

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MICHAEL RAY CRAWLEY, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 THE STATE OF OKLAHOMA, )  
 )  
 Appellee. )

NOT FOR PUBLICATION  
Case No. F-2017-153

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

AUG 30 2018

JOHN D. HADDEN,  
CLERK

SUMMARY OPINION

ROWLAND, JUDGE:

Michael Ray Crawley appeals his Judgment and Sentence from the District Court of Pittsburg County, Case No. CF-2015-866, for First Degree Felony Murder (Count 1) in violation of 21 O.S.Supp.2012, § 701.7 (B), Felony Eluding/Attempting to Elude a Police Officer, After Two or More Prior Convictions (Count 2) in violation of 21 O.S.2011, 540A, Second Degree Burglary, After Two or More Prior Convictions (Count 3) in violation of 21 O.S.2011, § 1435 and Possession of Burglary Tools (Count 8) in violation of 21 O.S.2011, § 1437.<sup>1</sup> The Honorable Tim Mills presided at Crawley’s jury trial and sentenced him in accordance with the jury’s verdicts to life imprisonment with the possibility of parole on Count 1, three years imprisonment on Count 2, six years imprisonment on Count 3 and one year imprisonment on Count 8.<sup>2</sup>

<sup>1</sup> Crawley’s jury acquitted him of Count 4—Leaving Scene of Accident Involving Injury, Count 5—Assault and Battery with a Dangerous Weapon, Count 6—Assault and Battery with a Dangerous Weapon and Count 7—Malicious Injury to Property.

<sup>2</sup> Under 21 O.S.Supp.2015, § 13.1, Crawley must serve 85% of the sentence imposed on Count 1 before he is eligible for parole consideration.

Judge Mills ordered the sentences on Counts 1, 2, 3 and 8 to be served concurrently, but consecutively to Crawley's revoked sentences.<sup>3</sup> Judge Mills further awarded credit for time served, but only from the time of Crawley's arrest to the revocation of his prior sentences.

Crawley raises the following issues:

- (1) whether the district court erred in excluding the alternative suspect's purported confession that he was driving when the victim was killed;
- (2) whether the district court erred in excluding evidence concerning the alternative suspect's charge of eluding police committed within days of the instant crime;
- (3) whether the evidence was sufficient to support a conviction for first degree felony murder;
- (4) whether the district court erred in failing *sua sponte* to submit a jury instruction on second degree felony murder;
- (5) whether his conviction for Count 2 violates the prohibition against double jeopardy/double punishment;
- (6) whether there was a fatal variance between the allegations in the Information and the evidence adduced at trial;
- (7) whether his first degree felony murder charge was properly predicated upon the commission or attempted commission of eluding an officer;
- (8) whether prosecutorial misconduct deprived him of a fair trial;
- (9) whether he received effective assistance of counsel; and
- (10) whether the accumulation of errors deprived him of a fair trial.

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<sup>3</sup> The district court revoked Crawley's sentences in CF-2013-474, CF-2014-836, CF-2015-159, CF-2015-278, CF-2015-285 and CF-2015-353 (each of which is running concurrently with CF-2008-335 and CF-2008-336) prior to trial.

We find relief is not required on Counts 3 and 8 and affirm the Judgment and Sentence of the district court on those counts. We find, however, that the error raised in Proposition 1 requires reversal of Counts 1 and 2 for the reasons discussed below.<sup>4</sup>

### **Background**

Amber Brewer died, on November 5, 2015, during a high speed police chase around McAlester, Oklahoma. Officers were in pursuit of Appellant Crawley's truck when she exited the front passenger side door and was run over. The identity of the driver of Crawley's truck was the contested issue at trial.<sup>5</sup>

The police chase started around 4:00 a.m. when police officers responded to a local storage unit facility to investigate a burglary in progress complaint. Upon arrival, officers saw Crawley's white Ford truck parked next to an open storage unit. Patrol Officer Danny Kelley attempted to impede the truck's way out with his cruiser. He could make out the presence of a Caucasian person in the front passenger seat; he then observed a man duck under the storage unit door, run to the truck and get in the driver's seat. Officer Kelley identified the man as Crawley after dispatch reported Crawley was the truck's owner. The driver struck not only Officer Kelley's cruiser and the storage unit building as

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<sup>4</sup> Because we find reversal is required, we do not address the remaining claims.

<sup>5</sup> The State charged Crawley as the driver responsible for the high speed chase that resulted in Brewer's death. The prosecutor argued during closing that the jury should acquit Crawley of first degree felony murder if it found Crawley was not the driver.

he sped off but also another officer's car at the entrance of the storage unit facility. Several officers pursued the truck. At one point on Shuman Road, the doors of the truck came ajar. At a turn, the truck slowed and Brewer emerged from the truck to jump out. She was instantly swept under the truck, however, and the rear dually wheels bounced over her body, killing her instantly. The truck sped away and the police pursuit continued. The truck finally stopped near the prison cemetery outside the Oklahoma State Penitentiary. It came to rest in a ditch against a fence that prevented the driver's side doors from opening. Officers surrounded the truck, but saw no one inside it. They looked around for signs of someone on foot, but observed no one or any signs that someone had run away from the truck. Officers returned to the truck and found Crawley crouched down in the floorboard of the backseat. Crawley insisted he was not the driver and named Travis Jones.<sup>6</sup> Despite Officer Preston Rodgers' statements that the driver was bailing out and they might need the dogs, officers found no evidence showing anyone escaped from the truck without being seen.

### **Analysis**

Crawley complains that his constitutional right to present a meaningful defense was infringed by the district court's ruling excluding the testimony of two proposed defense witnesses, namely Stephani Compton and Danny Cook. Each witness purportedly heard Travis Jones confess he was the driver behind the wheel when Brewer was run over by Crawley's truck. Crawley argues their

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<sup>6</sup> Travis Jones was also known by and referred to as Travis Marlow.

testimony was admissible as both impeachment evidence as well as substantive third-party guilt evidence.

At Crawley's trial, the prosecution called Jones who denied that he was the driver of Crawley's truck when Brewer was killed and that he ever told Compton or Cook that he was driving on that fatal night. Crawley sought to present the testimony of Compton and Cook to impeach Jones's trial testimony. The State objected, arguing Jones's statements to Compton and Cook, even if offered for impeachment only, amounted to inadmissible hearsay. The district court denied, over objection, admission of Jones's alleged statements to Compton and Cook because the unsworn statements did not fall within a hearsay exception and were not the type of extrinsic evidence, as understood by the court, allowed under 12 O.S.2011, § 2613. The defense made an offer of proof of each witness's proposed testimony by examining each witness outside the presence of the jury. These witnesses recounted the alleged statements made by Jones and the circumstances surrounding their making. The district court refused to reconsider its original ruling denying admission of the statements and denied Crawley's motions for mistrial. Post-verdict, the district court denied Crawley's motion for new trial that asserted he was denied a fair trial by the exclusion of Compton's and Cook's testimony.<sup>7</sup>

Crawley's claim—that the district court erred in excluding impeachment evidence—has been preserved for appellate review. We review the district

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<sup>7</sup> Defense counsel attached affidavits from two jurors who attested that the excluded evidence would have affected their decision in this case.

court's ruling excluding the impeachment evidence for an abuse of discretion. *Baird v. State*, 2017 OK CR 16, ¶ 37, 400 P.3d 875, 885. "An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue or a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Sanders v. State*, 2015 OK CR 11, ¶ 4, 358 P.3d 280, 283.

The Evidence Code defines hearsay as an out-of-court statement offered in evidence for its truth. 12 O.S.2011, § 2801(A)(3). The district court erred in excluding the testimony of Compton and Cook concerning Jones's alleged confession on the basis of hearsay because the statements were not offered for their truth but rather to impeach Jones's earlier testimony, thereby exempting them from the rule barring hearsay. That the statements failed to meet the requirements of non-hearsay statements under 12 O.S.2011, § 2801(B)(1)(a) was also of no consequence for the same reason that the statements were not offered for their truth as substantive evidence, but for impeachment under 12 O.S.2011, § 2613(B). Inconsistent statements of a witness—not made during a trial, hearing or other proceeding, or deposition—are inadmissible as substantive evidence of guilt. *See Lewis v. State*, 1998 OK CR 24, ¶ 31, 970 P.2d 1158, 1169; 12 O.S.2011, § 2801(B)(1)(a). Such statements, however, can be used to impeach a witness under 12 O.S.2011, § 2613(B). *Id.*

Defense counsel laid the necessary foundation for Compton's and Cook's testimony by asking Jones about his alleged confession and obtaining an unequivocal denial that he ever told either Compton or Cook that he was the driver when Brewer died. Here, Jones was available to explain or deny the alleged statements and both the defense and the prosecution had an opportunity to question him about them. Thus, Jones's denial opened the door for extrinsic evidence through Compton and Cook about Jones's prior inconsistent statements to impeach his credibility. See *Foster v. State*, 1987 OK CR 174, ¶ 12, 742 P.2d 1131, 1135 (extrinsic evidence of an inconsistent statement is admissible for impeachment purposes unless witness admits making statement); 12 O.S.2011, § 2613(B) (permitting use of extrinsic evidence of prior inconsistent statements for impeachment purposes).

Crawley contends relief is required because his "entire defense centered on who was driving the truck" and discrediting Jones was key to his defense strategy. He maintains that exclusion of the testimony prevented him from further discrediting the prosecution's already weak case. Crawley claims, for example, that the testimony of Officer Kelley, the sole witness identifying him as the driver, was influenced by the dispatcher's announcement over the radio that the truck's tag traced back to him. He further cites the statements made by Officer Rodgers who was immediately behind Crawley's truck when it stopped—that the driver had "bailed out on foot," that they needed to get some dogs out there, and that the subject is running on foot—as evidence calling into

doubt Officer Kelley's identification and supporting his defense that he was not the driver. Crawley also notes that when Officer Kelley identified him at the storage unit, Officer Kelley stated that he was wearing a camouflage ball cap. Crawley had no such cap when pulled from the truck's backseat floorboard by officers.<sup>8</sup> No officer recalled finding such a cap in the truck. Travis Jones, however, appeared in court at trial with a camouflage ball cap. (Defense Exhibits 3 & 4).

The State argues that no relief is required because Crawley's proposed impeachment evidence was *de facto* substantive evidence that was properly excluded under *Lewis*, 1998 OK CR 24, ¶¶ 31-32, 970 P.2d at 1169-70. We disagree. Admittedly, the distinction between substantive evidence and impeachment evidence can be a subtle one. The State offered Jones's substantive statement that he was not the driver and the defense sought to impeach Jones's credibility with extrinsic evidence that he had made inconsistent statements concerning the identity of the driver in the past. In other words, Crawley sought to admit the impeachment evidence via Compton and Cook to cast doubt on Jones's veracity in hopes the jury would disbelieve his substantive evidence statement that he was not the driver. The desired byproduct of the impeachment evidence was to strengthen Crawley's own credibility in hopes the jury would believe his substantive testimony that Jones

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<sup>8</sup> The jury asked during deliberations to hear Officer Kelley's body cam audio about the cap. (Court's Exhibit 3)

was, in fact, the driver. The impeachment evidence in this case was admissible under Section 2613 and the district court abused its discretion in excluding it.<sup>9</sup>

This Court must decide whether the exclusion of the impeachment evidence of Jones's purported confession prejudiced Crawley. In *Dodd v. State*, 2000 OK CR 2, ¶¶ 18-19, 993 P.3d 778, 783, this Court found error in the exclusion of impeachment evidence involving a jailhouse informant and used the analysis set forth in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.3d 705 (1967) to determine if the error was harmless beyond a reasonable doubt. The *Dodd* Court considered five factors: (1) the importance of the testimony, (2) its cumulativeness, (3) the presence or absence of corroborative or contradicting evidence, (4) the extent of cross-examination allowed, and (5) the overall strength of the State's case. Unlike *Dodd*, Crawley's case also involves consideration of the overarching constitutional question of whether the exclusion of the impeachment evidence deprived Crawley of his right to present his third-party guilt defense.

A criminal defendant is guaranteed under the Constitution a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S.

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<sup>9</sup> Crawley also argues that Compton's and Cook's testimony should have been admitted as substantive evidence in support of his alternative suspect defense. Crawley makes an appeal for this Court to reconsider the prohibition on the substantive use of unsworn prior inconsistent statements in the narrow situation when a criminal defendant attempts to introduce exculpatory evidence of a third party confession to support his or her defense and the declarant testifies at trial subject to cross-examination. Crawley asks this Court to judicially adopt, as an exception to 12 O.S.2011, § 2801(B)(1)(a) of the hearsay rules, a rule that would allow for the admission of inconsistent out-of-court statements of a witness for their truth when the witness is present and subject to cross-examination. We need not decide whether to carve out this exception to Oklahoma's hearsay rule in this case because the error in excluding the challenged inconsistent statements for impeachment was not harmless beyond a reasonable doubt and requires relief.

319, 324, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006); *Summers v. State*, 2010 OK CR 5, ¶ 62, 231 P.3d 125, 145. The *Summers* Court explained that the Constitution under *Holmes* “permits judges to exclude evidence that is (1) repetitive, (2) only marginally relevant, or (3) poses an “undue risk” of harassment, prejudice, or confusion of the issues. *Summers*, 2010 OK CR 5, ¶ 62, 231 P.3d at 145. *Holmes*, according to the *Summers* Court, “recognized that the principle that defendants must be allowed a ‘meaningful opportunity to present a complete defense’ is particularly important in cases where a defendant desires to present evidence that someone else, other than the defendant, committed the crime(s) at issue, *i.e.*, third-party perpetrator evidence.” *Id.* at ¶ 62, 231 P.3d at 145.

*Holmes* involved the exclusion of substantive evidence of third-party guilt, but its analysis provides guidance in analyzing the impact of the error in this case. The defendant in *Holmes* attempted to utilize a two-part defense strategy to defend his murder, rape, robbery and burglary charges. First, he sought to undermine the State’s forensic evidence connecting him to the crime by showing the mishandling of evidence by police permitted evidence contamination and by showing the existence of a deliberate plot by certain police officers to frame him. Second, he sought to offer evidence of an alternative suspect through testimony placing the alternative suspect in the vicinity of the crime scene near the time the crimes were committed and through four other witnesses who had heard the alternative suspect either

acknowledge the defendant's innocence or admit guilt. *Holmes*, 547 U.S. at 323, 126 S.Ct. at 1730. The trial court excluded the third-party guilt evidence based on case law and the state supreme court upheld the ruling excluding the evidence, finding, after weighing the evidence, that the alternative suspect evidence did not raise a reasonable inference of the defendant's innocence in light of the strong forensic evidence supporting guilt. *Id.*, 547 U.S. at 323-24, 126 S.Ct. at 1731. The United States Supreme Court reversed and held evidence rules that do not serve legitimate interests cannot be used to exclude important defense evidence of third-party guilt. *Id.*, 547 U.S. at 324, 126 S.Ct. at 1731. The Court condemned the rule under review because the critical inquiry concerned the strength of the prosecution's case without regard for the probative value or the potential adverse effects of the defendant's third-party guilt evidence. *Id.*, 547 U.S. at 329, 126 S.Ct. at 1734. The Court explained:

If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.

*Id.* The question under *Holmes* focused not on the strength of the evidence supporting guilt, but on whether the rule excluding the third-party guilt evidence prevented undue harassment, prejudice or confusion of the issues.

*Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), also involved the exclusion of third-party guilt evidence. The alternative suspect evidence in that case was excluded on the basis of the evidentiary

rules barring the admission of hearsay. The *Chambers* Court also reversed the defendant's conviction because, *inter alia*, the alternative suspect's oral confessions to three friends were excluded under the hearsay rules, despite the presence of circumstances demonstrating the trustworthiness of the alleged confessions. *Id.*, 410 U.S. at 302-03, 93 S.Ct. at 1049. The Court concluded:

Few rights are more fundamental than that of an accused to present witnesses in his own defense. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence . . . . [The excluded] testimony . . . was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

*Id.*, 410 U.S. at 302, 93 S. Ct. at 1049.

Under the reasoning of *Holmes* and *Chambers*, the question is not whether the evidence of Crawley's guilt was strong, but whether the district court's erroneous exclusion of the impeachment evidence unfairly prevented Crawley from presenting evidence in support of his third-party guilt defense. We are mindful of this point in reviewing the *Dodd* factors to determine whether the error in this case is harmless beyond a reasonable doubt. Impeaching Jones's testimony was certainly important to Crawley's alternative suspect defense. The impeachment evidence Crawley sought to present was not cumulative. That Jones made inconsistent statements was disputed, but was hardly implausible. According to Compton and Cook, Jones's confessions were made spontaneously. Compton said during the offer of proof that she had been

friends with Jones all of her life making it understandable for him to confide in her. She said that Jones, distraught over the loss of his son, told her that God took his son because he was driving the night Brewer was killed. Cook, who was living with Compton, said Jones remarked that he was driving that night; Cook also heard Jones mention the death of his child. Compton's and Cook's similar account concerning Jones's purported confession provided corroboration for the excluded testimony. Furthermore, that someone else was driving was also supported by the officer's testimony that the driver bailed out of the truck on foot as it came to a stop. Because evidence of Jones's inconsistent statements was excluded, there was no direct or cross-examination evidence shedding light on his credibility concerning his contradictory trial testimony. And, as to the final *Dodd* factor which is the strength of the State's case, the record shows that the State's case was not a foregone conclusion as evidenced by the jury's verdicts acquitting Crawley of four counts.

As in *Holmes*, Crawley contested the reliability of the prosecution's evidence identifying him as the driver. His third-party guilt evidence was directed to the central issue of the trial, *i.e.*, identity of the driver. It was the fact finder's duty to decide whether the State proved beyond a reasonable doubt that Crawley was the driver or whether Crawley's alternative suspect evidence undermined the prosecution's case. The jury was capable of evaluating the circumstances of Jones's alleged confessions to Compton and

Cook and assessing these witnesses' credibility. Tasked with sifting through the details of Crawley's alternative suspect defense, it is only reasonable that the jury be provided with all of the admissible evidence relevant to the key issue so the jury could judge for itself whose testimony was worthy of belief. The district court's exclusion of the extrinsic evidence of impeachment in this case was error, and within the context of these facts prevented Crawley from meaningfully presenting his third-party guilt defense. For these reasons, we hold on this record that the ruling of the district court deprived Crawley of a fair trial. Because we cannot find the error harmless beyond a reasonable doubt, we reverse Counts 1 and 2 and remand this matter for a new trial not inconsistent with this opinion. *See Dodd*, 2002 OK CR 2, ¶ 27, 993 P.3d at 784-85.

### **DECISION**

The Judgment and Sentence of the district court on Counts 3 and 8 is **AFFIRMED**. The Judgment and Sentence of the district court on Counts 1 and 2 is **REVERSED** and the case **REMANDED** for a new trial. Crawley's Notice of Extra-Record Evidence Supporting Proposition IX of Brief of Appellant and/or Alternatively Application for Evidentiary Hearing on Sixth Amendment Claims is **MOOT**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2018), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF PITTSBURG COUNTY  
THE HONORABLE TIM MILLS, ASSOCIATE DISTRICT JUDGE**

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**OPINION BY: ROWLAND, J.**

LUMPKIN, P.J.: Concur in Part and Dissent in Part  
LEWIS, V.P.J.: Concur in Results  
HUDSON, J.: Concur  
KUEHN, J.: Concur

**LUMPKIN, PRESIDING JUDGE: CONCURRING IN PART/DISSENTING  
IN PART**

I concur in the results reached but write separately to address the analysis set forth in the opinion.

While I agree that the trial court abused its discretion when it prohibited Appellant from introducing the testimony of Stephani Compton and Danny Cook, I cannot agree with the undue emphasis given to the sentence fragment “the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense” that was contained in *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006). *Summers v. State*, 2010 OK CR 5, ¶ 4, 231 P.3d 125, 155 (Lumpkin, J., dissenting). Instead, this Court correctly applied *Holmes* in *Pavatt v. State*, 2007 OK CR 19, 159 P.3d 272, where we stated:

Appellant refers us to *Gore v. State*, 2005 OK CR 14, 119 P.3d 1268, and *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), to support his claim that he was entitled, as a matter of due process, to present evidence of a possible third-party perpetrator. In *Holmes*, the Supreme Court found that a state evidentiary rule governing admissibility of third-party perpetrator evidence ran afoul of the Sixth and Fourteenth Amendment rights to a fair trial. The defendant in *Holmes*, charged with rape, burglary, robbery, and capital murder, proffered testimony suggesting that the forensic evidence against him had been contaminated and/or planted, and that another man, White, had admitted to the crime to several other people. White

denied making any incriminating statements to others, and offered an alibi. The trial court excluded this evidence. The state appellate court affirmed, holding that third-party perpetrator evidence should be excluded any time the evidence against the defendant is “strong,” particularly when there is “strong forensic evidence” of the defendant’s guilt.

The United States Supreme Court found the rule applied by the state appellate court in *Holmes* to be too rigid. The Court pointed to several of its past cases, striking down similar rules that “serve[d] no legitimate purpose” or were “so disproportionate to the ends that they [were] asserted to promote.” *Holmes*, 547 U.S. at 326, 126 S.Ct. at 1732-33. Yet the Court recognized the authority of legislatures, and courts, to impose reasonable evidentiary rules in criminal trials, and noted that such authority – even regarding the admission of third-party perpetrator evidence – was not directly at issue. The only issue in *Holmes* was the South Carolina Supreme Court’s recent expansion of its decades-old, judge-made rule, to make the admissibility of third-party perpetrator evidence entirely dependent upon the strength of the prosecution’s evidence, considered in isolation. The Supreme Court found such a rule unconstitutional, in effect because it irrationally presumed that any evidence presented by the state was necessarily more credible than any evidence proffered by the defense.

*Pavatt*, 2007 OK CR 19, ¶¶ 49–50, 159 P.3d at 288–289 (footnotes omitted).

“The U.S. Supreme Court decision in *Holmes* did nothing to dilute the application of the Rules of Evidence.” *Summers*, 2010 OK CR 5, ¶ 5, 231 P.3d at 156 (Lumpkin, J., dissenting). Instead, the Supreme Court recognized that “rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with

which they are charged” are widely accepted. *Holmes*, 547 U.S. at 327, 126 S.Ct. at 1733.

In the present case, the Rules of Evidence actually permitted Appellant to attempt to impeach Travis Jones’ testimony through the introduction of the testimony of Compton and Cook. 12 O.S.2011, § 2613(B). Therefore, the trial court erred when it prohibited Appellant from presenting their testimony.

I also cannot agree with the harmless error analysis set forth in this opinion. This Court’s review to assess the ramifications of a Constitutional error is straight forward. We do not determine whether the appellant was unfairly prevented from presenting evidence in support of his defense. We already made that determination when we concluded that the trial court had committed error. Instead, where the Constitutional error is subject to harmless error analysis, we apply *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967) and determine whether the error was harmless beyond a reasonable doubt. *Barnes v. State*, 2017 OK CR 26, ¶ 12, 408 P.3d 209, 215; *Bartell v. State*, 1994 OK CR 59, ¶ 15, 881 P.2d 92, 97; *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, 701. The U.S. Supreme Court did not apply a harmless error analysis in *Holmes*, instead, the Court simply determined that a constitutional violation had occurred and remanded

the matter back to the state courts for the error to be addressed. *Holmes*, 547 U.S. at 331, 126 S.Ct. at 1735. The discussion in *Holmes* criticizing evaluation of the strength of the evidence was the Supreme Court's discussion of the unreasonableness of the state court created rule prohibiting the admission of the third-party perpetrator evidence. See *Id.*, 547 U.S. at 329-31, 126 S.Ct. at 1734-35. Thus, *Holmes* does not make up any part of the harmless error analysis.

A violation of a criminal defendant's constitutional right to present evidence is subject to the harmless beyond a reasonable doubt analysis. *Gore v. State*, 2005 OK CR 14, ¶ 30, 119 P.3d 1268, 1277. "Before a federal constitutional error can be held harmless, this Court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*, quoting *Chapman*, 386 U.S. at 23-24, 87 S.Ct. at 827-28. In the present case, there is a reasonable probability that the outcome of the proceeding would have been different had the trial court allowed Appellant to present the proffered testimony. Thus, Appellant is entitled to a new trial as to Counts 1 and 2.