

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELECIO LOVATO,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
WASHOE; AND THE HONORABLE
DAVID A. HARDY, DISTRICT JUDGE,
Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

No. 64546

FILED

JAN 16 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER DENYING PETITION

This original petition for a writ of mandamus or prohibition challenges the process used during a grand jury proceeding that resulted in petitioner's indictment on four counts of lewdness with a child under the age of 14 years.

Petitioner previously challenged the process used during the grand jury proceeding by way of a pretrial petition for a writ of habeas corpus, which the district court denied after a hearing. Petitioner now challenges the district court's role in the grand jury proceeding, arguing that the district court was without jurisdiction or exceeded its jurisdiction by allowing (1) the alleged victim to present testimony that was distinctly different from her out-of-court statements, (2) the grand jury to indict petitioner of a lesser-included offense, (3) the prosecutor to instruct the grand jury that the petitioner had elected not to testify, and (4) a child victim advocate to be present without the express permission of the grand

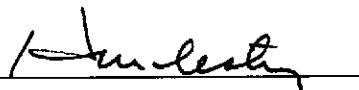
jury. Petitioner seeks a writ directing the district court to grant his habeas petition and dismiss the indictment without prejudice.

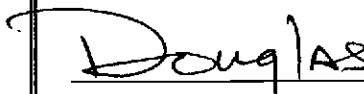
A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, NRS 34.160, or to control an arbitrary or capricious exercise of discretion, *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court. NRS 34.320. “Although we generally refrain from reviewing pretrial challenges to the sufficiency of an indictment by way of a writ petition, we have considered petitions when the case involves only a purely legal issue.” *Rugamas v. Eighth Judicial Dist. Court*, 129 Nev. ___, ___, 305 P.3d 887, 892 (2013) (internal citation and quotation marks omitted). “Petitioner[] carr[ies] the burden of demonstrating that extraordinary relief is warranted.” *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004)

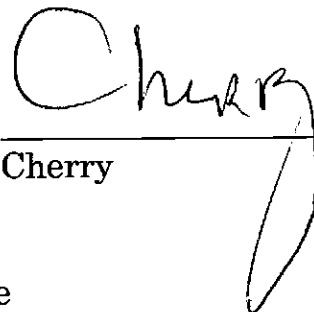
We conclude that petitioner has failed to demonstrate that extraordinary relief is warranted for the following reasons: The victim’s prior inconsistent statement that petitioner “put his private into my private” was not exculpatory evidence that explained away the charges. *See* NRS 172.145(2); *King v. State*, 116 Nev. 349, 359, 998 P.2d 1172, 1178 (2000). Although the manner in which the SAFE Passage medical examination results were presented was improper, petitioner was not prejudiced because the grand jury was informed that the results revealed that there was no physical trauma to the victim. *See Lord v. State*, 107 Nev. 28, 33-34, 806 P.2d 548 551 (1991). The State acted within its

discretion by seeking indictments for lewdness with a child. See *Salaiscooper v. Eighth Judicial Dist. Court*, 117 Nev. 892, 903 n.25, 34 P.3d 509, 516 n.25 (2001). Although NRS 172.095(1)(d) requires the district court to instruct the grand jury not to consider the failure of a defendant to testify, it does not prohibit the State from reciting and explaining the law while assisting the grand jury. See *Sheriff v. Keeney*, 106 Nev. 213, 218, 791 P.2d 55, 58 (1990). And, the victim advocate's presence during the child-victim's testimony was expressly authorized by the grand jury foreperson. See NRS 172.235(1)(g); *Lujan v. State*, 85 Nev. 16, 18, 449 P.2d 244, 245 (1969). Accordingly, we

ORDER the petition DENIED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. David A. Hardy, District Judge
Routsis Hardy-Cooper
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk