STATE OF MINNESOTA

IN SUPREME COURT

A19-1822

State of Minnesota,

Respondent,

vs.

Michael Carlton Lowe, Sr.,

Petitioner.

ORDER

On November 14, 2019, the court of appeals dismissed this appeal, which is taken from the district court's orders that denied petitioner's claims for civil relief that were filed in his criminal case. The deadline for filing a petition for review of this decision was December 16, 2019. *See* Minn. R. Civ. App. P. 117, subd. 1 (requiring a petition for review to be filed "within 30 days of the filing of the Court of Appeals' decision"). On December 3, 2019, petitioner Michael Carlton Lowe, Sr. filed a motion for reconsideration with the court of appeals, which was rejected because the appeal was no longer open in that court. On December 18, 2019, Lowe submitted a petition for review, which was rejected because it was untimely. On January 7, 2020, Lowe filed a motion to accept a late petition for review, stating that he had received the court of appeals' November 14 order late because he had been relocated to another correctional facility.

Minnesota Rule of Civil Appellate Procedure 117 requires a petition for review of a decision of the court of appeals to be served and filed within 30 days of the filing date of the court of appeals' decision. By the time petitioner filed his motion, the deadline for filing a petition for review, December 16, 2019, had expired. Although Minn. R. Civ. App. P. 126.02 generally authorizes the court to extend time limitations for good cause shown, it specifically provides that "[t]he appellate court may not extend . . . the time prescribed by law for securing review of a decision or an order of a court . . . except as specifically authorized by law." Thus, an extension of time to file a petition for review of a decision of the court of appeals in a civil case, such as this one, is not authorized by the Rules of Civil Appellate Procedure. Further, we have only excused late filings in "exceptional" or "peculiar" circumstances. *See In re Welfare of J.R.*, 655 N.W.2d 1, 3–4 (Minn. 2003). We have not done so based on negligence, inadvertence, or oversight with respect to the requirements of the rules governing appellate proceedings. *Id.* at 4. Even though the November 14 order was sent to a different correctional facility, Lowe had sufficient time to prepare and submit a motion for reconsideration to the court of appeals. As the circumstances of this case are not exceptional, we cannot excuse the late submission of a petition for review.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the motion of Michael Carlton Lowe, Sr. to accept a late petition for further review be, and the same is, denied.

Dated: January 15, 2020

BY THE COURT:

Lorie S. Gildea
Chief Justice

2009 WL 437493
Only the Westlaw citation
is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Michael C. LOWE, Sr., Appellant.

No. A07-2321.
|
Feb. 24, 2009.
|
Review Denied May 27, 2009.

West KeySummary

1 Criminal Law
⇦ Incarceration

A passing testimonial reference to the defendant's criminal record did not justify a mistrial. The defendant was charged with criminal sexual conduct, assault, and terroristic threats for physically and sexually assaulting his fiancee. At trial, an officer testified that the victim told him she was afraid because the defendant had been in prison for murder and she thought the defendant would kill her. That testimony was not intentionally elicited by the prosecutor. The reference to the defendant's prior prison time was made in passing and was an isolated, nonrecurring incident. Moreover, the court gave the jury a curative instruction that the defendant's counsel drafted.

Cases that cite this headnote

Hennepin County District Court, File No. CR-07-022594.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN, and Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, Minneapolis, MN, for respondent.

Michael C. Lowe, Sr., Rush City, MN, pro se appellant.

Considered and decided by WORKE, Presiding Judge; LANSING, Judge; and KLAPHAKE, Judge.

UNPUBLISHED OPINION

WORKE, Judge.

*1 Appellant challenges his convictions of first-degree criminal sexual conduct, third-degree assault, and terroristic threats, arguing that the district court (1) abused its discretion by denying his mistrial motion

after the prosecutor elicited inadmissible evidence regarding a previous imprisonment and (2) erred by imposing a double-upward departure in sentencing without a jury finding that he is a danger to public safety as required under the dangerous-offender statute. Appellant also raises several issues in his pro se supplemental brief that we conclude are without merit. We affirm.

FACTS

On April 8, 2007, officers responded to Abbott Northwestern Hospital for a reported domestic assault. The victim, H.W., reported being physically and sexually assaulted by appellant Michael C. Lowe, her fiancé. The assault took place at the couple's residence throughout the previous day. H.W. reported that appellant was angry with her and accused her of infidelity. Appellant slapped and punched H.W. in the face, head and abdominal area, and kicked her in the legs. Appellant threw H.W. on the bed and forcefully penetrated her anally and vaginally. While appellant was sexually assaulting H.W., he grabbed her neck, struck her in the rib cage, pulled her hair and struck her head against the bed. During the assault appellant also threatened to kill H.W. and her children and burn down her house. H.W. had scratches and bruises on her face, two black eyes, a broken nose, and a cut on her lip that required seven stitches.

Appellant was charged with first-degree criminal sexual conduct, third-degree assault, and terroristic threats. A jury found appellant guilty as charged. The jury also found that aggravating factors existed. Based on the jury's findings, the district court sentenced appellant to an upward departure of 360 months in prison. This appeal follows.

DECISION

Mistrial

Appellant argues that the district court abused its discretion by denying his motion for a mistrial. This court reviews a district court's denial of a motion for a mistrial for abuse of discretion. *State v. Spann,* 574 N.W.2d 47, 52 (Minn.1998). "[A] mistrial should not be granted unless there is a reasonable probability that the outcome of the trial would be different" if the event that prompted the motion had not occurred. *Id.* at 53 (citing *State v. Clobes,* 422 N.W.2d 252, 255 (Minn.1988)).

During trial, the prosecutor asked an officer if H.W. reported that appellant threatened her during the assault. The officer responded: "I don't remember exactly. She did mention to me that she was afraid. She said that [appellant] had been in prison for murder and she was afraid that he was going to kill her." Appellant's attorney objected and moved for a mistrial. The district court denied the motion, determining that the officer merely repeated the victim's statement, which went to the theory of fear and threats, and that there was no proof that appellant had been convicted of murder.

*2 Generally, evidence from which a jury could infer that a defendant has a criminal record is inadmissible. *State v. Richmond,*

298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974). But when a reference to a defendant's prior criminal record "is of a 'passing nature,' or the evidence of guilt is 'overwhelming,' a new trial is not warranted because it is extremely unlikely 'that the evidence in question played a significant role in persuading the jury to convict.' " *State v. Clark,* 486 N.W.2d 166, 170 (Minn.App.1992) (quoting *State v. Haglund,* 267 N.W.2d 503, 506 (Minn.1978)). In *Haglund,* the objected-to testimony was in reference to the content of a note that the defendant ate. 267 N.W.2d at 505. An officer testified that the note stated that the defendant did not want to "get sent to St. Cloud again." *Id.* The supreme court concluded that reversal was not necessary because the prosecutor did not intentionally elicit the testimony and the defendant was not prejudiced because the reference was made in passing and the evidence of guilt was overwhelming. *Id.* at 506.

In *State v. Manthey,* the defendant was found guilty of murdering her husband. 711 N.W.2d 498, 500 (Minn.2006). On appeal, Manthey challenged two separate references during trial to her custody status. *Id.* at 505. One statement was made by Manthey's daughter, who in response to the question, "So by your testimony for the last two years your mother had been answering the phone?" responded, "No. She's been in jail." *Id.* The second reference was not in the form of evidence, but was information learned by a juror of Manthey's custody status. *Id.* at 506. Although *Manthey* involved a current incarceration and this case involves a prior incarceration, the supreme court similarly analyzed the issue in *Manthey* for prejudice. *Id.* The supreme court determined that "whatever prejudice was created was not so fundamental or egregious as to require a mistrial and was effectively mitigated by the court's [curative] instructions." *Id.*

Here, the prosecutor did not intentionally elicit the objectionable testimony. Instead, the reference was made "in passing," was isolated, and did not reoccur. Additionally, the district court gave a curative instruction that appellant's counsel drafted. The district court instructed the jury to disregard the testimony and explained that consideration of the testimony would result in unfair double punishment. *See Long v. Humphrey,* 184 F.3d 758, 761 (8th Cir.1999) (discussing curative alternatives less dramatic than mistrial); *see also State v. Budreau,* 641 N.W.2d 919, 926 (Minn.2002) (stating our presumption that juries follow instructions). Further, the officer merely repeated the statement of the victim regarding her fear-there was no evidence that appellant had been convicted of murder. Finally, because the evidence against appellant was overwhelming, it is extremely unlikely that the officer's statement played a significant role in persuading the jury to convict appellant. Therefore, the district court did not abuse its discretion in denying appellant's mistrial motion.

Sentence

***3** Appellant next argues that the district court abused its discretion by imposing an upward sentencing departure pursuant to the dangerous-offender statute without the fact-finder determining that appellant is a

danger to public safety. *See* Minn.Stat. § 609.1095, subd. 2 (2006) (stating that the district court may impose an aggravated departure from the presumptive sentence if the defendant is convicted of a violent felony, the court determines that the offender has two or more prior convictions for violent crimes, and the fact-finder determines that the defendant is a danger to public safety). The decision to depart from the sentencing guidelines rests within the district court's discretion and will not be reversed absent a clear abuse of that discretion. *State v. Givens,* 544 N.W.2d 774, 776 (Minn.1996). A district court may not deviate from a presumptive sentence without specifying "the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence." Minn. Sent. Guidelines II.D. Generally, in determining whether to depart durationally, the district court must determine whether the defendant's conduct was "significantly more serious than typically involved in the commission of the offense." *State v. Best,* 449 N.W.2d 426, 427 (Minn.1989). The role of a reviewing court is to determine whether the reasons given by the district court in support of its departure are justified under the law or supported by sufficient evidence in the record. *Williams v. State,* 361 N.W.2d 840, 844 (Minn.1985).

The jury found that the state proved beyond a reasonable doubt that aggravating factors existed, including: appellant violated the victim's zone of privacy, there was a child present during the offense, appellant penetrated the victim anally and vaginally, appellant caused personal injury to the victim as a result of the sexual penetration, appellant caused multiple injuries to the victim, appellant fractured the victim's nose, appellant's actions resulted in the victim suffering a permanent scar to her face, and appellant threatened to commit multiple crimes of violence against the victim. The district court's sentencing-departure report adopted the jury-found factors supporting an upward departure *and* included an additional finding that appellant is a dangerous offender. Because the jury-determined findings are sufficient to support the imposition of an aggravated sentence, we do not need to determine whether the district court abused its discretion by imposing an upward sentencing departure pursuant to the dangerous-offender statute.

Pro Se Issues

Sufficiency of the Evidence

Appellant argues that the evidence is insufficient to support his convictions because he lacked motive and opportunity. In considering an insufficiency-of-the-evidence claim, appellate review is limited to whether the evidence, viewed in the light most favorable to the jury's verdict, was sufficient to support the verdict. *State v. Webb,* 440 N.W.2d 426, 430 (Minn.1989). This court "must assume the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Taylor,* 650 N.W.2d 190, 206 (Minn.2002). The verdict will remain undisturbed if the jury, while giving "due regard" to the requirements of proof beyond a reasonable doubt and the presumption of innocence, could reasonably have reached

a guilty verdict. *Id.* The evidence here includes: the victim's testimony; appellant's ex-wife's testimony regarding a similar assault; photos of the victim's injuries; and physician testimony regarding the injuries. The evidence is sufficient to support the convictions.

Arrest

***4** Appellant also argues that his convictions should be reversed because his arrest was illegal. The district court did find that appellant's arrest in his residence was not supported by exigent circumstances. As a result, the court suppressed a gun, which was the only item seized as a result of the unlawful entry into the home. But the court determined that it would not dismiss the charges against appellant because there was probable cause for the arrest, and it was inevitable. On appeal from a district court's finding that a police officer had probable cause to arrest, this court reviews findings of fact for clear error, giving "due weight to inferences drawn from those facts by [the district court]." *State v. Lee,* 585 N.W.2d 378, 383 (Minn.1998) (quotation omitted). This court determines if probable cause existed based on an objective inquiry and review of the totality of the circumstances. *State v. Hussong,* 739 N.W.2d 922, 926 (Minn.App.2007).

Here, officers were dispatched to arrest appellant after the victim reported that appellant assaulted her and that he was at home. Therefore, the officers had probable cause to arrest appellant for suspected felony assault. And the district court did not abuse its discretion in refusing to dismiss the complaint because the only evidence seized as a result of the unlawful entry was the gun, which the district court suppressed.

Physician Witness

Appellant argues that the physician who testified should not have been a witness because he based his testimony on medical records. The physician testified that he treated the victim after the assault. The testimony was admissible, and the physician was permitted to testify from the medical records. *See* Minn. R. Evid. 803(4) (statements are not hearsay when made for the purposes of a medical diagnosis or treatment); Minn. R. Evid. 803(6) (statements are not hearsay when part of a record made at the time the information was transmitted by a person with knowledge, kept in the course of a regularly conducted business activity, and the business regularly makes a record).

Spreigl Evidence

Appellant argues that his ex-wife should not have been permitted to testify regarding a similar assault. Evidence of past crimes or bad acts is not admissible to prove the character of a person or that the person acted in conformity with that character in committing an offense. Minn. R. Evid. 404(b). But this evidence may be admissible to prove factors such as motive, intent, identity, knowledge, and common scheme or plan. *State v. Kennedy,* 585 N.W.2d 385, 389 (Minn.1998). The decision to admit such evidence depends on whether (1) the state has given notice of its intent to admit the evidence, (2) the state has clearly

indicated what the evidence will be offered to prove, (3) there is "clear and convincing evidence that the defendant participated in the prior act," (4) the evidence is "relevant and material to the state's case," and (5) the probative value of the evidence is "outweighed by its potential prejudice to the defendant." *State v. Ness,* 707 N.W.2d 676, 685-86 (Minn.2006). The admission of such evidence is reviewed for an abuse of discretion. *Id.* at 685.

*5 The state gave notice of its intent to call appellant's ex-wife to testify regarding appellant's assault of her and indicated that the evidence would be offered to prove motive, intent, identity, and common scheme or plan-(1) motive: appellant's ex-wife told him she was leaving him and he told her that he would kill her before he let her leave him again and appellant accused H.W. of being unfaithful; (2) intent: appellant wanted to cause women to suffer because his ex-wife wanted to leave and he believed that H.W. was unfaithful; (3) identity: appellant threatened to kill each woman, he punched and kicked both women, and both offenses occurred in private residences in the presence of children; and (4) common scheme: both assaults involved female victims with whom appellant had a romantic relationship, he caused both women numerous physical injuries, and after each assault he permitted the women to go to the hospital with instructions to lie about their injuries. There is clear and convincing evidence that appellant participated in the prior act-appellant's ex-wife testified regarding the assault, and appellant was charged with attempted murder and battery with substantial bodily harm, ultimately pleading guilty to battery with substantial bodily harm. The evidence is relevant to the state's case for the purpose of demonstrating motive, intent, identity, and common scheme or plan of a domestic assault.

Finally, the probative value of the evidence was not outweighed by its potential prejudice. Appellant contends that the evidence was unfairly prejudicial because the jury convicted him for being "brutal enough to beat a woman." If that is the case, the jury convicted appellant for assaulting H.W. Further, this was a case involving a domestic assault, in which the victim did not initially implicate appellant and the evidence of a similar assault supported the state's burden of proof. *See State v. Berry,* 484 N.W.2d 14, 17 (Minn.1992) (stating that the district court should admit the evidence only when the state's other evidence is weak and the evidence is needed to support the state's burden of proof). Therefore, the district court did not abuse its discretion in admitting the *Spreigl* evidence.

Lesser-Included

Appellant next argues that he received double punishment because the charges stemmed from one behavioral incident to accomplish a single goal. Under Minn.Stat. § 609.04, subd. 1 (2006), an offender may be convicted of either one but not both of the following: (1) a lesser degree of the same crime; (2) an attempt to commit the charged crime; (3) an attempt to commit a lesser degree of the same crime; (4) a crime proved if the charged crime is proved; and (5) a

petty misdemeanor proved if a misdemeanor is proved. Appellant was convicted of first-degree criminal sexual conduct, the use of force or coercion to accomplish sexual penetration; third-degree assault, assault with the infliction of substantial bodily harm; and terroristic threats. Minn.Stat. §§ 609.342, subd. 1(e)(i), .223, subd. 1, .713, subd. 1 (2006). None of these offenses are lesser-included offenses. Thus, appellant's argument is without merit.

DNA Evidence

***6** Appellant also argues that physical evidence obtained from his person was obtained as a result of the illegal arrest. The only evidence seized as a result of the warrantless entry into appellant's residence was the gun, which the district court suppressed. The DNA evidence was obtained sometime after appellant's arrest, which was supported by probable cause. Appellant's argument has no merit.

Due-Process Rights

Appellant next argues that his due-process rights were violated because he was arraigned on the day of trial and the Rasmussen hearing was held immediately before his trial. On July 26, 2007, the district court began a Rasmussen hearing. The Rasmussen hearing was continued to August 6, 2007, at which time the court was reminded that it had not yet made a probable-cause determination. Appellant's attorney asked the court to determine probable cause on the face of the complaint. The court found that probable cause existed, and appellant was formally arraigned and pleaded not guilty. A jury trial then commenced.

Under Minn. R.Crim. P. 8.01, if the defendant does not plead guilty at the initial appearance following the complaint, the arraignment shall be continued until the omnibus hearing. Under Minn. R.Crim. P. 11.10, if the defendant requests, the court must allow the defendant to enter a plea at the omnibus hearing and the defendant shall be tried as soon as possible after the entry of a not guilty plea. The district court did not violate the rules; therefore, appellant's argument fails.

Speedy Trial

Appellant also argues that he was denied his right to a speedy trial. Under Minn. R.Crim. P. 11.10, after a speedy trial demand, a trial must commence within 60 days from the date of the demand unless good cause is shown. On May 21, 2007, appellant demanded a speedy trial. The state argued that there was good reason to extend the trial date. The district court determined that appellant's attorney had a busy schedule and was most likely not prepared for trial to begin in two weeks. The court also determined that discovery was not complete, and the DNA evidence was not yet available. Given the number of cases pending and the serious nature of the charges against appellant, the district court determined that there was good cause for expanding the time for trial. The district court did not err in determining that good cause existed to extend the trial date.

Prosecutorial Misconduct

Finally, appellant argues that the prosecutor committed misconduct by fabricating evidence regarding the source of appellant's wounds. Because appellant did not object to the alleged misconduct, a new trial will be granted only if the misconduct is plain error. *State v. Washington,* 725 N.W.2d 125, 133 (Minn.App.2006), *review denied* (Minn. Mar. 20, 2007). "The plain error standard requires that [appellant] show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen,* 648 N.W.2d 681, 686 (Minn.2002). Appellant bears the burden of demonstrating that error occurred and that it was plain. *State v. Ramey,* 721 N.W.2d 294, 302 (Minn.2006). "An error is plain if it was clear or obvious." *Strommen,* 648 N.W.2d at 688 (quotation omitted). "Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *Ramey,* 721 N.W.2d at 302. If appellant shows plain error, the burden shifts to the state to demonstrate lack of prejudice. *Id.* If there is plain error that affected appellant's substantial rights, "we may correct the error only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " *Strommen,* 648 N.W.2d at 686 (quoting *State v. Crowsbreast,* 629 N.W.2d 433, 437 (Minn.2001)).

*7 During closing argument, the prosecutor discussed H.W.'s testimony and stated:

> [Appellant] started to beat her and he slapped her with an open hand and he punched her with a closed fist. He punched her so many times that [H.W.] couldn't keep track of how many times she had been hit. She was hit in the face, the head, the ribs....
>
> And this went on for awhile, as [H.W.] stated, but she didn't know for sure how long this went on. But eventually [appellant] stopped hitting her. But before he did, ladies and gentlemen, you heard [H.W.] testify that [appellant] picked up a towel and wrapped it around his hand because he didn't want to hurt his hand anymore. [H.W.] testified that there were marks, cuts on his knuckles. You also heard [an officer] testify that he saw [appellant's] hand after this happened and there were marks on his knuckles, marks on his hands.

H.W. testified that appellant wrapped a towel around his hand and continued to hit her. An officer testified that on April 9, 2007, he came in contact with appellant and noticed cuts and scratches on his hands. The prosecutor did not fabricate evidence because there was evidence that appellant had cuts and marks on his hand. And the prosecutor is permitted to argue reasonable inferences that can be drawn from the evidence-that the cuts and marks on appellant's hand resulted from the assault. *See State v. Young,* 710 N.W.2d 272, 281 (Minn.2006) (stating that the prosecutor's arguments "must be based on the evidence produced at trial, or the reasonable inferences from that evidence"). There is no error here.

Affirmed.

2011 WL 3557877
Only the Westlaw citation
is currently available.

Court of Appeals of Minnesota.

Michael Carlton LOWE,
Sr., petitioner, Appellant,
v.
WARDEN ADMINISTRATOR/
RUSH CITY CORRECTIONAL
FACILITY, et al., Respondents.

No. A11–248.
|
Aug. 15, 2011.

Chisago County District Court, File No. 13–CV–11–123.

Attorneys and Law Firms

Michael C. Lowe, Sr., Rush City, MN, pro se, appellant.

Krista J. Guinn Fink, and Lori Swanson, Attorney General, Kelly S. Kemp, Assistant Attorney General, St. Paul, MN, for respondents.

Considered and decided by SCHELLHAS, Presiding Judge; PETERSON, Judge; and MINGE, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge.

*1 Appellant challenges the district court's dismissal of his petition for a writ of habeas corpus with prejudice. Appellant argues that his petition is not frivolous because his arrest was illegal. We affirm.

FACTS

In April 2007, the State of Minnesota charged appellant Michael Lowe with first-degree criminal sexual conduct, third-degree assault, and terroristic threats, alleging that he physically and sexually assaulted his fiancée and threatened to kill her and her children and burn down her house. *State v. Lowe*, No. A07–2321, 2009 WL 437493, at *1 (Minn.App. Feb. 24, 2009), *review denied* (Minn. May 27, 2009). Before trial, the district court found that the warrantless arrest of Lowe in his residence was not supported by exigent circumstances. *Id.* at *4. "But the [district] court determined that it would not dismiss the charges against [Lowe] because there was probable cause for the arrest, and it was inevitable." *Id.* A jury found Lowe guilty on all three counts and found that aggravating factors existed. *Id.* at *1. The district court sentenced Lowe to 360 months in prison-an upward departure from the presumptive sentence. *Id.*

Lowe appealed, arguing, among other things, that "his convictions should be

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Not Reported in N.W.2d, 2009 WL 437493

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reversed because his arrest was illegal." *Id.* at *4. This court addressed and rejected each of Lowe's arguments and affirmed his convictions and sentence, concluding that "the officers had probable cause to arrest [Lowe]," and "the district court did not abuse its discretion in refusing to dismiss the complaint because the only evidence seized as a result of the unlawful entry was ... suppressed." *Id.* at *4–7.

Lowe filed his first petition for postconviction relief in June 2009, arguing, in part, that his arrest was illegal. *Lowe v. State,* No. A09–1449, 2010 WL 1658006, at *1 (Minn.App. Apr. 27, 2010), *review denied* (Minn. July 20, 2010). The district court rejected Lowe's claim, concluding that it was barred by *State v. Knaffla,* 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976), because he raised the claim on direct appeal. *Id.* The district court denied the remaining claims in the petition on substantive and *Knaffla* grounds. *Id.* Lowe did not appeal. *Id.*

After two more unsuccessful postconviction petitions, Lowe filed a petition for a writ of habeas corpus and an affidavit for proceeding in forma pauperis in Chisago County district court. Lowe asserted that he is entitled to immediate release from custody because his arrest violated the U.S. and Minnesota constitutions. The district court dismissed Lowe's petition with prejudice under Minn.Stat. § 563.02, subd. 3 (2010), concluding that Lowe's claim "is frivolous and has no arguable basis in law or fact."

This appeal follows.

DECISION

The district court may dismiss with prejudice an action commenced by an inmate plaintiff who seeks to proceed in forma pauperis, if the court determines that the action is frivolous or malicious. Minn.Stat. § 563.02, subd. 3(a). "In determining whether an action is frivolous or malicious, the court may consider whether ... the claim has no arguable basis in law or fact...." *Id.,* subd. 3(b)(1); *see also Maddox v. Dep't of Human Servs.,* 400 N.W.2d 136, 139 (Minn.App.1987) ("A frivolous claim is without any reasonable basis in law or equity and could not be supported by a good faith argument for a modification or reversal of existing law." (quotation omitted)). The court may dismiss the action "before or after service of process, and with or without holding a hearing." Minn.Stat. § 563.02, subd. 3(c). The district court has broad discretion in considering proceedings in forma pauperis and will not be reversed absent an abuse of discretion. *Maddox,* 400 N.W.2d at 139.

***2** Lowe argues that his petition is not frivolous because "exigent circumstances did not exist to justify [his] warrantless arrest" and he should "be released from custody ... until re-arrested in a manner prescribed by law." Lowe also argues that DNA evidence obtained from his person was obtained as a result of the illegal arrest.

"[H]abeas corpus may not be used as a substitute for ... appeal or as a cover for a collateral attack...." *State ex rel.*

Thomas v. Rigg, 255 Minn. 227, 234, 96 N.W.2d 252, 257 (1959). A habeas petition is properly dismissed where other means are available to raise the claims. *See Kelsey v. State,* 283 N.W.2d 892, 893–94 (Minn.1979) (affirming dismissal of habeas action where claims could be and were raised in a direct appeal and through postconviction petition). Lowe's claim challenging the validity of his arrest is an improper attempt to use habeas corpus as a substitute for an appeal. Lowe's claims could be and were raised and rejected in his direct appeal and postconviction petitions. *See Lowe,* 2010 WL 1658006, at *1 (second and third postconviction petitions); *Lowe,* 2009 WL 437493, at *4, 6 (direct appeal). The claims are frivolous because they have no arguable basis in law or fact. The district court therefore did not abuse its discretion in dismissing the action under Minn.Stat. § 563.02, subd. 3.

Affirmed.

All Citations

Not Reported in N.W.2d, 2011 WL 3557877

the jury found nine aggravating factors, including the fact that there was children present, that this happened within the zone of privacy for Ms. Wuollet, I want to focus on the fact that Mr. Lowe is in fact a violent offender. He had previously been convicted of murder, previously convicted of assault with great bodily harm and that in fact occurred against Paula Durant who testified in court and who is in court again today. And then this current offense is clearly a violent offense, a third degree assault, terroristic threat and a rape conviction for what he did to Heather Wuollet.

This man, Mr. Lowe, is dangerous. If he is to be released he will be a danger to the public, he will be a danger to anybody in his family, he will be a danger to his children and more certainly to Ms. Wuollet and Ms. Durant. He certainly qualifies under the law as a dangerous offender. I think this is the type of case that the enhancements are made for. This is the perfect kind of case to give a departure upward. The State is asking for 30 years on the criminal sexual conduct in the first degree. As well, the State is asking for an additional five years for the terroristic threats. The State does concede the assault in the third degree and the crim

sex were part of the same behavioral incident. However, the terroristic threats can be separated out from that. And the facts of the case that came out during testimony, he threatened Ms. Wuollet outside of the house right after Ms. Wuollet arrived home that day. After they argued and after he threatened her verbally and by picking up a piece of wood, he left for a time period, he left for a couple of hours and that clearly separates the two incidents, the terroristic threats of threatening to beat her up, to bury her, to hit her with a piece of wood, can be separated from the assault in the third degree, the criminal sexual conduct. Those are two separate incidents and as you know, these are all crimes that can be run consecutively, they are permissive, consecutive sentences and that is what the State is asking for is he be sentenced for 30 years, statutory maximum on the criminal sexual conduct. He be sentenced to the maximum of five years for the terroristic threats and run them consecutively with the assault in the third degree run concurrent to the other two.

At this time I would ask the Court's permission for Ms. Wuollet to speak.

She has changed her mind. She would not

that.

THE DEFENDANT: On the grounds of?

THE COURT: That it's my opinion that you received a fair trial; that I ruled that your arrest was inevitable and that there was certainly a mountain of evidence against you in this case.

THE DEFENDANT: At the time of my arrest the police failed to produce probable cause as well as a warrant and forcibly entered my household, which you ruled that my arrest was an illegal pretext arrest and a violation of my Fourth Amendment rights. You said that the arrest was a violation of my Fourth Amendment rights but inevitable. At that time no warrant was obtained afterwards until 36 hours later after the police had taken me to Hennepin County Medical Center, forcibly taken my DNA from me, after they forcibly entered my household without consent, exigent circumstances or any warrant for my arrest. They came in under suspicion of the allegations made without a search warrant or arrest warrant. They had misdemeanor warrants which we know is prohibited to be executed on a Sunday between the hours of 10 and 8 as well as on holidays. So that also made that issue of them using that as a matter of the means to come to my household as well to be prohibited. So what