

IN THE SUPREME COURT OF THE STATE OF NEVADA

MONTY LEE BURCH,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 55660

**FILED**

**MAR 17 2011**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of six counts of sexual assault of a minor under 14 years of age, lewdness with a minor under 14 years of age, and attempted sexual assault of a minor under 14 years of age. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

First, appellant Monty Lee Burch argues that the State's use of the victim's unsworn police statement violated his confrontation rights under Crawford v. Washington, 541 U.S. 36 (2004), and NRS 51.385 and allowed his conviction to be sustained by an unsworn statement.<sup>1</sup>

As to Burch's Crawford claim, that case does not apply as the victim testified at trial and was subject to cross-examination. Crawford, 541 U.S. at 68-69 (precluding admission of testimonial hearsay statements

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<sup>1</sup>Burch also contends that the admission of the victim's unsworn police statement violated article 1, § 10 of the United States Constitution. However, he did not object to the evidence on that basis below and therefore his claim is not preserved for appellate review. See Pantano v. State, 122 Nev. 782, 795, 138 P.3d 477, 485 (2006).

of unavailable declarant unless defendant had prior opportunity to cross-examine); see Walters v. McCormick, 122 F.3d 1172, 1175 (9th Cir. 1997) (“When a witness gives ‘testimony that is marred by forgetfulness, confusion, or evasion . . . the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination’” (quoting Delaware v. Fensterer, 474 U.S. 15, 22 (1985))); see Pantano v. State, 122 Nev. 782, 787-91, 138 P.3d 477, 480-83 (2006) (applying Crawford under similar factual circumstances).

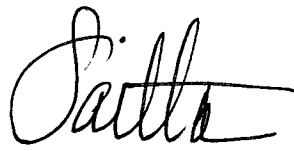
Burch’s claim under NRS 51.385 also fails. That statute allows the admission of a statement by a sexual abuse victim under age 10 when certain conditions are met. Burch appears to argue that the admission of the victim’s police statement violated NRS 51.385 because the victim’s unavailability was not established. However, the admission of such evidence is not predicated on the victim’s unavailability. Further, his contention that the challenged evidence did not satisfy the trustworthiness requirement under the statute lacks merit. The district court considered the factors enumerated in NRS 51.385(2), and, balancing those factors, concluded that the challenged statements provided sufficient circumstantial guarantees of trustworthiness. We discern no error. See Pantano, 122 Nev. at 787-91, 138 P.3d at 480-83 (applying NRS 51.385 under similar factual circumstances).

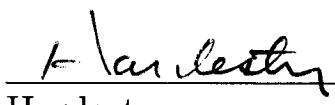
Burch’s claim that his convictions are improperly supported by unsworn statements lacks merit as the victim’s unsworn police statement was properly admitted. His conviction was supported not only by that evidence but by compelling DNA evidence recovered from the victim’s person.

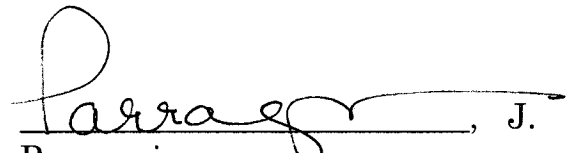
Second, Burch argues that the district court abused its discretion by denying his motion for mistrial based on the admission of prior bad act evidence. Despite the State and the defense's stipulation to redact references to instances of domestic violence from the victim's police statements, the jury heard the victim's statement that the police were called when Burch hurt the victim's mother. We conclude that the error did not have a "substantial and injurious effect or influence in determining the jury's verdict," Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)), given the overwhelming evidence of guilt, including the victim's testimony and the compelling DNA evidence, and the district court's curative instruction to the jury to disregard the evidence, Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004) (stating that this court presumes that jury follows district court's instructions). Accordingly, we conclude that the district court did not abuse its discretion by denying Burch's motion for mistrial. See Rose v. State, 123 Nev. 194, 206-07, 163 P.2d 408, 417 (2007).

Having considered Burch's claims and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Jennifer Togliatti, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Michael H. Schwartz, Esq.  
Eighth District Court Clerk