

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO LOPEZ-BENITEZ A/K/A MARIO  
LOPEZBENITEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38840

**FILED**

MAY 15 2003

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict for one count of sexual assault with a minor under the age of fourteen. Appellant Mario Lopez-Benitez was sentenced to a term of life with the possibility of parole.

Benitez was charged with first-degree kidnapping and one count of sexual assault against Rosa Aida Martinez (Aida), a thirteen-year-old female. Aida has been deaf, mute, and mentally disabled since the age of fourteen months as a result of a spinal meningitis infection. She also suffers from frequent seizures and, as a result, requires twenty-four hour supervision. She is able to communicate through rudimentary sign language.

Benitez, testifying on his own behalf, admitted that he met Aida, took her to his apartment, and based upon his belief Aida was flirting with him, masturbated in front of her. Benitez indicated he was near enough to Aida, however, that his sperm flew across the intervening space to lodge in her underpants and vagina. Evidence unequivocally established the DNA sample taken from Aida's underpants matched Benitez's DNA. Benitez maintained that he thought Aida was of age and

she understood and consented to his sexual act. He denied placing his penis in her vagina.

Dr. Michael Zbiegien, director of the Suspected Child Abuse and Neglect (SCAN) Unit for Sunrise Children's Hospital, testified that he examined Aida for suspected sexual assault. Zbiegien testified that Aida had a fresh tear on her hymenal tissue at the 6 o'clock position that included some bruising. Based upon his examination, Zbiegien also testified that, in his expert medical opinion, Aida had not had sexual intercourse prior to the activity causing the hymenal tear (i.e., she was a virgin). Based upon the presence of motile sperm, Zbiegien concluded that Aida had been subjected to recent vaginal penile penetration determinative of sexual abuse.

During trial, Aida took the stand over Benitez's objection for the purpose of demonstrating to the jurors she was non compos mentis. Following Benitez's oral motion in limine to preclude Aida's testimony, the district court concluded the State was not calling Aida as a witness, but instead was presenting as a witness solely for the purpose of demonstrating her limited communication skills. Benitez again objected on the grounds that he had a right to vigorously cross-examine witnesses against him.

The district court asked the parties whether there was a method by which the parties could enter a stipulation acknowledging that Aida suffered from ailments that could be explained to the jury by a physician. In response, the State indicated it had not sought to retain or call an expert witness regarding Aida's psychological or mental disabilities. Thereafter, the district court, noting that Aida's testimony would not be required for the jury to reach a verdict and that Aida would

not be asked to testify as to any material issue, concluded that Aida could be presented as a witness and advised Benitez that he could propose a jury instruction regarding his concerns.

Aida took the stand and provided limited testimony through certified sign language interpreter, Kathryn Black. Aida was only able to provide her name and the number of her house. Black testified that she had extensive training in translating for persons with minimal language abilities. Black also testified that Aida was one of the most difficult clients she had ever had to interpret for based upon her language deficits. Black stated that, in her opinion, Aida could not have a gestural sign for something she did not comprehend (e.g., sexual contact). Benitez did not cross-examine Aida.

Following trial, the jury found Benitez guilty of the sexual assault and not guilty of first-degree kidnapping. Benitez timely appealed.

First Benitez contends that the district court erred in refusing to give the defense proposed Jury Instruction D. The language of the instruction was not included in the record. However, the trial transcript reveals Benitez indicated that the instruction would advise the jury that the law requires that a child sexual assault victim must testify with some particularity regarding the alleged assault in order to sustain a conviction. Benitez argues that Bradley v. State<sup>1</sup> prohibits convictions in child sexual assault cases unless the victim gives specific testimony. The district court overruled Benitez's objection regarding the proposed instruction as being an incorrect statement of the law. We agree. Although Bradley contains

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<sup>1</sup>109 Nev. 1090, 864 P.2d 1272 (1993).

some broad language in support of Benitez' assertion, it is applicable only in cases in which the only evidence of sexual assault comes from the victim's testimony. In such cases, the victim must testify with sufficient particularity as to the nature of the offense. Here, the record reflects there is sufficient evidence to sustain a conviction without the victims' testimony. Therefore, Bradley does not apply.

Second, Benitez argues he was denied the constitutional right to a fair trial where he was denied the right to cross-examine Aida. Benitez contends that, because Aida was unable to communicate verbally or through standardized sign language, Benitez was unable to effectively cross-examine her during the trial. Further, because Benitez asserts that only Aida's family can understand her efforts to communicate, there is no way to verify the veracity of either Aida's statements or the interpretation attached to those statements by her family.

The State argues Aida's testimony was more akin to a demonstrative exhibit. It was designed to display her disability and attendant limited communication skills. As such, the Sixth Amendment right to confrontation does not apply. Even if Aida could be considered a witness, the State contends Aida was able to communicate non-material limited information through sign language and with the use of an interpreter. Thus, the State argues Benitez had the opportunity to question Aida to the same limited extent as the State did but declined to do so. Finally, the State notes that Benitez had the ability to cross-examine Black and the members of Aida's family regarding their conclusions about Aida's limited communication skills and mental abilities. Therefore, Benitez had the ability to contest the State's witnesses regarding Aida's lack of ability to consent.

The district court treated Aida's testimony as a demonstration, rather than as a traditional witness competency issue. Indeed, the State, when opposing the motion in limine, apologized for treating Aida as a demonstrative exhibit. We conclude, based upon the limited purpose of the testimony and Benitez' ability to contest Aida's capacity through other means, that no Sixth Amendment confrontation violation occurred and the district court did not err in permitting the demonstrative testimony.

Finally, Benitez argues the district court granted an untimely request to televise his trial. Benitez contends SCR 230<sup>2</sup> requires that media outlets must request permission to televise a trial seventy-two hours prior to the televising unless good cause exists to do otherwise. Benitez asserts he objected to the untimely request, but the district court overruled his objection, concluding good cause existed. However, the district court did not explain the basis for its good cause ruling. As such, Benitez argues that the presence of television cameras in the courtroom during his trial deprived him of the right to a fair trial. Benitez does not

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<sup>2</sup>SCR 230 states:

Representatives of the media desiring permission to broadcast, televise, record or take photographs in the courtroom shall file a written request with the judge at least 72 hours before the proceeding commences. For good cause shown, however, the judge may grant such a request on shorter notice. The attorneys of record shall be notified by the court administrator or by the clerk of the court of the filing of any such request by the media. The written order of the judge granting or denying media access to a proceeding shall be made a part of the record of the proceedings.

support his claim with any factual citation to the record that demonstrates how the presence of the cameras prejudiced his case.

The State argues that the district court has the discretion to approve or deny untimely media requests, and the failure of the court to specifically cite its reasons for allowing the untimely request does not amount to an abuse of discretion. We agree.

This court will not disturb the district court's discretion in determining good cause except for clear cases of abuse.<sup>3</sup> This court, in the context of an untimely filed post-conviction writ of habeas corpus, defined 'good cause' as "a substantial reason; one that affords a legal excuse."<sup>4</sup>

In the present case, the district court received a media request, presumably to televise Benitez's trial, on the day set for trial. The district court minutes for September 26, 2001, indicate the district court orally granted the media's request and found, without explanation, good cause existed to grant the untimely request. While the district court should have indicated the facts supporting its finding of good cause for the record, absent any evidence of prejudice we conclude granting the untimely media request did not deprive Benitez of the right to a fair trial.<sup>5</sup> Accordingly, we

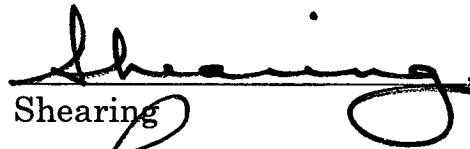
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<sup>3</sup>Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989).

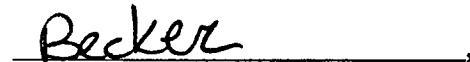
<sup>4</sup>Id.

<sup>5</sup>We have considered Benitez's other claimed errors regarding the sufficiency of evidence against him and allegations of prosecutorial misconduct based on statements made during closing arguments. We conclude these assignments of error do not warrant relief.

ORDER the judgment of the district court AFFIRMED.

 J.  
Shearing

 J.  
Leavitt

 J.  
Becker

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