

IN THE SUPREME COURT OF THE STATE OF NEVADA

ADRIAN LOPEZ,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
MICHELLE LEAVITT,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 58480

FILED

JUL 14 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Imersa*
DEPUTY CLERK

ORDER DENYING PETITION

This original petition for a writ of mandamus or, in the alternative, writ of prohibition, challenges district court decisions denying a pretrial motion to dismiss an indictment and a pretrial petition for a writ of habeas corpus. Petitioner Adrian Lopez claims that his right to fair proceedings was violated by contentious proceedings regarding his codefendant, the State failed to present exculpatory evidence to the grand jury, and the State presented misleading instructions to the grand jury. Lopez seeks a writ of mandamus or prohibition directing the district court to dismiss his indictment. See NRS 34.160; NRS 34.320; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.3d 534, 536 (1981).

First, Lopez claims that the State's contentious and constitutionally infirm dealings with his brother and codefendant, Raul Lopez, have infected his prosecution and thus entitle him to dismissal with prejudice. We conclude that this argument lacks merit. Lopez does not have standing to assert alleged violations of his brother's rights. See

United States v. Le Pera, 443 F.2d 810, 812 (9th Cir. 1971) (finding that appellant does not have standing to assert a witness's right against self-incrimination).


Second, Lopez claims that the State failed to present exculpatory evidence to the grand jury. This court has considered the failure to present exculpatory evidence to the grand jury as grounds for granting an extraordinary writ. See Ostman v. District Court, 107 Nev. 563, 564-65, 816 P.2d 458, 459 (1991). However, Lopez has not demonstrated that the State failed to present exculpatory evidence in violation of NRS 172.145(2), which requires the prosecutor to present "any evidence which will explain away the charge" if the prosecutor is aware of the evidence. In particular, most of the alleged exculpatory evidence primarily concerned prior inconsistent statements by the alleged victims. Such evidence does not have the tendency to "explain away the charge" as contemplated by NRS 172.145(2). Lay v. State, 110 Nev. 1189, 1198, 886 P.2d 448, 453 (1994). Further, evidence that the victim had "called out" Lopez to fight does not explain away the charge in light of the prior fights in which the groups engaged where the participants did not resort to deadly force. Accordingly, Lopez has not demonstrated that extraordinary relief is warranted.

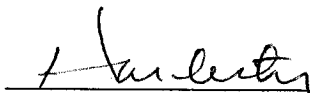
Third, Lopez claims that the instructions provided to the grand jury were deficient and misleading. We conclude that extraordinary relief is not warranted on this claim for the following reasons. First, while the State was mandated to instruct the grand jury on the elements of the offenses, see NRS 172.095(2), this court has never required the State to instruct the grand jury on applicable law concerning theories of liability, such as giving the unarmed offender instruction pursuant to Brooks v.

State, 124 Nev. 203, 210, 180 P.3d 657, 661 (2008), or instructing on aiding and abetting pursuant to Sharma v. State, 118 Nev. 648, 658, 56 P.3d 868, 874 (2002), or giving a limiting instruction concerning the significance of evidence provided by a certain witness. See Schuster v. Dist. Ct., 123 Nev. 187, 192, 160 P.3d 873, 876 (2007) (“This court has further held that ‘it is not mandatory for the prosecuting attorney to instruct the grand jury on the law.’” (quoting Hylar v. Sheriff, 93 Nev. 561, 564, 571 P.2d 114, 116 (1977))). Second, while the challenge-to-fight instruction was incomplete, the indictment cited the relevant statute and set forth the elements of the crime. See NRS 200.450. Third, many of Lopez’s challenges to specific instructions concern whether the State produced sufficient evidence to support the instructions and are therefore not appropriate grounds for extraordinary relief. See Kussman v. District Court, 96 Nev. 544, 545-46, 612 P.2d 679, 680 (1980) (providing that this court’s review of a pretrial probable cause determination through an original writ petition is disfavored). Fourth, Lopez has an adequate remedy at law by way of a direct appeal through which he may challenge the constitutionality of the school property sentencing alternative. See NRS 34.170; NRS 34.330.

Because petitioner has not demonstrated that our intervention is warranted, we

ORDER the petition DENIED.


Saitta _____, J.
Saitta


Hardesty _____, J.
Hardesty


Parraguirre _____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk