



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

**NO. 02-16-00106-CR**

JOSHUA JAMES HILL

APPELLANT

V.

THE STATE OF TEXAS

STATE

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FROM THE 396TH DISTRICT COURT OF TARRANT COUNTY  
TRIAL COURT NO. 1443789R

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**MEMORANDUM OPINION<sup>1</sup>**

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Appellant Joshua James Hill appeals from his convictions for one count of continuous sexual abuse and for two counts of indecency with a child by contact. He argues that the trial court's limitations on his right to introduce evidence of one of the child victim's extraneous sexual behavior were abuses of discretion and contributed to his convictions. The error and harm alleged here by Hill are indistinguishable from the error and harm alleged in a recent case handed down

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<sup>1</sup>See Tex. R. App. P. 47.4.

by the court of criminal appeals: *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). In that case, the court held that a limitation on Johnson’s right to introduce evidence of the child victim’s extraneous sexual abuse of his sister violated Johnson’s constitutional right of confrontation. We are bound by this precedent. Applying the dictates of *Johnson*, we have no choice but to hold that the trial court’s limitation here was likewise an abuse of its discretion, leading to the unavoidable conclusion that the absence of Hill’s requested cross-examination contributed to his convictions. Accordingly, we are compelled to, and unenthusiastically do, reverse the trial court’s judgments and remand the case for further proceedings.

## **I. BACKGROUND FACTS LEADING TO CONVICTIONS**

### **A. ABUSES AND OUTCRIES**

Hill and Mother<sup>2</sup> had three daughters together: Ashley, who was born in 1997; Susan, who was born in 1999; and Sabrina, who was born in approximately 2004. Hill and Mother divorced in 2008 and agreed to a one-week-on, one-week-off custody arrangement.<sup>3</sup> Hill moved into a house on Springridge Drive in Arlington with his girlfriend Jan, who had a daughter from a

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<sup>2</sup>With the exception of Hill, we refer to the complainants, their family members, and any other person necessary to protect the victims’ identities by aliases. See 2d Tex. App. (Fort Worth) Loc. R. 7; see also Tex. R. App. P. 9.8(a), 9.10.

<sup>3</sup>At some point, Ashley and Hill convinced Mother to allow Ashley to live with her full-time; but by early 2012, Ashley had returned to the previous one-week-on, one-week-off schedule.

previous marriage, Elaine, who had been born in approximately 2006. In January 2009, Hill and Jan moved to a house on Galaway Bay Drive in Grand Prairie. In September 2009, Hill and Jan moved again to a house on Kirbywood Drive in Grand Prairie. Hill and Jan married in 2010 and they had a daughter together in 2012, Pam. Hill and Jan moved to a house on Shannon Lane in 2012. In July 2013, Hill and Jan moved to a house on Pine Valley in Arlington.

In early 2009 while Hill and Jan were living at the Galaway Bay house, Hill and Ashley, who was twelve, were alone in the house. Ashley was getting out of the shower and, seeing Hill in the bathroom, yelled at him to leave. Hill later called Ashley into his bedroom and told her that she was “growing up to be a beautiful young lady” and that when she had yelled at him to get out of the bathroom, “it made him feel different.” Hill then had Ashley lie down on his bed where he pulled her pants down. Hill lay down beside her, where she felt his penis against her leg, and he put his fingers inside her vagina. Ashley asked Hill to stop, which he did, and she went back to her room after Hill told her “not to tell anybody” and to keep it “secret.”

From then on, Hill began to abuse Ashley “at least” once a week while she was staying with him—at least two times a month. During another incident at the Galaway Bay house, Hill was watching pornography on his phone in Ashley’s presence. When she saw a man in the video performing oral sex on a woman, Ashley told Hill that she did not “know what that was.” Hill offered to show her and placed his mouth on her female sexual organ. After a few seconds, Ashley

told Hill to stop and she went back to her room. Another instance occurred before Ashley left for school one morning and involved Hill's digital penetration of Ashley's vagina by using "strawberry lube." Hill once kissed Ashley with his tongue and told her that as long as it was not a "goodbye or goodnight kiss," they could kiss like that.

Hill also abused Susan at the Galaway Bay house, beginning when she was ten. Hill called Susan and Ashley into his bedroom to watch television. While they were watching television, Hill began rubbing their backs and touched Susan's female sexual organ under her clothes. Hill also touched Ashley's "private part." Although Susan did not see Hill touch Ashley, the two later talked about what had happened.

The abuse continued when Hill and Jan moved to the Kirbywood house. During one incident, Ashley was lying on the couch with Hill watching television when Hill put his hands down the back of her pants and "started fingering [her], with his finger inside." Later, Hill, Jan, Ashley, and Susan were watching a movie together in bed. After Jan and Susan fell asleep, Hill digitally penetrated Ashley. During another instance, Hill told Susan to remove her clothes and lie on his bed after she locked his bedroom door. Hill removed his clothes, lay next to Susan, touched her breasts, and put his finger inside her vagina. When Hill tried to put his penis in Susan's vagina, she "said no and kicked him off." On another occasion, Hill was driving his truck with Susan on the front bench seat beside him. Hill had Susan take off her pants to allow him to digitally penetrate Susan

while he was driving. Once when Ashley walked into Hill's bedroom, she saw Hill lying naked on the bed watching a pornographic video on his phone while Susan lay naked beside him "touching herself." Ashley told them to stop, but both Susan and Hill told her they were doing nothing wrong.

At the end of Ashley's eighth-grade year in 2011, Hill stopped abusing her; but he continued his abuse of Susan into 2013. The last time Hill abused Susan was at the Shannon house. Hill texted Susan and told her to meet him in the garage. Susan refused. Hill went to her bedroom, which she shared with a sleeping Ashley, and ordered her to pull down her pajamas. Hill rubbed Susan's female sexual organ, used his finger to penetrate her vagina, and performed oral sex on her. When Susan's pleas for him to stop became too loud, Hill left the room.

During these years, Hill and Mother disagreed on how to raise Ashley, Susan, and Sabrina, and Mother mainly communicated with Jan "to make it easier." These problems were exacerbated by Ashley's and Susan's behavioral issues and disobedience, which began "six months to a year" after Hill and Mother divorced in 2008. Susan's disciplinary problems began to escalate in severity in 2014, adding to the tension between Hill and Mother. Shortly after a "big" incident in May 2014 that led to Susan's two-month suspension from school—which commenced the next school year in August 2014—Ashley and Susan told several of their friends that Hill had abused them in the past. Ashley also had previously revealed Hill's abuse to a friend when she was in the seventh

grade (2009–2010) and to another friend when she was in the tenth grade (2012–2013).

After Susan’s school suspension, Jan posted “unsavory” comments on Facebook about the incident but quickly took them down. When Hill, Jan, and Mother discussed the post in front of Susan on July 4, 2014, Susan stated that Hill and Jan “will pay for the things that were said and they will [be] sorry.”

At this same time—summer of 2014—Ashley began working part-time at a Braum’s restaurant that was close to Mother’s home but farther away from Hill’s. Hill frequently was not at home in October and November, so during his weeks to have Ashley, Susan, and Sabrina, Jan had to drive Ashley to and from work. In early November 2014, Ashley was told that she would have to quit, work fewer hours, or move in with Mother full-time.

On November 11, 2014, Ashley told Hill and Mother that Susan had broken several “behavioral rules” that they had set for Susan and Ashley, a “dramatic and traumatic” event that caused “everything” to “crash[] and c[o]me to a head.” Mother’s husband Don<sup>4</sup> picked Susan up from school early based on what Ashley had revealed. Don asked Susan “why this was still happening and [they] were dealing with this stuff.” Susan told him that it was Hill’s fault because he had been “touching [her and Ashley] inappropriately,” which had “opened [Susan] up to the sexual aspect.” Don called Mother and reported Susan’s general

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<sup>4</sup>Mother and Don had married in May 2013.

allegations against Hill. Even though Susan was “extremely distraught” and crying, Don warned Susan that her allegations “can’t be taken back, it’s going to be addressed” to ensure that she “understood the situation that [they] were all going to be in from that point on.” Susan persisted and told Don that Hill abused her “multiple times throughout several years.”

Don texted Ashley, asking if Susan’s allegations were true, but Ashley told Don it was not true and that Susan was accusing Hill to “get out of trouble.” Ashley then called Hill and asked what she should do. Hill “kept saying: It didn’t happen, it didn’t happen. . . . And then he told [Ashley] to tell them that it didn’t happen.” Hill called Mother who told him she would “find out the truth.” When Ashley got home, she told Mother and Don that Susan was lying and yelled at Susan that she would “ruin Dad’s life.” But when Ashley saw how sad Susan was, Ashley knew she “had to tell the truth,” and she confirmed Susan’s allegations. Ashley told Mother and Don that that she and Susan “had made a pact that they would never tell anybody” because Ashley “didn’t want her daddy to go away forever.”

At this point, Hill arrived at Mother and Don’s home. Mother took Hill into another room and told him that Susan and Ashley had revealed that he had been sexually assaulting them. Hill did not expressly deny the allegations:

[Mother] . . . I told [Hill] that [Ashley] had said that it happened too. And then he started crying and fell to the floor.

Q What did he say?

A Oh, my God, how could I have done this. How could I have hurt my babies.

Q What happened next?

A I said: Maybe you don't remember. Maybe you were drinking. I don't know what's happening right now. All I know is that both of the girls have said this and I have to do something about it.

Q What did he say?

A He cried a lot, and he said: I'm a monster. And I said: You're not a monster. And then he said: I'm the type of man that would kill somebody for hurting my children. How could I be the one that hurt them? And then he asked me to go ask [Sabrina] if he had hurt her, also.

Mother's father Gary also came to the house at Mother's request to act as a "mediator." When Gary confronted Hill with Ashley's and Susan's allegations, Hill stated that he did not "remember any of it." Gary then talked to Ashley who recounted that Hill had touched her "privates" on many occasions and that he had masturbated in her presence.

Hill then asked to speak to Susan and Ashley individually. Susan would not see Hill alone, so Mother accompanied her. Hill "cried and said: I'm so sorry, I'm so sorry. . . . [P]lease forgive me." Susan began crying and left the room with Mother. Ashley then talked to Hill alone. Hill apologized to Ashley, hugged her, and told her "he wished he could take it back." Ashley left the room crying and asked Mother, "Why are we doing this now? He's going to lose everything." Mother then told Hill that they would call the police the next day to give him a chance to tell Jan.



## **B. INVESTIGATION AND TRIAL**

The next day, Hill tried to convince Mother to not involve the police, but Mother did. The police took statements from Ashley and Susan, and they were interviewed by the Department of Family and Protective Services (DFPS). DFPS sent the girls to the Alliance for Children for forensic interviews.

Ashley and Susan were also examined by a sexual-assault nurse examiner. Ashley and Susan both told the nurse examiner that they were currently sexually active. Ashley told the nurse examiner that Hill had “sexually abused [her] for two to three years,” beginning by “fingering” her vagina on multiple occasions. Ashley also recounted the strawberry-lube incident, revealed that she had seen Susan masturbating while Hill watched pornography, and affirmed that Hill had put his mouth on her female sexual organ, made her touch his penis, and masturbated while touching her. She stated the abuse began when she was in the sixth grade (2008–2009) and ended in the eighth grade (2010–2011) when she warned Hill that she would “tell.” Ashley’s physical exam was normal.

Susan’s physical exam was also normal. Susan stated that Hill’s abuse of her began when she was nine or ten and in the fourth grade (2008–2009) and had stopped by July 2014. The abuse included Hill putting his mouth on her female sexual organ and putting his finger in her vagina on multiple occasions. Although one such digital penetration caused her to bleed, she stated that everyone assumed the nine year old had started her period. Hill made Susan

touch his penis, and he touched her breasts over and under her clothes, both with his hands and his mouth. Susan also said that Hill had once “tried to have sex with [her] and [she] told him no.”

Hill was indicted with two counts of continuous sexual abuse (CSA) of Susan, one count of CSA of Ashley, one count of indecency with Susan by contact, and one count of indecency with Ashley by contact. Hill pleaded not guilty, and the State later waived one of the CSA counts as to Susan and the CSA count as to Ashley. At trial, the forensic interviewer, Samantha Shircliff, testified that “sensory and peripheral details”—“things that are surrounding the event, . . . like what people were wearing, where everybody was, where it happened, and when it happened”—are indicators that the outcry was truthful and not the result of coaching. Shircliff stated that Ashley and Susan provided such details, such as how things felt and where bodies were positioned. She also testified that “script memory”—the inability to recall details of recurring events—could cause several episodes of similar occurrences to become “jumbled.”

The jury found Hill guilty of each of the remaining counts, and the trial court assessed his punishment at thirty years’ confinement for the CSA conviction and twenty years’ confinement for each indecency conviction, all to be served concurrently. Hill filed a motion for new trial, arguing that the “verdicts are contrary to the law and evidence,” which was deemed denied. See Tex. R. App. P. 21.3(h), 21.8(c). Hill appeals his convictions and argues that the trial court

abused its discretion by excluding evidence pertinent to Susan's and Ashley's prior sexual conduct and by excluding evidence impeaching the forensic interviewer's testimony that the girls' symptoms were common in child-abuse victims.

## **II. EVIDENCE OF PREVIOUS SEXUAL CONDUCT**

In his four points, Hill asserts that the trial court abused its discretion by excluding evidence under rule 412 regarding Susan's and Ashley's previous sexual conduct, violating his rights under the Confrontation Clause. The excluded evidence included the sexual nature of the girls' escalating behavioral issues and the girls' statements to the nurse examiner that they were sexually active at the time of the exams.

### **A. RULE 412 AND STANDARD TO REVIEW ITS APPLICATION**

Hill urged admission of this evidence under rule 412, arguing that it showed the girls' motive to falsely accuse Hill of sexual misconduct; thus, its admission was required under the Confrontation Clause. Rule 412 is a rule of exclusion. See Tex. R. Evid. 412(a); David A. Schlueter & Jonathan D. Schlueter, *Texas Rules of Evidence Manual* § 412.02[3] (10th ed. 2015). As such, opinion and reputation evidence of a sexual-assault victim is absolutely prohibited. See Schlueter, *supra*, at § 412.02[3]. The rule also prohibits specific instances of a victim's past sexual behavior unless, relevant to this case, the evidence relates to the motive or bias of the victim or the constitution requires its admission. See Tex. R. Evid. 412(b)(2). This exception to inadmissibility is

generally available “when the victim’s prior sexual acts or relationships have a tendency to explain why the victim has alleged that a sexual offense occurred.” Schlueter, *supra*, at § 412.02[4][e]. But such evidence’s probative value must still outweigh the danger of unfair prejudice. See Tex. R. Evid. 412(b)(3). Accordingly, rule 412 is designed to restrict the introduction of evidence regarding the sexual-assault victims’ prior, consensual sexual behavior to situations in which the evidence is both relevant to a defendant’s defense and not unduly prejudicial or inflammatory. See *Woodall v. State*, 376 S.W.3d 122, 131–32 (Tex. App.—Texarkana 2012, no pet.). The defendant bears the burden to show that such evidence is more probative than prejudicial. See Schlueter, *supra*, at § 412.02[4][b].

We review a trial court’s ruling under rule 412 for an abuse of discretion. *Johnson*, 490 S.W.3d at 908. Such an abuse occurs if the court’s decision falls outside the zone of reasonable disagreement. *Id.* Although a trial court can abuse its discretion by excluding admissible evidence offered to show the complainant’s motive to fabricate a sexual-assault accusation, it may put limits on the defendant’s right to cross-examine the complainant. *Id.* at 909; *Thaxton Johnson v. State*, 433 S.W.3d 546, 551–52 (Tex. Crim. App. 2014). A limit on cross-examination is permissible if it does not infringe upon the Confrontation Clause’s guarantee of “an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the

defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985) (per curiam); see also *Thaxton Johnson*, 433 S.W.3d at 557.

## **B. BEHAVIORAL ISSUES INVOLVED SEX**

In his first two points, Hill argues that the trial court abused its discretion by excluding evidence that Ashley’s and Susan’s behavioral issues, which culminated in the allegations of abuse against Hill, were sexual in nature. In his first point, Hill argues that the exclusion of both girls’ past sexual conduct violated the Confrontation Clause; in his second, he asserts that it violated evidentiary rules 412 and 613.<sup>5</sup> See U.S. Const. amend. VI; Tex. R. Evid. 412(b)(2)(C). Hill asserts that the exclusion of these details “prohibited the jury from determining if [Ashley and Susan] made false allegations of *sexual* misconduct against [Hill] to deflect blame from their own *sexual* misconduct.”

### **1. Evidence Excluded<sup>6</sup>**

In a hearing outside the jury’s presence, Hill elicited testimony regarding Ashley’s specific behavioral issues: (1) when Ashley was in the ninth grade (2011–2012), she once met with boys instead of going to soccer practice, which

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<sup>5</sup>Although Hill asserts the admission of this evidence was also required under rule 613(b), he did not raise this basis for admission to the trial court; thus, we will not address rule 613. See Tex. R. App. P. 33.1(a)(1)(A); Tex. R. Evid. 103(a)(1)(B); see also Tex. R. Evid. 613(b). We address only those grounds Hill raised to the trial court and in his brief on appeal—rule 412 and the Confrontation Clause. See *Kamanga v. State*, 502 S.W.3d 871, 878 (Tex. App.—Fort Worth 2016, pet. ref’d).

<sup>6</sup>Other evidence of the girls’ behavioral issues was proffered at the rule 412 hearing, but Hill attacks only those involving sexual conduct.

had been rained out, resulting in her coming home with a hickey on her neck; (2) that same year, Ashley sent a semi-nude picture of herself to a boy; and (3) Ashley was having sex with her boyfriend “in June and July of 2014,” which Hill and Jan knew but did not counsel her against. Hill also elicited evidence that Susan (1) told her parents she was going to school for tutoring when she was actually meeting boys and (2) repeatedly sent “sexually explicit images” of herself and received such images of boys in return.

But the main occurrences that Hill sought to introduce involved the circumstances surrounding Susan’s May 2014 school suspension and the November 11, 2014 “dramatic and traumatic” event that caused Don to immediately pick up Susan from school. In May 2014, Susan was caught in a school bathroom with a boy. The two were kissing and touching each other’s “private part.” Susan was suspended from school for six weeks, which she served at the beginning of the next school year. On November 11, 2014, shortly after Susan returned to school, Ashley saw her iPod, which she believed had been stolen, in Susan’s backpack. Ashley discovered that the iPod contained sexual images of Susan and four or five different boys that had been texted back and forth. Ashley took the iPod to the school office and called her Mother. Don then picked up Susan from school, and Susan made her outcry when Don questioned her behavior.

At the conclusion of the hearing, the trial court ruled that “general” evidence “about there were problems between mom and dad” could be admitted; but the trial court excluded the specifics:

I am going to allow the Defense to question the girls in a general manner about there were problems between mom and dad. This started during the divorce. It continued all the way up - - from the time of the divorce all the way up to November of 2014. We’re not getting into any specifics. You may do it in a general manner.

But all of this stuff about telling lies and ninth grade soccer and hickeys and all that stuff with [Ashley], none of that comes in. [Susan], none of the sexual stuff comes in. You can develop the fact that there was . . . a rocky relationship, and I have no doubt that these two parents were at each other’s throats and these kids got caught up in the middle of it.

You can develop that in the general manner, but we are not going to get into any specifics and we are not going to go into anything sexual. That’s the ruling of the Court.

. . . .

. . . My ruling is you can go into general questions so the jury will know this is not Ward-and-June-Cleaver situation that we’re dealing with here. I’m going to let you develop the fact that this is a bad situation that these kids are growing up in, but we are not getting into specifics.

Hill objected, arguing that the evidence was admissible under rule 412 and that its exclusion violated the Confrontation Clause, which the trial court implicitly overruled. See Tex. R. App. P. 33.1(a)(2)(A).

Hill argues on appeal that the excluded evidence would have established a motive for the nature of the allegations made against Hill—because Susan and Ashley wanted to deflect blame for their sexual misconduct, it was more likely

that they would accuse Hill of “sexual misconduct as opposed to some other type of inappropriate behavior that was not sexual in nature.”

## **2. Abuse of Discretion**

Although Hill asserts in his brief that the trial court abused its discretion by excluding evidence of Ashley’s and Susan’s previous sexual history because “they were both in trouble” at the time of their outcries, Hill focuses exclusively on the May and November 2014 incidents involving Susan. At oral argument, Hill’s attorney argued that instances of Ashley’s previous sexual conduct should have been admitted because by agreeing with Susan, Ashley either “preemptively” got herself out of trouble for her prior specific instances of sexual conduct or was avoiding being “thrown under the bus” as a result of Susan’s misbehavior. Hill fleetingly addressed the exclusion of Ashley’s sexual misconduct in his brief: “Likewise, once [Ashley] discovered [Susan] was making an accusation of *sexual* misconduct against [Hill] to get herself out of trouble[,] . . . it is more likely she would also have a motive to make a false accusation of sexual misconduct against [Hill] in an attempt to deflect blame for her own admitted sexual misconduct.” We construe Hill’s argument to be that the exclusion of the May and November 2014 incidents involving Susan should have been admitted because not only did they show Susan’s motive to testify falsely, they showed Ashley’s as well. As did Hill in his brief, we will limit our analysis to the exclusion



of the May and November 2014 incidents involving Susan to determine whether error occurred.<sup>7</sup>

As we have recognized, the excluded evidence regarding Susan is indistinguishable from the evidence excluded in *Johnson*. In that case, the trial court excluded evidence that the complainant, H.H., had been sexually abusing his sister for “a number of years” before he made his outcry that implicated Johnson as his sexual abuser. *Johnson*, 490 S.W.3d at 912. Other evidence of H.H.’s behavior was admitted, including that he was upset with Johnson, that he routinely watched pornography, that he was in counseling, and that he had been caught shoplifting before the outcry. *Id.* at 902, 904, 914. Although the court of criminal appeals recognized that the admitted evidence showed that Johnson had not been “wholly prevented from presenting his theory of fabrication,” the court determined that “evidence of H.H.’s past sexual abuse of his sister would have added further support” to the defense and was of “no small magnitude.”

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<sup>7</sup>Even if Hill had clearly and separately argued that the specific evidence regarding Ashley’s prior sexual conduct should have been admitted, we would disagree. These remote-in-time instances did not reveal a definite and logical link between Ashley’s past sexual conduct and her alleged motive to lie at the time of the outcry, outweighing the danger of unfair prejudice. See *Stephens v. State*, 978 S.W.2d 728, 734–35 (Tex. App.—Austin 1998, pet. ref’d). Further, Ashley was not in trouble at the time of her outcry—Hill and Mother knew that Ashley was having sex with her boyfriend but did not counsel her against it—removing the implication that Ashley had a motive to fabricate her allegations based on her own sexual conduct. See *Johnson*, 490 S.W.3d at 914 (“[T]he more important issue is whether H.H. had a motive to fabricate the allegations against Johnson.”). To the extent Hill argues that the trial court erred by excluding specific evidence of Ashley’s past sexual conduct in his first two issues, we overrule those portions of his first two issues as inadequately briefed and, alternatively, on the merits.

*Id.* at 914. That court specifically noted that admissibility of such evidence is favored if “the believability of the complainant forms the foundation of the State’s case.” *Id.* at 910. The court of criminal appeals ultimately concluded that the exclusion of the evidence that H.H. had sexually abused his sister in the past was a “subtle” abuse of discretion because such evidence had a direct bearing on H.H.’s credibility and supported Johnson’s theory that H.H. had a motive to falsely accuse Johnson of sexually molesting him. *Id.* at 914–15 (“Although subtle, it was error nevertheless . . .”).

Here, the jury heard evidence that Susan was angry about Jan’s Facebook post that occurred after Susan’s suspension from school for a “big” incident, leading Susan to declare to family members that Jan and Hill would “pay” and be “sorry.” Evidence was also admitted that after Susan was suspended, Ashley and Susan began telling their friends that Hill had abused them in the past. Mother and Ashley testified that Ashley was told in November 2014 that she would have to quit her job or reduce her hours because neither Hill nor Jan was willing to drive her there while she was staying at Hill’s home. The jury also heard that after a “dramatic and traumatic” incident in November 2014 involving Susan’s breach of “behavioral rules,” Susan made her outcry to Don after he questioned why these infractions continued to occur. Evidence also was

admitted that Hill had distinctive tattoos on his groin area and nipple piercings that neither Susan nor Ashley were able to identify.<sup>8</sup>

Although this admitted evidence put the girls' credibility at issue and revealed Susan's and Ashley's possible motive to fabricate their allegations against Hill, the absence of the specificities regarding the incidents involving Susan prevented the jury from having a clear picture that Susan's behavioral issues were sexual in nature and, thus, were directly probative and relevant to Hill's defensive theory that she would make up sexual allegations to get herself out of trouble for her own sexual indiscretions. *See Hammer v. State*, 296 S.W.3d 555, 562 (Tex. Crim. App. 2009) (noting "important distinction between an attack on the general credibility of a witness and a more particular attack on credibility" for biases or motives). Further, this evidence would have lent more credence to Ashley's first statement to Mother and Don that Susan was fabricating her allegations to get out of trouble and would have directly undermined the credibility of Ashley's independent allegations and subsequent corroboration of Susan's allegations, which Ashley admitted she did after she saw how sad Susan was.

As in *Johnson*, this evidence was of "no small magnitude," and we are compelled to conclude that it should have been admitted to give the jury "all of the relevant evidence pertaining to the issue of whether [Susan and Ashley] had

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<sup>8</sup>Ashley was able to testify that Hill was circumcised; Susan could not.

a motive to fabricate the sexual assault allegation[s] against [Hill].” *Johnson*, 490 S.W.3d at 914. In other words, the probative value of the evidence regarding Susan’s previous sexual conduct leading to her and Ashley’s outcries was not substantially outweighed by the danger of unfair prejudice.<sup>9</sup> See Tex. R. Evid. 412(b)(3); *Johnson*, 490 S.W.3d at 911–13; *Hammer*, 296 S.W.3d at 567; *Yzaguirre v. State*, 938 S.W.2d 127, 128–29 (Tex. App.—Amarillo 1996, pet. ref’d). Therefore, the trial court abused its discretion by excluding the specific evidence that Susan had been suspended from school for sexual misbehavior before she made her outcry to several friends and that she had been caught at school with suggestive pictures on Ashley’s iPod before she made her outcry to Don. This exclusion violated rule 412 and the Confrontation Clause.

We believe it is important to again recognize that our finding of an abuse of the trial court’s broad discretion through these limitations on Hill’s cross-examination is dictated by binding precedent. The interplay between rule 412’s protection of sexual-assault victims from being impugned with their previous sexual conduct and the Confrontation Clause’s guarantee of an opportunity to cross-examine witnesses is difficult to assay. See, e.g., *Johnson*, 490 S.W.3d at

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<sup>9</sup>While we may very well conclude that this evidence was substantially more prejudicial than probative, the evidence that H.H. was sexually abusing his own sister was even more prejudicial, and the court of criminal appeals concluded that its probative value was heavier. See *id.* at 911; cf. *Arriola v. State*, 969 S.W.2d 42, 43 (Tex. App.—Beaumont 1998, pet. ref’d) (concluding evidence of victim’s past sexual history inadmissible to prove motive to lie because there was no nexus between past sexual conduct and alleged motive).

909–11; *Hammer*, 296 S.W.3d at 561–62; *Estes v. State*, 487 S.W.3d 737, 752–54 (Tex. App.—Fort Worth 2016, pet. granted). But this difficulty could suggest that if a sexual-assault victim is sexually active near the time of the outcry, rule 412(a)'s exclusion would be overcome in every instance. This would be a reversion to the state of the law before rule 412 was enacted, which routinely put the sexual-offense victim on trial, misled the jury, and embarrassed the victim. See *Schlueter*, *supra*, at § 412.02[2]. We agree with the State that at some point, the rule announced in *Johnson* could eventually swallow the protections envisioned by rule 412. Although we clearly see the slippery slope potentially begun by *Johnson*, we cannot avoid it in this case. We acknowledge the *Johnson* holding that we erred in our previous analysis regarding the exclusion of this exact type of evidence and respectfully seek to apply the law as directed.

### 3. Harm

Having found an abuse of discretion, we must reverse the judgments of conviction unless we determine beyond a reasonable doubt that the constitutional error did not contribute to Hill's convictions. See Tex. R. App. P. 44.2(a); *Johnson*, 490 S.W.3d at 915. Such a review consists of three steps. First, we assume 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 the evidence to the State's case, (2) whether evidence of the sexual nature of Susan's past misconduct would have been

cumulative of other admitted evidence, (3) the presence or absence of evidence corroborating or contradicting the outcries on material points, (4) the extent of cross-examination 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 are to focus not on the propriety of the outcome of the trial but on “the probable impact of the error on the jury in light of the existence of other evidence.” *Wesbrook v. State*, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000).

As we have recognized, Hill sought to cross-examine Susan with the evidence that at the time of her and Ashley's outcries against Hill, the trouble Susan was in with her family and at school was sexual in nature. The damaging potential of this testimony as fully realized would have allowed the jury to surmise that Susan fabricated her allegations against Hill, which Ashley corroborated out of concern for Susan, in order to gain sympathy and avoid punishment for Susan. See *Johnson*, 490 S.W.3d at 914.

We now turn to the factors in the second step. Although there was some evidence to corroborate the outcries—for example, the testimonies of the nurse examiner, the forensic interviewer, and Mother—the heart of the State's case was the credibility of Ashley and Susan. Both were subject to cross-examination regarding their possible motives to testify falsely and regarding their credibility, but Hill was not allowed to delve into the sexual nature of Susan's problems.

These specifics would have given “further support” to Hill’s defensive theory that a sexually active minor who was facing punishment for that behavior would be more likely to fabricate sexual allegations, rather than some other criminal offense, to turn the focus from herself and cast herself as a victim. *Id.* It further would have made Ashley’s initial denial of Susan’s allegations to Mother and Don more credible than her prior corroboration to friends and her later corroboration to Mother and Don after she saw that Susan was “sad” and would be in deeper trouble for her sexual indiscretions.

In arguing that there was no harm, the State points to Mother’s testimony that Hill made incriminating statements when first confronted with the girls’ allegations—“how could I have done this” and “I’m a monster”—to argue that the State’s case was strong. The State also relies on the significant evidence Hill was able to introduce suggesting that the girls fabricated their allegations and on the girls’ inability to identify Hill’s prominent groin tattoos. But the State’s case was intertwined with Ashley’s and Susan’s ultimate credibility and motives for accusing their father. Although Hill was not “wholly prevented from presenting his theory of fabrication,” it was unconstitutionally curtailed. *Id.*

By taking all of this into account in the third step, we cannot conclude beyond a reasonable doubt that the absence of this evidence did not contribute to Hill’s convictions. The evidence excluded “was of no small magnitude” and went to the heart of the State’s case against Hill, thereby harming him. *Id.*; see *Fox v. State*, 115 S.W.3d 550, 563–64 (Tex. App.—Houston [14th Dist.]

2002, pet. ref'd); *cf. Hammer v. State*, 311 S.W.3d 20, 22 (Tex. App.—San Antonio 2010, no pet.) (op. on remand) (analyzing similar error as nonconstitutional error under rule 44.2(b), as previously directed by the court of criminal appeals, and finding harm).

### **III. CONCLUSION**

The trial court abused its discretion, violating rule 412 and the Confrontation Clause, by excluding evidence that Susan's disciplinary problems were sexual in nature, which would have provided additional support to and allowed the jury to more fully evaluate Hill's fabrication defense. This evidence was more probative than prejudicial, and we cannot conclude beyond a reasonable doubt that its absence did not contribute to Hill's convictions. Accordingly, we sustain only that portion of Hill's first and second issues challenging the exclusion of the evidence regarding Susan. We need not address his remaining two issues directed to evidence excluded during the testimonies of the nurse examiner and forensic interviewer. See Tex. R. App. P. 47.1. Therefore, we reverse the trial court's judgments and remand to the trial court for further proceedings. See Tex. R. App. P. 43.2(d), 43.3(a).



/s/ Lee Gabriel

LEE GABRIEL  
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

MEIER, J., concurs without opinion.

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

DELIVERED: May 11, 2017