

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN ENRIQUE LOPEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40084

FILED

AUG 13 2003

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 Juan Enrique Lopez's post-conviction petition for a writ of habeas corpus.

On February 28, 2001, Lopez was convicted, pursuant to a jury verdict, of one count each of battery with the use of a deadly weapon with substantial bodily harm, gross misdemeanor child abuse and neglect, and battery constituting domestic violence, third offense. The district court sentenced Lopez to serve a prison term of 35 to 156 months for the battery count, a concurrent jail term of 12 months for the child abuse count, and a consecutive prison term of 19 to 48 months for the domestic violence count. Lopez filed a direct appeal, and this court affirmed the judgment of conviction.<sup>1</sup>

On April 29, 2002, Lopez filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Pursuant to NRS 34.750 and NRS 34.770, the district court declined to

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<sup>1</sup>Lopez v. State, Docket No. 37578 (Order of Affirmance, June 27, 2001).

appoint counsel or conduct an evidentiary hearing. On July 31, 2002, the district court denied Lopez's petition. This appeal followed.

In the petition, Lopez raised numerous claims of ineffective assistance of trial and appellate counsel. To establish ineffective assistance of trial or appellate counsel, a petitioner must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense.<sup>2</sup> To establish prejudice with regard to trial counsel, a petitioner must show a reasonable probability that but for counsel's errors the result of the trial would have been different.<sup>3</sup> To establish prejudice with regard to appellate counsel, a petitioner "must show that the omitted issue would have a reasonable probability of success on appeal."<sup>4</sup>

Lopez first claims that his trial counsel was ineffective for failing to move for a judgment of acquittal based on insufficient evidence. The district court rejected Lopez's claim on the merits, finding that Lopez was not prejudiced by trial counsel's failure to file a motion for a judgment of acquittal. We conclude that the district court did not err in rejecting Lopez's claim. Lopez was not prejudiced by his trial counsel's failure to file a motion for a judgment of acquittal because that motion had no reasonable likelihood of success. At trial, the State presented sufficient

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<sup>2</sup>Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

<sup>3</sup>Strickland, 466 U.S. at 694.

<sup>4</sup>Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

evidence to sustain Lopez's convictions, including the ex-girlfriend's preliminary hearing testimony identifying Lopez as the individual that attacked her. The ex-girlfriend testified that after she broke up with Lopez, he attacked her in her automobile while her four-year-old son was sitting in the back seat. The ex-girlfriend also testified that Lopez hit her and then cut her face from her eyebrow to her neck resulting in nerve damage and some vision loss. Additionally, the State presented evidence that two months before the attack on the ex-girlfriend, Lopez had pleaded guilty to physically grabbing the ex-girlfriend and spitting on her. Finally, the State presented evidence that Lopez had attacked another ex-girlfriend in a manner similar to the ex-girlfriend in that, after a recent breakup, he hit the woman and then cut her face. Because a reasonable jury could infer from the evidence presented that Lopez committed battery with the use of a deadly weapon with substantial bodily harm, gross misdemeanor child abuse and neglect, and battery constituting domestic violence, third offense, Lopez failed to show he was prejudiced by his trial counsel's failure to file a motion for acquittal.<sup>5</sup>

In the petition, Lopez raised numerous claims of ineffective assistance of trial counsel that lacked sufficient specificity.<sup>6</sup> In particular, Lopez claimed that his trial counsel was ineffective for failing to: (1) "develop a relationship with" Lopez; (2) adequately prepare his case for trial; (3) adequately communicate with him; (4) discuss possible defenses

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<sup>5</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

<sup>6</sup>See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

with him; (5) make fully informed strategic decisions with regard to the defense; (6) investigate and familiarize himself with the facts of the case; (7) impart to Lopez an understanding of the law in relation to the facts of his case; (8) file a pretrial motion for discovery and “other matters”; (9) file a pretrial motion to suppress “certain damaging evidence”; (10) object to “endless occasions” of prosecutorial misconduct; and (11) present character witnesses at sentencing.<sup>7</sup> Moreover, Lopez claimed that his appellate counsel was ineffective for failing to raise “numerous egregious errors committed . . . throughout the criminal proceedings.”

We conclude that the district court did not err in ruling that Lopez’s claims of ineffective assistance of trial and appellate counsel, set forth above, failed for lack of specificity.<sup>8</sup> Lopez failed to identify the exculpatory evidence or witnesses that trial counsel would have uncovered with further investigation or discovery. Lopez also failed to identify the evidence that trial counsel should have moved to suppress or discuss the legal basis for the suppression motion. Likewise, Lopez failed to describe the prosecutorial misconduct that purportedly occurred at trial, identify

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<sup>7</sup>Lopez also claimed that his trial counsel was ineffective at sentencing in failing to advise him of NRS 453.3405, the substantial assistance statute. The district court did not err in ruling that trial counsel was not ineffective for failing to advise Lopez of the substantial assistance statute. That statute did not apply to Lopez’s case because he was not convicted of a trafficking offense. See NRS 453.3405(2) (stating that defendants convicted under NRS 453.3385, NRS 453.339, or NRS 453.3395 may render substantial assistance).

<sup>8</sup>See Hargrove, 100 Nev. 498, 686 P.2d 222.

the witnesses that would have testified at the sentencing hearing, or set forth the issues appellate counsel should have raised on direct appeal. Finally, Lopez failed to show that he was prejudiced by counsels' deficient performance because he did not allege or explain how the outcome of the proceedings would have been different if his counsel had not been ineffective. Accordingly, the district court did not err in rejecting Lopez's claims for lacking adequate specificity.

In the petition, Lopez also raised several claims that should have been raised on direct appeal. In particular, Lopez claimed that the district court erred in admitting the following evidence: (1) testimony from Officer Lovell describing a photograph because it was inadmissible hearsay; (2) the preliminary hearing testimony of the ex-girlfriend because it was inadmissible hearsay; and (3) two documents that should have been excluded based on Confrontation Clause grounds. Additionally, Lopez claimed that there was insufficient evidence to support his convictions and that prosecutorial misconduct committed at his trial warranted reversal. Lopez waived these claims by failing to raise them in his direct appeal.<sup>9</sup> Accordingly, the district court did not err in rejecting them.

Moreover, Lopez raised several claims of ineffective assistance of counsel involving underlying issues that were already considered by

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<sup>9</sup>See Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) ("claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings"), overruled in part on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

this court in Lopez's direct appeal.<sup>10</sup> In particular, Lopez claimed that his trial counsel was ineffective in failing to object to the admission of Officer Lovell's testimony describing Lopez's prior acts of domestic violence because it was improper character evidence. Additionally, Lopez claimed that the admission of the ex-girlfriend's preliminary hearing testimony violated Lopez's right to confront the witnesses against him.<sup>11</sup> Those issues were fully litigated in the district court and on direct appeal. In the order of affirmance filed in Lopez's direct appeal, this court concluded that the district court did not err in admitting evidence of Lopez's prior acts of domestic violence because it was admissible to prove intent, motive or common scheme. Further, this court concluded that the admission of the ex-girlfriend's prior preliminary hearing testimony did not violate Lopez's right to confront the witnesses against him because the ex-girlfriend was unavailable at the time of trial and the State had made reasonable, good faith efforts to locate her. Accordingly, the district court did not err in rejecting Lopez's claims of ineffective assistance because, in light of our prior ruling that Officer Lovell's and the ex-girlfriend's testimony were

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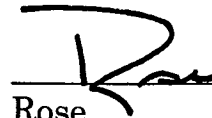
<sup>10</sup>See generally Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975).

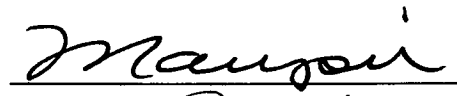
<sup>11</sup>In a related argument, Lopez claimed that his trial counsel was ineffective for failing to request a cautionary instruction limiting the use of Officer Lovell's testimony for a "prohibited purpose." The district court did not err in rejecting Lopez's claim because it lacked sufficient specificity. Lopez failed to explain the type of cautionary instruction trial counsel should have requested and the "prohibited purpose" of which the jury should have been advised.

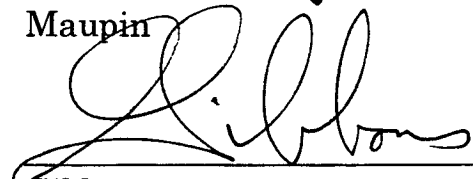
admissible, Lopez could not establish that he was prejudiced by his counsel's failure to successfully move to exclude that testimony.

Having reviewed the record on appeal, we conclude that Lopez is not entitled to relief and that briefing and oral argument are unwarranted.<sup>12</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>13</sup>

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. John S. McGroarty, District Judge  
Juan Enrique Lopez  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>12</sup>See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

<sup>13</sup>We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.