Cite as 2011 Ark. 373

SUPREME COURT OF ARKANSAS

No. CR10-1143

ROBERT LEE DAVIS, JR.
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered September 22, 2011

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[NO. CR-09-1024]

HON. MARION ANDREW HUMPHREY, JUDGE

AFFIRMED.

PAUL E. DANIELSON, Associate Justice

Appellant Robert Lee Davis, Jr., appeals from his convictions of capital murder and aggravated robbery and his sentence of life imprisonment without parole. His sole point on appeal is that the admission of a witness's out-of-court statement deprived him of his Sixth Amendment right to confront witnesses. We find no error and affirm.

Because Davis does not challenge the sufficiency of the evidence supporting his convictions, only a brief recitation of the facts is necessary. *See, e.g.*, *Vance v. State*, 2011 Ark. 243, 383 S.W.3d 325. On February 2, 2008, the Little Rock Police Department investigated the homicide of Larry Taylor at the intersection of Meadowcliff and Sheraton Roads in Little Rock, Arkansas. During the course of the investigation, Detective Tommy Hudson interviewed Davis's sister, Latasha Smith. Smith informed Detective Hudson that on February 13, 2008, Davis told her that he "killed somebody." When she inquired further, Davis stated

that he shot "that man that got killed on Meadowcliff." The State charged Davis with capital murder and aggravated robbery.[1]

At trial, the State called Smith as a witness. Smith testified on direct examination that while she remembered giving a statement to Detective Hudson, she did not remember the subject matter of their discussion. Despite her lack of memory, however, she testified that she did not lie to police officers and that any statement given to Detective Hudson was truthful. The State unsuccessfully attempted to refresh Smith's memory by allowing her to review the transcript of her statement. A bench conference was conducted, during which Davis argued that Smith should be deemed unavailable as a witness due to her lack of memory. The circuit court disagreed and allowed the line of questioning. Smith continued to testify on direct examination that she did not lie to the police, and that while she remembered meeting with Detective Hudson, she did not remember what they discussed.

Davis then conducted a voir dire of the witness, during which the following colloquy occurred:[2]

DEFENSE COUNSEL:	All right. Do you have certain mental incapacities as a result of your—your—you getting disability?
WITNESS:	Yes.
DEFENSE COUNSEL:	Are some of those problems that you have relate[d] to memory, short-term memory, long-term memory?

[1]The amended felony information charged Davis with one count of capital murder, one count of aggravated robbery, one count of possession of a firearm by certain persons, and one count of intimidating a witness. Counts 3 and 4—possession of a firearm by certain persons and intimidating a witness—were later nolle prossed.

[2]The record reflects that the jury was present during the voir dire of Smith.

WITNESS: A whole lot of it is related to that because I have—most of all, I black out, I forget stuff, I remember stuff and I just—like right now, I'm getting very agitated because I don't remember and she's pressuring me to remember.

DEFENSE COUNSEL: Okay. And you don't remember—you don't remember what you said that particular date; is that correct?

WITNESS: No, I do not.

DEFENSE COUNSEL: Al right. Now, you do—you do receive disability; is that correct?

WITNESS: Yes, I do.

DEFENSE COUNSEL: Al right. And you had to go through certain procedures in order to receive that disability, did you not?

WITNESS: Yes, sir.

DEFENSE COUNSEL: And they concluded that you are, in fact, disabled?

WITNESS: Yes.

DEFENSE COUNSEL: Is it related to your mental health?

WITNESS: Yes.

DEFENSE COUNSEL: I know it's kind of private but that's the reason why they're giving you disability; is that correct?

WITNESS: Yes, sir.

DEFENSE COUNSEL: Okay. And you have no memory of giving this statement; is that correct?

WITNESS: No, sir.

The State concluded its direct examination of Smith, and Davis did not conduct a cross-examination. The State then presented the testimony of Detective Hudson, who

testified that Smith contacted him in February 2008 and that the transcript was an accurate reflection of Smith's statement. Over Davis's objections, Smith's recorded statement was admitted into evidence and played for the jury to hear. Davis was found guilty, and a judgment and commitment order was entered against him on April 27, 2010. Davis timely appealed.

As his sole point on appeal, Davis argues that the admission of Smith's out-of-court statement deprived him of his Sixth Amendment right to confront witnesses. Specifically, he asserts that because Smith was unable to remember her out-of-court statement, she was constructively unavailable as a witness. In response, the State contends that Davis had the opportunity to cross-examine Smith, but chose not to do so. The State further argues that a witness's inability to recall details of a prior statement does not render the witness unavailable.

Because Davis's appeal raises a constitutional question, our standard of review is de novo. *See, e.g.*, *Seely v. State*, 373 Ark. 141, 282 S.W.3d 778 (2008). The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. 6. The defendant's right of confrontation consists of the "the right to physically face those who testify against him and the opportunity to conduct effective cross-examination." *Bowden v. State*, 301 Ark. 303, 308, 783 S.W.2d 842, 844 (1990) (citing *Delaware v. Fensterer*, 474 U.S. 15 (1985)).

The Sixth Amendment places restraints on the use of testimonial hearsay against a defendant. *See Crawford v. Washington*, 541 U.S. 36, 53 (2004). Davis argues, and the State

properly concedes, that Smith's out-of-court statement is testimonial in nature. *See id.* at 68 ("Whatever else the term [testimonial] covers, it applies at a minimum . . . to police interrogations."). Thus, the Sixth Amendment's Confrontation Clause is implicated.

However, the right of confrontation is not violated where testimonial hearsay is admitted against the defendant and the declarant is present at trial and available as a witness. *See id.* at 59, n.9 ("[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."). While Davis does not dispute that Smith was present at trial, he asserts that he was unable to effectively cross-examine her due to her lack of memory. We disagree and find no Sixth Amendment violation where Davis declined the opportunity to confront the witness through cross-examination.

The Sixth Amendment provides no guarantee against the testimony of a forgetful witness. *See Fensterer*, *supra*. It is sufficient that the defendant is afforded the opportunity to test the validity of the declarant's statement by attacking such matters as the declarant's bad memory. *See United States v. Owens*, 484 U.S. 554, 560 (1988) ("We do not think that a constitutional line drawn by the Confrontation Clause falls between a forgetful witness'[s] live testimony that he once believed this defendant to be the perpetrator of the crime, and the introduction of the witness'[s] earlier statement to that effect."); *Fensterer*, 474 U.S. at 22 ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness'[s]

testimony."); *see also Yanez v. Minnesota*, 562 F.3d 958 (8th Cir. 2009) (holding that a witness's lack of memory regarding her out-of-court statement did not render the admission of such statement unconstitutional); *United States v. Ghilarducci*, 480 F.3d 542 (7th Cir. 2007) (finding no violation of the Confrontation Clause where the defendant was able to test the witness's credibility by exposing the extent of his memory loss on cross-examination); *State v. Nyhammer*, 963 A.2d 316 (N.J. 2009) (holding that the admission of a witness's out-of-court statement did not violate the Confrontation Clause where the defendant did not attempt to cross-examine the witness regarding her prior statement or her inability to remember such statement).

The fact that Smith was unable to recall the details of her out-of-court statement on direct examination is of no consequence in this particular case where Davis declined the opportunity to cross-examine the witness. That Davis chose not to cross-examine the witness does not mean that he was denied the opportunity to do so. To the contrary, Davis was afforded the opportunity to confront Smith, as well as the opportunity to voir dire the witness. During voir dire, Davis was able to elicit testimony from Smith regarding her mental incapacities and her tendency to "black out" or "forget stuff." Nevertheless, he did not pursue the matter further on cross-examination. In fact, Davis made absolutely no attempt to cross-examine Smith regarding the core accusations included in her statement. For this reason, we cannot say that Davis's Sixth Amendment right of confrontation was denied. Accordingly, we find no error in the admission of the witness's statement and affirm Davis's convictions and sentence.

Pursuant to Arkansas Supreme Court Rule 4-3(i) (2011), the record has been examined for all objections, motions, and requests made by either party that were decided adversely to Davis, and no prejudicial error has been found.

Affirmed.

Benca & Benca, by: *Patrick J. Benca*, for appellant.

Dustin McDaniel, Att'y Gen., by: *Valerie Glover Fortner*, Ass't Att'y Gen., for appellee.