



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-11-00253-CR

JOE DALE JOHNSON

APPELLANT

V.

THE STATE OF TEXAS

STATE

FROM THE 89TH DISTRICT COURT OF WICHITA COUNTY
TRIAL COURT NO. 48,790-C

EN BANC MEMORANDUM OPINION¹ ON REMAND

This appeal was remanded from the court of criminal appeals to determine whether the appellate record reveals beyond a reasonable doubt that the denial of appellant Joe Dale Johnson's constitutional right to cross-examine the complainant—H.H.—did not contribute to Johnson's convictions for the aggravated sexual assaults of H.H. *Johnson v. State*, 490 S.W.3d 895, 915

¹See Tex. R. App. P. 47.4.

(Tex. Crim. App. 2016). We cannot so conclude and, therefore, must reverse the trial court's judgments of conviction and remand the case to the trial court for further proceedings. See Tex. R. App. P. 43.2(d), 44.2(a).

The trial court abused its discretion by denying Johnson his constitutional right to cross-examine H.H. with evidence of his past sexual behavior with his sister, which led to H.H.'s subsequent juvenile adjudication for delinquent conduct.² See *Johnson*, 490 S.W.3d at 897. "H.H. had been sexually abusing his sister for a number of years" before he made the outcry in November 2007 implicating Johnson in the offenses at issue. *Id.* at 914. This evidence "was of no small magnitude" and "supported [Johnson's] theory that H.H. had, at that time, a motive to falsely accuse Johnson of sexual molestation." *Id.* at 914–15.

Although the underlying facts have been recounted at length by this court and by the court of criminal appeals, we are compelled to look at the entire record with fresh eyes to determine, for the first time, whether the error meets the standard for reversible constitutional error. Compare *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986) (providing trial courts "wide latitude" to determine the limits of cross-examination under the Confrontation Clause), with Tex. R. App. P. 44.2(a) (applying strict reversible-error standard to constitutional errors). Such a review consists of three steps. First, we assume

²Johnson did not argue to the court of criminal appeals that it was an abuse of discretion to exclude evidence of H.H.'s juvenile adjudication. *Johnson*, 490 S.W.3d at 912 n.46. Thus, we do not address any error or harm arising from its exclusion as that issue was not remanded to us.

that the damaging potential of the denied cross-examination was fully realized. *Shelby v. State*, 819 S.W.2d 544, 547 (Tex. Crim. App. 1991). Second and with that assumption in mind, we analyze the error in light of several factors: (1) the importance of H.H.'s testimony to the State's case, (2) whether H.H.'s testimony about his past sexual behavior with his sister was cumulative of other admitted evidence, (3) the presence or absence of evidence corroborating or contradicting H.H.'s testimony on material points, (4) the extent of cross-examination of H.H. that was otherwise permitted, and (5) the overall strength of the State's case. See *id.* Third, we determine whether the error was harmless beyond a reasonable doubt based on the results of the first two steps. See *id.*; see also Tex. R. App. P. 44.2(a). We will recount the facts as necessary in our analysis of these three steps.

As we have recognized, Johnson sought to cross-examine H.H. with the evidence that he had been sexually molesting his sister "for a number of years" before his November 2007 outcry against Johnson. *Johnson*, 490 S.W.3d at 914. The damaging potential of this testimony as fully realized would have allowed the jury to surmise that H.H. fabricated his allegations against Johnson in order to gain sympathy with his parents as the victim of sexual assault and not the perpetrator. See *id.*

We now turn to the factors in the second step. Other than Johnson's past conviction for sodomy committed under similar circumstances as those alleged

by H.H.,³ no other evidence—eyewitness testimony, physical evidence, etc.—was admitted to corroborate H.H.’s allegations. It was a swearing match, and the State’s case was inextricably connected to H.H.’s ultimate credibility. No other evidence was admitted that indicated H.H. had sexually abused his sister before he made the outcry implicating Johnson. However, Johnson was allowed to cross-examine H.H. in the jury’s presence about H.H.’s longstanding pornography habit, his depression, his problems at school, his “distant” relationship with his parents, his need for counseling, and his being caught shoplifting, which all occurred before or close to the same time that he made the outcry against Johnson. This evidence, as pointed out by the court of criminal appeals, showed that Johnson was not “wholly prevented from presenting his theory of fabrication”; however, “evidence of H.H.’s past sexual abuse of his sister would have added further support” to Johnson’s fabrication defense. *Id.*

Taking all of this into account in the third step leads to the conclusion that Johnson was harmed by his inability to question H.H. about his prior sexual abuse of his sister, occurring before H.H.’s outcry and before H.H. testified Johnson began abusing him. This prevented the jury from fully understanding H.H.’s possible motives to fabricate his allegations. *Id.* at 915. And as the court of criminal appeals recognized, “although the State was given the opportunity to rebut Johnson’s defensive theory of fabrication with . . . extraneous offense

³As the court of criminal appeals noted, Johnson did not argue to that court that the admission of this prior conviction was an abuse of discretion. *Id.* at 915.

evidence, Johnson had not been given the opportunity to fully and completely explore such defensive theory [of fabrication] through the requested line of cross-examination.” *Id.* Because H.H.’s testimony was the heart of the State’s case and the excluded evidence “was of no small magnitude,” we cannot conclude beyond a reasonable doubt that the absence of this evidence did not contribute to Johnson’s convictions for the aggravated sexual assaults of H.H. *Id.* at 914.

Following the court of criminal appeals’ opinion and based on our harm analysis, we reverse the trial court’s judgments and remand to the trial court for a new trial on the two counts of aggravated sexual assault of a child alleged in the indictment.

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

EN BANC⁴

LIVINGSTON, C.J., filed a dissenting opinion in which MEIER, J., joins.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: March 2, 2017

⁴The constitution of the en banc court for this appeal consists of all members of the court and Senior Justice Lee Ann Dauphinot. See Tex. R. App. P. 41.2(a).