

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO LOPEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 49539

**FILED**

OCT 16 2008

TRACE K. LINDSMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; David Wall, Judge.

On April 24, 2007, the district court convicted appellant Francisco Lopez, pursuant to a jury verdict, of sexual assault and battery with intent to commit a crime. He was sentenced to a term of life in prison with the possibility of parole after 10 years for sexual assault. In addition, he was sentenced to a term of life in prison with the possibility of parole after 24 months for battery with intent to commit a crime. Both sentences were ordered to run concurrently.

Lopez raises two issues on appeal. First, he argues that the district court's denial of his motion to substitute counsel violated his right to due process. Specifically, Lopez argues that the district court should have allowed him to substitute counsel based on allegations that his counsel was a racist, that Lopez did not get along with him, and that his counsel attributed statements and facts to him that he never provided to counsel. These allegations were made on the first day of trial after Lopez interrupted his counsel during opening statements.

The right to counsel of one's choice is not absolute, and a defendant is not entitled to reject his court-appointed counsel and request substitute counsel at public expense without first showing adequate cause.<sup>1</sup> In reviewing a ruling on a motion to substitute counsel, this court considers the nature of the conflict alleged, the timeliness of the motion, and the adequacy of the district court's inquiry.<sup>2</sup> Whether friction between a defendant and his counsel justifies appointment of new counsel is entrusted to the sound discretion of the trial court.<sup>3</sup>

In this case, we conclude the district court did not abuse its discretion in denying the motion to substitute counsel. While the district court's canvass of Lopez was limited, there is sufficient evidence in the record to support the district court's ruling. In particular, Lopez fails to satisfy the first and most important prong of Young v. State, as the record does not indicate a significant and complete breakdown in communications between counsel and Lopez.<sup>4</sup> From the record, it appears that there was merely a misunderstanding between Lopez and counsel or a general displeasure with counsel. This is evidenced by the fact that the conflict did not arise until the time of the opening statement and did not appear to continue through the trial. Lopez raised no further complaints against counsel during trial.

---

<sup>1</sup>Thomas v. State, 94 Nev. 605, 607, 584 P.2d 674, 676 (1978).

<sup>2</sup>Young v. State, 120 Nev. 963, 968-69, 102 P.3d 572, 576 (2004).

<sup>3</sup>Thomas, 94 Nev. at 607-08, 584 P.2d at 676.

<sup>4</sup>Young, 120 Nev. at 968, 102 P.3d at 576.

In addition, the motion to substitute counsel was not timely made. In Garcia v. State,<sup>5</sup> we found that the defendants had several months prior to trial to file a motion for substitution of counsel and that waiting until the eve of trial to file suggested a dilatory motive. Likewise, Lopez waited until the first day of trial to express any concern that he had with his counsel. Lopez had ample opportunity prior to trial to file a motion to substitute counsel and the fact that he waited until the first day of trial suggests that his motion was merely a dilatory tactic. Accordingly, we conclude that the district court did not abuse its discretion.

Second, Lopez argues that the district court's denial of his motion for a mistrial violated his right to due process. Specifically, Lopez contends that the district court should have granted his motion for a mistrial because the jury had been prejudiced by his outburst during his counsel's opening statement. Further, Lopez argues that even if the district court was correct in denying his motion for a mistrial, the district court should have issued an admonishment or curative instruction to the jury regarding Lopez's outburst.

The decision to grant a motion for a mistrial rests within the district court's discretion, and it will not be overturned absent an abuse of that discretion.<sup>6</sup> "The district court's assessment of the jury's ability to remain impartial despite the explosion of defiance from the defendant is accorded substantial weight because the district court is in the best

---

<sup>5</sup>121 Nev. 327, 338-39, 113 P.3d 836, 843 (2005).

<sup>6</sup>Rudin v State, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004).

position to ascertain whether an event is prejudicial.”<sup>7</sup> Moreover, this court has recognized that a defendant should not benefit from his own disruptive behavior.<sup>8</sup>

We conclude that Lopez’s statements were not so egregious as to warrant a mistrial. The district court was in the best position to determine whether a mistrial was necessary and found that it was not. In addition, Lopez has failed to show how he was prejudiced by the district court’s refusal to grant his motion. Moreover, as noted above, Lopez’s own conduct created the grounds upon which he sought a mistrial. Therefore, we conclude that the district court did not abuse its discretion in this regard.

Lopez also contends that the district court erred by not issuing an admonishment or curative instruction to the jury respecting his outburst. Lopez did not request a curative instruction and did not object to the fact that one was not given. Failure to raise an objection in the district court generally precludes appellate consideration of an issue absent plain error affecting substantial rights.<sup>9</sup> Generally, an appellant must show that he was prejudiced by a particular error in order to prove that it affected his substantial rights.<sup>10</sup>

---

<sup>7</sup>U.S. v. McCormac, 309 F.3d 623, 626 (9th Cir. 2002).

<sup>8</sup>Hylton v. District Court, 103 Nev. 418, 426, 743 P.2d 622, 628 (1987) (holding that a defendant should not benefit from his own disruptive behavior to receive a mistrial and then be spared from re-trial by double jeopardy); accord McCormac, 309 F.3d at 627.

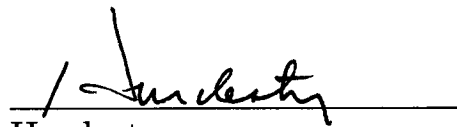
<sup>9</sup>See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

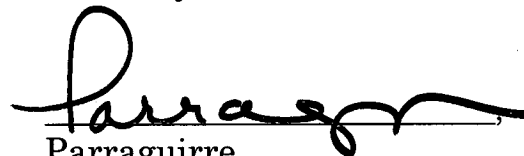
<sup>10</sup>Id.

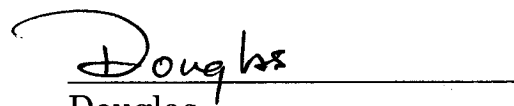
We conclude that Lopez failed to show that the district court's failure to provide a curative instruction was error that is plain from the record. Nor has Lopez shown that his substantial rights were affected because his outburst was brief and not egregious in nature. Accordingly, we conclude that the district court did not err in failing to give an admonishment or curative instruction to the jury regarding Lopez's outburst.

Having considered Lopez's claims and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

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

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

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. David Wall, District Judge  
Law Offices of Martin Hart, LLC  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk