

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO LOPEZ-BENITEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 47320

**FILED**

APR 06 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Mario Lopez-Benitez was convicted, pursuant to a jury verdict, of sexual assault of a minor under 14 years of age and sentenced to a life term in prison with the possibility of parole after 20 years. He was acquitted of kidnapping. This court affirmed Lopez-Benitez's conviction and sentence.<sup>1</sup> Lopez-Benitez filed a timely postconviction petition for a writ of habeas corpus, which the district court denied. On appeal, this court reversed and remanded the matter to the district court for inclusion and consideration of an English translation of Lopez-Benitez's habeas petition and supporting memorandum.<sup>2</sup> After doing so, the district court again denied his habeas petition, and this appeal followed.

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<sup>1</sup>Lopez-Benitez v. State, Docket No. 38840 (Order of Affirmance, May 15, 2003).

<sup>2</sup>Lopez-Benitez v. State, Docket No. 43286 (Order of Reversal and Remand, January 13, 2005).

Lopez-Benitez's conviction stems from a sexual assault he committed upon a 13-year-old girl, R.M., who was deaf and mute and suffered other disabilities as a result of spinal meningitis she contracted as a toddler.

Lopez-Benitez raises a number of claims he argues the district court erroneously denied. He further contends that he was entitled to an evidentiary hearing on his claims. In seeking postconviction relief, Lopez-Benitez "cannot rely on conclusory claims for relief but must support any claims with specific factual allegations that if true would entitle him or her to relief."<sup>3</sup> And he "is not entitled to an evidentiary hearing if the allegations are belied or repelled by the record."<sup>4</sup>

Claims of ineffective assistance of counsel

Lopez-Benitez contends that the district court erred in summarily denying his ineffective-assistance-of-counsel claims. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, Lopez-Benitez must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.<sup>5</sup> He must demonstrate prejudice by showing "a reasonable probability that but for counsel's errors the result of the trial would have been different."<sup>6</sup>

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<sup>3</sup>Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001).

<sup>4</sup>Id.

<sup>5</sup>See Strickland v. Washington, 466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

<sup>6</sup>See Thomas v. State, 120 Nev. 37, 43-44, 83 P.3d 818, 823 (2004).

Lopez-Benitez first argues that his counsel was ineffective for failing to adequately investigate his claim that he did not sexually assault R.M. Specifically, he contends that counsel did not focus on Lopez-Benitez's testimony that after R.M. removed her clothes she folded them. However, he does not explain what additional effort counsel should have undertaken to pursue this point or how focusing the jury's attention on this evidence might have changed the result of the trial. Moreover, Lopez-Benitez's testimony in this regard simply tracked the earlier testimony by R.M.'s mother that R.M. always folded her clothes after removing them. Therefore, we conclude that he failed to demonstrate that the district court erred in denying this claim without an evidentiary hearing.

Lopez-Benitez next contends that his counsel failed to investigate R.M.'s mental capacity and ability to communicate. First, he asserts that his counsel was ineffective for inadequately challenging the testimony of R.M.'s mother as she was the only person who testified that R.M. was sexually assaulted. Specifically, he points to the mother's testimony that she thought maybe R.M. had been raped. However, counsel objected to this testimony. Lopez-Benitez does not sufficiently explain what further action he desired his counsel to undertake in this regard. We conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez further argues that counsel did not investigate or conduct interviews regarding R.M.'s ability to communicate. However, he does not identify with whom the desired interviews should have been conducted or what material evidence they might have produced. We conclude that the district court did not err in denying this claim without conducting an evidentiary hearing.

Lopez-Benitez asserts that his counsel was ineffective for failing to argue that R.M.'s affect after her encounter was not consistent with that of a girl who had just been raped and that his actions in willingly driving R.M. home, allowing the police to enter his home, and staying with the police until his arrest later in the evening were indicative of innocence. Counsel did not highlight this evidence in closing argument. Rather, counsel focused his argument on challenging the sufficiency of the State's evidence, an argument that was successful to the extent Lopez-Benitez was acquitted of kidnapping. We conclude that there was no reasonable probability that the result of his trial would have been different had counsel engaged in Lopez-Benitez's suggested argument. Consequently, we conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez also argues that counsel failed to adequately investigate the location of the sperm cells and DNA found in R.M.'s vaginal cavity. The evidence showed that the amount of sperm found inside R.M.'s vagina was too small to conclusively establish the donor. Further, Lopez-Benitez's semen was found on the outside of R.M.'s vaginal cavity and her clothing. Counsel challenged the admission of some of the DNA evidence and cross-examined the State's DNA expert about his findings. Lopez-Benitez does not identify what further investigation he desired his counsel undertake. Consequently we conclude that Lopez-Benitez fails to demonstrate that the district court erred in summarily denying this claim.

Lopez-Benitez argues that counsel was ineffective for not calling Dr. Kenneth Misch as a witness. To support his claim, Lopez-Benitez referred to a letter sent to counsel in which Dr. Misch reported his review of R.M.'s examination. He asserts that Dr. Misch should have been

called as a witness because he made no findings supporting the State's assertion that he caused the slight tear of R.M.'s hymen. Dr. Misch stated R.M. suffered "a definite tear in the hymen at approximately 6 o'clock." He also acknowledged State expert Dr. Michael Zbiegien's finding that R.M. presented with a small amount of bruising and punctuate bleeding, but he did not observe these findings on the videotape he reviewed. However, Dr. Misch stated that these findings may not "copy well under video." Finally, Dr. Misch stated that the medical findings were "conclusive for sexual abuse." Contrary to Lopez-Benitez's contention, Dr. Misch's testimony corroborated the State's theory. Nothing in Dr. Misch's letter dispelled the State's contention that Lopez-Benitez was the perpetrator, as Lopez-Benitez suggests. We conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez next argues that his counsel was ineffective for not seeking a mental health evaluation of R.M. However, he fails to support this claim with any facts suggesting that counsel could have demonstrated a compelling need for such an examination under the law.<sup>7</sup>

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<sup>7</sup>See Abbott v. State, 122 Nev. \_\_\_, \_\_\_, 138 P.3d 462, 464 (2006) (reinstating the test for compelling a sexual assault victim to undergo a psychological evaluation requested by a defendant as set forth in Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000)); Koerschner, 116 Nev. at 1114-17, 13 P.3d at 454-56 (holding that a defendant must show a compelling reason to require a sexual assault victim to undergo a psychological evaluation considering such factors as whether the State calls or obtains a benefit from a mental health expert, whether the allegation is supported by little or no corroboration beyond the testimony of the victim, and whether there is a reasonable basis to believe that the victim's mental or emotional state may have affected her veracity).

Accordingly, we conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez asserts that his counsel was ineffective for failing to adequately present witnesses and evidence to support his claim that any sexual conduct that occurred with R.M. was consensual. Lopez-Benitez did not identify any witnesses whom he desired counsel to call. He claims that counsel overlooked evidence that R.M. removed and folded her clothes and sat on a couch while he masturbated, a clear indication, according to Lopez-Benitez, that R.M. consented to the activity. However, this evidence was presented to the jury. Lopez-Benitez does not explain what further action he desired his counsel to take in this regard. Consequently, we conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez complains that the State did not present any legally admissible or relevant evidence establishing that R.M. lacked the capacity to consent, but rather produced R.M. at trial as a demonstrative exhibit, introduced historical medical information through her mother, and presented a language specialist who testified about R.M.'s language capabilities. However, Lopez-Benitez fails to explain why the challenged evidence was improper or any basis upon which counsel should have objected. Moreover, the trial transcript shows that counsel objected to the mother's testimony describing R.M.'s medical condition. Counsel also sought a motion in limine to preclude the State from calling R.M. simply to show her incompetence. We conclude that the district court did not err in summarily dismissing this claim.

Lopez-Benitez next contends that his counsel was ineffective for failing to object to gross prosecutorial misconduct.<sup>8</sup> Specifically, he argues that the State's closing argument was testimonial in nature, replete with personal opinions and references to legally inadmissible evidence to which his counsel should have objected. Generally, a prosecutor may not interject his personal opinion in closing argument.<sup>9</sup> However, "[s]tatements by the prosecutor, in argument, indicative of his opinion, belief, or knowledge as to the guilt of the accused, when made as a deduction or conclusion from the evidence introduced in the trial, are permissible and unobjectionable."<sup>10</sup> Further, "'[a] prosecutor may not argue facts or inferences not supported by the evidence.' Nevertheless, the prosecutor 'may argue inferences from the evidence and offer conclusions on contested issues.'"<sup>11</sup>

We have reviewed the comments Lopez-Benitez contends were improper and conclude that they were, in essence, an explanation to the

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<sup>8</sup>Lopez-Benitez argues that prosecutorial misconduct rendered his trial unfair. However, this claim is appropriate for direct appeal and therefore procedurally barred. See NRS 34.810(3). Accordingly, we conclude that the district court did not err in summarily dismissing it.

<sup>9</sup>See Williams v. State, 113 Nev. 1008, 1021, 945 P.2d 438, 446 (1997), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

<sup>10</sup>Domingues v. State, 112 Nev. 683, 696, 917 P.2d 1364, 1373 (1996); Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971).

<sup>11</sup>Miller v. State, 121 Nev. 92, \_\_\_, 110 P.3d 53, 59 (2005) (quoting Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) and Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 56 (1997)).

jury of what the State was required to prove and an argument that it had met its burden of proof. We conclude that the prosecutor's use of personal pronouns constituted permissible argument not improper personal opinion. Accordingly, we conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez further asserts that particular comments made by the prosecutor in closing argument were inflammatory. He argues that the prosecutor's reference to his defense as "horrible" and a "foul, seductive-temptress-masturbation-flying-semen story" was inflammatory and an expression of the prosecutor's personal opinion about the case. A prosecutor may not disparage legitimate defense tactics.<sup>12</sup> "However, where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error."<sup>13</sup> Although some of these comments disparaged Lopez-Benitez's defense, we conclude that there is no reasonable probability of a different result even if counsel had objected to them. Therefore, we conclude that the district court did not err in denying this claim without conducting an evidentiary hearing.

Additionally, Lopez-Benitez argues that the prosecutor improperly implied that R.M. did not have knowledge of sexual matters even though there was no testimony to that effect. However, this claim is belied by the record.<sup>14</sup> Counsel had no basis upon which to object to the prosecutor's argument in this regard. Accordingly, we conclude that the

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<sup>12</sup>Butler v. State, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004); Williams, 103 Nev. 106, 737 P.2d 508.

<sup>13</sup>King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).

<sup>14</sup>See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984).



district court did not err in denying this claim without conducting an evidentiary hearing.

Lopez-Benitez argues that his counsel was ineffective for not objecting to language specialist Kathryn Black's testimony. Black testified for the State to rebut Lopez-Benitez's testimony that he was able to communicate with R.M. through the use of hand signals. Lopez-Benitez argues that Black's testimony was improper because he did not contend at trial that R.M. had communicated with him respecting the masturbation which he admitted performing in R.M.'s presence. Rather, according to him, she communicated consent by coming out of his bathroom with her pants around her ankles, removing her clothes, folding them, and sitting on the couch while he masturbated. However, Black's testimony went beyond R.M.'s ability to understand or communicate about sexual activity. Lopez-Benitez testified that R.M. communicated with him through hand signals that she wanted a ride and the general direction of her home. Black described the difficulty in communicating with R.M. and that R.M. only understood signs for concepts or people familiar to her. Black's testimony was relevant to rebut Lopez-Benitez's testimony that he communicated with R.M. and had no reason to believe that she was mentally incapable of consenting to sexual activity. We conclude that counsel had no basis to object to Black's testimony. Therefore, we conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez argues that his counsel should have objected to Black's testimony on the ground that it violated the exclusionary rule<sup>15</sup>

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<sup>15</sup>See NRS 50.155.

because she testified after being present for R.M.'s testimony. The State called R.M. to the stand solely to demonstrate to the jury her mental condition and the scope of her ability to communicate. Black served as R.M.'s interpreter, and her presence was necessary for this purpose. NRS 50.155(2)(c) excepts from the exclusionary rule "[a] person whose presence is shown by a party to be essential to the presentation of his cause." Further, Lopez-Benitez neglects to explain how Black's earlier presence was prejudicial to him. Consequently, we conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez further complains that his counsel should have objected to Black's testimony because the State failed to provide adequate notice of her expert testimony pursuant to NRS 174.234. This statute speaks solely to a party's obligation to reveal expert witnesses it intends to call in its case-in-chief. Black was called in her capacity as a language specialist in the State's rebuttal case. Counsel had no basis upon which to object to Black's testimony pursuant to NRS 174.234. Therefore, we conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez asserts that his counsel failed to zealously advocate on his behalf. He points to three instances in the record he claims illustrate his counsel's dispassionate representation. First, Lopez-Benitez argues that counsel's repeated use in closing argument of words such as "story," "claims," and "as he told it" to describe Lopez-Benitez's version of events signaled to the jury counsel's disbelief in Lopez-Benitez's defense. The record reveals only one instance where counsel referred to Lopez-Benitez's testimony as his "story, as he told it." The reference occurred during counsel's argument respecting the kidnapping charge, of which Lopez-Benitez was acquitted. The word "claims" appears nowhere

in counsel's closing argument. We conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez next contends that counsel lacked zeal respecting several aspects of Dr. Zbiegien's testimony. Dr. Zbiegien performed a sexual assault examination of R.M. and testified for the State. Lopez-Benitez first argues that counsel should have objected to Dr. Zbiegien's comment, "As far as I know, fingers don't ejaculate," which Lopez-Benitez describes as flippant. However, the underlying point of the comment was relevant, and no discernible prejudice resulted from counsel's failure to object to it. Accordingly, we conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez further asserts that counsel should have asked Dr. Zbiegien whether the small number of sperm cells found in R.M.'s vaginal cavity could be explained by a masturbating woman transferring ejaculate from a male ejaculating onto her. Although counsel did not ask this precise question, counsel queried Dr. Zbiegien about the possibility of an act other than penile penetration explaining the presence of a small amount of semen in R.M.'s vaginal cavity. We conclude that counsel was not ineffective in this regard. Therefore, we conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez further argues that his counsel was ineffective for not mentioning Dr. Zbiegien's testimony during closing argument. The record reveals that Dr. Zbiegien's testimony as a whole was damning to the defense. Lopez-Benitez fails to explain any prejudice resulting from his counsel's declining to highlight such damaging testimony in closing argument. Therefore, we conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez next argues that counsel was ineffective for not presenting to the district court his proper person motion requesting dismissal of counsel. Lopez-Benitez asserts that he presented a letter to counsel expressing dissatisfaction with counsel and that he prepared a motion to dismiss counsel. It is unclear whether counsel was aware of Lopez-Benitez's motion to dismiss counsel. However, even assuming counsel was aware of the motion and was deficient in not advising the district court of it, Lopez-Benitez must still demonstrate prejudice. We conclude that he failed to allege sufficient factual allegations demonstrating a reasonable probability of success on the motion<sup>16</sup> or of a different outcome at trial. Lopez-Benitez's claims in his letter and motion that a conflict of interest existed between him and counsel were supported by nothing more than vague allegations that he was unhappy with counsel's representation. Consequently, we conclude that he was not entitled to an evidentiary hearing on this claim and that the district court did not err in summarily denying it.

Claims of ineffective assistance of appellate counsel

Lopez-Benitez contends that the district court erred in summarily denying several claims of ineffective assistance of appellate counsel. Such claims are also reviewed under the Strickland test.<sup>17</sup> "To establish prejudice based on the deficient assistance of appellate counsel,

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<sup>16</sup>See Young v. State, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004) (stating that this court considers three factors in reviewing a district court's denial of a motion to substitute counsel: "(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion").

<sup>17</sup>Lara v. State, 120 Nev. 177, 183-84, 87 P.3d 528, 532 (2004).

the defendant must show that the omitted issue would have a reasonable probability of success on appeal."<sup>18</sup>

Lopez-Benitez first argues that appellate counsel was ineffective for failing to adequately challenge the sufficiency of the evidence. He accurately points out that appellate counsel erroneously stated in his brief that Lopez-Benitez's semen was found inside R.M.'s vaginal cavity. The evidence revealed that although semen was detected inside R.M.'s vaginal cavity, the amount found was insufficient to identify the source. However, more than sufficient evidence was presented to support Lopez-Benitez's conviction. Therefore, even if counsel had not made the error and had more strenuously argued this matter on direct appeal, there was no reasonable probability of a different result. Consequently, we conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez next contends that appellate counsel was ineffective for failing to raise an issue of prosecutorial misconduct. However, as explained above, we conclude that even if appellate counsel had raised this matter on appeal, a different result was not reasonably probable. Accordingly, we conclude that the district court did not err in summarily denying this claim.

Lopez-Benitez further contends that his appellate counsel was ineffective for failing to "federalize" his direct appeal issues in order to preserve them for federal appellate review. However, he failed to provide sufficient specific factual allegations demonstrating that the results of his direct appeal might have been different if counsel had "federalized" the

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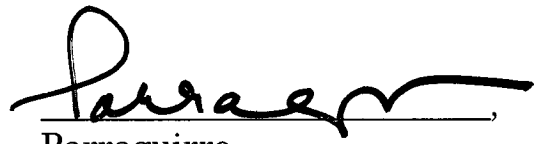
<sup>18</sup>Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

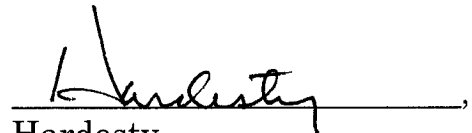
issues. Consequently, we conclude that the district court did not err in summarily denying this claim.

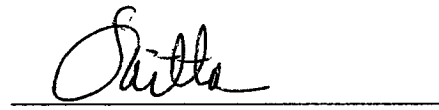
Lopez-Benitez asserts that his appellate counsel was deficient for not replying to the State's answering brief on appeal. However, he wholly fails to explain any prejudice resulting from this omission. Therefore, we conclude that the district court did not err in summarily denying this claim.

Having considered Lopez-Benitez's arguments and concluded that the district court did not err in dismissing his habeas petition, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Stewart L. Bell, District Judge  
Karen A. Connolly, Ltd.  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk