

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSEPH SAMUEL MARTINEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 78911-COA

**FILED**

**JUN 10 2020**

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Joseph Samuel Martinez appeals from a judgment of conviction, pursuant to a jury verdict, of one count of sexual assault on a child under the age of 14, one count of lewdness with a child under the age of 14, and one count of statutory sexual seduction by a person age 21 or older. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

In April 2017, Martinez, who was 28, contacted a 13-year-old girl (hereinafter, the second victim), on Facebook.<sup>1</sup> In May 2017, they decided to meet at Mendive Middle School in Sparks, Nevada. Martinez picked the second victim up, and they went to Martinez's house and watched movies. They continued to meet over the next several months. In August 2017, the second victim told Martinez that her 13-year-old friend (hereinafter, the first victim), as well as an additional friend, needed a ride. Martinez picked up the first victim and the friend, gave them a ride, and after dropping off the friend, drove to a park and stopped. Martinez reached into the first victim's pants and touched her vagina over her leggings. He then asked the victim to perform oral sex on him, which she declined. Martinez later admitted to police that he touched the first victim's legs to see if she would perform oral

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

sex on him, and then asked her for oral sex, even though he knew she was 13, but he denied any further touching.

In September 2017, Martinez picked up both victims and took them to his house. The first victim had apparently consumed whiskey, and per the second victim, was heavily intoxicated before Martinez picked them up. When they arrived at Martinez's house, the first victim laid down on Martinez's bed. She recalled Martinez inserting a finger into her vagina. She fell asleep, and hours later, she asked to go home. The victims argued about whether to let Martinez take the first victim home, and Martinez asked to talk to the first victim alone in his closet. Martinez later told police that he touched the first victim's vagina by inserting his finger while in the closet but not while she was on the bed; the victim did not recall if she was touched in the closet. Afterward, the first victim called her parents and left.

The second victim spent the night with Martinez. She woke up during the middle of the night to Martinez inserting his penis into her vagina. Martinez later admitted to the police that he engaged in both oral and anal sex with her. They both fell asleep, and when they woke up, the police had arrived and commenced an investigation. The police found a used condom, which contained DNA from both Martinez and the second victim. The first victim, following a forensic medical examination, was found to have a hickey on the left side of her neck, and minor tears on her labia minora and hymen, which would be consistent with fingers recently penetrating her vagina.

After the jury found Martinez guilty on all three counts in January 2019, sentencing was scheduled for May 2019. Prior to sentencing, Martinez sent multiple messages by handwritten notes to the district court requesting a new attorney, a new trial before an unbiased judge, and a new

jury. He also requested that the court appoint him a female attorney. Martinez also averred that the presentencing investigation report was “bogus,” and that his attorney did not file motions that he wanted him to file. He additionally requested a one-year delay in sentencing so that he could investigate his case. Martinez also wrote a statement to the district court noting that he deserved to do prison time with respect to the second victim because it was a lapse of judgment.

At the May 2019 sentencing hearing, Martinez noted that he was still dissatisfied with his attorney and wanted new counsel appointed. The district court conducted a *Young*<sup>2</sup> hearing, wherein Martinez noted that he was dissatisfied with his attorney because the attorney had not filed a motion to continue his sentencing, specifically so that his family would have time to conduct an investigation for his case. Martinez also alleged that his attorney called him and his family idiots. The district court noted that Martinez admitted in a written statement attached to his PSI report that he deserved to serve time with respect to the second victim, but that he nonetheless was seeking probation.

The district court explained that any communication breakdown between Martinez and his counsel was due to Martinez’s unrealistic expectations, such as expecting probation for his crimes, two of which disallowed probation. The district court also found that Martinez was only seeking to receive a continuance at the last minute to delay his sentencing and not for a legitimate purpose. Thus, the district court concluded that the attorney’s purported comment, as well as Martinez’s wish to continue

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<sup>2</sup>See *Young v. State*, 120 Nev. 963, 968-69, 102 P.3d 572, 576 (2004) (holding that the district court must make an adequate inquiry into a motion for substitution of counsel).

sentencing, did not provide adequate grounds to relieve Martinez's attorney and appoint new counsel. The district court further stated that Martinez had presented no good faith legal basis to show the breakdown of the attorney-client relationship. The district court allowed Martinez to choose between representing himself and allowing his attorney to represent him. Martinez chose to have his attorney represent him during sentencing. Martinez received an aggregate sentence of life in prison with the possibility of parole after 49 years.

On appeal, Martinez contends that insufficient evidence supports his convictions for lewdness and sexual assault.<sup>3</sup> He further contends that the district court abused its discretion in denying his motion to substitute counsel. We disagree.

*Sufficient evidence supports Martinez's convictions*

Martinez argues that there was insufficient evidence to convict him of lewdness of a child under the age of 14 because the first victim's story changed in that, on direct examination she testified that Martinez touched her vagina while parked in his car, whereas on cross-examination she said that he touched her leg while driving. He further contends that insufficient evidence supports his conviction for sexual assault on a child under the age of 14 because, although the first victim testified that Martinez penetrated her vagina with his finger on the bed, Martinez admitted digital penetration occurred in the closet. Martinez also contends that the second victim testified that she did not see Martinez sexually assault the first victim. Thus, Martinez contends that these contradictions require the reversal of his convictions.

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<sup>3</sup>Both of these charges pertain to the first victim. On appeal, Martinez does not challenge his conviction pertaining to the second victim.



When reviewing whether sufficient evidence supports a criminal conviction, we consider “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Stewart v. State*, 133 Nev. 142, 144, 393 P.3d 685, 687 (2017) (emphasis and internal quotations omitted). “[I]t is the jury’s function, not that of the [appellate] court, to assess the weight of the evidence and determine the credibility of witnesses.” *Rose v. State*, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007) (alteration in original) (internal quotations omitted). We will not disturb a verdict supported by substantial evidence. *Stewart*, 133 Nev. at 144-45, 393 P.3d at 687.

Under NRS 201.230(1)(a), a person 18 years of age or older commits lewdness with a child if he

willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 16 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child . . . .

Under NRS 201.230(2), if the child is under the age of 14 years, the defendant must receive a sentence of life in prison with the possibility of parole after serving ten years. Under NRS 200.366(1)(b), a person is guilty of sexual assault if he “commits a sexual penetration upon a child under the age of 14 years.” Under NRS 200.366(3)(c), a person convicted of sexual assault on a child under the age of 14 years old—not resulting in substantial bodily harm—must receive a sentence of life in prison with the possibility of parole after serving 35 years.

Here, with respect to the lewdness charge, Martinez admitted that he touched the first victim’s leg—to see if she was interested in

performing oral sex—and then asked her to perform oral sex. The victim testified that Martinez touched her leg, and her vagina under her pants but over her underwear, and asked her for oral sex. Martinez contends that this evidence is uncorroborated and inconsistent, but we conclude that a rational jury could have found that Martinez committed the acts requisite to support a conviction under NRS 201.230 for lewdness with a child because he touched either the victim’s leg or vagina with sexual intent while asking her to perform oral sex. “Moreover, a lewdness victim’s testimony need not be corroborated.” *Franks v. State*, 135 Nev. 1, 7, 432 P.3d 752, 757 (2019). A rational jury could have found that the first victim’s testimony was credible and that Martinez touched her leg or her vagina with the intent of arousing his or her sexual desires, as evidenced further by his request for oral sex. Therefore, we affirm Martinez’s conviction for lewdness with a child under the age of 14.

With respect to the sexual assault charge, the State’s amended information contended that Martinez either penetrated the first victim with his finger in his bed or in his closet. Although the victim testified the sexual assault occurred in Martinez’s bed and that she did not remember what happened in the closet, a rational jury could have concluded either that the sexual assault occurred on the bed, consistent with the first victim’s testimony, or in the closet, consistent with Martinez’s admission to police that he digitally penetrated the victim’s vagina in his closet. Furthermore, even though the second victim did not see the sexual assault, the jury could have still believed the first victim’s testimony that she was sexually penetrated. Moreover, this would be a reasonable interpretation of the facts because the second victim testified that, although she was in the same room at the time of the alleged sexual assault, she was playing video games while

sitting on the floor. Based upon the evidence presented by the State, we conclude that a rational juror could have found Martinez guilty of sexual assault. Therefore, we affirm Martinez's conviction for sexual assault on a child under the age of 14.

*The district court did not abuse its discretion in denying Martinez's motion for a new attorney*

Martinez contends that his right to counsel under the Sixth Amendment was violated when the trial court denied his motion to substitute his appointed counsel at the sentencing hearing.

This court reviews the district court's decision regarding substitution of counsel for an abuse of discretion. *Anderson v. State*, 135 Nev. 417, 424, 453 P.3d 380, 386 (2019). When considering whether the district court abused its discretion in denying a motion to substitute counsel, this court reviews "(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion." *Id.* (quoting *Young*, 120 Nev. at 968, 102 P.3d at 576). "An indigent defendant has a right to substitution only upon establishing good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which could lead . . . to an apparently unjust verdict." *Gallego v. State*, 117 Nev. 348, 363, 23 P.3d 227, 237 (2001) (internal quotations and alterations omitted), *overruled on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). "Good cause is not determined solely according to the subjective standard of what the defendant perceives." *Id.* (internal quotations omitted). "Attorney-client conflicts justify the grant of a substitution motion only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." *Id.* (internal quotations omitted).


Here, the record reflects that the district court inquired into Martinez's purported conflict with his counsel after Martinez requested

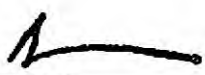
substitute counsel before his sentencing hearing. Martinez noted that he wanted to delay sentencing for a year so that his family could investigate his case, and that his lawyer refused to file a motion to continue the sentencing. Martinez further alleged that his lawyer called him an idiot. When asked if he had any other facts to show that there was a breakdown in the attorney-client relationship, Martinez could not point to additional facts, nor demonstrate that an investigation would be beneficial. Thus, Martinez did not show that he and his attorney were so at odds as to hinder his defense, and instead, his purported grievances were based on his own subjective notions that his attorney harmed him by calling him and his family idiots and that an investigation by his family was needed. Moreover, Martinez had already been found guilty of the charged offenses, and was sentenced within the statutory penalties provided by NRS 201.230(2) and NRS 200.366(3)(c), which did not allow probation.

Thus, on these facts, we conclude that the district court did not abuse its discretion in concluding that there was no adequate basis to grant Martinez's motion to substitute counsel. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

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

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Egan K. Walker, District Judge  
David Kalo Neidert  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk