary hearing, the postconviction court denied his postconviction petition with respect to the erroneous legal advice. The court concluded that Lott had not met his

---

<sup>3</sup> During C.S.’s direct examination, she stated that after Lott punched her teeth out, he said he deserved to go back to prison. Lott moved for a mistrial, which the district court granted.

<sup>4</sup> Although the jury found Lott guilty of fifth-degree assault against B.M., the district court only sentenced Lott on the first-degree assault charge and kidnapping charge because the third-degree assault against B.M. was part of the same behavioral incident as the other charges.

burden of showing that his counsel made misleading statements that tended to affect his decision to reject the plea. And even if the advice was deficient, the postconviction court found no prejudice because Lott failed to demonstrate he was reasonably likely to have pleaded guilty, but for his attorney's advice. Nor did the postconviction court find Lott's counsel's decision not to seek severance of a charge deficient. Any such motion, the court stated, would have been denied. Lott appeals and additionally claims that his 480-month sentence exaggerated the criminality of his conduct, as well as making several pro se arguments.

## D E C I S I O N

### **I. Lott's counsel was not unconstitutionally ineffective.**

“[W]hen we review a postconviction court's denial of relief on a claim of ineffective assistance of counsel, we will consider the court's factual findings that are supported in the record, conduct a de novo review of the legal implication of those facts on the ineffective assistance claim, and either affirm the court's decision or conclude that the court abused its discretion because postconviction relief is warranted.” *State v. Nicks*, 831 N.W.2d 493, 503-04 (Minn. 2013).

Lott argues that the postconviction court erred when it denied his postconviction petition because his trial counsel was unconstitutionally ineffective for two reasons: (1) his trial counsel provided deficient advice that led him to reject a plea offer made by the state; and (2) his trial counsel provided deficient representation when he failed to sever the fifth-degree assault charge from the remaining charges. We address each argument below.

*Advice leading to the rejection of plea offers*

The Sixth Amendment right to effective assistance of counsel is implicated in the decision to accept or reject a plea bargain when an attorney's advice falls below objectively reasonable standards. *Leake v. State*, 737 N.W.2d 531, 540 (Minn. 2007). Lott contends that his trial counsel misled him into believing that, if convicted, the worst-case scenario was a 240-month sentence, not the 480-month sentence he received.

The district court, in response to his postconviction petition, held an evidentiary hearing. Lott testified that his trial counsel told him that he did not need to worry about the kidnapping charge "and that he could get it dismissed at trial because it was incidental to the assault charge" under *State v. Smith* and *State v. Welch*.<sup>5</sup> Based on these purported representations, Lott asserted he believed the maximum prison time was 240 months and decided to take his chances rather than accept the state's 186-month offer.

Lott's trial attorney, Dale Hansen, testified as well. Hansen recalled that while he initially believed he could get the kidnapping charge dismissed as incidental to the assault with a pretrial motion, he later determined that this was precluded by factual questions. He denied ever assuring Lott that the kidnapping charge would be dismissed. Nor did he tell Lott the maximum he could receive was 240 months.

---

<sup>5</sup> In both of these cases, the kidnapping charges were overturned and the court held that "where the confinement or removal of the victim is completely incidental to the perpetration of a separate felony, it does not constitute kidnapping." *State v. Smith*, 669 N.W.2d 19, 32 (Minn. 2003); *see State v. Welch*, 675 N.W.2d 615, 620-21 (Minn. 2004). In *Welch*, the confinement of the victim was "completely incidental to attempted second-degree criminal sexual conduct[.]" 675 N.W.2d at 616, and in *Smith*, the momentary confinement of the victim "was completely incidental to the perpetration of murder." 669 N.W.2d at 22.

The postconviction court found the testimony of Mr. Hansen to be more credible than Lott's and determined that Lott had not shown that Hansen's advice fell below an objective standard of reasonableness. We generally defer to the postconviction court's credibility determinations because it is in the best position to evaluate witness credibility. *Bobo v. State*, 860 N.W.2d 681, 684 (Minn. 2015). But we need not reach the issue of whether Lott's trial counsel's advice was deficient because, even assuming it was objectively unreasonable, there is a dearth of evidence to show that Lott would have accepted either of the state's plea bargains absent trial counsel's alleged deficient advice. *See Leake*, 737 N.W.2d at 533.

During the postconviction hearing, Lott testified that, due to his prior convictions, he knew that he was subject to the dangerous-offender statute and that he decided to "roll the dice" at trial. And Lott's trial counsel further testified that Lott "was adamant that he was not guilty and he wanted to go to trial." The postconviction court correctly noted as well that, immediately before Lott entered a plea of not guilty, the state clearly stated on the record the plea offer and his potential exposure (480 months) if convicted of all charges. Nonetheless, Lott pleaded not guilty. And during the postconviction hearing, Lott reiterated that he was unwilling to plead guilty to either first-degree assault or kidnapping.

Lott's insistence of his innocence at the sentencing phase further buttresses the district court's assessment that Lott would not have accepted a plea. At sentencing, Lott continued to claim that C.S. had lied throughout the proceeding. She had gotten him drunk that afternoon, he claimed repeatedly, so that he would assault her. And after the district court sentenced him, Lott called the victim a "f-ck'in lying b-tch."

But Lott argues that his statements in the presentence investigation report demonstrate that he admitted to all of the elements of the charged offenses and took responsibility for his actions, which undercut his claims of innocence. As a result, he claims there is a reasonable likelihood that he would have pleaded guilty if he had received effective counsel.

The presentence investigation report, as a whole, demonstrates otherwise. A Stearns County corrections agent met with Lott and then wrote the presentence investigation report, which states that Lott contended that the victim wanted him to become intoxicated and assault her so that she could receive Medicare, rent, a car, and schooling through a local women's shelter.<sup>6</sup> It also documents Lott's assertion that the victim believed that Lott could "be her sacrifice[,] go to prison, and assault and murder the victim's step-father who was in prison at the time. The agent further wrote:

The defendant appeared to have no remorse when I interviewed him for this investigation. He wanted to blame the victim and the prosecutor for whom he states he is going to sue due to "harassment of his family." He stated that he believed that he was being excessively charged with a "domestic assault that went bad."

Lott did admit to factual allegations in the presentence investigation report. But selected factual admissions in the presentence investigation report are not sufficient to counterbalance Lott's continued assertions of innocence throughout trial and sentencing.

---

<sup>6</sup> Lott also referred to the victim as "obsessive and overbearing" in his written statement attached to the presentence investigation report.

And these assertions fly in the face of Lott's argument that, with proper advice, he would have accepted the state's earlier plea offer.

In sum, Lott has not shown there is a reasonable probability that he would have accepted either of the state's plea offers absent his counsel's alleged ineffective assistance. *See Andersen*, 830 N.W.2d at 10 (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064). For this reason, the district court did not err in denying Lott's petition for postconviction relief.

***Lack of motion to sever the fifth-degree assault charge***

Lott argues that his trial counsel's failure to sever the fifth-degree assault charge from the remaining offenses was deficient because it was a separate behavioral incident from the other charged offenses. He also argues that the outcome of his jury trial would have been different because the testimony given regarding the fifth-degree assault charge prejudiced the jury. We disagree.

The postconviction court concluded that Lott's trial counsel was not unconstitutionally ineffective in failing to sever the fifth-degree assault charge from the remaining charges because the assault and kidnapping of C.S. were related in time and place to the assault of B.M. and were separated by as little as twenty minutes and several hundred feet. Had Lott's trial counsel move to sever the fifth-degree assault charge, the postconviction court stated, the motion would have failed. Thus, Lott's trial counsel was not deficient when he failed to make it.

During the postconviction hearing, Lott's trial counsel testified that he did not move to sever the fifth-degree assault because evidence of the assault of the secondary victim,

B.M., may have come in anyway as pattern-of-conduct evidence, immediate-episode evidence, *res gestae*, motive, immediate-conduct evidence, or evidence of same course of behavior.<sup>7</sup> This was a strategic judgment decision made by Lott’s trial counsel. We allow counsel the flexibility to represent a client to the fullest extent possible and we do not review attacks on counsel’s trial strategy. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). Because Lott fails to establish that his trial counsel was deficient in failing to sever the fifth-degree assault charge from his other charges, we need not determine whether the result of his jury trial would have been different had counsel moved to sever the fifth-degree-assault charge. *See Andersen*, 830 N.W.2d at 10.

## **II. Lott’s 480-month sentence does not exaggerate the criminality of his conduct.**

Lott argues that the district court erred when it imposed the statutory maximum sentence of 480 months. He does not dispute that he is a dangerous offender or that the district court is authorized to sentence him pursuant to the dangerous-offender statute.<sup>8</sup> Rather, he argues that the imposition of the statutory maximum sentence exaggerates the criminality of his conduct. We disagree.

---

<sup>7</sup> Lott argues that evidence of the fifth-degree assault against B.M. would have been inadmissible as *Spreigl* evidence during his trial for assaulting and kidnapping C.S.

<sup>8</sup> “The dangerous-offender statute is a sentencing statute that permits durational departures not otherwise authorized by the sentencing guidelines.” *Neal v. State*, 658 N.W.2d 536, 545 (Minn. 2003). A person is a dangerous offender if: (1) the offender was at least 18 years old at the time the felony was committed; (2) the offender has two or more prior convictions for violent crimes; and (3) the factfinder determines that the offender is a danger to public safety. Minn. Stat. § 609.1095, subd. 2 (2014). If the requirements of this statute are satisfied, as they are here, the district court may impose an upward durational departure up to the statutory maximum sentence, even if severe aggravating circumstances are not present. *Id.*; *Neal*, 658 N.W.2d at 545-46.

We review the length of a sentence imposed by the district court pursuant to the dangerous-offender statute for an abuse of discretion. *See Neal*, 658 N.W.2d at 546; *see also Vickla v. State*, 793 N.W.2d 265, 269 (Minn. 2011). Our review of whether Lott’s sentence unfairly exaggerates the criminality of his conduct is “guided by past sentences imposed on other offenders.” *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007) (quotation omitted).

The district court determined that Lott was a dangerous offender because he was forty-one years old at the time of the current offenses, had three prior felony convictions for violent crimes, and was a danger to public safety. During sentencing, the district court reiterated that, as an adult, Lott had five felonies, three of which were violent offenses—double the number of violent crimes required by the dangerous-offender statute—that spanned over 20 years, eight of which he spent in jail.

Both parties point to *Neal*, where the appellant also was convicted of kidnapping, as well as aggravated robbery, as the touchstone case to determine whether Lott’s sentence unfairly exaggerates the criminality of his conduct. 648 N.W.2d at 541. In *Neal*, the supreme court determined that Neal committed kidnapping to facilitate robbery of a store. *Id.* at 547. And the supreme court reversed the appellant’s 480-month dangerous-offender sentence for kidnapping because it unfairly exaggerated the criminality of his conduct.

Here, the district court distinguished *Neal* from Lott’s case, stating that Neal was given an upward durational departure of 4.4 times the presumptive sentence, whereas Lott’s departure was 2.5 times the presumptive sentence. It also determined that Lott’s kidnapping of C.S. was more egregious than the kidnapping in *Neal*. The court further

concluded that Lott had taken no responsibility for his actions, blamed the victim for what had happened, and lacked the ability to function outside of prison.

But Lott contends that a 480-month sentence for the short confinement of C.S. in a car exaggerates the criminality of his conduct, contrary to the supreme court's holding in *Neal*. In *Neal*, the kidnapping offense consisted of the appellant threatening one of the victims with a gun, transporting her from the front of the store to the bathroom in the back, confining her in the bathroom for a period of approximately ten minutes, tying her wrists, covering her head with tape, and slapping her in the face. *Id.* at 546.

Lott's reliance on *Neal* is erroneous. Unlike *Neal*, Lott did not commit the offense of kidnapping to facilitate the first-degree assault of C.S. Lott first assaulted C.S. while she was driving his vehicle, prior to when he got behind the wheel and kidnapped her. In addition, the kidnapping victim in *Neal* did not sustain permanent injuries, whereas Lott knocked out three of C.S.' front teeth, causing permanent damage.

Nor are we persuaded by Lott's argument that his case is similar to *Neal* because each involved similar periods of confinement. *See id.* at 546. In *Neal*, the appellant transported the victim from the front of the store to the bathroom in the back. *Id.* at 546. Here, Lott drove the victim out of the city from the Mississippi River near St. Cloud State University to the McStop off the highway outside of town. Lott then drove further into the country. There was only one house nearby surrounded by empty crop fields. The victim testified that it felt like they were driving in circles and that only after Lott punched her in the mouth and knocked out her teeth was he willing to turn around and drive back to St. Cloud.

Finally, we note the variation between the sentence here and the sentence in *Neal*, which was held to have exaggerated the criminality of Neal's conduct. Neal's sentence for kidnapping was 4.4 times the presumptive sentence. *Neal*, 658 N.W.2d at 542. Assuming Lott's argument that his 161-month presumptive-sentence argument is correct,<sup>9</sup> his sentence of 480 months was 2.98 times this presumptive sentence, which is significantly less than the multiplier in *Neal*.<sup>10</sup>

In light of the record and our review of sentences imposed in similar cases, we conclude that Lott's 480-month sentence did not unfairly exaggerate the criminality of his conduct. As a result, the district court did not abuse its discretion by imposing the statutory maximum sentence.

### **III. Lott's pro se arguments lack merit.**

In his pro se supplemental brief, Lott argues: (1) the evidence was insufficient to convict him; (2) that the district court gave improper jury instructions; and (3) the district court violated his constitutional right to a speedy trial. We disagree.

---

<sup>9</sup> Lott's sentencing worksheet classified kidnapping as a severity-level nine offense. He had seven criminal history points, one custody status point and six felony points. His presumptive sentencing range was 138 to 192 months, with a mid-point of 161 months. Lott argues that his presumptive sentence was 161 months for determining how much longer the statutory-maximum sentence given was in comparison to the presumptive sentence. While 161 months is *one* of the presumptive sentences for kidnapping, "any sentence within the presumptive range for the convicted offense constitutes a presumptive sentence." *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

<sup>10</sup> This also is less than the permissible sentence ratio in *State v. Norton*, 328 N.W.2d 142, 146-47 (Minn. 1982), where the supreme court held that the appellant's sentence, which was three times the presumptive sentence, was permissible. In *Neal*, the supreme court relied on *Norton* as an example of a permissible sentence, whereas Neal's sentence, which was 4.4 times the presumptive sentence, was not.

Lott cites to no legal authority and provides no legal arguments related to either of his first two claims. On appeal, we do not consider pro se arguments that are unsupported by either arguments or citations to legal authority. *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008). We therefore deem them waived. *State v. Krosch*, 642 N.W.2d 713, 714 (Minn. 2002).

Lott also argues that his constitutional right to a speedy trial was violated. The United States and Minnesota Constitutions both provide that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .” U.S. Const. amend VI; Minn. Const. art. I, § 6. Whether a defendant has been denied a speedy trial is a constitutional question reviewed de novo. *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017).

Here, Lott made a speedy trial demand on January 6, 2015. His first trial concluded in a mistrial on February 17, 2015. After the mistrial, Lott specifically waived his right to a speedy trial and agreed to go to trial on March 16, 2015, which he did. Thus, Lott’s right to a speedy trial was not violated.

In summary, we conclude that the postconviction court did not err in denying Lott’s postconviction petition because his ineffective-assistance-of-counsel claim fails to show there is a reasonable probability that the outcome would have been different, even assuming his trial counsel erred in his advice. *See Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). Nor did Lott establish that his trial counsel was deficient in failing to sever the fifth-degree assault charge. In addition, Lott has not met his burden to show that the district

court abused its discretion in sentencing him to the statutory maximum sentence for both charges of first-degree assault and kidnapping. Finally, Lott's pro se claims are without merit on the record before us. Accordingly, we affirm.

**Affirmed.**