

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELDER ZACARIAS-LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44802

FILED

JUN 14 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant Elder Zacarias-Lopez's post-conviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

On July 24, 2002, the district court convicted Lopez, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced Lopez to serve two consecutive terms of life in the Nevada State Prison with the possibility of parole after twenty years. This court affirmed Lopez's judgment of conviction and sentence on direct appeal.¹ The remittitur issued on June 8, 2004.

On November 22, 2004, Lopez filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Lopez filed a reply. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent

¹Zacarias-Lopez v. State, Docket No. 40116 (Order of Affirmance, May 11, 2004).

Lopez or to conduct an evidentiary hearing. On February 23, 2005, the district court denied Lopez's petition. This appeal followed.

In his petition, Lopez raised numerous allegations of ineffective assistance of trial counsel.² To state a claim of ineffective assistance of trial counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.³ A petitioner must further establish a reasonable probability that, in the absence of counsel's errors, the results of the proceedings would have been different.⁴ The court can dispose of a claim if the petitioner makes an insufficient showing on either prong.⁵

First, Lopez claimed that his trial counsel was ineffective for failing to object to the violation of his right to have a preliminary hearing within fifteen days of his initial arraignment.⁶ A review of the record

²To the extent that Lopez raised any of the following claims independently from his ineffective assistance of counsel claims, we conclude that they are waived; they should have been raised on direct appeal and Lopez did not establish good cause for failing to do so. See NRS 34.810(1)(b)(2). Further, Lopez raised several of the following claims in the context of ineffective assistance of appellate counsel as well. Consistent with the reasoning discussed below, Lopez did not demonstrate that his appellate counsel was ineffective.

³See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

⁴Id.

⁵Strickland, 466 U.S. at 697.

⁶See NRS 171.196(2).

reveals that Lopez's preliminary hearing was continued one time by stipulation of counsel; it was continued two additional times due to Lopez's desire to secure his own counsel. The preliminary hearing was eventually conducted approximately ten weeks after Lopez's initial arraignment. We conclude that Lopez failed to demonstrate that there was a lack of good cause for the delay,⁷ such that his trial counsel was ineffective for failing to object. As such, the district court did not err in denying Lopez relief on this claim.

Second, Lopez alleged that his trial counsel was ineffective for failing to have evidence discovered at the crime scene analyzed. Specifically, Lopez claimed that his counsel should have had the following items analyzed for DNA and fingerprint evidence: cartridge casings, a bullet, a can of beer, a baseball hat with apparent blood, and swabs of apparent blood.

We conclude that Lopez's claim is without merit. First, Lopez did not establish a reasonable likelihood that blood found at the crime scene belonged to anyone other than the victim. Second, Lopez failed to demonstrate that evidence linking the empty beer can to someone other than himself or the victim would have altered the outcome of the trial. Finally, Lopez failed to demonstrate that fingerprint or DNA evidence would likely have been present on an expended bullet, or that his counsel acted unreasonably in failing to have the cartridge casings discovered at the scene analyzed for fingerprints. Consequently, the district court did not err in denying this claim.

⁷See id.

Third, Lopez claimed that his trial counsel was ineffective for failing to request that gunshot residue and DNA tests be conducted on the eight individuals at the Teardrop residence. However, Lopez did not establish that a gunshot residue test would have been appropriate weeks or months after the murder. Further, Lopez did not articulate how evidence from the other residents would have aided his defense that an individual known only as "Javier" committed the crime. Consequently, Lopez did not establish that he was prejudiced by his counsel's actions, and we affirm the district court's denial of this claim.

Fourth, Lopez contended that his trial counsel was ineffective for failing to object to the district court's improper statement to the jury prior to the commencement of his trial. Specifically, Lopez argued that the following remark shifted the burden of proof to the defense: "This is a criminal case, and there are two basic rules you should keep in mind. First, the defendant is proved—is presumed innocent unless and until proved guilty beyond a reasonable doubt."

We conclude that Lopez did not establish that his counsel was ineffective for failing to object to this remark. Although the district court initially misspoke, she immediately corrected her error, and jury instruction four correctly informed the jury of the defendant's presumption of innocence. Moreover, Lopez failed to adequately articulate how the district court's statement shifted the burden of proof.⁸ Therefore, we affirm the district court's denial of this claim.

⁸See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Fifth, Lopez alleged that his trial counsel was ineffective for failing to "properly object" to the leading questions the State asked thirteen-year old witness Sean Giron. However, the record reveals that trial counsel objected to the leading nature of the questions and the district court sustained the objection. Lopez failed to establish how his counsel's performance was deficient in this regard,⁹ and the district court did not err in denying him relief.

Sixth, Lopez contended that his trial counsel was ineffective for failing to object to the prosecutor's knowing procurement of false testimony from witness Giron. Lopez claimed that Giron's testimony that the shooter held the gun with both hands was "unbelievable because if a person [were] to put [two] hands on a Davis model P-32 pistol, it would cover the whole pistol so it wouldn't be visible." We conclude that Lopez failed to establish that the prosecutor knowingly used false testimony, such that his trial counsel's performance was deficient for failing to object. We therefore affirm the district court's denial of this claim.

Seventh, Lopez alleged that his trial counsel was ineffective for failing to object to Juan Carlos Torres' false testimony. During trial, Torres testified that nobody left the house except Lopez. Torres also testified that he was asleep until the sound of gunshots woke him. Lopez argued that this testimony was conflicting. "Where conflicting testimony is presented, the jury determines what weight and credibility to give it,"¹⁰

⁹See id.

¹⁰Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002).

and Lopez failed to demonstrate that an objection by trial counsel was warranted. Thus, the district court did not err in denying this claim.

Eighth, Lopez claimed that his trial counsel was ineffective for failing to subpoena the victim's cell phone records from the day of the murder. Lopez testified during the trial that the victim received a phone call on his cell phone and provided the caller with his address. A short time later, an individual named Javier arrived and shot the victim. Even assuming cell phone records indicated that the victim received a phone call shortly before his murder, Lopez did not establish a reasonable likelihood that the results of his trial would have been different, in light of the overwhelming evidence presented against him. Therefore, Lopez was not entitled to relief on this claim.

Ninth, Lopez contended that his trial counsel was ineffective for failing to question Detective Robert Wilson about statements given by three child witnesses. However, the record reveals that trial counsel did attempt to question Detective Wilson concerning the children's statements, but the district court sustained an objection by the State. Therefore, Lopez's claim is belied by the record.¹¹ Further, on direct appeal, this court concluded that the district court did not err in preventing this line of questioning.¹² As such, we affirm the district court's denial of this claim.

Ninth, Lopez appeared to argue that his counsel was ineffective for failing to request a jury instruction concerning flight. Lopez

¹¹See Hargrove, 100 Nev. at 503, 686 P.2d at 225.

¹²See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

contended that because the prosecutor elicited testimony from several witnesses concerning Lopez's excessive driving speed when he left the crime scene, a flight instruction would have been appropriate. We disagree with Lopez's contention. Lopez failed to articulate how informing the jury that it could consider flight as circumstantial evidence in determining his guilt or innocence¹³ would have aided his defense.¹⁴ Consequently, Lopez did not demonstrate that his counsel was ineffective in this regard.

Tenth, Lopez claimed that his trial counsel was ineffective for failing to object to the prosecutor's erroneous remark during his closing argument. Lopez contended that the following prosecutorial comment shifted the burden of proof:

One final point about reasonable doubt. You'll have an instruction that defines it. And what it says is it's not beyond all possible doubt. It's beyond a reasonable doubt. Is it possible? Is it possible that somebody else killed Moris Morataya? That's for you to decide. But that's not the ultimate question in this case. The question is it reasonable to believe that somebody other than Elder Lopez committed this crime? And when you consider all this evidence the answer is, of course, no.

¹³See e.g., Walker v. State, 113 Nev. 853, 870 n.4, 944 P.2d 762, 773 n.4 (1997).

¹⁴We reject Lopez's contention that if a flight instruction had been offered to the jury, the district court would necessarily have admitted evidence of his low IQ. In Lopez's direct appeal, this court concluded that evidence of Lopez's mental capacity was not relevant to the proceedings. See NRS 48.015.

Lopez failed to establish that his trial counsel acted unreasonably in failing to object to this comment. Even assuming the prosecutor's statement was erroneous, it was harmless because the jury was provided with the correct statutory definition of reasonable doubt.¹⁵ Therefore, we affirm the district court's denial of this claim.

Eleventh, Lopez alleged that his trial counsel was ineffective for failing to object to jury instruction 32.¹⁶ Lopez contended that the portion of the instruction that referenced "equal and exact justice" impermissibly shifted the burden of proof. This court has rejected the argument that this language affects the presumption of innocence,¹⁷ and Lopez therefore did not demonstrate that his counsel was ineffective in this regard.

¹⁵See Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001) (noting that this court has "consistently deemed incorrect explanations of reasonable doubt to be harmless error as long as the jury instruction correctly defined reasonable doubt").

¹⁶Jury instruction 32 was as follows:

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

¹⁷See Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998).

Next, Lopez contended that his appellate counsel was ineffective. To establish ineffective assistance of appellate counsel, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficient performance prejudiced the defense.¹⁸ "To establish prejudice based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal."¹⁹ Appellate counsel is not required to raise every non-frivolous issue on appeal.²⁰

First, Lopez contended that his appellate counsel was ineffective for failing to argue that his conviction violated the Vienna Convention because he is a Guatemalan national but was not informed of his right to contact the Guatemalan consul. We conclude that Lopez is not entitled to relief on his claim.

The Vienna Convention is a multilateral treaty negotiated in 1963 to which the United States is a party.²¹ Article 36 of the treaty provides that a foreign national who is "arrested or committed to prison or to custody pending trial or is detained in any other manner" has the right to have his foreign consulate notified and to communicate with the

¹⁸See Strickland, 466 U.S. 668; Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996).

¹⁹Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

²⁰Jones v. Barnes, 463 U.S. 745, 751 (1983).

²¹See Vienna Convention, 21 U.S.T. 77.

consulate.²² Article 36 also requires that arresting authorities inform the detained person of these rights.²³

Preliminarily, we note that it is questionable whether the Vienna Convention created an individually enforceable right.²⁴ Nevertheless, even assuming Lopez has standing to enforce an alleged violation of the Vienna Convention, he did not establish that an appeal of this issue would have been successful. In Garcia v. State, this court rejected the proposition that a violation of the Vienna Convention requires automatic reversal of a conviction.²⁵ Consequently, we affirm the district court's denial of this claim.²⁶

Second, Lopez claimed that his appellate counsel was ineffective for failing to challenge the unnecessarily suggestive photographic line-up conducted with witness Giron. Lopez contended that the line-up was unduly suggestive because his was the only picture of a resident of the Teardrop house. We conclude that the photographic identification procedure was not "so impermissibly suggestive as to give

²²Id. at 101.

²³Id.

²⁴See Breard v. Greene, 523 U.S. 371, 376 (1998) (commenting that the Vienna Convention "arguably" creates individually enforceable rights).

²⁵117 Nev. 124, 129, 17 P.3d 994, 997 (2001) (holding that, "a Vienna Convention violation is not of the constitutional dimension required for structural error").

²⁶To the extent that Lopez also argued that his trial counsel was ineffective for failing to object to the alleged violation of the Vienna Convention, we note that Lopez did not articulate how he was prejudiced by his counsel's actions. See Hargrove, 100 Nev. at 502, 686 P.2d at 225.

rise to a very substantial likelihood of irreparable misidentification,"²⁷ such that an appeal of this issue had a reasonable likelihood of success. Therefore, we affirm the district court's denial of this claim.²⁸

Third, Lopez alleged that his appellate counsel was ineffective for failing to raise a claim that the State impermissibly used three peremptory challenges to remove African-American jurors from the venire, in violation of Batson v. Kentucky.²⁹ We conclude that Lopez did not demonstrate that his appellate counsel was ineffective in this regard.

Under the equal protection analysis set forth in Batson, once the opponent of a peremptory challenge makes a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to give a race neutral explanation (step two).³⁰ If such an explanation is given, then the trial court must decide whether the opponent has proved purposeful racial discrimination (step three).³¹

Here, Lopez's trial counsel objected to the State's use of peremptory challenges to remove potential jurors 221, 297, and 326. The

²⁷Simmons v. United States, 390 U.S. 377, 384 (1968); see also Cunningham v. State, 113 Nev. 897, 944 P.2d 261 (1997).

²⁸To the extent that Lopez additionally contended that his appellate counsel was ineffective for failing to argue that Lopez's Sixth Amendment rights were violated at the photo line-up because his counsel was not present, we disagree. See Barone v. State, 109 Nev. 1168, 866 P.2d 291 (1993).

²⁹476 U.S. 79 (1986).

³⁰Purkett v. Elem, 514 U.S. 765, 767 (1995).

³¹Id.

prosecutor stated that he removed potential juror 221 because two of her children were convicted felons and she expressed discomfort at the thought of sitting in judgment of others; he excused potential juror 297 because he was very young, did not respond to any questions, and had an earring in his left ear, which the prosecutor felt suggested a lack of respect for authority; and he excused potential juror 326 because her son had been shot and the assailant was never caught, and her son and brother were both incarcerated. The second Batson step "does not demand an explanation that is persuasive, or even plausible."³²

At the third step of the Batson analysis, the persuasiveness of the explanation becomes relevant and the district court must determine whether the opponent of the peremptory challenge has carried his burden of proving purposeful discrimination.³³ "[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible."³⁴ Because the district court's findings on the issue of discriminatory intent largely turn on evaluations of credibility, they are entitled to great deference.³⁵ Here, the district court ruled that Lopez did not demonstrate that the State engaged in purposeful discrimination. With respect to potential juror 297, the district court specifically noted, "not only did he not provide a response, . . . [h]e looked a little bored with the proceedings." We conclude that Lopez failed to establish that an

³²Id. at 768.

³³Id.

³⁴Miller-El v. Cockrell, 537 U.S. 322, 339 (2003).

³⁵Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998).

appeal of this issue had a reasonable probability of success,³⁶ or that his counsel acted objectively unreasonably in failing to raise this claim. Therefore, we affirm the district court's denial of this claim.

Fourth, Lopez claimed that his appellate counsel was ineffective for failing to challenge jury instruction four, which concerned reasonable doubt. This claim is without merit. Jury instruction four correctly stated the law. NRS 175.211 provides a statutory definition of reasonable doubt, which the court is required to give a jury in a criminal case. The language used in jury instruction four was identical to that found in the statute. This court has held that the statutory definition of reasonable doubt does not "dilute the state's burden to establish guilt beyond reasonable doubt and does not shift the burden of proof."³⁷ Therefore, Lopez was not entitled to relief on this claim.

Finally, Lopez contended that his appellate counsel was ineffective for failing to argue that there was insufficient evidence to support his conviction. We disagree. Evidence is sufficient to uphold a conviction when a reasonable jury could have been convinced of the defendant's guilt beyond a reasonable doubt.³⁸ Evidence was presented at

³⁶See Doyle v. State, 112 Nev. 879, 889, 921 P.2d 901, 908 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004) (recognizing that prosecution's belief that juror's association with criminal justice system causes bias may be valid reason to use peremptory challenge).


³⁷Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 813-14 (1977); see also Bollinger v. State, 111 Nev. 1110, 1114-15, 901 P.2d 671, 674 (1995).

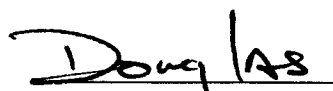
³⁸Nika v. State, 113 Nev. 1424, 1434, 951 P.2d 1047, 1054 (1997), overruled on other grounds by Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002).

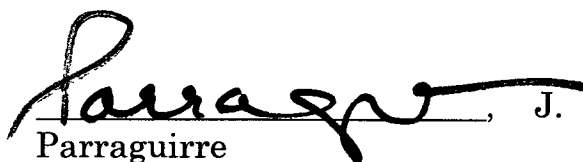
Lopez's trial that he was seen with the victim immediately before the murder; he fled the scene after the murder; police observed him throw the murder weapon out of his vehicle; several live cartridges matching the type used to shoot the victim were found in his pocket; and his hands tested positive for gunshot residue. Lopez did not establish that an appeal of this issue had a reasonable probability of success, and he therefore did not demonstrate that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that Lopez is not entitled to relief and that briefing and oral argument are unwarranted.³⁹ Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁴⁰


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

³⁹See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁴⁰We have reviewed all documents that Lopez has submitted in proper person to the clerk of this court in this matter, and we conclude that no relief based upon those submissions is warranted. To the extent that Lopez has attempted to present claims or facts in those submissions that were not previously presented in the proceedings below, we have declined to consider them in the first instance.

cc: Hon. Jennifer Togliatti, District Judge
Elder Zacarias-Lopez
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk