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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1908-22

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

DONNIE E. HARRELL,

Defendant-Respondent.

APPROVED FOR PUBLICATION
May 18, 2023
APPELLATE DIVISION

Argued April 18, 2023 – Decided May 18, 2023

Before Judges Messano, Rose and Perez-Friscia.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Union County, Indictment No. 19-12-0852.

Milton S. Leibowitz, Assistant Prosecutor, argued the cause for appellant (William A. Daniel, Union County Prosecutor, attorney; Milton S. Leibowitz, of counsel and on the brief).

Joshua Forsman argued the cause for respondent (Caruso Smith Picini, PC, attorneys; Wolodymyr P. Tyshchenko, on the brief).

The opinion of the court was delivered by

ROSE, J.A.D.

This appeal requires us to consider the propriety of a February 23, 2023 Law Division order, excluding several allegations of sexual abuse against defendant that were memorialized in the child victim's March 30, 2016 videorecorded statement to law enforcement. The trial court admitted the entire statement under the tender-years exception to the hearsay rule, N.J.R.E. 803(c)(27), in October 2021. At that time, the court found the statement trustworthy, noting the alleged victim, who was eight years old when she gave her statement, would be called as a witness at trial.

Prior to trial, the State informed the defense the child was unable to recall all but one incident. During the February 23, 2023, N.J.R.E. 104 hearing that followed, the alleged victim, now fifteen years old, acknowledged she no longer recalled certain sexual conduct asserted in her tender-years statement. The court granted defendant's in limine motion, limiting the child's testimony to the only allegation she recalled and ordered her videorecorded statement redacted accordingly.[1] The court determined the child's lack of memory rendered her unavailable for cross-examination on the incidents she could not recall, thereby violating defendant's right of confrontation.

[1] The same order denied defendant's motion to reconsider the court's October 14, 2021 order admitting the child's statement pursuant to N.J.R.E. 803(c)(27). That decision is not at issue on this appeal.

During jury selection in the now-adjourned trial, we granted the State's emergent application to file a motion for leave to appeal, granted leave, and now reverse the court's February 23, 2023 order. We hold defendant's right of confrontation is not violated by admission of the child's entire videorecorded statement under N.J.R.E. 803(c)(27), previously deemed trustworthy by the court, provided the victim testifies at trial and is subject to cross-examination. We therefore conclude the trial court improperly parsed, and erroneously excluded, those alleged incidents the victim does not recall.

I.

The State contends defendant Donnie E. Harrell, while employed as an elementary school music teacher for the Plainfield Public School District, sexually abused two students, A.R. and N.G.,[2] between September 1, 2014 and March 23, 2016. A third student, E.L., apparently reported the allegations to the girls' second-grade teacher, Gabriela Zanatta-Perdomo, who in turn, reported the matter to the authorities. Only the allegations pertaining to A.R. are at issue in this appeal. We therefore confine our discussion to those claims.

[2] We use initials to protect privacy of the alleged victims. See R. 1:38-3(c)(12).

On March 30, 2016, Detective Joshua Rios of the Union County Prosecutor's Office (UCPO) Child Advocacy Center conducted a videorecorded interview of A.R. The child disclosed defendant touched her "private parts"; "butt"; and thighs over her clothing on more than one occasion. A.R. also asserted defendant placed her hand "on his private parts" over his clothing. All incidents allegedly occurred during school hours in defendant's music room.

In December 2019, defendant was charged in a seven-count Union County superseding indictment with: second-degree sexual assault "by committing one or more acts of sexual contact upon A.R.," who was under the age of thirteen and defendant was at least four years older, "on diverse dates between September 1, 2015 and March 23, 2016," N.J.S.A. 2C:14-2(b); second-degree endangering the welfare of A.R. by sexual conduct, N.J.S.A. 2C:24-4(a)(1); second-degree official misconduct, N.J.S.A. 2C:30-2(a); and second-degree pattern of official misconduct, N.J.S.A. 2C:30-7(a).[3]

At all three trial preparation sessions during the summer of 2022, A.R. told the trial prosecutor and a UCPO investigator she did not recall most of the events she had reported to Rios six years earlier. A.R. said she remembered

[3] The remaining counts pertained to allegations of abuse upon N.G. The initial indictment was not provided on appeal.

defendant placed her hand on his private parts but did not recall her previous allegation that defendant touched her private parts, buttocks, and thighs. Viewing her videorecorded statement during the second session did not refresh her recollection. According to the State's September 15, 2022 letter to defense counsel, A.R. "remembered telling one or two friends about sexual conduct by defendant close in time to the occurrence, specifically remembering that she talked to [E.L.] about it and possibly to another friend."

At the ensuing N.J.R.E. 104 hearing, A.R. testified defendant taught her music class twice a week during the first and second grade. She provided details about the room and its furnishings. A.R. "really liked" defendant and thought he was a "really good teacher."

When questioned whether "something bad happened with [defendant]," A.R. stated:

> [T]his one time we were watching a movie and the lights were off and the kids were all sitting in the area where the seats were at, and I wasn't paying attention. I was just doing my own thing and I was just being all over the place, and I ended up being underneath this big table. I was going up and down sliding underneath the table. And then [defendant], I don't know, he appeared out of nowhere and he sat on the table, and he ended up grabbing my hand and putting it outside his pants on his penis area.

A.R. did not recall how long the incident lasted or what happened afterward. She remembered telling E.L. and was "pretty sure" she told other

friends about it. She also recalled that her teacher at the time, "Ms. Zanatta," heard about the incident from the other children and sent A.R. to the main office. When asked whether she spoke with Ms. Zanatta, A.R. replied: "Yes, I think I did."

A.R. recalled meeting with "Mr. Joshua," i.e., Rios, and a "child advocate," whose name she had forgotten. A.R. said Rios questioned her and "gave [her] a doll to demonstrate the areas" where she "had been touched." A.R. "told him everything that [she] remembered at that time," and that her account to him was truthful. However, she did not recall whether defendant ever touched her private parts, buttocks, or thighs.

A.R. acknowledged she met with the trial prosecutor three times during the summer and watched the videorecording of her statement to Rios during one of those meetings. Although she did not recall all the incidents she described in her statement, A.R. knew "[t]here were other incidents." She explained she "didn't know at the time [the abuse] was a bad thing, but [she] had a feeling it was a bad thing." A.R. noted she "was just in second grade [at the time] so, of course [she] wasn't aware."

Defense counsel elicited similar testimony on cross-examination. When shown photographs of the music room, A.R. noted certain furnishings, such as a keyboard, were not present when she was defendant's student. A.R. said she

recalled telling the police defendant touched her private parts but "d[id]n't recall it occurring."

Immediately following argument, the trial court issued an opinion from the bench. The court found A.R.'s lack of recollection genuine, noting she was "an entirely credible witness." The court elaborated:

> She testified in a direct and forthright fashion. She did not seek to embellish her testimony. She was not evasive in any of her answers. She clearly stated what she knew and what she didn't know. She did possess the ability to recollect and recall and relate. However, there are gaps within what she does recall.

The court found A.R.'s lack of recollection "real" and not "feign[ed]." The court did not disturb its prior finding that A.R.'s statement to Rios was trustworthy, noting the "video" was "compelling."

But the court ordered redaction of the incidents A.R. described in her videorecorded statement she no longer remembered. The court found the admission of those incidents at trial would deny defendant his constitutional right of confrontation. More particularly, A.R.'s inability to recall anything about the forgotten incidents deprived defendant of the ability to cross-examine A.R. about those allegations, and he had no prior opportunity to do so. See Crawford v. Washington, 541 U.S. 36, 54-55 (2004) (holding the right of confrontation guarantees a defendant the opportunity to cross-examine a

declarant on an out-of-court testimonial statement offered against the accused in a criminal trial).

In reaching its decision, the trial court distinguished A.R.'s inability to recall from the witness's feigned lack of recollection in State v. Sims, 250 N.J. 189, 201 (2022). The court cited State v. Brown, 138 N.J. 481 (1994), for the same proposition. The court also noted different evidence rules applied in those cases.

Instead, the trial court relied on our opinion in State v. Nyhammer, where we reversed the trial court's decision admitting the child victim's tender-years statement. 396 N.J. Super. 72, 78 (App. Div. 2007), rev'd 197 N.J. 383 (2009). During her testimony at the N.J.R.E. 104 hearing, the child in Nyhammer "did not describe on direct or cross-examination the acts described in her videotaped statement." Id. at 80. We distinguished the victim's "complete inability to present current beliefs about any of the material facts, or to testify about her prior statements . . . from a situation where a trial witness for the prosecution simply has a bad memory." Id. at 89.

We held for purposes of the Confrontation Clause, "mere presence is not enough to render a witness available for cross-examination"; "the opportunity for cross-examination must be more than a mere sham." Id. at 88-89. The trial court in the present matter recognized our decision in Nyhammer was later

overruled by the Supreme Court but, because the Court concluded the defendant failed to preserve the Confrontation Clause issue by declining to cross-examine the child, see 197 N.J. at 414, the court here was persuaded the principles we enunciated remained valid.

The trial court also cited an excerpt from our decision in State v. Burr, 392 N.J. Super. 538, 568 (App. Div. 2007), aff'd as modified on other grounds, 195 N.J. 119 (2008). In that case, we considered the defendant's facial challenge to the tender-years exception, specifically N.J.R.E. 803(c)(27)(c)(ii). Id. at 565. The defendant contended the provision was unconstitutional under the Confrontation Clause because it permitted the admission into evidence of a child's out-of-court statement even if the child did not testify. Ibid. We said:

> This case does not present a situation where a child victim takes the stand but cannot remember sufficient details of the offense to provide meaningful testimony or is unable or refuses to respond to questions posed on cross-examination. In such instances, an argument could be made that while technically "available" for testimony, no realistic opportunity for cross-examination is presented.
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> [Id. at 568.]

"Believe[ing] that's the controlling law," the court in the present matter concluded defendant would have no realistic opportunity for cross-examination if A.R.'s unrecalled incidents were admitted in evidence.

On appeal, the State maintains defendant's right of confrontation will be honored at trial because A.R. intends to testify and recalls some details of the underlying events. Citing Delaware v. Fensterer, 474 U.S. 15, 20 (1985), and State v. Cabbell, 207 N.J. 311, 330 (2011), the State argues "[a]lthough the Confrontation Clause guarantees a defendant has an opportunity for effective cross-examination, it does not guarantee cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." The State further contends the court erroneously relied on decisions and principles that have been rejected by our Supreme Court in Sims and Nyhammer.

The State emphasizes the facts presented here are clearly distinguishable from those situations where the defendants were deemed unable to confront their accusers. See State in Int. of A.R., 234 N.J. 82 (2018) (child witness was not competent to testify); State v. Coder, 198 N.J. 451 (2009) (child witness was unable to recall any facts about the alleged crime). By contrast the State argues A.R. was not deemed incompetent, unable, or unwilling to testify, and her memory loss was only partial. Thus, the State contends A.R.'s lack of recollection bears upon her credibility and does not rise to the level of a confrontation right violation.

Finally, the State argues that if the court's interpretation of the right of confrontation is correct, and a witness's out-of-court statement can be parsed

into sections to redact facts that the witness no longer recalls, then two hearsay exceptions – N.J.R.E. 803(a)(1) (prior inconsistent statements), and N.J.R.E. 803(c)(5) (recorded recollection) – would be rendered meaningless and potentially unconstitutional because both relate to circumstances in which a witness is unable to recall facts.

Defendant urges us to affirm the trial court's order, relying initially on the evidence rules to support his position. He claims A.R.'s lack of recollection renders her unavailable under N.J.R.E. 804(a)(3) (providing "a declarant is 'unavailable' as a witness if [the] declarant . . . testifies to a lack of memory of the subject matter of the statement"). Defendant also argues because A.R. cannot recollect the forgotten events, she lacks personal knowledge of the facts, required under N.J.R.E. 602. Echoing the trial court's decision, defendant further argues the right of confrontation guarantees effective cross-examination.

II.

"[T]he burden of proving the constitutional admissibility of a statement in response to a Confrontation Clause challenge" is borne by the State. State v. Basil, 202 N.J. 570, 596 (2010). We review an evidentiary hearsay ruling under the abuse of discretion standard but afford no deference to questions of law, including those interpreting a defendant's constitutional rights. See Sims,

250 N.J. at 218. Where admission of evidence under a hearsay-rule exception results in a Confrontation Clause violation, the evidence must be excluded. See State v. Branch, 182 N.J. 338, 369-70 (2005) ("Crawford . . . is a reminder that even firmly established exceptions to the hearsay rule must bow to the right of confrontation.").

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution afford an accused in a criminal trial the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10. The right is implicated when the State seeks to admit a hearsay statement as evidence against a defendant in a criminal trial. See State in the Int. of J.A., 195 N.J. 324, 341-42 (2008). "Hearsay is 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" Branch, 182 N.J. at 357 (quoting N.J.R.E. 801(c)). "Hearsay is not admissible except as provided by [the Rules of Evidence] or by other law." N.J.R.E. 802.

Pertinent to this appeal, the tender-years exception is set forth in N.J.R.E. 803(c), which governs statements that "are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness."

Entitled, Statements by a Child Relating to a Sexual Offense, N.J.R.E. 803(c)(27) provides:

> A statement made by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil case if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601 [regarding competency of the witness].

In State v. P.S., however, the Court invalidated the first clause of subsection (c)(ii) to the extent it permits admission in evidence of a tender-years testimonial hearsay statement where the child does not testify at trial. 202 N.J. 232, 249 (2010). To comply with the right of confrontation, the defendant must have the opportunity to cross-examine the child on a testimonial hearsay statement in a criminal prosecution. Ibid.

Before the United States Supreme Court issued its 2004 opinion in Crawford, Confrontation Clause jurisprudence permitted the admission of a

hearsay statement by an unavailable declarant provided the statement had "adequate 'indicia of reliability.'" 541 U.S. at 40 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)); see also State v. D.R., 109 N.J. 348, 366 (1988). A hearsay statement satisfied the reliability standard if it fell within a "firmly rooted hearsay exception" or contained "particularized guarantees of trustworthiness." Crawford, 541 U.S. at 42 (quoting Roberts, 448 U.S. at 66).

Crawford changed the rule by precluding all hearsay statements offered against a defendant in a criminal prosecution if the statement is "testimonial" and the defendant does not have an opportunity to cross-examine the declarant at trial or did not have a prior opportunity to do so. Id. at 50-51. The decision found support in the intent of the Framers, who "would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Id. at 53-54.

"Not all hearsay evidence, however, is interdicted by the Confrontation Clause." Coder, 198 N.J. at 468. "[O]nly 'testimonial' statements trigger a defendant's Confrontation Clause rights." Ibid. (citing Crawford, 541 U.S. at 53-54). In this case, it is undisputed that A.R.'s videorecorded statement was testimonial.

During the nearly two decades following the United States Supreme Court decision in Crawford, New Jersey courts have issued several opinions interpreting a defendant's opportunity for cross-examination vis-à-vis the right of confrontation. Those decisions find support in United States v. Owens, 484 U.S. 554 (1988). Although the Court's decision in Owens predates Crawford, that portion of Owens relating to the defendant's opportunity to cross-examine was not overruled by Crawford. See State v. Ramirez, 252 N.J. 277, 305-06 (2022) (relying, in part, on Owens, explaining the right of confrontation and its relation to cross-examination).

In Owens, the defendant was convicted of brutally beating a corrections officer. 484 U.S. at 556. Nearly a month after the attack, when the officer recovered enough to provide a statement to law enforcement, he named the defendant as his attacker and identified the defendant's photograph. Ibid. At trial, the victim testified he recalled feeling the blow to his head and identifying the defendant in his statement to the agent. Ibid. But on cross-examination, he acknowledged he did not recall seeing the attacker and, other than his discussion with police, could not recall any discussions he had while hospitalized. Ibid.

On appeal, the defendant in Owens argued the victim's statement should have been excluded from evidence because the witness's inability to recall

details violated the defendant's right of confrontation. Id. at 555-56. The Court disagreed, stating:

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, 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, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness'[s] testimony.
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> [Id. at 558 (quoting Fensterer, 474 U.S. at 21-22).]

According to the Court, "the Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Id. at 559 (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987)). "It is sufficient that the defendant has the opportunity to bring out such matters as the witness'[s] bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that [the witness] has a bad memory." Ibid. Further, "[t]he weapons available to impugn the witness'[s] statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee." Id. at 560. Rather, "a witness is regarded as 'subject to cross-examination' when [the witness] is placed on the stand, under oath, and responds willingly to questions." Id. at 561.

In the present matter, the cases cited by the trial court do not support redaction of A.R.'s tender-years statement. We address each case in turn.

In Nyhammer, the trial court admitted in evidence the nine-year-old child accuser's videotaped statement to police pursuant to N.J.R.E. 803(c)(27). 197 N.J. at 395-96. During the interview, the child described and demonstrated with a doll the ways in which the defendant, her "Uncle John," sexually abused her. Id. at 411.

Two years later at trial, the child "answered preliminary questions with some ease," but the prosecutor "encountered great difficulty in drawing from [her] the information contained in her videotape statement." Id. at 394. "[T]he young girl stated that she told the truth when she spoke with [the detective], and that she told the detective 'about certain things that happened between' her and [the] defendant, even though it was 'hard.'" Ibid. The child, however, did not respond when asked "several different times" . . . "if Uncle John touched [her] anywhere." Ibid. (alteration in original).

Defense counsel questioned the child, but cross-examination was limited to "safe questions—questions intended to elicit answers that would reveal only mundane information rather than information that might damage or, even worse, implicate her client." Id. at 395. For example, "When asked whether she recalled telling [the detective] about what happened, [the child] could not

give details." Ibid. The trial court denied the defendant's motion to exclude the child's videorecorded statement, rejecting his argument that the child's "inability to recall or corroborate her videotape interview rendered her out-of-court statements untrustworthy and therefore inadmissible under N.J.R.E. 803(c)(27)." Id. at 395-96.

In overturning our decision that reversed the trial court's order, the Supreme Court found no violation of the federal or state right of confrontation because the child testified at trial and the defendant "had the opportunity to question her on the inculpatory statements and descriptions she gave in her taped interview." Id. at 413 (emphasis added). According to the Court:

> That counsel decided to forgo critical cross-examination because of [the child]'s unresponsiveness to many questions on direct does not mean th[e] defendant was denied the opportunity for cross-examination. Had counsel directly confronted [the child] on her claims on cross-examination and had she remained completely silent or unresponsive, then we would have a record on which to decide whether her silence or unresponsiveness effectively denied [the] defendant his constitutional right of confrontation.
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> [Id. at 414.]

Although the facts and procedural history in Nyhammer differed slightly from those presented here, the Court's discussion on the right of confrontation is nonetheless instructive. The Court rejected our conclusion that the defendant's right of confrontation was violated by the child's severely limited

testimony and confirmed that when the witness is subject to cross-examination, the right of confrontation is preserved. Ibid. The trial court's reliance on our decision in Nyhammer therefore was misplaced. A.R. did not remain "silent or unresponsive" during the N.J.R.E. 104 hearing. Presuming she answers questions at trial, she will be "available" for cross-examination. The opportunity for – not the sufficiency of – cross-examination is the decisive factor in a right-of-confrontation analysis.

Comparably, the Court in Sims overturned our decision, which had reversed a trial court order that denied the defendant's motion to suppress the witness's statement based on the witness's alleged loss of memory. 250 N.J. at 217-18. During the pretrial Wade/Henderson[4] hearing, the witness, who had previously identified the defendant as his shooter, testified he neither recalled the shooting nor the statement he had made to police. 466 N.J. Super. at 356, 360. The trial court found the witness's out-of-court identification reliable and thus admissible. Id. at 360. During trial, but outside the presence of the jury, the witness invoked the right against self-incrimination and refused to testify. Id. at 361. The court declared the witness unavailable under N.J.R.E. 804(a)(1) (unavailable witness based on the refusal to testify), and permitted

[4] United States v. Wade, 388 U.S. 218 (1967); State v. Henderson, 208 N.J. 208 (2011).

the State to read into the record his testimony from the Wade/Henderson hearing pursuant to N.J.R.E. 804(b)(1)(A) (providing the admission of a prior sworn statement of unavailable witness). Id. at 360-61.

Relevant here, the Supreme Court held the victim's inability to recall any details about the shooting or his police statement did not defeat the defendant's opportunity to cross-examine, but rather related to the effectiveness of his attempt to discredit the witness. Sims, 250 N.J. at 225-26. The Court further found that defense counsel's cross-examination of the witness at the Wade/Henderson hearing qualified as a prior opportunity for cross-examination. Id. at 226.

Citing Owens, the Court noted "successful cross-examination is not the constitutional guarantee." Id. at 223 (quoting Owens, 484 U.S. at 560). "Instead, 'the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Ibid. (quoting Fensterer, 474 U.S. at 20).

The Court continued that while "Crawford does not provide a specific standard for determining whether a defendant had an opportunity to cross-examine a witness, . . . it does suggest that the prior opportunity must be adequate." Ibid. (citing Rolan v. Coleman, 680 F.3d 311, 327 (3d Cir. 2012)).

However, adequacy is not based on the witness's recollection, as the opportunity to cross-examine can be adequate "even if the witness denies recollection of relevant events." Id. at 224. According to the Court:

> [T]he Confrontation Clause provides "no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion," but rather "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." Owens, 484 U.S. at 558 (quoting Fensterer, 474 U.S. at 21-22).
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> [Sims, 250 N.J. at 224.]

Thus, "the Confrontation Clause is not violated by the admission of an unavailable witness's prior testimony simply because that witness claims that he does not recall the event at issue." Id. at 225 (citing Owens, 484 U.S. at 559). In the present matter, defendant's right of confrontation is not dependent on A.R.'s ability to recall the details, but rather, on defendant's opportunity to probe her lack of recollection on cross-examination.

Nor are we bound by the dicta in Burr that the trial court found compelling here. The Supreme Court modified and affirmed our decision on other grounds, 195 N.J. at 124, without addressing our comment that "a child victim [who] takes the stand but cannot remember sufficient details of the offense to provide meaningful testimony or is unable or refuses to respond to

questions posed on cross-examination," prevents a "realistic opportunity for cross-examination," 392 N.J. Super. at 568. Even if our comment were not dicta, unlike the trial court, "we are not bound by our earlier decisions because we do not sit en banc." Liberty Mut. Ins. v. Rodriguez, 458 N.J. Super. 515 (App. Div. 2019); see also Pressler and Verniero, Current N.J. Court Rules, cmt. 3.3 on R. 1:36-3 (2023) (noting this court's "opinions clearly are binding on all [trial] courts" but they do not bind "other panels of the Appellate Division").

Nonetheless, during the N.J.R.E. 104 hearing, A.R. described the incident she recalled with some detail and testified that while she did not remember the others, she: was aware that other incidents had occurred; recalled the layout of the alleged crime scene, including a change in the appearance of the music room since she had been a student; reported the incident to her friends and school personnel; identified herself in the videorecorded statement; and confirmed the recording contained her truthful account. A.R.'s failure to recall all details bears upon her credibility and the weight of the evidence. See State v. Feaster, 156 N.J. 1, 79 (1998) (stating "any perceived inadequacies in [a witness's] testimony concern the weight it [is] to be accorded by the jury, not its admissibility").

Moreover, the State intends to call A.R. as a trial witness. See Cabbell, 207 N.J. at 330 (recognizing "[o]ne of the key objectives of the Confrontation Clause is to give the 'jury' the opportunity 'to observe the witness's demeanor.'" (quoting Owens, 484 US. at 560)). Accordingly, the jury can assess A.R.'s credibility and determine what, if any, weight to ascribe to her testimony.

In view of our decision, we need not address the State's contentions under the evidence rules, but briefly address defendant's evidentiary arguments. As a preliminary matter, we reject defendant's contention that A.R.'s inability to recall the alleged touching of her private parts, buttocks and thighs renders her unable to testify to those incidents under N.J.R.E. 602. Relevant here, the Rule provides: "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

Satisfying the personal-knowledge requirement is not an arduous task. Provided the party calling the witness presents a foundation from which the court can conclude the witness's testimony is based on the person's observations and experience, and not on information someone else conveyed, the requirement will be satisfied. See Phillips v. Gelpke, 190 N.J. 580, 590 (2007) ("In respect of lay testimony, the foundation for its admission is simply the witness's personal knowledge."); Neno v. Clinton, 167 N.J. 573, 584-85

(2001) (explaining that a witness may not rely on information conveyed by someone else, but rather, must rely on personal observations). A.R.'s testimony at the N.J.R.E. 104 hearing established her personal knowledge of the incidents.

Finally, we reject defendant's argument that A.R.'s lack of memory rendered her unavailable under N.J.R.E. 804(a), and Coder, 198 N.J. at 467, where the Court applied the N.J.R.E. 804(a) definition of an unavailable witness to a right of confrontation challenge. In Coder, the defendant was convicted of sexually assaulting a three-year-old girl in the basement of her apartment building in the presence of her eight-year-old friend. 198 N.J. at 456, 460. The friend reported the incident to the child's mother. Id. at 457. The child then complained to her mother, pointing to her vagina and buttocks, and stating, "it hurts," and, "Mommy, he touched me." Ibid.

One year later, the child testified at the N.J.R.E. 104 hearing but was unable to recall: being present in the basement with her friend; "something with a man in the basement"; "speaking to a policeman"; the reason why she was in court that day; whether there was any "place on her body that nobody's supposed to touch"; and whether anything happened when she was with her friend "that made [her] feel sad." Ibid. As to each of these inquiries posed by

the court, the child "shook her head, 'no.'" Ibid. The defendant "waived cross-examination." Ibid. The child did not testify at trial. Id. at 459-60.

In upholding the admission of the child's statement under the tender-years exception, the Court stated the child's "inability or unwillingness to testify at the Rule 104 hearing" regarding the abuse "coupled with the fact that she was not even called as a witness at trial, rendered her 'unavailable' under N.J.R.E. 804(a)(3)," and similarly unavailable for purposes of N.J.R.E. 803(c)(27)(c)(ii). Id. at 467. However, her statements were admissible, as the trial court had ruled, because there was sufficient corroborating evidence of the assault. Id. at 468. Admitting her statements into evidence did not violate the right of confrontation because her statements were not testimonial. Id. at 469.

Unlike the child in Coder, A.R. is not an unavailable witness for purposes of N.J.R.E. 804(a)(3), or N.J.R.E. 803(c)(27)(c)(ii). A.R. answered all questions on direct and cross-examination at the N.J.R.E. 104 hearing and recalled some details about the underlying events. Indeed, following the hearing, the trial court found A.R. "possess[ed] the ability to recollect and recall and relate." Clearly, she was not unresponsive and had information to offer. And unlike the child in Coder, A.R. will be called as a witness at trial.

Thus, A.R. is an available witness under N.J.R.E. 803(c)(27)(c)(i). Moreover, in view of the Court's decision in P.S., Coder is of little precedential value.

In summary, provided A.R. testifies at trial and is subject to cross-examination, defendant's right of confrontation is not violated by the admission of her videorecorded statement to police under N.J.R.E. 803(c)(27). Our decision is consistent with the underpinnings of the tender-years exception. See D.R. 109 N.J. at 360 (recognizing, "[t]he lapse of time between the sexual assault and the trial can affect the child's ability to recall the incident"). The incident allegedly occurred when A.R. was eight years old – seven years before she testified at the N.J.R.E. 104 hearing. Admission of her statement under the circumstances presented here is consonant with the Rule's purpose.

Reversed.