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Vol. 22, No. 41, October 13, 2014

Case Name: [Joe Dale Johnson v. The State of Texas](#)

- OFFENSE: Aggravated Sexual Assault
- COUNTY: Wichita
- C/A CASE No. 02-11-00253-CR
- DATE OF OPINION: October 9, 2014
- DISPOSITION: Conviction Affirmed OPINION: [Gabriel, J.](#)
- TRIAL COURT: 89th D/C; Hon. Mark Price
- LAWYERS: [Mark Barber](#) & [Jeff Eaves](#) (Defense); [Maureen Shelton](#) & [John Brasher](#) (State)

Ed Note: The memorandum opinion issued February 13, 2014, is withdrawn.

(Background Facts) H.H. was suffering from depression, was bullied at school, was interested in pornography, had been caught shoplifting, and had a “strained” relationship with his mother. Indeed, H.H.’s father and mother had placed him in counseling to address these issues. Appellant, who was in his fifties, was a lay leader at the church that H.H. and his family began attending in 2005. Johnson and H.H. began spending time together, and H.H. began mowing Johnson’s lawn for extra money when he was twelve. In the spring of 2007, shortly before H.H. turned thirteen, Appellant began showing H.H. pornography and sexually abusing him. Following a broken promise by Appellant to provide H.H. with a Nintendo DS game, H.H. had a conversation with a youth-group leader at the church and told him “everything” that had happened between himself and Johnson. H.H. stated that he “felt better, like a weight off [his] shoulders.” The youth-group leader told H.H.’s parents about H.H.’s outcry, and H.H.’s parents reported it to the police. Johnson was arrested on December 6, 2007.

309.05 Witnesses / Right to Present Evidence - Exclusion of Testimony: Appellant asserts that the trial court abused its discretion by excluding evidence that H.H. had sexually assaulted his sister and had been adjudicated for engaging in delinquent conduct. Appellant posits several theories mandating admission of H.H.’s juvenile adjudication. First, he argues that the State left a false impression as to why H.H. was in counseling, which invited the admission of H.H.’s juvenile adjudication. Johnson’s second theory of admissibility is that H.H.’s past sexual assaults of his sister would have shown his mental health at the time he reported Johnson’s actions and at the time of his testimony. Johnson’s third theory is that the evidence was admissible to challenge H.H.’s assertion that he was relieved after he told the youth-group leader about the assault. During his direct testimony, H.H. testified that after he told the youth-group leader “everything,” he “felt better, like a weight off [his] shoulders.” In an offer of proof, H.H. stated that he felt “minute” guilt about his sister. But he then immediately testified that he “felt guilt” for abusing

his sister. Fourth, Johnson asserts that the evidence should have been admitted because it was necessary to show that H.H. made a false accusation to get attention from his parents and “get himself out of trouble in the eyes of his parents.” Johnson’s fifth theory is that the sexual-abuse evidence was necessary to show that H.H. “was not naive about sexual behavior and knowledge of sexual matters” and to show his “knowledge that an individual can get in trouble for committing sexual acts on a juvenile.”

Holding: Although the constitutional right of confrontation includes the right of cross-examination to show bias or fabrication, the trial court retains wide latitude to impose reasonable limits on such cross-examination “based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” Delaware v. Van Arsdall, 475 U.S. 673 (1986). [Appellant] has failed to show that the excluded evidence about H.H.’s past sexual behavior and subsequent juvenile adjudication fell outside this wide latitude and did not relate to any of the valid concerns recited in Van Arsdall. Thus, we conclude the trial court did not abuse its discretion by excluding this evidence . . .

⚖️ **276.02 Reputation & Character Evidence / Extraneous Bad Acts / Evidence Used for Impeachment:** During the guilt-innocence phase, over Appellant’s objections, the State was permitted to introduce the testimony of G.M., who testified “that he was molested by [Appellant] under almost mirror like circumstance in 1979.” Appellant argues that the trial court abused its discretion by admitting evidence of his 1980 conviction for the aggravated sodomy of G.M. at the guilt-innocence phase of trial. He asserts the evidence was inadmissible because it was mere propensity or conformity evidence, it had the “taint of fabrication,” it was too prejudicial, and the State gave inadequate notice to Appellant of its intent to use the prior offense.

Holding: [Appellant] asserted in his opening argument to the jury that H.H. lied about Appellant. Appellant then questioned H.H. about a possible reason for the fabrication -- H.H.’s anger over not getting a Nintendo DS from Appellant -- and his desire to get Appellant in trouble, which H.H. knew a sexual-assault allegation would accomplish.

Holding: The State called G.M. as its last witness in its case in chief to rebut [Appellant]’s fabrication and retaliation theories, which the trial court recognized “came through loud and clear from the time of the voir dire of the Jury on up and through the examination of the last witness.” Indeed, a defendant’s opening statement supported by subsequently admitted evidence may open the door to the admission of extraneous-offense evidence to rebut defensive theories presented in that opening statement. *** [Appellant] clearly and repeatedly argued to the jury that H.H. fabricated the allegations against him, which rendered the extraneous-offense necessary to rebut that defense. G.M.’s testimony lasted only fifteen minutes in the guilt-innocence phase of trial, which spanned a total three days. Although [Appellant] previously had been convicted of two other sexual offenses against children, which also would have rebutted [Appellant]’s fabrication theory, the State sought to introduce only one of his prior convictions. Further, the trial court gave limiting instructions to the jury regarding the extraneous-offense evidence, which obviated any concern that the testimony would be given undue weight. We conclude that the trial court did not abuse its discretion by admitting the extraneous-offense evidence because the evidence was relevant apart from showing character -- to rebut [Appellant]’s fabrication and retaliation theories -- and because the probative value of the extraneous-offense evidence was not substantially outweighed by its prejudicial effect.

Ed Note: The Court of Appeals also rejected Appellant’s claim that the State gave inadequate notice of its intent to offer evidence of the previous conviction, because “evidence was offered to rebut the defensive theory of fabrication and retaliation; thus, the advance-notice requirements are not applicable.”

⚖️ **61.03 Challenges to Prosecution / Double Jeopardy / Multiple Punishments:** Appellant argues that because the crime of indecency with a child by contact, as alleged in count three of the indictment, was subsumed into the crime of aggravated sexual assault of a child, as alleged in count one of the indictment, convictions of both offenses violate double-jeopardy protections. The

record shows that the sexual contact proved at trial occurred during and as part of the aggravated sexual assault alleged in count one.

Holding: As the State concedes, to allow both convictions to stand would violate the constitutional prohibition against double jeopardy. *** We reverse the trial court's judgment as to count three, set aside [Appellant]'s conviction and punishment for indecency with a child by contact as alleged in count three, and enter a judgment of acquittal on count three.