NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR08-580

	Opinion Delivered December 31, 2008
CURTIS DARRELL TUBBS APPELLANT	APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT, [NO. CR-06-1753]
V.	HONORABLE DAVID L. REYNOLDS, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED IN PART; REVERSED and REMANDED IN PART

LARRY D. VAUGHT, Judge

Curtis Tubbs appeals from a judgment and commitment order entered by the Faulkner County Circuit Court, finding him guilty of first-degree false imprisonment, third-degree domestic battery, and failure to appear and sentencing him ten years', twelve months', and three years' imprisonment respectively. Tubbs contends that the trial court erred in failing to grant his motions for dismissal and by permitting the introduction of the victim's hearsay statements in violation of his constitutional right to confront his accuser. We hold that sufficient evidence supports all three convictions. However, the trial court erred in admitting the victim's hearsay statements, which warrants reversal and remand of the false-imprisonment conviction.

The testimony at trial revealed that on July 8, 2006, the Conway Police Department received a call requesting a check on the welfare of Carolyn Keys. The information, provided

by a family member of Keys, was that Keys was being held against her will (by Tubbs) at a motel in Conway, Arkansas. Officers Lois Spencer, Laura Hodges, and James Stephen Beemis, Jr., testified that when they arrived at the motel where Tubbs was staying, they knocked on the door and observed someone inside the room; however, no one answered the door. The officers testified that they considered this an emergency situation and therefore gained access to the room using a passkey provided by the motel manager. Upon their entry, the officers observed Keys, who appeared to be asleep in one bed, and Tubbs, who appeared to be asleep in the other bed. Officers testified that the room was in disarray. The officers testified that Keys, visibly upset, immediately jumped out of the bed. They also observed that she had a black eye and red marks/scratches on her nose, right arm, neck, and near her left eye.

Then one of the officers began to testify about what Keys said as she was escorted out of the motel room. Tubbs objected, arguing that those statements were hearsay and that because Keys was not present at trial, admission of those statements violated his constitutional right to confront his accuser.[1] The State responded that the statements were admissible because they were not testimonial in nature. The trial court overruled the objection.

Officer Spencer went on to testify that as Keys left the motel room, she said "I've been waiting for you." A few minutes later, Keys told the officer that Tubbs had told her that she

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[1]This was not the first time Tubbs objected to the officers testifying about Keys's out-of-court statements. Immediately prior to trial, Tubbs advised the trial court that Keys would not be present at trial. (Keys resided in Texas and was beyond the court's subpoena power. Although the State made travel arrangements for Keys, she elected not to attend trial). Tubbs moved in limine to exclude any out-of-court statements made by Keys, arguing that they were hearsay and violated Tubbs's constitutional right to confront his accuser. The trial court made no ruling, and instead stated: "There are some statements excluded from the hearsay rule and we will have to see what the circumstances are."

only had two hours left to live. Officers Hodges and Beemis testified that when Keys exited the motel room, she thanked them for coming and hugged Officer Hodges. Officer Hodges added that Keys said that Tubbs had been hitting and kicking her all day and that he would not allow her to use the phone or leave the room.

Tubbs testified that Keys had been his live-in girlfriend for the past four and a half years. Tubbs, who was in Conway temporarily working on the construction of a Wal-Mart, was staying at the motel with Keys. He testified that on July 8, 2006, he and Keys got into a fight. Keys, a drug addict, was mad because he did not have any money to buy her drugs. He claimed that she broke a hairbrush over his head. While he denied striking back at Keys, he admitted that he used his hand to push her face from him when she was attacking him. He said that after the argument, he fell asleep and was still asleep when the police arrived. He said that Keys could have left the motel at any time as she had her own cell phone, his van operated without keys, and there was sixty dollars on the table. Finally, Tubbs admitted that he failed to appear in court for his November 12, 2006, trial date. He said that Keys told him that she dropped the charges against him.

The trial court found that Tubbs was guilty of first-degree false imprisonment, third-degree domestic battery, and failure to appear. On appeal, Tubbs first argues that the trial court erred in allowing the State to introduce the hearsay statements of Keys as it was a violation of his constitutional right to confront his accuser. His second argument is that the trial court erred in failing to grant his motions to dismiss.

A motion to dismiss at a bench trial is a challenge to the sufficiency of the evidence. *Russell v. State*, 367 Ark. 557, 242 S.W.3d 265 (2006). While Tubbs challenges the sufficiency

of the evidence in his second point, because of double-jeopardy concerns, we consider the challenge to the sufficiency of the evidence before addressing other arguments. *Grillot v. State*, 353 Ark. 294, 107 S.W.3d 136 (2003). When a defendant challenges the sufficiency of the evidence that led to a conviction, the evidence is viewed in the light most favorable to the State. *White v. State*, 98 Ark. App. 366, 255 S.W.3d 881 (2007). Only evidence supporting the verdict will be considered. *Id.* The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Id.* On review, this court neither weighs the evidence nor evaluates the credibility of witnesses. *Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998). Credibility determinations are made by the trier of fact, which is free to believe the prosecution's version of events rather than the defendant's. *Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001). Finally, when reviewing a challenge to the sufficiency of the evidence, we consider all the evidence, including that which may have been inadmissible. *Fondren v. State*, 364 Ark. 498, 221 S.W.3d 333 (2006).

Tubbs contends that there was insufficient evidence to support the false-imprisonment conviction. Under Arkansas law, "[a] person commits the offense of false imprisonment in the first degree if, without consent and without lawful authority, the person knowingly restrains another person so as to interfere substantially with the other person's liberty in a manner that exposes the other person to a substantial risk of serious physical injury."Ark. Code Ann. § 5-11-103(a) (Repl. 2006). When considering *all* the evidence, including that which may have been inadmissible, there is sufficient evidence to support the first-degree false-imprisonment

conviction. The evidence demonstrated that Keys thanked the officers when they arrived. She told them that she had been waiting for them, that Tubbs had been hitting and kicking her all day, that he would not let her leave the room or use the phone, and that he told her that she only had two hours to live. Therefore, we affirm on this point.

Tubbs also challenges the conviction for domestic battery. A person commits domestic battery in the third degree if he recklessly causes physical injury to a family or household member. Ark. Code Ann. § 5-26-305(a)(2) (Repl. 2006). "Family or household member[s]" includes persons who presently or in the past have resided or cohabited together and who have been in the past or are presently in a dating relationship together. Ark. Code Ann. § 5-26-302(2)(F), (H) (Repl. 2006). "Dating relationship" is defined, in part, as a romantic or intimate social relationship between two individuals, determined by examining the length of the relationship, the type of the relationship, and the frequency of the interaction between the two individuals involved in the relationship. Ark. Code Ann. § 5-26-302(1)(A) (Repl. 2006).

We hold that sufficient evidence supports this conviction, without relying upon Keys's out-of-court statements. First, Tubbs testified that he and Keys were boyfriend/girlfriend and had lived together for four and one half years leading up to his arrest. Keys clearly qualifies as a "family or household member." Tubbs also testified that he pushed her face with his hands and that this action caused the red mark on Keys's nose. He also acknowledged that he may have poked his finger in her eye. Finally, Keys's injuries were confirmed by the officers who observed them. Therefore, we hold that there is sufficient evidence supporting the third-degree domestic-battery conviction, and we affirm this point.

Lastly, Tubbs argues that there is insufficient evidence to support the failure-to-appear

conviction. Arkansas Code Annotated § 5-54-120 provides that a person commits the offense of failure to appear if he fails to appear without reasonable excuse subsequent to having been lawfully set at liberty upon condition that he appear at a specified time, place, and court. Ark. Code Ann. § 5-54-120(a)(2) (Repl. 2005). The evidence supports this conviction. Several pretrial orders, including an order continuing Tubbs's trial until November 1, 2006, were introduced into evidence. The record also included the transcript of the pretrial hearing where Tubbs was present and requested the continuance of his trial to November 1, 2006, in order to accommodate his work schedule. Finally, and most importantly, Tubbs admitted at trial that he failed to appear in court on November 1, 2006. We affirm this conviction.

In Tubbs's second point on appeal, he argues that the trial court erred when it permitted the introduction of Keys's out-of-court statements through the testimony of the police officers. He argues that this ruling violated his constitutional right to confront his accuser. This point raises a question of constitutional interpretation, which is subject to de novo review. *Seely v. State*, 373 Ark. 141, ___ S.W.3d ___ (2008).

The admission of hearsay cannot violate the defendant's Sixth Amendment right "to be confronted with the witnesses against him." *Seely*, 373 Ark. at ___ , ___ S.W.3d at ___.

> The Confrontation Clause mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court examined the history behind the Clause and overruled its then-leading decision on point. The Court held that confrontation—the opportunity for cross-examination—is what the Constitution requires to test the reliability of testimonial statements offered at trial to prove the truth of the matter asserted. 541 U.S. at 63–69. Where testimonial evidence is offered, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross examination." 541 U.S. at 68.

Lee v. State, 102 Ark. App. 23, ___, ___ S.W.3d ___, ___ (2008). Under *Crawford*, the

question of whether the hearsay statement of a witness who does not appear at trial is admissible turns on whether the statement is testimonial. *Crawford*, 541 U.S. at 53–54. If a statement is testimonial, then it cannot be admitted unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Id.* Therefore, we must determine whether Keys's statements were testimonial.

In *Davis v. Washington*, 547 U.S. 813, 822 (2006), the Supreme Court defined testimonial and nontestimonial statements:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

In *Davis*, the Court held that a domestic-violence victim's statements over the phone to a 911 operator were nontestimonial, concluding "that the circumstances of [the victim's] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency." *Davis*, 547 U.S. at 828. The Court noted that in domestic disputes "[o]fficers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Id.* at 832 (quoting *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 186 (2004)). Because the victim's statements were made during an emergency situation, she was alone and unprotected by police, she was seeking aid from the 911 operator and not telling a story about the past, the statements were held to be nontestimonial. *Id.* at 832.

The State likens the case at bar to *Davis* and argues that Keys's statements were

admissible because they were nontestimonial. The State points to the testimony that the officers considered the situation an emergency when they entered the motel room, that Keys was visibly upset when the officers arrived, and that Keys's statements were made within two to three minutes of the officers' arrival. The State argues that the case at bar is distinguishable from *Hammon v. Indiana*, (consolidated with *Davis* for the purpose of appeal). In *Hammon*, when the police responded to a domestic dispute, the alleged victim (the wife) was found on the front porch and her husband in the kitchen. The house was in disarray. Police learned from the husband that the couple had been in an argument, but he stated that everything was fine. Then the wife entered the home and reported her version of events to the police. Thereafter, the husband was charged with domestic battery. His wife failed to attend trial. The trial court allowed the officers to recount the wife's statement at trial as an "excited utterance" and because it was nontestimonial. The Supreme Court disagreed and held that the wife's statements were testimonial because they were part of the investigation—to find out what had already happened; that there was no emergency in progress; that the wife was not alone, she was protected by the police; and she was not seeking aid. *Hammon*, *supra*.

The facts in the instant case are more similar to those in *Hammon* than *Davis*. As such, we hold that Keys's statements were testimonial, and the admission of those statements violated Tubbs's constitutional rights.[2] As was the case in *Hammon*, when officers arrived at the motel and found Keys and Tubbs, there was no emergency. While it appeared as though a domestic dispute may have occurred (Keys had some injuries and the room was a mess), it

[2]Although not argued by Tubbs on appeal, it is inherent in our holding that because there was no emergency at the time the statements of Keys were made, there was no basis for admitting them under the excited-utterance exception to the hearsay rule.

was clear that the dispute was over. Moreover, Tubbs was asleep. Officers described the wife in *Hammon* as "somewhat frightened." Similarly, Keys was visibly upset. Just as in *Hammon*, as soon as police arrived, Keys was no longer alone, but under police protection. She was immediately separated from Tubbs. The statements she gave two to three minutes after officers arrived were statements telling the story about what *had* happened. The statements were elicited as part of the investigation about the crime committed; not to determine how to resolve an emergency.

Alternatively, the State argues that if admitting Keys's statements was error, it was harmless because the evidence of Tubbs's guilt was overwhelming. We agree with this argument as it relates to the domestic-battery and failure-to-appear convictions. Without Keys's statements, there was sufficient evidence to support these two convictions. However, we are not persuaded that the error was harmless as it relates to the false-imprisonment conviction. Without Keys's statements (that Tubbs would not let her leave the room or use the phone, that he kicked and hit her all day, and that he threatened that she only had two hours to live), the remaining evidence fails to support the false-imprisonment conviction.[3] Therefore, we cannot say that the Confrontation Clause error was harmless beyond a reasonable doubt. *See Sparkman v. State*, 91 Ark. App. 138, 142, 208 S.W.3d 822, 825 (2005). As such, we reverse and remand for a new trial on the false-imprisonment charge.

Affirmed in part; reversed and remanded in part.

GLADWIN and MARSHALL, JJ., agree.

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[3]The remaining evidence included some minor injuries about the face and neck of Keys, a messy motel room, unidentified hair on the floor, and a hug from Keys to a police officer.