

No. 22-5218

IN THE SUPREME COURT OF THE UNITED STATES

REGINALD DEXTER CARR, JR., *Petitioner*

VS.

STATE OF KANSAS, *Respondent*.

*On Petition for Writ of Certiorari to the
Supreme Court of Kansas*

REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

REPLY TO BRIEF IN OPPOSITION

Petitioner respectfully submits this Reply to issues raised by the Respondent's Brief in Opposition to his Petition for a Writ of Certiorari.

I

This case presents an opportunity for this Court to resolve the split in jurisdictions as to whether the denial of the right to testify is structural error.

The Respondent makes two arguments against review of the question of whether the denial of the right to testify is structural error. First, the respondent claims that Reginald Carr's constitutional right to testify was not violated (Brief in Opposition, pp. 15-16). Second, the respondent claims that the Kansas Supreme Court did not hold that Reginald Carr's right to testify was violated (Brief in Opposition, pp. 18-19). These arguments are contrary to this Court's precedent and the record.

The court's erroneous limitations on Reginald Carr's ability to testify as to anything useful to the defense resulted in a denial of his right to testify.

The Respondent would have this Court find that Reginald Carr's Fifth, Sixth and Fourteenth Amendment rights to testify in his own defense were not violated because the trial court did not bar Reginald Carr from taking the witness stand and offering testimony. While it is true that he was not prohibited from testifying, he was prevented from offering a complete and coherent account of the events surrounding the capital offenses in order to address the accusations against him. Based on this distinction, the

Respondent denies that this case contributes to the split in jurisdictions as to whether the denial of the right to testify is structural error or trial error.

To determine that the Respondent is mistaken, this Court need look no further than its opinion in *Rock v. Arkansas*, 483 U.S. 44, 97 L.Ed.2d 37, 107 S.Ct. 2704 (1987). In *Rock*, the petitioner, who was charged with manslaughter, submitted to hypnosis to refresh her memory of the events surrounding the incident. 483 U.S. 45-46. This helped her remember details that she had not remembered before. 483 U.S. 47. On the prosecutor's motion, the trial court limited the Petitioner's trial testimony to events she detailed before her memory had been refreshed through hypnosis. 483 U.S. 47-48.

The Petitioner had not been completely barred from taking the witness stand, but the trial court's ruling "had a significant adverse effect on petitioner's ability to testify. It virtually prevented her from describing any of the events that occurred on the day of the shooting..." 483 U.S. 57. This Court found that the application of the Arkansas law precluding all post-hypnosis testimony had infringed impermissibly on her right to testify on her own behalf. 483 U.S. 62.

Likewise, Reginald Carr was not completely barred from taking the witness stand. But the trial court's rulings had a significant adverse effect on his ability to testify, or, in the words of the Kansas Supreme Court, acted as an "effective preclusion of his ability to testify to anything useful to the defense." *State v. Carr*, 300 Kan. 210-11, 331 P.3d 544 (2014), *rev'd and remanded on other grounds*, 577 U.S. 108, 193 L.Ed.2d 535, 136 S.Ct. 633 (2016). As in *Rock*, where a significant adverse impact on the Petitioner's ability to testify supported a finding that the Petitioner's right to testify had been violated, the

preclusion of Reginald Carr's ability to testify as to anything useful to the defense supports the conclusion that his right to testify had been violated.

The Kansas Supreme Court found that Reginald Carr's right to testify was violated.

The Respondent claims that the Kansas Supreme Court did not address Reginald Carr's argument that he had been denied his right to testify, therefore did not hold that it was trial error as opposed to structural error. The Respondent points to the fact that the opinion "quickly" addressed this issue. (Brief in Opposition, p. 19).

In his opening brief to the Kansas Supreme Court, filed May 11, 2009, Reginald Carr argued that the trial court's erroneous application of Kansas hearsay rules and the Kansas third-party evidence rule violated both his right to present a defense and his right to testify, then argued that the denial of his right to testify was structural error. *State v. Carr*, No. 90,044, Brief of Appellant, pages 165-166, 171-172. This issue (Issue No. Ten from the opening brief) is reproduced in its entirety in the Appendix.

The Kansas Supreme Court agreed that the trial court's evidentiary rulings were in error, then considered the constitutional violations together, specifically rejecting Reginald Carr's argument that the denial of the right to testify should be treated as structural error, and applying a harmless error analysis to both violations:

We have already determined that R. Carr's proffered evidence was relevant and admissible. It was not merely integral to his defense; it was his defense. *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (defendant's testimony may be indispensable). The State has not argued, and we do not divine, how either the third-party evidence rule, as understood and applied by Judge Clark, or the judge's refusal to apply the hearsay exception for declarations against interest was supported by a legitimate interest sufficient to overcome R. Carr's right to present his defense.

Remedy for Violation

R. Carr urges us to treat the violation of his right to present a defense—particularly given its effective preclusion of his ability to testify to anything useful to the defense—as structural error that is automatically reversible.

R. Carr cites a single case from the Supreme Court of Louisiana to support his argument, *State v. Hampton*, 818 So.2d 720 (La.2002). *Hampton* is too different from R. Carr's situation to have much persuasive punch. In it, the defendant had told his counsel continuously that he wanted to testify; counsel responded that it was not the defendant's decision to make. Here, the record before us indicates that R. Carr decided not to testify after consulting with counsel in the wake of the judge's rulings.

In addition, although the United States Supreme Court has not ruled on the issue, it appears the majority of courts that have considered the issue have applied a constitutional harmless error standard to denial of a defendant's right to testify. See *Palmer v. Hendricks*, 592 F.3d 386, 398 (3d Cir.2010); *Ortega v. O'Leary*, 843 F.2d 258 (7th Cir.1988); *Wright v. Estelle*, 572 F.2d 1071 (5th Cir.1978); *Quarels v. Com.*, 142 S.W.3d 73 (Ky.2004).

The United States Supreme Court has held that denial of a defendant's right to present a defense is subject to the constitutional harmless standard. See *Crane v. Kentucky*, 476 U.S. 683, 691, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).

Carr, 300 Kan. 210–11.

The Court's determination that Reginald Carr had been precluded from testifying as to anything useful to the defense was, in fact, a finding that his right to testify had been violated (See Section I). Additionally, when the Court considered and rejected his argument that it was structural error, and adopted the majority position on this issue, implicit in that holding was the fact that a violation had occurred. If the Court had found that his right to testify had not been violated because he had not been barred from taking the witness stand, the Court would have said so. If the Court had found that his right to testify had not been violated, there would be no need to consider and distinguish a case in which another jurisdiction found the violation of the right to testify to be structural error.

Conclusion

The Kansas Supreme Court correctly concluded that Reginald Carr's right to testify had been violated, then determined that this violation could be subjected to harmless error review. Therefore, this case presents an appropriate opportunity for this Court to resolve the split in jurisdictions as to whether the denial of the right to testify is structural error, requiring automatic reversal, or trial error, allowing a harmless error review.

II

The Respondent's argument in favor of the Kansas Supreme Court's harmless error analysis relies on the quantity, not the quality, of the evidence in support of his convictions and sentence.

The Respondent claims a mountain of evidence supports these convictions and the death sentence, therefore the Kansas Supreme Court's harmless error analysis was correct. But the evidence cited was not a mountain of conclusive or irrefutable evidence, some of the evidence had little or no value and Reginald Carr's proposed testimony would have addressed a great deal of the evidence against him. The Respondent's summary of evidence is here re-ordered, in light of the entire record:

Evidence of no value:

Mitochondrial DNA analysis which did not exclude Reginald Carr as the donor of two of the four hairs collected from the Birchwood residence. (Brief in Opposition, p. 8).

As acknowledged in the Kansas Supreme Court's opinion, mitochondrial DNA is shared by all maternal relatives, and nuclear DNA testing performed on a hair that had a root showed that it belonged to Jonathan Carr. 300 Kan. 215. As Jonathan Carr was

undoubtedly present at the Birchwood residence, the presence of more hairs with his mitochondrial DNA has no value in establishing that Reginald Carr was present. Even the Kansas Supreme Court stated that it was not relevant to prove that Reginald Carr was present. 300 Kan. 215.

Evidence of minimal value:

Nuclear DNA test results which did not exclude Reginald Carr as the donor of DNA recovered from Holly G.'s inner thigh (Brief in Opposition, p. 8).

As discussed in the Petition (p. 6), the correlation between Reginald Carr's DNA and the sample obtained was weak, it is a profile that occurs once in every 16,000 individuals. Additionally, the test results did not exclude Jonathan Carr either, who was conclusively proven to be one of the intruders.

Reginald Carr's link to the Lorcin handgun used in the commission of the murders. (Brief in Opposition, p. 9).

The opinion of the Kansas Supreme Court acknowledges that the particular gun used in the murders was not linked to Reginald Carr, rather there was testimony that he was seen with a similar black gun. 300 Kan. 99. The last person seen in possession of the actual murder weapon was Jonathan Carr, who had loaned it to Tronda Adams, then requested its return on December 11, 2000. *State v. [Jonathan] Carr*, 300 Kan. 340, 364, 329 P.3d 1195 (2014), *rev'd and remanded on other grounds*, 577 U.S. 108, 193 L.Ed.2d 535, 136 S.Ct. 633 (2016).

Problematic eyewitness identification:

Holly G.'s identification of Reginald Carr immediately following the attack and at trial (Brief in Opposition, p. 8).

As discussed in the Petition (p. 7), Holly G. testified at trial that she had identified Reginald Carr in a photographic array that she viewed soon after the crimes. However, the detective who showed her the array testified that Reginald Carr's photograph was not in the array, rather the array contained Jonathan Carr's photograph. Additionally, the first opportunity for Holly G. to make an in-court identification of Reginald Carr as one of the intruders came at the preliminary hearing. Although she identified Jonathan Carr as one of the intruders, she did not identify Reginald Carr, who was also present in the courtroom. (Petition, p. 7).

Finally, Holly G. testified that Reginald Carr ejaculated in her mouth. DNA testing established that only Jonathan Carr's DNA was in her mouth. (Petition, p. 7).

Surprise evidence that Reginald Carr was given no opportunity to refute:

Medical evidence which demonstrated that a few months after the attack Holly G. developed the same sexually transmitted disease that Reginald Carr carried (Brief in Opposition, p. 8).

The admission of this evidence was challenged on appeal. As noted in the Kansas Supreme Court's opinion, although the defense had requested Holly G.'s medical records, she did not disclose that she had HPV – a virus which can cause genital warts or lesions – until a witness at trial testified that Reginald Carr had genital warts. The Court found that this was not a discovery violation, as the prosecution was surprised by her disclosure as well. 300 Kan. 219. Then the Court found that the evidence was not important in the

context of the trial, as she had testified that she recognized Reginald Carr as one of the intruders and its surprise admission did not require a mistrial. 300 Kan. 220.

Had Reginald Carr's defense team been given an opportunity to rebut or refute this evidence, they could have investigated whether Reginald Carr's warts were caused by the same virus carried by Holly G., if so, how frequently that virus occurs in the general population and how long a person can carry the virus before any visible symptoms appear.

Evidence that Reginald Carr could have explained, but for the erroneous evidentiary rulings that prevented him from testifying as to his defense:

Nuclear DNA results that identified the blood on Reginald Carr's shirt and underwear as that of one of the victims (Brief in Opposition, p. 8).

Reginald Carr's possession of property taken from the Birchwood residence (Brief in Opposition, p. 8).

The fact that Reginald Carr was stopped by law enforcement officers driving by the Birchwood residence after the crimes occurred (Brief in Opposition, p. 9).

As explained in the Petition, Reginald Carr would have addressed these aspects of the case against him. He would have testified that he went by the Birchwood address after learning of the night's events from his brother Jonathan Carr, and that he agreed to help dispose of the stolen property. When taking possession of the stolen property, he could have come into contact with blood from one of the victims. (Petition, pp. 33-34).

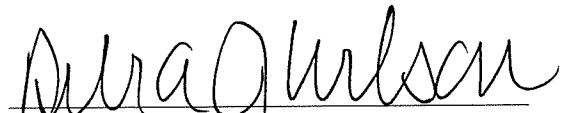
Conclusion

Footwear impressions and cigar ash evidence constitute the remains of the Respondent's mountain. While this evidence was not surprise evidence, and had some evidentiary value, it was not conclusive as to his guilt. Had the Kansas Supreme Court conducted a proper harmless error review, viewing the evidence in the light of the entire record, and considering how Reginald Carr's improperly excluded testimony would have addressed a great deal of the evidence against him, that Court would have reached a different conclusion.

CONCLUSION

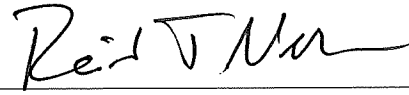
Your Petitioner respectfully prays this Court issue a Writ of Certiorari to the Supreme Court of Kansas to settle the split in authority and hold that the denial of the defendant's right to testify is structural constitutional error requiring automatic reversal of Reginald Carr's convictions, to correct the Kansas Supreme Court's misapplication of the federal constitutional error analysis and to correct the denial of Due Process that occurred when Reginald Carr was convicted and condemned on the basis of allegations he had no opportunity to deny, rebut or explain.

Respectfully submitted,



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APPENDIX

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battery in the complaint/information, and battery was not a lesser included offense of any of the crimes charged. This Court granted the defendant relief on that issue even though the jury received the instruction on battery at the defendant's request.

In State v. Wilson, 240 Kan. 606, Syl. ¶ 2, 731 P.2d 306 (1987) this Court stated, "A conviction based upon an information which does not sufficiently charge the offense for which the accused is convicted is void." In Wilson, the complaint failed to sufficiently allege the elements of the crime of second degree murder. In vacating the conviction, this Court stated, "The trial court had no jurisdiction to try her or to convict her of an offense when she was not charged with any offense under the laws of this state." 240 Kan. 609. Although the factual pattern of this case is different, the principle is the same: Count Forty-Three of the amended complaint in this case failed to charge Reginald with any offense and the court was without jurisdiction to convict and sentence him pursuant to that count.

"[I]f a crime is not specifically stated in the information or is not a lesser included offense of the crime charged, the district court lacks jurisdiction to convict a defendant of the crime, regardless of the evidence presented." State v. Belcher, 269 Kan. 2, 8, 4 P.3d 1137 (2000). Reginald's conviction and sentence for attempted rape pursuant to Count Forty-Three must be vacated.

Issue No. 10: The trial court committed reversible error when it misapplied the Kansas third-party evidence rule and the hearsay rule to exclude evidence integral to Mr. Carr's defense.

Standard of Review

The trial court's ruling on a motion in limine is reviewed under an abuse of discretion

standard. State v. Bornholdt, 261 Kan. 644, Syl. ¶16, 932 P.2d 964 (1997). Decisions regarding the third-party evidence rule and other evidentiary rules are also reviewed for abuse of discretion. State v. Adams, 280 Kan. 494, 504, 124 P.3d 19 (2005); State v. Gonzalez, 282 Kan. 73, 80, 145 P.3d 18 (2006). An evidentiary decision based on an erroneous interpretation of the law can be an abuse of discretion. Adams, 280 Kan. 504, citing Koon v. United States, 515 U.S. 81, 100, 135 L.Ed.2d 392, 116 S.Ct. 2035 (1996). Finally, this Court conducts a heightened scrutiny of trial proceedings in a capital case. State v. Marsh, 278 Kan. 520, 525, 102 P.3d 445 (2004), *overruled on other grounds*, Kansas v. Marsh, 548 U.S. 163, 165 L.Ed.2d 429, 126 S.Ct. 2516 (2006).

Factual and Procedural Overview

Reginald's defense to the capital murder charges, and the charges associated with the Birchwood residence, was that those crimes were committed by his brother Jonathan, and another, uncharged, individual. (Opening statement, 155, 46-47, 48). In support of this defense, Reginald proposed to testify that he and Jonathan parted ways after leaving Tronda Adams' house the evening of December 14. He received three telephone calls from Jonathan after 11 p.m. Jonathan was distraught, crying and asking for his help. Jonathan told him that his companion was "trippin'" and that he had shot some people. Reginald came to Jonathan's aid. He saw and spoke with Jonathan's companion, and he helped the two men dispose of the property that they had stolen. Jonathan warned him that not only was the property stolen, but that people had been killed. (88, 30-32)(The entire proffer is reproduced at Appendix 4, Part G).

The State filed, prior to trial, motions in limine requesting that Reginald be prevented from introducing circumstantial evidence that someone other than himself committed the crimes that he was charged with, and from introducing Jonathan's hearsay statements. (50, 3789-3790; 3791-3792). At the motions hearing, the State argued that because it had direct evidence him, Reginald could only counter it by similar direct evidence. (78, 7).

The trial court agreed, ruling during the trial, that Reginald would not be allowed to adduce circumstantial evidence that another person committed the Birchwood crimes:

Now, as to the law that if it be shown that a perpetrator at a crime is at the scene of the crime by direct evidence, then the circumstantial evidence may not be used to support the inference of a third party was there absent direct evidence of that fact. That's the law. That will be the law of this case.

And looking at – in the order of proof, and let's call it the 12727 Birchwood, Holly [G.] puts both defendants present as perpetrators at that crime. Therefore, before any evidence to support the inference that a third party was there can be accepted, there must be direct evidence that a third party was there. (123, 129-130).

Reginald later made the proffer previously described. (88, 30). The State objected to his proffered evidence on two grounds, arguing that it was hearsay and also "I think the Court has made it abundantly clear that he doesn't get to do this on his 'some other dude did it' kind of defense when they're direct cases." (88, 33-34, 35). "Second, it is a direct violation of the Court's ruling under what we refer to as the SODDI defense, some other dude did it, or suggestion thereof. They are – there is no direct evidence here unless Reginald Carr is saying he was there and watched it as an eyewitness or something more

direct. There would be no direct evidence under the proffer that's made that should allow them to make this suggestion about another person." (88, 38).

The court agreed:

THE COURT: Okay. The declarations proffered under Mr. Reginald Carr's proffer just now fits no exception to the hearsay rule that I know of. **They are not direct evidence of any participation by a third party. And based on everything I know right now, they're not admissible in evidence.** They're offered to prove the truth of the matter stated therein. They're hearsay.
(88, 39)(emphasis added).

Applicable Law

Under the state and federal Constitutions a defendant is entitled to present the theory of his or her defense and the exclusion of evidence that is an integral part of that theory violates a defendant's fundamental right to a fair trial. Marsh, 278 Kan. 521, Syl. ¶ 8, State v. Mays, 254 Kan. 479, 486, 866 P.2d 1037 (1994). When a motion in limine is used to exclude relevant and material information pertaining to the defense, the defendant's right to a fair trial is violated. State v. Quick, 226 Kan. 308, 311, 597 P.2d 1108 (1979). Reginald proposed to give his evidence of third party involvement through his own testimony. Because the trial court erroneously limited his testimony, the trial court's ruling not only impinged on his Fourteenth Amendment right to present his defense, but also on his right to testify on his own behalf. This violated Reginald's rights under the Fifth, Sixth and Fourteenth Amendments:

The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that "are essential to due process of law in a fair adversary process." [citation

omitted]. The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony...

The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. [citation omitted]...

The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. *Rock v. Arkansas*, 483 U.S. 44, 52, 97 L.Ed.2d 37, 107 S.Ct. 2704 (1987).

The Kansas Constitution Bill of Rights provides in a similar manner for the right to compulsory process and the right against self incrimination at Section 10, and the right to a remedy for injuries "by due course of law" at Section 18.

a. The trial court erroneously applied the third-party evidence rule to exclude Reginald's testimony.

The third-party evidence rule excludes evidence that someone other than the defendant had a motive to commit the crime, absent evidence connecting that person to the crime. It has limited application and is "subordinate to the general rules of evidence and the statutory definition of relevancy in K.S.A. 60-401(b)." *Marsh*, 278 Kan. 531.

In *Marsh*, this Court stated that the third-party evidence rule does not prohibit circumstantial evidence that someone else committed the crime merely because the State relies on direct evidence. Instead, if circumstantial evidence of the third party's guilt is relevant, and otherwise admissible, it will not be excluded merely because the State has direct evidence of the defendant's guilt. 278 P.3d 531. See also, *Holmes v. South Carolina*, 547 US. 319, 164 L.Ed.2d 503, 126 S.Ct. 1727 (2006) (criminal defendant's right to a meaningful opportunity to present a complete defense violated by state rule

excluding evidence of third-party guilt when State's case based on strong forensic evidence, without an assessment of the probative value and relevancy of the defendant's evidence).

In this case, the trial court held that Holly G.'s identification of Reginald rendered his testimony inadmissible because he could not state that he saw Jonathan and his companion commit the crimes. The ruling in Marsh makes it clear that this was a misapplication of the Kansas third-party evidence rule.

In Marsh, this Court relied in part on its previous decision in State v. Evans, 275 Kan. 95, 62 P.3d 220 (2003). In Evans, the trial court excluded the defendant's circumstantial evidence that someone else shot the victim (witnesses who saw another person with the murder weapon immediately after the shooting, coupled with that person's admissions that he shot the victim) because the State had direct evidence of the defendant's guilt (witnesses who said they saw the defendant shoot the victim). 275 Kan. 97-98. This Court reversed, finding that the exclusion of the defendant's evidence was inconsistent with substantial justice. 275 Kan. 106.

Reginald's case is similar. His circumstantial evidence consisted of his observations of Jonathan and his companion with property stolen from the Birchwood residence, coupled with Jonathan's admissions that they committed the crimes. This is not "mere speculation or conjecture" that someone else may have committed the crimes. See, Evans, 275 Kan. 104. Instead, it is evidence that "tends to prove a fact in issue by proving other events or circumstances which afford a basis for reasonable inference by the jury of the occurrence of the fact in issue." 275 Kan. 105. The fact that Holly G. identified Reginald as Jonathan's

companion that night does not render his evidence irrelevant or inadmissible. Reginald's proffered evidence would certainly be admissible against Jonathan if introduced by the State in a proceeding against him alone. "Circumstantial evidence that would be admissible and support a conviction if introduced by the State cannot be excluded by a court when offered by the defendant to prove his or her defense that another killed the victim." 275 Kan. 105. A proper application of the third-party evidence rule would not exclude this evidence.

Additionally, some of the proposed evidence was direct evidence. Jonathan's statements admitting his complicity in the crimes were, correctly, characterized by the prosecution as a confession. (88, 34). Confessions are considered direct evidence. See, State v. Hamons, 248 Kan. 51, 60, 805 P.2d 6 (1991)(defendant's jailhouse confession characterized as direct evidence). Jonathan's statements to Reginald were direct evidence of third party participation and not subject to any rule limiting circumstantial evidence.

The court misapplied the law when it held that the Kansas third-party evidence rule barred Reginald's testimony. This constituted an abuse of discretion.

b. The evidence was not inadmissible hearsay

The trial court found that portions of the proffered testimony were inadmissible hearsay. However, as the defense noted, citing K.S.A. 60-460(j) and (d), Jonathan's statements to Reginald were admissible as declarations against interest and as excited utterances. (88, 30-32, 39).

(i) Declarations against interest

K.S.A. 60-460(j) allows the admission of hearsay statements that are

...at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected the declarant to civil or criminal liability or so far rendered invalid a claim by the declarant against another or raised such risk of making the declarant an object of hatred, ridicule or social disapproval in the community that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.

In State v. Brown, 258 Kan. 374, 904 P.2d 985 (1995) this Court found the district court may have abused its discretion in failing to admit the testimony of two witnesses that another person had admitted to the killing for which the defendant was on trial, but found the error harmless. 258 Kan. 385. This Court found that the requirements of K.S.A. 60-460(j) had been met: the statements were unquestionably against the declarant's interest and subjected him to criminal liability; the statements were corroborated by other evidence; and the statements were made spontaneously, and without motivation. 258 Kan. 383.

Jonathan's statements to Reginald meet those requirements. They were against his interest, as they implicated him in multiple homicides, they were corroborated by the DNA evidence and the physical evidence which placed Jonathan at the scene of the crime and, as they were made while the events were occurring, and immediately afterwards, were certainly spontaneous and there is no evidence of motivation to make the statements. See also, State v. Jones, 246 Kan. 214, 218-219, 787 P.2d 726 (1990)(error in refusing to admit statement of co-defendant that he committed the crime in question with two other men); State v. Meinert, 31 Kan.App.2d 492, 494-495, 67 P.3d 850 (2003)(error in refusal to admit co-defendant's confession to crime they were both charged with: "It appears to us that Pearson's statement was clearly a declaration against interest." 31 Kan.App.2d 495);

State v. Campbell 29 Kan.App.2d 50, 63-66, 23 P.3d 176 (2001)(same).

In Chambers v. Mississippi, 410 U.S. 284, 292, 93 S.Ct. 1038, 1044 (1973), the defendant's evidence that another person had admitted he shot the victim was excluded on the ground that it was hearsay. The Chambers court found reversible error in that the statements fit clearly within the established "statement against interest" exception to the hearsay rule. In this case, Jonathan's statements implicating himself and a third person in these crimes constitute statements against Jonathan's interest and were admissible under the declaration against interest exception to the hearsay rule.

(ii) *Excited utterances*

K.S.A. 60-460(d)(2) allows the admission of hearsay statements made "while the declarant was under the stress of nervous excitement caused by" perceiving an event or condition that the statement narrates, describes or explains. This subsection is known as the "excited utterance" exception to the hearsay rule. State v. Boldridge, 274 Kan. 795, 57 P.3d 8 (2002). This Court has found that the excited utterance exception to the hearsay rule is a firmly rooted exception to the hearsay rule, and as such, the reliability of such a statement can be inferred. 274 Kan. 795-769, Syl. ¶ 7.

There are four elements present in an excited utterance: (1) an event or condition occurred; (2) it was sufficiently startling to cause nervous excitement; (3) the declarant perceived it; and (4) the declarant made the statement while under stress of nervous excitement. State v. Rowe, 252 Kan. 243, 250, 843 P.2d 714 (1992).

Jonathan's statements to Reginald qualify as excited utterances. The events that he

related were the home invasion and crimes at Birchwood followed by the murders in the soccer field. It was a series of events sufficient to cause nervous excitement. Jonathan perceived the events as a participant and was still crying and distraught over the crimes when he related them to Reginald.

(iii) Confession

Additionally, although not argued at trial, as Jonathan was a defendant in this case, his statements to Reginald constitute a confession. Such a statement may be admitted into evidence under K.S.A. 60-460(f):

In a criminal proceeding as against the accused, a previous statement by the accused relative to the offense charged, but only if the judge finds that the accused (1) when making the statement was conscious and was capable of understanding what the accused said and did and (2) was not induced to make the statement (A) under compulsion or by infliction or threats of infliction of suffering upon the accused or another, or by prolonged interrogation under such circumstances as to render the statement involuntary or (B) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same.

There was no evidence that Jonathan's statements were the product of compulsion, duress or promises. Therefore, his statements would constitute a confession and were admissible on that basis as well.

The court misapplied the law when it held that Jonathan's statements to Reginald were not admissible under any exception to the hearsay rule. This erroneous interpretation of the law constituted an abuse of discretion.

These errors requires reversal

(a) Structural error

The trial court's ruling prevented Reginald from testifying. Although the defense stated that Reginald's decision to not testify was voluntary, (89, 33; 90, 180-181), stripped of references to Jonathan's accomplice and Jonathan's statements, Reginald's testimony would have been meaningless, confusing and even incriminatory. In this way, Reginald's situation is quite similar to that of the defendant in Rock v. Arkansas, where the defendant's testimony was limited to matters she recalled prior to being hypnotized. The Supreme Court noted that the application of the rule against post-hypnosis testimony had "a significant adverse effect on petitioner's ability to testify." 483 U.S. 57. Likewise the trial court's ruling had a significant adverse effect on Reginald's ability to testify.

In State v. Hampton, 818 So.2d 720 (La. 2002) the Louisiana Supreme Court held the denial of the defendant's right to testify to be a structural error, not amenable to a harmless error analysis. 818 So.2d 729. Adopting language from Rock, ("the most important witness for the defense in many cases is the defendant himself" 483 U.S. 52) the Court found that the defendant's right to testify is among those constitutional protections without which a criminal trial is "structurally flawed." 818 So.2d 729. This Court should hold likewise and find that the court's erroneous decision significantly limiting Reginald's right to testify is a structural error which requires reversal. (For contrary holdings see Quarels v. Commonwealth, 142 S.W.3d 73, 82 (Ky. 2004).)

(b) Harmless error

Error in the exclusion of the defendant's proffered third-party evidence is reviewed

under a constitutional harmless error standard which requires reversal unless the court can declare, beyond a reasonable doubt, the error had little, if any likelihood of changing the result of the trial. Marsh, 278 Kan. 533. A harmless error standard of review is applied when admissible hearsay is wrongfully excluded. State v. Brown, 258 Kan. 374, Syl. ¶ 5, 904 P.2d 985 (1995).

The evidence connecting Reginald to the Birchwood crimes can be summarized as Holly G.'s identification (123, 126-127; 159, 96); the presence of Heather M.'s blood on his clothing (103, 86-88, 90-91, 193-194, 196-199); his appearance on Birchwood shortly after the crimes (156, 82-84, 87, 108, 141); and his possession of a great deal of the stolen property. (103, 94-95, 97; 162, 144-145, 147-148, 150-151; 163, 37, 39, 42-51, 63). Reginald's defense was that he became involved with the Birchwood crimes after the fact, and only did so because Jonathan enlisted his aid. Reginald could not present his defense without telling the jury what he observed when he met Jonathan, and what Jonathan told him about his participation, as well as the participation of his companion in the crimes. Reginald was able to challenge Holly's identification through cross-examination. (160, 11-13, 17-19, 22-23, 25, 31, 36-38, 66-69)(Portions reproduced at Appendix 4, Part H). He could not, however, explain the presence of Heather M.'s blood on his clothing, his possession of the stolen property, and his presence at Birchwood, without telling the jury that he became involved, at Jonathan's request, with storing the property. Jonathan's statements and evidence regarding his companion were not only relevant, they were essential, to Reginald's defense. If believed, Reginald's testimony would have resulted in his acquittal of the capital

crimes and the crimes associated with the Birchwood residence. It cannot be said, beyond a reasonable doubt, that the wrongful exclusion of this evidence had little, if any likelihood of changing the result of the trial. The exclusion of Reginald's proffered evidence violated his rights under the Fifth, Sixth and Fourteenth Amendments and require reversal of his convictions for capital murder, and the associated charges.

Issue No. 11: The trial court committed reversible error when it allowed into evidence testimonial hearsay.

Standard of Review

Whether a defendant's Sixth Amendment right to confrontation of witnesses has been violated is a question of law subject to unlimited review. State v. Adams, 280 Kan. 494, 511, 124 P.3d 19 (2005).

Relevant Facts and Procedural Overview

Reginald was charged, in Count 51 of the Amended Complaint with the first degree murder of Linda Ann Walenta. (6, 397). He was convicted and sentenced to life imprisonment on that count. (54, 4053, 4105). He was also charged with and convicted of an associated weapons offense. (6, 399; 54, 4055). Ms. Walenta died before she could testify, either at trial or the preliminary hearing. (170, 25). Reginald moved *in limine* to exclude her hearsay statements from evidence, citing his Sixth Amendment right to confrontation. (21, 1575-1580; 65, 136, 140-141). At the hearing on this motion, the State conceded that Ms. Walenta's statements were hearsay but argued that they were admissible under K.S.A. 60-460(d)(3) "contemporaneous statements admissible on the