

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS BRANAGAN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 57523

**FILED**

**NOV 18 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 sexual assault of a minor under 14 years of age. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Appellant Thomas Branagan argues that the district court erred by permitting the victim's mother to testify at the preliminary hearing and at trial as to the victim's out-of-court statements about the offense pursuant to NRS 51.385. We review the admission of evidence for abuse of discretion. See Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006).

First, as to Branagan's claims related to the preliminary hearing, any error committed in the preliminary hearing was cured by his conviction by a jury under a higher burden of proof. See Dettloff v. State, 120 Nev. 588, 596, 97 P.3d 586, 591 (2004) (observing that any irregularities occurring during grand jury proceedings were cured when defendant was convicted by jury under higher standard of proof); Frutiger v. State, 111 Nev. 1385, 1393, 907 P.2d 158, 163 (1995) (Steffen, J., dissenting) ("The reason we do not reverse criminal convictions despite arguably deficient indictments is because indictments do not involve a determination of the innocence or guilt of an accused.").

Second, Branagan claims that the district court erred by allowing the victim's mother to testify at trial as to the victim's out-of-court statements about the sexual assault because the statements and testimony were not trustworthy. We disagree. The district court held a trustworthiness hearing outside the presence of the jury to assess the admissibility of those statements. The district court determined that the challenged statements regarding the initial disclosure of the sexual assault contained sufficient guarantees of trustworthiness, as they were spontaneous and not a result of repetitive questioning.<sup>1</sup> See NRS 51.385(2) ("In determining the trustworthiness of a statement [by a child describing sexual abuse], the court shall consider, without limitation, whether: (a) The statement was spontaneous; (b) The child was subjected to repetitive questioning; (c) The child had a motive to fabricate; (d) The child used terminology unexpected of a child of similar age; and (e) The child was in a stable mental state."). Although the district court did not make explicit findings as to the other factors in NRS 51.385(2), there is no evidence in the record of fabrication, age-inappropriate terminology, or unstable mental condition on the part of the victim. Furthermore, the

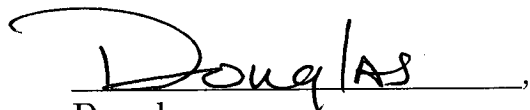
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<sup>1</sup>Branagan contends that the district court failed to inquire into the trustworthiness of the mother's testimony at trial, as the district court should have excluded the mother's testimony because it conflicted with her testimony during the preliminary hearing. However, this argument incorrectly conflates the district court's trustworthiness inquiry with the jury's function of determining the weight and credibility to give to conflicting testimony. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Moreover, we note that Branagan had the opportunity to cross-examine the victim's mother at trial about any inconsistencies in her testimony.

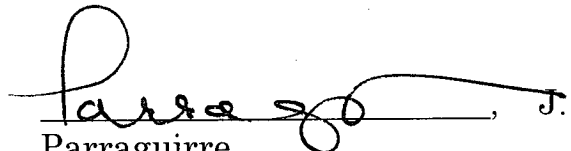
victim testified and was subject to cross-examination at trial. Based on our review of the hearing and the district court's findings, we conclude that the district court did not abuse its discretion by admitting testimony of the victim's mother as to the victim's out-of-court statements.

Having considered Branagan's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

 J.  
Douglas

 J.  
Hardesty

 J.  
Parraguirre

cc: Hon. David B. Barker, District Judge  
Sandra L. Stewart  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk