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IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 24-1967

Union County # FECR012590

STATE OF IOWA,

Plaintiff-Appellee,

vs.

AARON CHRISTOPHER CUSTER,

Defendant-Appellant.

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

APPLICATION FOR FURTHER REVIEW OF THE COURT OF APPEALS' OPINION FILED APRIL 1, 2026

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QUESTION PRESENTED FOR REVIEW

Whether the trial court erred in allowing two witnesses to testify about separate, remote instances of sexual contact by the Defendant pursuant to Iowa Rule of Evidence 5.404.

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STATEMENT IN SUPPORT OF FURTHER REVIEW

This Court should accept further review as the court of appeals has entered a decision in conflict with a decision of the Supreme Court on an important matter and the case presents an issue of broad public importance that the Supreme Court should ultimately determine. Iowa R. App. Proc. 6.1103(b)(1 & 4).

This Court has made clear that a defendant must be tried for what he did, not for who he is. In this case Mr. Custer was charged with the sexual abuse of three female victims. Unrelated to the evidence of the charged crimes, the State also presented evidence of two brothers who testified that Mr. Custer inappropriately touched them while living in the State of Kansas over twenty years ago.

The Court of Appeals acknowledged the general test for admissibility for such evidence and then ignored this Court's prior cases in the application of the rule. Citing it's own unpublished decision, it found that the State's decision to admit prior statements of Mr. Custer to family members during their

case in chief was sufficient to require such testimony, even if the only defense at trial was a general denial. This holding is in conflict with this Court's cases finding that issues are not disputed simply because it could have been raised as a defense. *State v. Thoren*, 970 N.W.2d 611, 630-31(Iowa 2022).

That error was compounded by the Court of Appeals then holding that the evidence was more probative than prejudicial as it was needed to rebut the same statements. In doing so, this Court's prior cases cautioning that "regardless of the stated purpose of such evidence, the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered—to convict the defendant because he or she is a bad person" was disregarded. *State v. Sullivan*, 679 N.W.2d 19, 30 (Iowa 2004).

This Court should accept this case for further review to affirm its prior holdings concerning admission of similar acts evidence of a defendant and disavow attempts to limit or disregard these cases.

NATURE OF THE CASE

Appellant Aaron Custer appeals following guilty verdicts by a jury on four charges of Sexual Abuse in the Third Degree, a class C felony. D0091, Verdict Form (10/09/2024); D0116, Notice of Appeal (12/09/2024)

STATEMENT OF THE FACTS

Aaron Custer was tried on four counts of Sexual Abuse in the Third Degree. D0103, Final Amended Trial Information (11/22/2024). Count 1 charged that he abused Ja. J. "by force or against her will" as well as "while she was fourteen or fifteen years of age and the Defendant was a member of the same household" between November, 2014 and November, 2016. *Id.,* page 1.[1] Count 2 charged that he abused Ja. J. "by force or against her will" between November, 2014 and November, 2019. Count 3 charged he abused Jo. J. "while she was fourteen or fifteen years of age and Defendant was a member of the same household" between September, 2016 and September, 2018. *Id.*

[1]As two of the alleged victims have the same initials, a second letter has been added to delineate between them.

Count 4 charged that he abused M. S. while she was twelve or thirteen years old between March, 2019 and March, 2020. *Id.*, page 2.

At the time of trial Jo. J. was twenty-six years old. D0126, 70:3-70:4. She remembered moving into Mr. Custer's house when she was in fifth grade with her mother Jodi Jones and her sister. D0126, 71:10-71:12. While she and her sister shared a bedroom, Ja. J. would always sleep in the living room or with her mother and Mr. Custer. D0126, 73:6-71:9. The times that Jo. J. would sleep in the other bedroom with her mother and Mr. Custer were rare. D0126, 73:10-73:15.

Jo. J. testified that Mr. Custer "groomed" her vagina and inserted his fingers inside of her. D0126, 74:21-75-1. She tried to push him off, but he would not leave her alone. D0126, 75:23-75:24. She was either fourteen or fifteen years old when this occurred. D0126, 76:12-76:13.

Jo. J. said that a few months after this incident, she confronted Mr. Custer about touching her. She told him that he

inserted his fingers inside her that one night. Mr. Custer denied it. They went back and forth until he finally said, well, don't tell your mom. D0126, 77:8-77:13. She testified that he stated that he thought she was dreaming. D0126, 79:1-79:2.

About four years later, she was going through a "rough patch" in her relationship with Mr. Custer. D0126, 79:18-79:19. She was in the process of getting a car in her name and trying to move out of the house. D0126, 79:25-80:1. She stated that she "needed to get out of what I was living in and I just needed to tell someone." D0126, 79:18-79:21. She told her aunt Tammi. D0126, 90:2-80:4.

Ja. J. came to the house. She had been texted by her mother. D0126, 36:9-36:12. Ja. J. was asked if anything had happened to her. She started crying. D0126, 131:4-131:9. It was at that point that she started talking about what had happened. D0126, 36:9-36:12.

Mary Swanson is a sister of Jodi Jones. D0126, 123:17-123:20. She is the aunt of Ja. J. and Jo. J. D0126, 123:21-

123:24. M. S. is her daughter. D0126, 123:5-123:6. She became aware of the allegations by Jo. J. D0126, 123:9-123:12. Ms. Swanson had concerns about her own daughter. She spoke to M. S., who eventually disclosed what had happened to her. D0126, 131:17-132:2.

M. S. was seventeen years old at the time of trial. She is the cousin of Jo. J. and Ja. J. D0126, 95:18-95:21. M.S. initially testified that nothing happened at the house which made her uncomfortable or scared and that there was no touching that made her scared, uncomfortable or that "wasn't ok." D0126, 101:9-14.

When asked about a prior statement, M.S. stated that Mr. Custer assaulted her by touching her breasts. She was sleeping on the couch in the living room. D0126, 102:4-102:12. Her brother was sleeping in the room at the time. D0126, 102:13-1-2:16. Mr. Custer was on the floor next to the couch she was on. D0126, 103:7-103:8.

M. S. testified that after he touched her breasts, his hand

moved down past her belly button, with about half of his hand past that point. D0126, 107:11-107:16. His fingers were past her hips. D0126, 107:17-107:18. However, she did not remember specifically where his fingers were touching. D0126, 108:14-108:15. She picked up his hand and moved it to her stomach. 108:21-109:2. She then fell back to sleep. D0126, 109:3-109:5. She testified she was twelve years old at the time. D0126, 118:22-118:24.

At the time of trial, Ja. J. was 23 years old. D0126, 14:19-14:20. She is the sister of Jo. J. D0126, 15:25-16:1. Their mother and father separated when she was 11 or 12 years old. D0126, 16:14-16:17. After the separation her mother, began dating Aaron Custer. D0126, 17:5-17:11. Ja. J. met Mr. Custer when she was 12 or 13 years old. D0126, 17:14-17:15.; 19:25-20:2.

She and her family moved into Mr. Custer's house shortly after her mother's relationship began. D0126, 17:25-18:10. She and her sister shared a bedroom. *Id.* However she would often sleep with her mother and Mr. Custer. D0126, 21:21-22:5.

Ja. J. testified that there were times after her mother would go to work, that Mr. Custer would touch her while in the bed. D0126, 23:15-23:19. He would touch her breast and vagina. D0126, 23:18-23:19. She was either 13 or 14 when this started. D0126, 23:22-23:24. This continued and he touched her at other times when she was fourteen or fifteen years old. D0126, 25:22-26:12.

During this time period Mr. Custer would ask her if she wanted to "go play." It was her understanding that this meant to have sex. There would be times that she said no and nothing would happen. However there were also times that he would touch her when she said no. D0126, 26:3-26:21.

Ja. J. estimated that Mr. Custer touched her vagina with his hands more than twenty times during this time period. D0126, 27:6-27:15. She testified that he also would put his mouth on her vagina. D0126, 27:24-28:1. This activity occurred up until the time she was nineteen years old. D0126, 30:8-30:11.

She testified that Mr. Custer used force to touch her.

D0126, 31:12-31:16. This involved him getting on top of her and putting his penis in her vagina. This happened approximately five times. D0126, 31:17-31:25. He used his hands to open her legs. D0126, 32:19-33:3. She only recalled one occasion where the contact occurred outside of the bedroom. D0126, 54:2-54:18.

The State during their case in chief asked Jodi Jones if she had a conversation with Mr. Custer about the allegations. She testified that he denied having sex with Ja. J. He said that he would never do anything to hurt her. D0126, 162:11-162:24. She was then asked:

> Q. Did he offer you any explanation or any defense or anything like that sort of -- to show you, hey, this didn't happen?
>
> A. He said no. He -- he said he didn't do didn't do nothing with her.

D0126, 162:11-162:24.

Concerning M.S., the State asked the following questions:

> Q. Thank you. All right. The question that I had asked you is if you had talked to Aaron about what [M. S] said happened. Do you remember now whether you talked to him about it or not?

A. Yes.

Q. Okay. Do you remember what he told you?

A. He just said he covered her up and I think --I believe that's the only thing he said. He said he covered her up because she -- she spends the night. She sleeps on the couch and she never has a blanket, because they just fall asleep watching TV. So he just gave her a blanket out of the cupboard and just took it and covered her up with it.

D0126, 167:13-168:1.

Finally concerning Jo. J. The following testimony was offered:

Q. Okay. What did he tell you about that?

A. I guess – wait, well, what did I – oh, my God, I don't remember what I all said at that time. But – because I asked him about it – but it was because we're in – because she used to come in the bedroom like when I'd go to work – like I said, when I went to work she'd lay in there –

Q. Okay.

A. – and he thought it was me. Because I probably – you know, when you turn – 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. So he just turned around and he just thought it was me to (indicating). That's about – that's about it.

D0126, 169:1-169:18.

The State called A. C. as a witness. He is an adult who currently works in Topeka, Kansas. D0126, 204:4. Mr. Custer was his neighbor in Kansas from the time A. C. was five or six until he was thirteen or fourteen years old. D0126, 204:17-204:18. He would go over to Mr. Custer's house and play video games, sometimes staying the night. D0126, 204:21-204:25. Mr. Custer was about twenty years older that A. C. D0126, 206:23:-206:24. Mr. Custer lived with his mother at the time. D0126, 207:12-207:13.

A. C. would spend the night at Mr. Custer's house every month or two, typically with his brother D. C. D0126, 208:7-208:13. A. C. testified:

> When I was about 10 years old – and I remember the year was 2003 – I couldn't put an exact date or month on that – but I stayed the night over there. And usually he would sleep in the same bed as us in the middle. And I remember waking up in the middle of the night and he was touching my penis under my pants or under shorts. And that went on for a few minutes. And he even said in my [ear] that, you know, that – hey hey, does that feel good? And finally I turned away and it had stopped.

D0126, 209:5-209:14.

D. C. was then called as a witness. He is the twin brother of A. C. D0126, 208:12. Mr. Custer was his neighbor in Topeka, Kansas. D0126, 213:22-213:24. He would spend time at Mr. Custer's house playing video games. D0126, 215:16-215:18. He testified that on one occasion:

> A. It was one night – Aaron always – Aaron always worked nights and so he always had black coverings on his windows. And I was staying the night. And I woke up one night and he was touching me.
>
> Q. You say he was touching you.
>
> Where was he touching you?
>
> A. He was touching my penis.
>
> Q. And was he touching your penis over your clothes or under your clothes?
>
> A. Under – under.
>
> Q. Did he say anything to you at this time?
>
> A. Not that I can remember.
>
> Q. What did you do when you felt that contact?
>
> A. I will always remember, I quickly – I was laying on

> my back and I quickly turned to the left so I was on my left side. And I'll always remember this – because like I said he had black covers on his windows. And I – I didn't fall back asleep. And I waited until I could see sunlight coming through (indicating) the bottom portion of the window that wasn't covered, and the second I saw the morning sun I dipped out of there.

D0126, 216:10-217:5.

Mr. Custer declined to testify at trial. D0128 21:14-22:5. The only witness called in his case in chief was his mother. D0128, 62:15-62:17. She testified that she and Mr. Custer lived together in Kansas from 2000 till he moved out of the house in 2006. D0128, 62:20-63:5. She testified that she did not see anything that occurred during that time period that in any way concerned her between Mr. Custer and A. C. or D. C. D0128, 70:4-70:16.

ARGUMENT

I. The trial court erred in allowing two witnesses to testify about separate, remote instances of sexual contact by the Defendant pursuant to Iowa Rule of Evidence 5.404.

A. Error Preservation. After the State filed their notice of intent to use Rule 404(b) evidence, trial counsel filed both a

resistance to the notice and a motion in limine. D0068, Resistance to 5.404(b) Evidence (09/26/2924); D0070, Motion in Limine (09/26/2024).

In the "Resistance to 5.404(b) Evidence," trial counsel stated in part: "7. General denial defense. The defense is not claiming this was accidental or a mistake case theory." D0068, Resistance to 5.404(b) Evidence, page 1 (09/26/2924).

On the first day of trial, the Court ruled:

> Then I believe that those witnesses can be presented in the State's case in chief.
>
> I find that their testimony is relevant based on the defendant's alleged admissions that either this was a mistake on his part or it was an accident. That it is relevant for that purpose to show that was not a mistake and that the nature of the contact was sexual.

D0129, Trial Tr., 8:13-8:24 (10/7/2024).

During trial, the prosecutor alerted the Court that they were about to the point where the testimony would be presented. After further argument, the Court ruled:

> Ms. [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 Jodi Jones 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.

D0126, Trial Tr., 290:8-190:24 (10/8/2024).

Neither ruling of the Trial Court was conditional. *State v. Tangie*, 616 N.W.2d 564, 568-69 (Iowa 2000)*; State v. Alberts*, 722 N.W.2d 402, 406 (Iowa 2006). The rulings on the motion in limine preserved the evidentiary issues without the need for objections during trial. The State has not argued that the issue is not preserved.

B. Standard of Review: Evidentiary rulings, are reviewed for abuse of discretion. *State v. Thoren*, 970 N.W.2d 611, 620

(Iowa 2022).

C. Argument. Rule 5.404 is a rule of exclusion, not inclusion of evidence. Iowa R. Evid. 5.404; *State v. Sullivan*, 679 N.W.2d 19, 28 (Iowa 2004). The fear is not that the evidence is irrelevant, but rather "that juries will tend to give it excessive weight and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds." *Sullivan,* 679 N.W.2d at 24. Rule 5.404(b) "is a codification of our common-law rule that one crime cannot be proved by proof of another." *State v. Castaneda*, 621 N.W.2d 435, 439 (Iowa 2001).

There is a three part test for admissibility under the rule. *State v. Putman*, 848 N.W.2d 1, 8-9 (Iowa 2014). The evidence must be relevant to a legitimate, disputed factual issue. *Id.*, 848 N.W.2d at 9. Second there must be clear proof of the prior act. *Id.* Third, the evidence's probative value must be substantially outweighed by the danger of unfair prejudice. *Id.; Thoren*, 970 N.W.2d at 626.

From the Court of Appeals opinion:

The State contends that the twins' testimony proved sexual intent, absence of mistake, and lack of accident. To assess these contentions, some additional factual background is in order.

The State presented evidence at trial that both Custer's girlfriend and her younger daughter separately confronted him. Each confrontation resulted in different excuses from Custer. When the mother confronted Custer about touching her niece (her daughters' cousin) while she was sleeping on the couch, Custer claimed he was just covering her with a blanket, suggesting that any touching was not sexually motivated and was the result of an accident or mistake. When the mother asked about him touching her younger daughter, Custer claimed that he thought he was touching the mother, again suggesting that it was an accident or mistake that he was actually touching the younger daughter.

When the younger daughter confronted Custer, he denied that anything occurred and claimed she must have dreamed the abuse. Custer's response implied that the younger daughter mistook a dream for actual contact.

Custer contends that his defense at trial was a general denial that sexual contact occurred, so there was no dispute about intent, mistake, or accident about which the twins' testimony would be relevant. Other criminal defendants have claimed a fact is not disputed when their defense was a general denial of the incidents and the noncharacter purposes supporting admission were raised through the State's evidence. We have rejected such claims because rule

> 5.404(b) does not require the factual dispute to be part of the defendant's theory of defense. It only requires that the evidence be relevant to a disputed fact.

State v. Custer, # 24-1967, pages 4-6 (filed April 1, 2026)(citations omitted). The Court did not discuss how the evidence was admissible in the two counts involving Ja. J.

The analysis by the Court of Appeals is contrary to what this Court has previously held. This Court has looked to what was actually contested by the defense at trial, not what the State decided to offer as evidence.

> Prior bad acts evidence can be admitted to show the touching or assault was not accidental. Accident is at issue when a defendant claims he touched intimate parts of the victim's body either accidentally, such as while playing, or for a legitimate reason, such as bathing or giving a medical treatment to a child.
>
> But Thoren never argued that he accidentally touched L.R. or that he touched her vaginal area for therapeutic purposes. He flat-out denied ever touching L.R. below her belly button. Just as the elements of a charge are not automatically disputed issues, the explanation for Thoren's inappropriate touching is not automatically considered a disputed issue simply because Thoren could have raised it as a defense. *The reason Thoren touched L.R.'s vaginal area was never a legitimate issue at trial; the disputed*

> *issue was whether the touching actually occurred.* The district court abused its discretion in allowing the State to use the former clients' testimony to prove a lack of accident.

State v. Thoren, 970 N.W.2d 611, 630-31 (citations omitted) (emphasis added). The fact that the State decided to present the statements does not mean that they can use that decision as a back door to admit otherwise inadmissible and prejudicial evidence.

Trial counsel always maintained that the defense involved a "[g]eneral denial defense. The defense is not claiming this was accidental or a mistake case theory." D0068, *Resistance to 5.404(b) Evidence* (09/26/2024), page 1. "Right now our defense – the evidence we see it will be like a general denial that the allegations did not occur." D0129, 7:3-7:16. From opening statement, "we believe that based on everything that you will hear, based on a common sense examination of the totality of everything that you will hear, you will be asking you to be returning a not guilty verdict against Aaron on all four counts." D0129, Trial Tr., 218:10-218:19 (10/07/2024). Trial counsel

ultimately argued, "We believe based on everything that we've been able to show the jury in our cross-examination, our presentation of the inconsistencies, the lack of detail, the lack of corroboration, the motive, the bias in this case, that the State has not met that heavy burden of reasonable doubt." DO130, Trial Tr. 137:22-138:3 (10/9/2024).

The defense never argued mistake. The Court of Appeals finding that the "issue" of lack of mistake allows for admission regardless of the party offering the evidence is directly contrary to this Court's holding in *Thoren*.

The Court of Appeals also ignored this Court's decisions on use of 404(b) evidence in general intent crimes, stating:

> Custer argues that intent cannot be a noncharacter purpose for admitting the twins' testimony because the type of third-degree sexual abuse with which he was charged is a general intent crime, so intent did not need to be proven and was therefore not an issue. A similar argument was rejected in *Puga*. There, the court noted that third-degree sexual abuse requires performance of a sex act. *State v. Puga*, 2021 WL 5106042, at *3. To determine whether a sex act occurred, the jury was instructed to "consider the type of contact and the circumstances surrounding it in deciding whether the contact was sexual in

nature." *Id.*

State v. Custer, # 24-1967, page 6, footnote 1 (filed April 1, 2026). Allowing propensity evidence is the exact opposite of reviewing the specific circumstances of the charged contact.

Sexual Abuse in the Third Degree, is a general intent crime. *State v. McNitt*, 451 N.W.2d 824, 824 (Iowa 1990). As this Court explained in *Thoren*:

> The State can offer evidence from Thoren's former clients to prove intent only if Thoren's intent is a legitimate disputed issue the jury needs to decide. Intent can be at issue when it is a disputed element of the crime.
>
> ...
>
> In contrast, in *State v. Putman* we held that evidence of '[t]he perpetrator's motive for sexually abusing [the victim] was not a legitimate or disputed issue in this case' because '[t]he State was not required to prove Putman's state of mind as an element of the crime.' Here, the State charged Thoren with one count of sexual abuse in the third degree by forcing the victim to perform a sex act against her will or by force. This is a general-intent crime so the State is not required to show intent as an element of the charge.

Thoren, 970 N.W.2d at 628-29 (citations omitted), citing *Putman*, 848 N.W.2d at 10. Determination of the nature of the

touching by reference to something which may have happened twenty years ago has been squarely rejected:

> [I]t requires the jury to draw an intermediate inference as to the accused's disposition or tendency to form a particular *mens rea*. The charged offense occurred at one time and place while the uncharged crime ordinarily occurs at a different time and place. To bridge the temporal and spatial gap between the two incidents, the prosecutor must assume the accused's propensity to entertain the same intent in similar situations. That assumption is the inescapable link between the charged and uncharged crimes. The trier of fact can reason from the starting point of the uncharged crime to a conclusion about the *mens rea* of the charged crime only through an intermediate assumption about the accused's character or propensity.

Sullivan, 679 N.W.2d at 26 (citation omitted).

Finally the Court of Appeals was not correct in its analysis that the probative value outweighed the unfair prejudice. It found:

> Here, there was a need for the evidence because the evidence of Custer's statements in response to being confronted with the sexual-abuse allegations suggested any contact was nonsexual in nature, was accidental, or was the result of a mistake. The twins' testimony was important to rebut Custer's suggested explanations.

State v. Custer, # 24-1967, page 8 (filed April 1, 2026)(citations omitted).

> In determining whether unfair prejudice generated by evidence of a defendant's other misconduct substantially outweighs the probative value of the evidence, the court should consider the need for the evidence in light of the issues and the other evidence available to the prosecution, whether there is clear proof the defendant committed the prior bad acts, the strength or weakness of the evidence on the relevant issue, and the degree to which the fact finder will be prompted to decide the case on an improper basis.

State v. Taylor, 689 N.W.2d 116, 124 (Iowa 2004)(citations omitted).

This Court has previously found that concerns about prejudice can be mitigated by narrowing the scope of the evidence presented to the jury. *Putman*, 848 N.W. 2d. at 15. Here it was expanded. With three charged victims, the testimony of two would always be in this category of evidence with the remaining victim's case. *See, State v. Romer*, 832 N.W.2d 169, 183 (Iowa 2013). The evidence was more prejudicial than probative.

CONCLUSION

For all of these reasons, this Court should grant the Petition for Further Review and that the judgment should be reversed and remanded for a new trial.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEW

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P.1103(5) because:

> [X] this brief has been prepared in a proportionally spaced typeface Century Schoolbook font, 14 point and contains 4,634 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.1103(5)(a).

Respectfully submitted,



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