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IN THE SUPREME COURT OF IOWA
Supreme Court No. 24-1967
Union County No. FECR012590

STATE OF IOWA,
Plaintiff–Appellee,

vs.

AARON CHRISTOPHER CUSTER,
Defendant–Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR UNION COUNTY
THE HONORABLE STACY RITCHIE, JUDGE

BRIEF FOR APPELLEE

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. The trial court properly exercised its discretion in admitting evidence of the defendant's similar acts of sexual abuse involving other victims to rebut his pretrial statements of accidental or mistaken contact.

ROUTING STATEMENT

This case does not meet the criteria for Iowa Supreme Court retention under Iowa Rule of Appellate Procedure 6.1101(2) (a)-(f). As the defendant suggests, transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

NATURE OF THE CASE

A Union County jury convicted Aaron Custer of four counts of third-degree sexual abuse, in violation of Iowa Code sections 709.4(1)(a), 709.4(1)(b)(2), and 709.4(1)(b)(3)(a). D0091, Verdict Forms (10/09/2024); D0106, Order of Disposition (11/22/2024); D0107, Order of Disposition (11/22/2024); D0108, Order of Disposition (11/22/2024); D0109, Order of Disposition (11/22/2024); *see also* D0103, Amended Trial Information (11/24/2024). The charges stemmed from allegations that Custer sexually abused his live-in girlfriend's two teenaged daughters and their twelve or thirteen-year-old cousin. D0024, Minutes of Testimony at 1–2 (12/11/2023).

Custer was sentenced to four terms of imprisonment not to exceed ten years; three of the terms were imposed consecutively, with the fourth term to be served concurrently. D0106 at 1; D0107 at 1; D0108 at 1; D0109

at 1. On appeal, Custer contends that the trial court abused its discretion in admitting evidence of his prior bad acts with two other victims.

STATEMENT OF THE FACTS

When she was about twelve years old, Ja.J. met Aaron Custer. D0126, 10-8-24 Trial Tr. Day 2 at 17:10–15 (01/15/2025). Her mother, Jodi, had separated from her husband and began dating Custer. D0126 at 16:10. Jodi, Ja.J., and her sister, Jo.J., eventually moved in with Custer. D0126 at 16:19–21:10. Initially, all was well. D0126 at 19:16–21:10. Because she was afraid of the dark and nervous in a new home, Ja.J. often slept with her mother and Custer. D0126 at 21:21–22:12. Custer slept in the middle of the bed, with his girlfriend and his girlfriend's then-thirteen or fourteen-year-old daughter flanking him. D0126 at 22:6–19. Jodi left for work early in the mornings, leaving Custer and Ja.J. alone in bed. D0126 at 23:15–24. Custer began touching Ja.J.'s breasts and vagina as he lay behind her. D0126 at 23:15–24.

The first time Custer touched her, Ja.J. was afraid and did not want to move. D0126 at 24:21–25:4. The defendant continued to touch her when she was fourteen and fifteen; he would ask Ja.J. if she wanted to "go play," which she interpreted as a sexual reference. D0126 at 26:3–16. Although

she told him "no," he would sometimes try to force her legs open. D0126 at 26:17–27:2. During that time period, Ja.J. estimated Custer touched her vagina with his hands at least 20 — maybe up to 40 — times. D0126 at 27:3–23.

Custer also touched Ja.J.'s vagina with his mouth. D0126 at 27:21–28. He told her not to tell anyone what he was doing, asking her, "[Y]ou want me to go away forever?" D0126 at 29:11–30:2. Custer continued to sexually abuse his girlfriend's daughter throughout the next several years. D0126 at 31:6–25. The abuse escalated to forcible intercourse at last five times, with Custer positioning himself on top of Ja.J. or behind her and prying her legs apart. D0126 at 31:12–33:3. Custer also made Ja.J. manipulate his penis until he ejaculated. D0126 at 33:4–22. All told, he sexually abused Ja.J. regularly until she was nineteen, with breaks of only a few days between incidents of abuse. D0126 at 30:20–34:20. Ja.J. was frightened and never disclosed the abuse to her sister, Jo.J., or anyone else while it was occurring. D0126 at 45:5–46:4.

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Jo.J. was two years younger than Ja.J., and remembered moving in with Custer when she was in fifth grade. D0126 at 71:10–17. While Ja.J. slept in bed with her mother and Custer frequently, Jo.J. slept with them

rarely — only if she was afraid or having nightmares. D0126 at 73:6–19. She, like Ja.J., described Custer as sleeping in the center of the bed. D0126 at 73:2–74:6. Once, when her mother had already left for work and Jo.J. was alone in bed with the defendant, he "groomed" her vagina and then inserted his fingers inside of her. D0126 at 74:18–75:7. She was on her side and not fully awake until she felt his fingers penetrate her vagina. D0126 at 75:8–21. Jo.J. "kind of froze" and then tried to push him away, but he persisted. D0126 at 75:22–76:11. She was fourteen or fifteen years old at the time. D0126 at 76:8–15.

At some point a few months later, Jo.J. confronted Custer about what he had done:

> … I told him that he inserted his fingers inside me that one night. And he told me no, he didn't. And I said yeah, you did; I remember. And he said no. Ant it was just back and forth until he finally said, well, don't tell your mom. And then I was even more scared to say anything.

D0126 at 77:3–23.

About four years later, Jo.J. was moving out of the house and decided to tell her aunt, Tammi, that Custer had sexually abused her. D0126 at 79:16–80:16. She did not want to tell her mother Jodi because she did not believe Jodi would "stand up" to Custer. D0126 at 81:6–25. Aunt Tammi

encouraged Jo.J. to tell Jodi and to speak to Ja.J., and after a group conversation, they notified the police. D0126 at 80:7–82:22.

Ja.J. would later recall that meeting; she received a mysterious text from her mother asking her to come to Jo.J.'s house after work that day. D0126 at 36:5–19. Tammi and another aunt, Mary, were there, and they told Ja.J. to be truthful about Custer, assuring her they would not be angry. D0126 at 36:5–37:23. After she told them that Custer had also sexually abused her, Mary became concerned for her own daughter, M.S., and later asked her if Custer had ever touched her inappropriately. D0126 at 128:6–132:17. He had, she told her while crying. D0126 at 132:3–133:8.

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Like Jo.J. but unlike Ja.J., M.S. reported that Custer touched her only once. D0126 at 105:17–109:22. When she was visiting and sleeping on the couch, she awoke to Custer groping her breasts. D0126 at 105:18–107:14. He touched her on the inside of her clothes. D0126 at 117:4–13. His hand then moved to below her belly button and his fingers slid down past her hips. D0126 at 107:5–20. She moved his hand back to her abdomen and tried to fall back asleep. D0126 at 108:12–25. She did not remember having a blanket on or near her before or after Custer touched her. D0126 at 109:3–17. M.S. was around twelve at the time and did not intend to tell

anyone what Custer did until her mother asked her directly, after his abuse of her cousins, Ja.J. and Jo.J., came to light. D0126 at 109:18–111:21; 118:4–24.

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Jodi testified at trial and admitted she was still in a relationship with Custer. D0126 at 158:20–25. She acknowledged that each of her daughters would sometimes sleep in bed with them. D0126 at 157:3–158:19. When she learned of her daughters' allegations, she spoke to her boyfriend and he denied any wrongdoing. D0126 at 162:11–24. He suggested that there was a "test" that could determine if a person was a virgin.[1] D0126 at 165:4–22. When asked about abusing M.S., Custer claimed that he once covered her with a blanket when she fell asleep on the couch. D0126 at 167:13–168:4. He also said he would not touch her because she did not bathe and was "dirty." D0126 at 168:5–25.

When asked about Jo.J., Custer told Jodi that he mistook her for Jodi:

> ... [H]e thought it was me. Because I probably -- you know, because I was like there and, you know, when you're asleep -- and then I leave, because I'm quiet when I leave -- he because, you know, I leave.

[1] Afton Police Chief Jacob McGuire also briefly testified at trial. When asked if a test existed to determine whether someone has had sex before, he replied, "No. That is not a thing." D0126 at 201:4–18.

> So he just turned around and he just thought it was me to (indicating).

D0126 at 169:1–18.

Over Custer's objection, two witnesses from Topeka, Kansas followed Jodi's testimony. D0126 at 182:5–191:12. Adult men A.C. and D.C. — twin brothers — both explained that Custer was their neighbor and a close family friend from the time they were five or six years old to early adolescence. D0126 at 204:14–25; 213:21–215:10. Custer was about twenty years older than the boys — like an older brother or uncle — and they played video games together at the house he shared with his mother and brother, often spending the night. D0126 at 204:19–25; 215:14–216:1. He would shower them with food, gifts and candy. D0126 at 206:25–207:21. Custer would usually sleep in the same bed as the boys, "in the middle." D0126 at 209:2–14.

When A.C. was ten years old in 2003, he woke up to Custer touching his penis underneath his clothes. D0126 at 209:2–14. The touching lasted a few minutes until a "mortified" A.C. turned away. D0126 at 209:2–20. Custer whispered in his ear, "[H]ey, hey, does that feel good?" D0126 at 209:2–14. A.C. waited until morning and "got out of there"; he did not report the touching. D0126 at ###:15–20; 211:18–22.

D.C. had an almost identical experience with Custer: "… I woke up one night and he was touching me." D0126 at 216:6–16. Custer touched D.C.'s penis under his clothes. D0126 at 216:17–217:5. D.C. quickly turned to his left and waited until he could see sunlight streaming into the bedroom, remembering that "the second I saw the morning sun I dipped out of there… as fast as I could." D0126 at 216:22–217:5. No report was filed. D0126 at 219:10–13.

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The defendant chose not to testify. D0128, 10-9-24 Trial Tr. Day 3 at 19:23–24:1 (01/15/2025). He called his mother to the stand to state that although A.C. and D.C. may have sometimes fallen asleep at their home years earlier, she never witnessed her son committing sexual abuse. D0128 at 66:1–67:13. She found the twins to be a "nuisance." D0128 at 68:9–16.

As indicated, the jury convicted Custer of four counts of third-degree sexual abuse.

ARGUMENT

I. The trial court properly exercised its discretion in admitting evidence of the defendant's similar acts of sexual abuse involving other victims to rebut his pretrial statements of accidental or mistaken contact.

Preservation of Error.

Error is preserved. The State filed a pretrial notice of its intent to introduce evidence Custer molested two boys in Kansas years earlier. D0062, Notice of Intent to Introduce Evidence Pursuant to 5.404(b) (09/20/2024); D0071, Supplement to Notice of Intent to Introduce Evidence Pursuant to Rule 5.404(b) (09/26/2024). Custer filed a resistance and argued at trial that the evidence should be excluded. *See* D0068, Resistance to 5.404(b) Evidence (09/26/2024); D0126 at 186:10–189:12. The State agrees that the court's ruling admitting the testimony was definitive and required no further objection. *See* D0126 at 189:13–191:4.

Standard of Review.

This court reviews challenges to prior bad acts evidence for an abuse of the trial court's discretion. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). "[W]e find an abuse of that discretion only when a party claiming it shows the discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.*

Merits.

Aaron Custer raises one claim on appeal. He contends the trial court abused its discretion in admitting evidence of prior bad acts in his sexual abuse trial to rebut a claim of accidental or mistaken touch. The court properly exercised its discretion in admitting the evidence.

Iowa Rule of Evidence 5.404(b) provides that evidence of a person's other acts is admissible under certain circumstances:

> Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character… This evidence may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

Iowa R. Evid. 5.404(b).

In determining whether evidence of other crimes, wrongs, or acts is admissible, the court uses a three-step analysis. *State v. Putman*, 848 N.W.2d 1, 8–9 (Iowa 2014). The court must first determine whether the evidence is relevant to establish a legitimate, non-character issue in the case. *Id.* at 9. Relevant evidence has "any tendency to make the existence of any fact that is of consequence… more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401.

Second, there must be clear proof the defendant committed the prior bad act. *Putman*, 848 N.W.2d at 9. The clear proof requirement is also part of the probative value/danger of unfair prejudice analysis that the court must perform. *See id.* at 14 ("For purposes of clarity and consistency, whether clear proof exists should remain as part of the balancing process in addition to being analyzed as an independent analytical step.").

Third, if the evidence is relevant for a legitimate, non-character purpose, the court should determine whether its probative value is substantially outweighed by the danger of unfair prejudice. *Id.*; Iowa R. Evid. 5.403 ("Although relevant, evidence may be excluded it its probative value is substantially outweighed by the danger of unfair prejudice…"). Rule 5.403 does not render all prejudicial evidence inadmissible, however. *State v. Howell*, 557 N.W.2d 908, 912 (Iowa Ct. App. 1996); *State v. Delaney*, 526 N.W.2d 170 175 (Iowa Ct. App. 1994) (noting "[r]elevant evidence is inherently prejudicial in the sense of being detrimental to the opposing party's case"). Instead, the rule prohibits only unfairly prejudicial evidence. *Id.* Unfairly prejudicial evidence "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base

its decision on something other than the established propositions in the case." *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988).

A. Relevance to a legitimate, non-character issue.

The testimony of twin brothers A.C. and D.C. detailing Custer's molestation of them years earlier was relevant for several legitimate, non-character purposes. First, the testimony was relevant to establish the sexual nature of the contact and Custer's sexual purpose in touching three young girls in a similar way. While specific intent is not an element of third-degree sexual abuse, the State must nonetheless establish the "sexual nature" of the contact under the definitional section of Iowa Code section 702.17. In *State v. Pearson*, the court recognized that innocent contact between two people involving certain body parts may occur and that "not all contact is a 'sex act.'" *State v. Pearson*, 514 N.W.2d 452, 455 (Iowa 1994). The court fashioned a non-exhaustive list of factors in determining whether contact is "sexual in nature":

> Such circumstances certainly include whether the contact was made to arouse or satisfy the sexual desires of the defendant or the victim. However, the lack of such motivation would not preclude a finding of sexual abuse where the context in which the contact occurred showed the sexual nature of the contact. Other relevant circumstances include but are not limited to the relationship between the defendant and the victim; whether anyone else was present; the length of the contact; the purposefulness

> of the contact; whether there was a legitimate, nonsexual purpose for the contact; where and when the contact took place; and the conduct of the defendant and victim before and after the contact.

Id. at 455.

Here, the fact that Custer sexually assaulted other teenagers while they were sleeping makes it more likely that his conduct with Ja.J., Jo.J., and M.S. was sexual in nature.[2]

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[2] "Motive" is "the impetus that supplies the reason for a person to commit a criminal act." *Putman*, 848 N.W.2d at 10 (quoting 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 404.22[3], at 404–119 to 404–120 (McLaughlin ed. 2d. 2014)). In *Putman*, the court rejected the State's argument that possession of child pornography depicting toddlers was relevant to establish Putman's motive in the brutal rape of a toddler. *Putman*, 848 N.W.2d at 10. The court reasoned that Putman's state of mind was not an element of first-degree sexual abuse and the child pornography evidence was not a legitimate or disputed issue in the case. *Id.* The *Putman* court went on to find, however, that the pornography evidence was admissible to prove Putman's identity, as he suggested the victim's father was the perpetrator. *Id*. at 10–11.

As Justice Waterman and Justice Mansfield have recognized, evidence of a defendant's sexual motive is relevant when he denies the crime charged. *See State v. Sievers*, 20 N.W.3d 203, 223–24 (Iowa 2025) (Waterman, J., dissenting) (suggesting the court was wrong in *Putman* to dismiss motive as a legitimate issue in a child sexual abuse case); *State v. Thoren*, 970 N.W.2d 611, 639 (Iowa 2022) (Mansfield, J., concurring specially) (noting that "[i]n short, the underlying reason why the other incidents [of sexual improprieties by a massage therapist] are relevant is to show Thoren's motive and intent"). A leading commentator has also questioned the *Putman* court's rejection of motive as a legitimate, non-character issue, noting that the court may have been "too quick" to dismiss it as irrelevant. *See* Laurie Kratky Doré, 7 *Iowa Practice Series*: *Evidence*, at 263 (2018-19 ed.). While the State disagrees with *Putman*'s holding regarding motive, it acknowledges that *Putman* currently remains the law.

The evidence was also specifically relevant to establish lack of mistake or accident. Custer contends on appeal that he did not allege a mistaken or accidental touching at trial and therefore that issue was not in dispute. *See* Defendant's Br. at 33–36. Although Custer did not testify or explicitly present that argument at trial, his initial statements to his girlfriend and to Jo.J. told a different tale. Given that Custer originally suggested he was merely covering one victim, M.S., with a blanket and may have mistakenly thought another victim, Jo.J., was his girlfriend in bed, it was incumbent upon the prosecutor to dispel the suggestion of accidental or unintentional contact.

It matters not which party introduces the claim of mistake or accident, provided it is a legitimate issue in the case. In *State v. Puga*, the Court of Appeals rejected the same claim Custer now makes on appeal:

> The State asserts the district court correctly found the evidence [of a prior act of sexual misconduct with a different victim] was relevant to establish that Puga's contact with M.D. was sexual and not accidental. [footnote omitted]. But Puga argues that it was not legitimate issue in dispute because "it was only the State referencing accidental touching and a 'misunderstood hug' in its closing arguments."

State v. Puga, No. 20-1184, 2021 WL 5106042, at *3 (Iowa Ct. App. Nov. 3, 2021). The *Puga* court found this claim unpersuasive, noting "that while it was the State's witness who testified to Puga's initial story about a

'misunderstood hug,' there is nothing in Rule 5.404(b) or related cases that require the evidence to be used by the State to rebut a *defense* theory." *Puga*, 2021 WL 5106042 at *3 (emphasis in original). The court went on to observe that "[i]nstead, the evidence must just be relevant to a 'legitimate issue in dispute,'" and a "legitimate issue in dispute was whether Puga's contact with M.D. was sexual in nature." *Id.*

Similarly, in *State v. Daugard*, the trial court admitted prior bad acts evidence that the defendant, a certified nursing assistant, was not permitted to be alone with female nursing home residents because of previous concerns of impropriety with the victim. *State v. Daugard*, No. 06-0537, 2007 WL 1062867, at *3 (Iowa Ct. App. Apr. 11, 2007). Although Daugard did not testify at trial, he raised the possibility of an accidental, non-sexual touching claim in his police interview. *Id.* The Court of Appeals affirmed the court's admission of the evidence on several grounds, including the absence of mistake or accident:

> ...[W]e find the testimony from Daugard's coworkers relevant because it cast doubt on his defense of mistake or accident. Daugard did not testify at trial, but he was interviewed at the sheriff's office on September 28. Daugard claimed his knees gave out when he was checking on [the victim], and he fell on top of her. He denied having sexual intercourse with [the victim] and claimed he was merely checking her incontinence undergarments. Daugard claimed [another employee] walked in the

> room to discover him lying on top of [the victim] at the precise moment he had innocently fallen on top of the unclothed woman. Evidence that Daugard's behavior with [the victim] had previously raised concerns with his coworkers and necessitated the imposition of work restrictions weakened his claim that the entire incident was accidental.

Id.; *see also State v. Weltman*, No. 20-0860, 2021 WL 2768910, at *6 (Iowa Ct. App. June 30, 2021) (court finds subsequent acts directed toward the victim relevant to prove "sexual nature" of brief hand-to-genital contact and to establish absence of mistake or accident, even though defendant maintained the act never occurred; the victim initially thought the fleeting contact may have been accidental).

This court, like the *Puga*, *Daugard,* and *Weltman* courts, should find that evidence of Custer's prior bad acts was relevant for legitimate, non-character purposes, whether he specifically presented that defense at trial or not. Because the testimony of the twins demonstrated the sexual nature of the contact and refuted Custer's initial claims of an unintentional or accidental touch, the trial court properly found the evidence to be relevant to legitimate issues in the case:

> THE COURT: Regarding the statement [the defendant's girlfriend, Jodi] testified that the defendant made about [M.S.], the court's recollection of the testimony is that [Jodi] was asked if she had a conversation with the defendant about the allegations of abuse made by [M.S.], and her eventual

response was that he said he covered her up [with a blanket].

The court's recollection of the testimony regarding [Jo.J.] was that the State asked [Jodi] whether she had ever talked to the defendant about the allegations that -- of sexual abuse that [Jo.J.] had made, and [Jodi]'s eventual answer was that the defendant thought it was [Jodi].

* * *

Additionally, [Jo.J.] testified that she confronted the defendant about her allegations of sexual abuse and he told her it did not happen. It was a dream.

I think his statement that it's a dream, obviously, whether you now argue just a general denial, certainly raises the issue that there was a mistake. She was mistaken about the contact.

I think his statements to [his girlfriend] that he thought it was her or that he was covering [M.S.] up with a blanket certainly raises the issue that there was either an accident -- accidental contact thinking it was [Jodi] or a mistake, that [M.S.] misinterpreted the contact.

I certainly think those have been raised, and I am going to allow the evidence to be presented by the State for the sole purpose of rebutting a mistake or accident.

I believe that the court has asked for a cautionary instruction and that the parties have provided one to the court, that it was agreed to by both parties, that will be submitted to the jury regarding this issue.

D0126 at 189:13–191:4. The trial court correctly analyzed the caselaw and rightly determined the prior bad acts evidence was relevant to rebut Custer's early claims of mistake or accident.

In addition, as the trial court found, the evidence was relevant to rebut a claim of mistake on Jo.J.'s part. In *State v. Thoren*, the court observed that the absence-of-mistake-or-accident exception to Rule 5.404(b) is not limited to a mistake or accident made by the defendant. *Thoren*, 970 N.W.2d at 632–33 ("Mistake usually arises in the context of the defendant's mistake — was the defendant's conduct the result of a mistake rather than criminal behavior? … But rule 5.404(b)(2)'s reference to mistake or accident is not strictly limited to a mistake or accident by the defendant."). The *Thoren* court held that evidence of prior bad acts by the defendant was relevant to rebut a claim of mistake by the victim. *Id.* at 633–34 (in light of defense evidence of "phantom touches during Reiki sessions, evidence that Thoren touched other clients inappropriately during therapy sessions is relevant to rebut Thoren's claim that L.R. experienced phantom touching rather than felt Thoren's hand").

Here, as the prosecutor noted, Custer suggested to Jo.J. that she may have dreamed the incident: "She testified today regarding statements that he made that the contact never happened. Essentially, [the defendant] said

that the victim was mistaken regarding the contact and said it was a dream." D0126 at 182:24–183:14; *see also* D0126 at 78:21—79:15 (Jo.J. testifies that when she confronted Custer, he told her he thought she dreamed the incident). The *Thoren* lack-of-mistake-on-the-victim's-part theory is another basis of relevancy for the testimony of the twins describing sexual abuse in the middle of the night, because it rebuts the suggestion Jo.J. was dreaming and mistaken in alleging Custer sexually abused *her* in the middle of the night.

B. Clear proof.

The State presented clear proof that Custer committed the acts involving A.C. and D.C. in Kansas. Clear proof need only be sufficient to "prevent the jury from engaging in speculation or drawing inferences based on mere suspicions." *State v. Taylor*, 689 N.W.2d 116, 130 (Iowa 2004) (quoting *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997)). The other act need not be proven beyond a reasonable doubt or corroborated, and the testimony of a credible witness alone can meet the requirement. *Putman*, 848 N.W.2d at 9; *State v. Reyes*, 744 N.W.2d 95, 100–01 (Iowa 2008) (quoting *State v. Jones*, 464 N.W.2d 241, 243 (Iowa 1990)) ("Direct testimony from the victim of a prior alleged assault, as a matter of law, is sufficient 'clear proof' to meet the code requirement."). Here, in addition to

credible testimony from A.C. and D.C. individually, their experiences were very similar and each lent credence to the testimony of the other. Their testimony describing Custer's earlier sexual assaults satisfied the clear proof standard.

C. Probative value v. prejudicial effect.

Finally, evidence of the Kansas sex acts had high probative value, while the danger of unfair prejudice was low. In making this determination, the court looks at the need for the evidence, whether there is clear proof of the other acts, the strength or weakness of the evidence on the relevant issue, and the degree to which the factfinder will be prompted to decide the case on an improper basis. *Putman*, 848 N.W.2d at 9–10.

Here, first, the need for the evidence was high. As noted, the State had to prove the contact was sexual in nature and needed to address the defendant's initial suggestions that the contact in at least two of the cases was innocent. At the same time, Custer issued a general denial at trial, increasing the need for the evidence. *See Puga*, 2021 WL 5106042 at *4 ("While there was a witness to the contact, Puga denied that anything improper had occurred, thus increasing the need for other sexual abuse evidence."); *State v. Paulson*, No. 06-0141, 2007 WL 461323, at *4 (Iowa Ct. App. Feb. 14, 2007) (citing *State v. Rodriguez*, 636 N.W.2d 234, 242

(Iowa 2001)) ("Additionally, the defendant completely denied any sexual abuse of C.O., which directly contradicted C.O.'s description. Therefore, the need for other evidence was substantial."); *State v. Query*, 594 N.W.2d 438, 444 (Iowa Ct. App. 1999) ("In the case at bar, the State needed the prior bad acts evidence to establish the sexual intent element of the charges and rebut the Query's claims the acts were innocent or accidental."). And while the acts were admittedly remote in time, occurring twenty-one years earlier, they occurred when A.C. and D.C. were in a similar pubescent or prepubescent age range, counterbalancing the remoteness. *See generally State v. Casady*, 491 N.W.2d 782, 785–86 (Iowa 1992) ("The remoteness of evidence generally affects the weight rather than admissibility of the remote evidence," and remoteness renders evidence irrelevant only when "the elapsed time is so great as to negate all rational or logical connection between the fact sought to be proved and the remote evidence offered to prove that fact."). In this case, Custer's behavior as a thirty-year-old sexual predator remains logically connected to that same behavior as a fifty-year-old.

Second, as discussed above, the testimony of A.C. and D.C. satisfied the requirement of clear proof. The jury was not required to speculate or draw inferences based on mere suspicion.

Third, the evidence of Custer's earlier sexual misconduct with minors was relevant and probative on the issue of whether his later conduct was innocuous or sexual in nature. *See Puga*, 2021 WL 5106042 at *3–4 ("…[T]he State argues 'the fact that Puga assaulted another teenage girl under similar circumstances… makes it more likely that his conduct with M.D. was sexual in nature and less likely that his [aggressive, grinding] hug of M.D. had an innocent or non-sexual purpose' or that it was accidental. We agree."); *State v. Cox*, 781 N.W.2d 757, 771 (Iowa 2010) ("[P]rior bad acts may be relevant to demonstrate motive or intent when a defendant claims touching was accidental.").

Finally, the evidence was not the sort of information that would have likely roused the jury to overmastering hostility. On a sliding scale of improprieties, Custer's behavior in Kansas was brief and isolated, making it equally or less offensive than the behavior for which he stood trial — thereby lessening its prejudice. *See Rodriguez*, 636 N.W.2d at 243 (citing *State v. Larsen*, 512 N.W.2d 803, 808 (Iowa Ct. App. 1993)) (comparing severity of the charged and uncharged acts and holding that danger of unfair prejudice regarding other bad acts was "neutralized by equally reprehensible nature of the charged crime")). The prosecutor did not belabor the prior bad acts testimony. *See* D0126 at 204:14–210:11; 213:19–

217:12. As in *Puga*, the State "did not spend much time developing testimony about the prior bad act during trial." *See Puga*, 2021 WL 5106042 at *3. And Custer was already being tried in one proceeding for sexually abusing three different victims. Obviously, the jury was aware that he faced multiple charges involving multiple minors.

The court was also careful to give the jurors a cautionary instruction, repeating it by book-ending the challenged testimony. Before and after A.C. and D.C. testified, the court cautioned the jury on the proper purpose of their testimony:

> THE COURT: I am going to read for the jury an instruction that will advise you on the testimony you are about to hear.
>
> Evidence has been received concerning or will be received concerning other wrongful acts alleged to have been committed by the defendant. The defendant is not on trial for these acts.
>
> This evidence must be shown by clear proof to show defendant's intent in the absence of mistake or accident on part of the defendant and an absence of mistake or accident on the part of [M.S.] and [Jo.J.] and for no other purpose.
>
> If you find wrongful acts occurred, then and only then may such other wrongful acts be considered for the purpose of… establishing intent or absence of mistake or accident.
>
> You may consider whether the acts were recent or remote and whether the acts were similar or dissimilar to the crimes charged in this case and all

> other relevant factors in deciding how much weight and effect to give them.

D0126 at 205:9–206:6; *see also* D0128 at 24:11–25:11 (court notes "the importance" of the cautionary instruction and rereads it to the jury the next morning). The court also gave the jurors that instruction in written form.[3] *See* D0090, Jury Instruction No. 20 (10/09/2024).

"Because the weighing of probative value against potential prejudice is not an exact science, this court gives a great deal of leeway to the trial judge who must make this judgment call." *Newell*, 710 N.W.2d at 20–21.

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[3] Despite Custer's suggestion on appeal that the jury was already hearing "propensity" evidence because three victims were involved in one trial (Defendant's Br. at 39), no motion to sever was filed in this case. The court instructed the jurors that if "you find the defendant guilty or not guilty on any one of the four counts, you are not to conclude the defendant is guilty or not guilty on the others. You must determine whether the defendant is guilty or not guilty separately on each count." D0090, Jury Instruction No. 13 (10/09/2024).

Custer also briefly suggests that the State presented propensity evidence by eliciting testimony from Jodi that she and Custer, her live-in boyfriend of twelve years, had never had intercourse, nor had she ever seen him naked. *See* Defendant's Br. at 40; D0126 at 158:20–159:7. No objection was lodged to this testimony. And although Custer contends on appeal the only relevance of this exchange is to show he "was somehow predisposed to commit crimes against younger girls," that testimony would have nothing to do with the age of his sexual partners. It would tend to show only that his girlfriend was not one of them, which could make it more likely than not he sought sexual gratification elsewhere. This was not improper propensity evidence.

The court here took steps to minimize any unfair prejudice and made the right judgment call. Custer's claim to the contrary should be rejected.

D. Harmless error.

Alternatively, if this court disagrees and finds that the trial court abused its discretion in admitting the testimony of A.C. and D.C., it should still deny Custer relief. The court's erroneous admission of evidence does not require reversal unless "a substantial right of a party is affected." *State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008) (quoting Iowa R. Evid. 5.103(a)). Errors in an evidentiary ruling that is harmless may not be a basis for relief on appeal. *Parker*, 747 N.W.2d at 209. For nonconstitutional errors, the court asks whether the defendant has been "injuriously affected or suffered a miscarriage of justice." *Id.* (citation omitted). The court considers a variety of circumstances, including the strength of the evidence of guilt. *Id.* at 210.

Here, Custer's rights were not affected and the verdict was not attributable to the challenged testimony. The testimony of the three victims was credible and compelling, and each corroborated the testimony of the other two by describing Custer's behavior of preying upon them as they slept. If the court finds that the trial court should have excluded the

prior bad acts evidence, it should deem the error harmless. The defendant's convictions for third-degree sexual abuse should be affirmed.

CONCLUSION

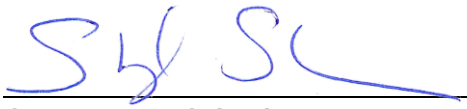
The trial court properly exercised its discretion in admitting testimony under Rule 5.404(b) to rebut the suggestion of accidental or innocuous contact. For the reasons discussed above, the State respectfully requests that the court affirm Aaron Custer's four convictions for third-degree sexual abuse.

REQUEST FOR NONORAL SUBMISSION

The defendant has requested oral argument. The State believes that the issue presented is fully addressed in the briefs and can be decided without further elaboration. If that the court grants the defendant argument, however, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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