IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0192

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEVIN THOREN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEFFREY D. FARRELL, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Therefore, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

This is a direct appeal by the defendant Kevin Thoren from his conviction for sexual abuse in the third degree. Judgment Entry; Notice of Appeal; App. 39-44; 45.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

Kevin Thoren was a licensed massage therapist. However, after a complaint that he had improperly touched a client, he surrendered his license, effective September 4, 2018. Tr. II, p. 27, line 24 – p. 30, line 21; Exh. 1 (combined statement of charges, settlement agreement, and final order); Conf. App. 4-6. Thoren is convicted of sexual abuse in the third degree based on a sexual assault that took place during a therapeutic massage Thoren performed on L.R. approximately six weeks after he had surrendered his license.

L.R. testified that on November 21, 2018, she was scheduled for a cranial massage session with Thoren. It was her second such massage with him. Tr. III, p. 30, line 3 – p. 31, line 11. Craniosacral therapy focuses on the head and spine down to the sacrum bone at the base of the spine. Tr. III, p. 87, line 22 – p. 88, line 10. It involves very gentle pressure to the head and spinal column. There is no massaging, rubbing, or movement of the hands over the client's body in craniosacral therapy. Patients are normally clothed during that type of therapy. Tr. III, p. 89, line 22 – p. 91, line 22.

During L.R.'s session on November 21, Thoren put a cloth over L.R.'s eyes so that she could not see. He did not ask her permission to do so. Then, Thoren told L.R. that he was going to "work on [her] vaginal area." Tr. III, p. 33, line 21 – p. 34, line 12. He "started to rub right on [her] pubic bone around [her] stomach." At first, Thoren rubbed gently. Then, the rubbing became "very hard and very insistent" and Thoren kept asking L.R. to tell him what she was feeling. Tr. III, p. 34, lines 13-18.

Thoren started to rub L.R.'s "clitoris area and on down toward [her] anal area," rubbing really briskly and "really insisting, tell me how it feels, tell me how it feels." Tr. III, p. 34, lines 19-20; 36, lines

1-18. Thoren was rubbing with a circular motion over L.R.'s vaginal area, but through her clothing. Tr. III, p. 35, lines 6-25. L.R. "froze up" and Thoren "just kept at it." After a time, L.R. was able to lift her leg a bit and tell Thoren, "enough." Tr. III, p. 34, line 22 – p. 35, line 2. Thoren stopped then and L.R. sat up on the table. She sat there for about five seconds trying to "get [her] bearings" and figure out how to get out of the office. Tr. III, p. 36, line 19 – p. 37, line 13.

As L.R. was sitting on the table, Thoren sat in a chair by the door, hung his head and told her, "I didn't mean for that to happen." Then he told her that she should take a bath before she came for her next session. Tr. III, p. 37, lines 7-13. L.R. got her coat and shoes and left. Tr. III, p. 37, lines 12-13.

L.R. reported to police that Thoren had sexually assaulted her. As a result of her complaint, Windsor Heights Police Detective Andrew Nissen met with Thoren for an interview on February 20, 2019. Tr. III, p. 132, lines 1-13; p. 135, line 15 – p. 139, line 6.

In the interview, Thoren acknowledged that his massage license had been revoked in August of 2018. He admitted that after his license was revoked, he did some massaging in some of his sessions "a

few times, … half a dozen times." He stated that his did the massaging on fully-clothed clients. Exh. 7 at 1:15-2:29; App. --.

Thoren told Det. Nissen that he had surrendered his license and had not contested the allegations because he had not had the money to hire a lawyer. Exh. 7 at 3:22-3:52.; App.-- Thoren stated that the woman who had filed the complaint against him had pulled the sheet down and exposed her breast and he touched it. She told him to stop and he stopped. Exh. 7 at 16:05-16:37; App. --.

Thoren acknowledged that there had been some other complaints but stated that he had supplied some emails that supported his position in those cases. Exh. 7 at 3:49-4:13; App. --.

Det. Nissen told Thoren that L.R. had reported that Thoren had touched her inappropriately at her appointment with him on November 21, 2018 at Thorson's Windsor Heights location. Exh. 7 at 4:22-5:00; 5:26-5:52; App. --. Thoren explained that L.R. was fully clothed and he put his hands on her belly near the solar plexus during the course of "energy work." He denied that he touched her near the vaginal area. He stated that sometimes in craniosacral treatments he will touch the client above the pubic bone but emphasized that it is

always above the pubic bone. Thoren did not remember whether he touched L.R. above her pubic bone. Exh. 7 at 6:10-7:04; App. --.

Thoren explained that craniosacral sessions are sometimes hands-off and sometimes he touches the client. Exh. 7 at 11:27-1:11:50; App. --. With L.R., he stated, his cranial sacral sessions were hands-off until the end. He recalled that towards the end of his session with L.R., he had his hands on L.R.'s belly and that L.R. had an orgasm. Thoren stated that he did not touch L.R. below the pubic bone. He emphasized that he told L.R. repeatedly that the purpose of touching her was not to cause an orgasm. Before that session, Thoren stated, he had never heard of a female client having an orgasm when her belly was touched, though he had had some male clients ejaculate during sessions. Exh. 7 at 6:04-9:26; 12:03-12:30; 13:13-13:23; 18:00-18:54; App. --.

Thorson asked Det. Nissen whether L.R. was saying he touched her vaginal area. The detective confirmed that was the allegation. Exh. 7 at 47:05-47:15; App. --. Thorson stated that there was no reason he would touch L.R.'s vaginal area; he did not even remember touching her above the pubic bone, though he sometimes does that. 48:10-48:19; App. --.

Five other women testified about sexual acts Thoren performed on them in the course of their sessions with him.

L.K. is a nurse practitioner in women's health and holistic endocrinology. She testified that Thoren was her massage therapist. Tr. II, p. 92, lines 1-25. She estimated that she had four sessions with Thoren. Those sessions were traditional massage with muscle and tissue work. Her last session with him was on February 2, 2014. Tr. II, p. 96, lines 3-23.

At L.K.'s last session with Thoren, she was lying on her back while Thoren massaged; she was unclothed but covered with a drape. Thoren asked if it would be okay if he pulled down the drape that covered her breasts. She thought that was a "weird" request but thought maybe the drape was getting in the way of the massage, so she agreed. Thoren pulled on L.K.'s right nipple. L.K. was "slow to react," and then Thoren pulled on her left nipple, as well. L.K. told Thoren, "that's weird," but he finished the massage and she paid him and went home. Tr. II, p. 97, line 9 – p. 98, line 15.

The next morning, L.K. called Thoren. She told him that what he had done was not right and could be bad for his license and that

she did not want to hear about that ever happening again. Thoren acknowledged that what he had done was wrong and told her that he did not have an explanation for why he did it. Tr. II, p. 98, line 10 – p. 99, line 17.

L.K. did not make a complaint to the Massage Therapy Board at the time. Later, however, she learned that her chiropractor was planning to bring Thoren into his office practice. She told her chiropractor about her experience with Thoren. At that point, she made a complaint. Her complaint was filed on March 31, 2017 and it led to Thoren surrendering his massage license. Tr. II, p. 99, line 6 – p. 102, line 16; p. 103, lines 15-22.

J.J. worked for Thoren and Rita Henry in 2008 and 2009, answering calls and booking appointments via cell phone for them. During that same period, J.J. also had about ten massage therapy sessions with Thoren. Tr. II, p. 105, lines 8-13; p. 106, line 3 – p. 107, line 18; p. 108, lines 5-12.

J.J. stopped getting massages from Thoren because she felt that his behavior "was crossing a line." Tr. II, p. 108, lines 13-15. In her last couple sessions with Thoren, he would work on her shoulders, then work his way down towards her breast tissue. She had not asked

him to work in that area and other massage therapists from whom she had gotten massages would not work in that area unless she specifically asked for it. She had not asked Thoren to work on her pectoral or breast tissue area. Tr. II, p. 109, lines 17-20; p. 110, lines 17-20.

Thoren did not touch J.J.'s nipples, but he was working withing a half-inch to one inch from her nipples. Tr. II, p. 109, line 24 – p. 110, line 6. J.J. asked Thoren why he was working on her breast area, since she had not asked him to do so. Thoren replied that he was "following the energies." Tr. II, p. 110, lines 7-12.

Thoren also used an electric vibrating machine on J.J. The vibration was very strong and, after Thoren had used it on her once or twice, J.J. requested that he not use it again. Despite her request, Thoren used the vibrating machine on J.J. again in what would be her final session with him. When Thoren started to use the machine, J.J. reminded him that she did not want it used. Thoren became upset, grumbling and banging the equipment as he was putting it away. J.J. never went back to Thoren for a massage. Tr. II, p. 111, lines 4-24.

Later, J.J. called Thoren, crying, and told him that she would not see him for any future massages and could not work for him

anymore. Tr. II, p. 112, lines 3-16. J.J. filed a complaint with the Massage Board in 2017 based upon Thoren's inappropriate behavior during her massage. As a result of her complaint, Thoren's massage license was suspended for one year. Tr. II, p. 113, lines 5-22.

A.N. testified that during a three-month period in 2009, she had three massage sessions with Thoren. Tr. II, p. 71, line 13 – p. 74, line 19. The first two sessions were unremarkable. Tr II, p. 75, lines 2-11. Her third and final visit started out like the others, but about two-thirds of the way through that session, Thoren held a powerful vibrating massaging tool close to and on her breasts and on her lower abdomen. Thoren held the vibrator as close to A.N.'s clitoris and vagina region as he could get with her legs closed. He held it in that area "a long time." Tr. II, p. 75, lines 12-24; p. 76, line 20 – p. 77, line 25.

A.N. found the procedure "very uncomfortable" and left feeling "disturbed." She never went back to Thoren and never spoke with him again. Tr. II, p. 78, line 1 – p. 79, line 25. In 2016, A.N. learned that other women had filed complaints about Thoren. At that point she filed her own complaint with the Message Therapy Board. Tr. II, p. 79, line 2 – p. 80, line 16.

S.T. is the defendant's sister-in-law. Tr. III, p. 4, line 21 – p. 5, line 11. She had had "[e]asily 150" massages in her lifetime and about a dozen massages from Thoren. Her last massage with Thoren was in August or September of 2009. Tr. III, p. 7, line 23 – p. 8, line 21.

That last massage started out like normal. S.T. was lying on the massage table; she was naked but covered with a sheet. Tr. III, p. 8, line 22 – p. 9, line 17. At the very end of the massage, Thoren told S.T. that he had had good experience using a massager on people's stomach areas. S.T. agreed to let Thoren use the machine on her stomach. Thoren placed the machine on S.T.'s stomach. Then, Thoren lifted the machine, paused, then set the machine down on S.T.'s "crotch area," "[d]irectly over [her] clitoris." Tr. III, p. 9, line 14 – p. 10, line 7.

S.T. froze up and was not able to say or do anything. After five or six seconds, Thoren lifted up the machine and told S.T. the massage was over and left the room. Tr. III, p, 10, lines 8-23.

M.L. booked one ninety-minute massage with defendant at the Mercy Health & Wellness clinic; the massage was on March 1, 2012. Tr. II, p. 118, lines 8-13; p. 119, lines 17-24; p. 120, lines 4-7. M.L. had had many massages before and after her massage with Thoren, but

none was "anything close to" her experience with Thoren. During her massage, M.L. was naked except for her underwear. Towards the start of her massage, M.L. was lying on her back and Thoren was "massaging in the breast area, he went farther on the side of the breast than would be appropriate." Right at the end of her massage, M.L. "flipped over to be on [her] stomach" and "could hear [Thoren] panting and heavy breathing like he was aroused." Tr. II, p. 121, lines 12-21; p. 122, line 13 – p. 123, line 14; p. 131, lines 5-12. In June of 2017, M.L. filed a complaint with the Massage Board about that session. Tr. II, p. 121, lines 3-11; p. 126, lines 14-15.

Thoren testified at his trial. He testified that until September of 2018, when he surrendered his license, he had been a licensed massage therapist. Tr. IV, p. 99, lines 14-19. He admitted that he had touched the breast of L.K. inappropriately, as alleged in the complaint that L.K. made to the Board of Massage, and that he had signed off on the statement of charges and stipulation in that incident. Tr. IV, p. 137, line 2 – p. 138, line 5; Exh. 1; App. 4-6.

Thoren testified that he is also trained in craniosacral therapy and both Celtic and Usiu Reiki. Tr. IV, p. 98, lines 14-25. He is also trained in Pranic healing. Tr. IV, p. 99, line 24 – p. 100, line 3. He

continued to perform craniosacral therapy, Reiki, and Pranic Healing even after he surrendered his massage license. Tr, IV, p. 100, lines 10-24.

Thoren testified that L.R. had a craniosacral treatment with him on November 2, 2018. Tr. IV, p. 113, line 3 – p. 117, line 18; Def. Exh. F screenshot of appointment calendar); App. 10. She booked a second appointment for November 21, 2018. The booking system indicated that it was a Reiki appointment. Tr. IV, p. 119, line 15 – p. 121, line 16.

Thoren testified that he did not perform any massage at L.R.'s November 21 appointment. He performed Reiki services and incorporated some craniosacral therapy. Tr. IV, 124, line 3 – p. 125, line 3. Thoren testified that during the craniosacral portion of the session, he placed his hands on L.R.'s abdomen. One hand was on her solar plexus in the ribcage; his other hand was on her navel. He held his hands in those positions for two to three minutes, less than five minutes. Tr. IV, p. 125, lines 21-24; p. 131, line 11 – p. 133, line 20.

Thoren testified that L.R. became really relaxed, then groaned and said, "that was the deepest orgasm I've ever had." Tr. IV, p. 134,

lines 2-13. Thoren stated that he immediately pulled his hands away and told L.R. that that was not the purpose or intent of the therapy. The session ended then. Tr. IV, p. 134, line 17 – p. 135, line 8. Thoren denied that he touched L.R. in "any private areas" and denied that he said anything inappropriate to her. Tr. IV, p. 136, lines 2-8

Thoren also presented testimony from several witnesses regarding what defense counsel characterized as "phantom touch." Tr. IV, p. 26, lines 18-20. Kimberly Fantini has an associate degree in physical therapy and has been a licensed massage therapist for twenty-five years. She is also trained in craniosacral therapy and Pranic healing. Tr. IV, p. 11, lines 4-16; p. 12, lines 8-18. She testified that at times a client who is undergoing craniosacral therapy will feel that they are being touched in an area that is not being touched. She explained that she can be touching one area of a client's body but the client will feel a sensation in another area of the body because the whole neurological system is connected. Tr. IV, p. 26, line 4 – p. 27, line 10.

Jan Stegeman is a registered nurse and is also a certified massage therapist. Tr. IV, p. 37, lines 9-19; p. 38, line 3 – p. 39, line 24. She is also trained in a number of alternative healing modalities,

including Reiki. She is a Reiki Master. Tr. IV, p. 40, line 3 – p. 42, line 5. Ms. Stegeman testified that she has experienced Reiki clients who thought they had been touched in areas that she had not touched. Tr. IV, p. 42, line 23 – 43, line 17.

Ms. Stegement recounted one such experience that she had had herself. She had been receiving a Reiki therapy session and the therapist had held her ankle for a time. She felt that and thought that the therapist had continued to hold on to her ankle for several minutes. When Ms. Stegeman opened her eyes, however, the therapist was actually working near her head and told Stegement that she had only held her ankle for couple of seconds. Tr. IV, p. 43, line 18 – p. 44, line 9.

Julie Kramer testified that she had had at least two hundred fifty sessions with Thoren since 2009. She started with craniosacral sessions. She had also had sessions that included Reiki. Tr. IV, p. 52, line 20 – p. 54, line 5; p. 57, lines 13-25. Ms. Kramer testified that at times she experienced the physical sensation of being touched on her body when Thoren was not near her. Tr. IV, p. 59, lines 17-24. She testified that at nearly every session, she would feel heat and warmth in her lower back even though Thoren was three to four feet away

from her. She testified that it was common to feel warmth all over. Tr. IV, p. 60, lines 8-24. She also recounted a session where Theron worked on her foot a lot. As she lay there with her eyes closed, she would think that he was still holding onto her feet, yet when she opened her eyes, he was not near her. Tr. IV, p. 60, line 8 – p. 61, line 12.

Cheryl Eaton testified that over the years she had known Theron, she had had at least seven hundred sessions with him, including Reiki, Pranic Healing, and craniosacral sessions. Tr. IV, p. 75, lines 7-11; p. 76, lines 3-20. She described times when she experienced sensations of physical changes in her body without being touched. She testified that she would feel energy move through her, feel heat, feel a shiver or tingling. On many occasions, she thought she was being touched when Theron was not touching her. Tr. IV, p. 83, line 4 – p. 84, line 11.

Additional facts will be discussed where pertinent to the State's argument, below.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Admitting Evidence That the Massage Board Had Investigated a Prior Complaint Against Thoren and That, as a Result of the Investigation, Thoren Had Surrendered His Massage License.

Preservation of Error

The State agrees that Thoren has preserved his challenge to the relevancy of Exhibit 1 and the testimony about it. However, he has not preserved his challenge to that evidence under Rule 5.403.

Thoren filed a pretrial motion in limine in which he argued that evidence he had been investigated by the Iowa Department of Health and Bureau of Professional Licensure for allegations of sexual misconduct and evidence that he had voluntarily surrender his massage license was inadmissible under Rules of Evidence 5.403 and 5.404(b). Motion in Limine; App. 8-9. The district court denied Thoren's motion, but its ruling was expressly a conditional one. Ruling on Motions at p. 5; App. 30.

A ruling sustaining or denying a motion in limine does not generally preserve error. *State v. Leedom*, 938 N.W.2d 177, 191 (Iowa 2020); *Quad City Bank & Tr. v. Jim Kircher & Assocs., P.C.,* 804 N.W.2d 83, 89–90 (Iowa 2011). Error only occurs, if at all, when the evidence is offered at trial and is either admitted or refused. *Quad*

City Bank & Tr., 804 N.W.2d at 89–90 (citing *State v. Langley*, 265 N.W.2d 718, 720 (Iowa 1978). "An exception exists when the court's ruling on a motion in limine leaves no question that the challenged evidence will or will not be admitted at trial, [thus] counsel need not renew its objection to the evidence at trial to preserve error." *Leedom*, 938 N.W.2d at 191 (internal quotation and citation omitted).

When Exhibit 1 was offered at trial, Thoren objected on the grounds that it was irrelevant and was admissible under Rule 5.404(b); he did not raise an objection under Iowa Rule of Evidence 5.403. He has, therefore, waived any claim that the probative value of the evidence is outweighed by its prejudicial impact. The State also notes that Thoren does not raise in this division of his brief a claim under Iowa Rule of Evidence 5.404(b). Thus, the only claim properly before the Court is whether the challenged evidence is relevant.

Scope and Standard of Review

The Court reviews evidentiary rulings for abuse of discretion. *State v. Tipton*, 897 N.W.2d 653, 690 (Iowa 2017). "An abuse of discretion occurs when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa

2003) (quoting *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001)). Even if the Court finds an abuse of discretion, it will only reverse if the defendant shows prejudice. *Tipton*, 897 N.W.2d at 690; *Buenaventura*, 660 N.W.2d at 50; *State v. Windso*r, 316 N.W.2d 684, 688 (Iowa 1982).

Merits

Kevin Thoren contends that the district court abused its discretion in admitting at his trial for sexual abuse in the third degree, committed during the course of a therapeutic massage, evidence that Thoren had been investigated by the Iowa Department of Health and Bureau of Professional Licensure for an allegation of sexual misconduct and that Thoren voluntarily surrendered his massage license. Thoren argues that this evidence was irrelevant and that any probative value was outweighed by its prejudicial impact and, therefore, that the district court should have excluded that evidence under Iowa Rules of Evidence 5.402 and 5.403. His claim should be rejected. As noted above, Thoren has waived any claim under Rule 5.403. In any event, the district court was well within its proper discretion in admitting the challenged evidence under Rules 5.402 and 5.403.

Thoren challenges the district court's admission testimony from Tony Alden, a representative of the Iowa Board of Massage Therapy that the Board had received a complaint that Thoren touched a client's breast for a non-therapeutic purpose and that, as a result of that complaint and the ensuing investigation, Thoren had voluntarily surrendered his massage license. Thoren also challenges the admission of Exhibit 1, the Combined Statement of Charges, Settlement Agreement, and Final Order filed in that administrative case. *See*, Exh. 1; App. 4-6. Thoren contends this evidence was irrelevant and that the prejudicial effect of that testimony and exhibit outweighed its probative value.

Thoren first argues that the challenged evidence is irrelevant. Evidence is relevant if it makes a desired inference about a material and consequential fact more probable than it would be without the evidence. Iowa R. Evid. 401; *State v. Shivers*, 2001 WL 355812, at *1 (Iowa Ct. App. Apr. 11, 2001). Under Rule 5.402,

> Relevant evidence is admissible, unless any of the following provide otherwise: the United States Constitution or Iowa Constitution, statute, these rules, or other Iowa Supreme Court rule. Irrelevant evidence is not admissible.

Iowa R. Evid. 5.402. Evidence of the prior complaint and Thoren's surrender of his license in response to the complaint is clearly relevant;

it makes it more likely that Thoren committed sexual abuse when he touched the victim in the case at bar.

Thoren contends, however, that the challenged evidence is irrelevant because the Board of Massage proceeding was an agency action which required a lower burden of proof, i.e. proof by a preponderance of the evidence. He argues that, to be relevant, "there must be a showing of equity between the burdens of proof and a similarity between the requirements for sexual abuse report leading to self-surrender and the offense of sexual abuse." Appellant's Brief at 18-19. Thoren does not cite any authority for that claim, nor could he. Relevant evidence "means evidence having any tendency in reason to prove any material matter and includes opinion evidence and hearsay evidence." *State v. Slauson*, 249 Iowa 755, 760, 88 N.W.2d 806, 809 (1958). There is no requirement in Iowa caselaw that an individual piece of evidence be established by proof beyond a reasonable doubt in order to be relevant.

Thoren also challenges the evidence on the ground that it is more prejudicial than probative. Although relevant evidence is generally admissible, Iowa R. Evid. 5.402, the trial court may exclude relevant evidence "if its probative value is substantially outweighed by

… unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Iowa R. Evid. 5. 403.

The Court utilizes a two-part test to decide whether evidence should be excluded under rule 5.403. *State v. Webster*, 865 N.W.2d 223, 242–43 (Iowa 2015). First, the Court considers the probative value of the evidence. Second, it balances the probative value against the danger of its prejudicial or wrongful effect upon the triers of fact." *Webster*, 865 N.W.2d at 242.

"Probative value refers to the strength and force of the evidence to make a consequential fact more or less probable." *Webster*, 865 N.W.2d at 242 (cleaned up). "Unfairly prejudicial evidence, on the other hand, 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. *Webster*, 865 N.W.2d at 242-243 (cleaned up); *and see* 7 Ia. Prac., *Evidence* § 5.403:1. "Weighing probative value against prejudicial effect 'is not an exact science,' so '[the Court gives] a great deal of leeway to the trial judge who must make this judgment call.' " *State*

v. Putman, 848 N.W.2d 1, 10 (Iowa 2014) (quoting *State v. Newell*, 710 N.W.2d 6, 20–21 (Iowa 2006)).

Here, the district court did not abuse its discretion. The court properly concluded that evidence that Thoren had touched the breast of one of his massage clients, and had surrendered his license in response to that client's complaint, was probative on the issues of motive, intent, absence of mistake, and lack of accident. Ruling on Motions at pp. 4-5; App. 29-30.

First, evidence that at the time of his session with L.R., Thoren no longer had a massage license helped establish that he lacked a legitimate, lawful reason to rub L.R.'s genitals. Similarly, that evidence is highly probative of the issues of Thoren's motive and intent in touching L.R. and his lack of mistake or accident. "Not all contact is a 'sex act.' The contact must be between the specified body parts (or substitutes) and must be sexual in nature." *State v. Pearson*, 514 N.W.2d 452, 455 (Iowa 1994). Because Thoren touched L.R. during a massage session, his motive, intent, and purpose in touching her were at issue, as was lack of lack of mistake or accident in touching her.

The victim had made an appointment for a craniosacral session. Tr. III, p. 30, lines 3-20. Craniosacral therapy uses touch to certain muscles or points on the body to "release." Tr. IV, p. 14, line 14 – p. 15, line 9. That "release" or "unwinding" can occur in parts of the body other than the area being touched by the therapist. Tr. IV, p. 21, line 9 – p. 24, line 24. The patient may have a feeling she is being touched in an area of the body that is not being touched. Tr. IV, p. 26, line 4 – p. 27, line 24.

There was also evidence that suggested that L.R. might have accidentally booked a Reiki session. Tr. III, p. 55, line 4 – p. 58, line 2; Def. Exh. A (email); App. 7-8. Reiki can be a "hands-on" therapy. Tr. III, p. 84,line 14 – p. 86, line 10. Theron presented evidence that Reiki clients sometimes perceive that their bodies are being touched in places that are not, in fact, being touched. Tr. IV, p. 42, line 23 – p. 44, line 9.

If there had been a therapeutic reason for Thoren to touch L.R.'s genitals, if he had only accidentally touched her genitals in the course of a legitimate therapeutic practice, or if L.R. had mistakenly believed that Thoren touched her genitals, Thoren would not be guilty of sexual abuse. Evidence that defendant had admitted that he had

previously touched a client's breast for a non-therapeutic purpose made it much more likely that Thoren's motive and intent in touching L.R. was sexual gratification, made it much less likely that Thoren mistakenly or accidentally touched L.R.'s genitals, and made it much less likely that L.R. had imagined that Thoren touched her genitals.

In addition, the need for the evidence was high. This was a "she said/he said" case in which L.R. testified that defendant touched her genitals and Thoren completely denied touching L.R. anywhere near her genitals. There was, therefore, a great need for evidence on the issue of whether Thoren performed a sex act. *See, State v. Rodriquez*, 636 N.W.2d 234, 242 (Iowa 2001) ("The circumstances surrounding the alleged confinement of Enriquez on October 11 were disputed by the only two persons present: the defendant and the victim. In light of the "he said/she said" nature of this disagreement, the need for other evidence on the issue of confinement was substantial."); *State v. Spaulding*, 313 N.W.2d 878, 881–82 (Iowa 1981) (The victim's sister's testimony that Spaulding had sexually abused her gave considerable credence to the victim's story, and tended to contradict the defendant's claim that the victim may have dreamed the occurrence.)

On the other side of the balance, the prejudicial effect of the challenged evidence was low. The prosecution presented only the bare facts that Thoren had admitted that he had touched the breast of a client for a non-therapeutic purpose and had agreed to surrender his massage license. Exhibit 1, and the testimony about it, were not inflammatory and did not appeal to the jury's sympathies, arouse its sense of horror, or provoke its instinct to punish. Significantly, the incident described in Exhibit 1 was much less serious than the incident for which Thoren was on trial. That evidence would not have led the jury to decide Theron's case on an improper basis. *See, Rodriquez*, 636 N.W.2d at 243 (There was no undue prejudice where the prior assaults to which a witness testified were no more brutal than the assault for which the defendant was on trial; that evidence would not "rouse the jury to 'overmastering hostility.'").

The district court did not abuse its discretion in admitting testimony that a complaint had been filed against Thoren with the Iowa Massage Therapy Board and that Thoren had subsequently voluntarily submitted his massage license. The evidence was relevant and more probative than prejudicial. Thoren's challenge to his conviction on this ground should be rejected.

II. The District Court Did Not Abuse Its Discretion in Admitting Evidence of Prior Sexual Misconduct.

Preservation of Error

The State does not challenge error preservation. The district court initially made only a conditional denial of Thoren's motion in limine seeking to exclude evidence of other bad acts. S*ee,* Ruling; App. 30. However, the court subsequently revisited its ruling and definitively ruled that the challenged testimony would be admitted. S*ee,* Ruling on Pretrial Motions; App. 32-36. That ruling preserved error.

Scope and Standard of Review

The Court reviews for abuse of discretion a district court's evidentiary ruling regarding the admission of prior bad acts. *State v. Cox*, 781 N.W.2d 757, 760 (Iowa 2010). "An abuse of discretion occurs when the trial court exercises its discretion 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *Cox*, 781 N.W.2d at 760 (quoting *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001)).

Merits

Thoren challenges the district court's admission of testimony from five of his former clients regarding Thoren's sexual touches

during their sessions with him. He alleges that their testimony was inadmissible under Iowa Rule of Evidence 5.404(b). The district court did not abuse its discretion in admitting the challenged testimony as that evidence was admissible under Rule 5.404(b) on the issues of motive, intent, absence of mistake, lack of accident, and on the issue of whether the victim falsely perceived or imagined that Thoren touched her genitals.

Thoren was charged with sexual abuse of L.R. during the course of a craniosacral massage. Thoren challenges the district court's admission of testimony from five other women about sexual acts he performed on them in the course of therapeutic procedures. Evidence that Thoren had touched clients other than L.R. in a sexual manner was admissible under Iowa Rule of Criminal Procedure 5.404(b). That rule provides:

> b. *Crimes, wrongs, or other acts.*
>
> (1) *Prohibited use*. 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.
>
> (2) *Permitted uses*. This evidence may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Iowa R. Crim. P. 5.404(b). The purposes listed in the rule are not exclusive. *State v. Plaster*, 424 N.W.2d 226, 228–29 (Iowa 1988); *State v. Barrett*, 401 N.W.2d 184, 187 (Iowa 1987); 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[08], at 404–56—57 (1986). "The key is 'whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit wrongful acts.'" *Plaster*, 424 N.W.2d at 229 (quoting *Barrett*, 401 N.W.2d at 187 and citing 2 *Weinstein* ¶ 404[08], at 404–52.). "If the evidence meets this litmus test, 'it is prima facie admissible, notwithstanding its tendency to demonstrate the accused's bad character.'" *Plaster*, 424 N.W.2d at 229 (quoting *Barrett*, 401 N.W.2d at 187).

The challenged evidence came from five other women defendant treated between 2008 and 2014. J.J. had about ten massage therapy sessions with Thoren in 2008 and 2009. Tr. II, p. 105, lines 8-13; p. 106, line 3 – p. 107, line 18; p. 108, lines 5-12. J.J. testified that she stopped getting massages from Thoren because she felt that his behavior "was crossing a line." Tr. II, p. 108, lines 13-15. In her last couple sessions with Thoren, he would work on her shoulders, then work his way down towards her breast tissue. Other

massage therapists from whom she had gotten massages would not work in that area unless she specifically asked for it. She had not ask Thoren to work on her pectoral or breast tissue area. Tr. II, p. 109, lines 17-20; p. 110, lines 17-20.

Thoren did not touch J.J.'s nipples, but he was working withing a half-inch to one inch from her nipples. Tr. II, p. 109, line 24 – p. 110, line 6. J.J. asked Thoren why he was working on her breast area, since she had not asked him to do so. Thoren replied that he was "following the energies." Tr. II, p. 110, lines 7-12.

A.N. testified that during a three-month period in 2009, she had three massage sessions with Thoren. Tr. II, p. 71, line 13 – p. 74, line 19. During her third visit, Thoren held a powerful vibrating massaging tool close to and on her breasts and on her lower abdomen. Thoren held the vibrator as close to A.N.'s clitoris and vagina as he could get with her legs closed. He held it in that area "a long time." Tr. II, p. 75, lines 12-24; p. 76, line 20 – p. 77, line 25. She found the procedure "very uncomfortable" and left feeling "disturbed." Tr. II, p. 78, line 1 – p. 79, line 25.

S.T. is the defendant's sister-in-law. Tr. III, p. 4, line 21 – p. 5, line 11. She had had "[e]asily 150" massages in her lifetime and about

a dozen massages from Thoren. Her last massage with Thoren was in August or September of 2009. Tr. III, p. 7, line 23 – p. 8, line 21.

At the very end of her last massage with Thoren, he used a massager on her stomach, with her consent. Thoren placed the machine on her stomach, then lifted the massager, paused, then set the machine down on S.T.'s "crotch area," "[d]irectly over" her clitoris. Tr. III, p. 9, line 14 – p. 10, line 7. After five or six seconds, Thoren lifted up the machine, told her the massage was over, and left the room. Tr. III, p. 10, lines 8-23.

M.L. booked one ninety-minute massage with defendant at the Mercy Health & Wellness clinic on March 1, 2012. Tr. II, p. 118, lines 8-13; p. 119, lines 17-24; p. 120, lines 4-7. M.L. had had many massages before and after her massage with Thoren, but none was "anything close to" her experience with Thoren. During her massage, M.L. was naked except for her underwear. Towards the start of her massage, M.L. was lying on her back and Thoren was "massaging in the breast area, he went farther on the side of the breast than would be appropriate." Right at the end of her massage, M.L. "flipped over to be on [her] stomach" and she could hear Thoren "panting and

heavy breathing like he was aroused." Tr. II, p. 121, lines 12-21; p. 122, line 13 – p. 123, line 14; p. 131, lines 5-12.

L.K. estimated that she had four sessions with Thoren. Those sessions were traditional massage with muscle and tissue work. Her last session with him was on February 2, 2014. Tr. II, p. 92, lines 1-25; p. 96, lines 3-23. At L.K.'s last session with Thoren, she was lying on her back while Thoren massaged; she was unclothed but covered with a drape. Thoren asked if it would be okay if he pulled down the drape that covered her breasts. L.K. thought that was a "weird" request but thought maybe the drape was getting in the way of the massage, so she agreed. Thoren pulled on L.K.'s right nipple. L.K. was "slow to react," and then Thoren pulled on her left nipple, as well. L.K. told Tr. II, p. 97, line 9 – p. 98, line 15.

The next morning, L.K. called Thoren. She told him that what he had done was not right and could be bad for his license and that she did not want to hear about that ever happening again. Thoren acknowledged that what he had done was wrong and told her that he did not have an explanation for why he did it. Tr. II, p. 98, line 10 – p. 99, line 17.

The district court properly admitted the testimony of these woman about Thoren's sexual behavior during the massages he gave them. In determining whether to admit prior-bad-acts evidence, the Court uses a three-step analysis. *State v. Putman*, 848 N.W.2d 1, 8 (Iowa 2014); *State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004). The Court must first determine whether the evidence is relevant to a legitimate, disputed factual issue. Second, the Court must find "clear proof the individual against whom the evidence is offered committed the bad act or crime." Finally, the Court must determine whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *Putman*, 848 N.W.2d at 9; *Sullivan*, 679 N.W.2d at 25.

The challenged testimony regarding Thoren's acts of sexually touching prior clients was relevant and material to Thoren's prosecution for sexually abusing L.R. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401; *see also Putman*, 848 N.W.2d at 9. "Stated another way, evidence is relevant if 'a reasonable person might believe the probability of the truth of the

consequential fact to be different if the person knew of the proffered evidence.'" *State v. Spencer*, 2018 WL 6131916, *1 (Iowa Ct. App. Nov. 21, 2018) (citing *Putman*, 848 N.W.2d at 9). The challenged testimony was relevant and admissible for a non-character purpose—specifically, for the purpose of showing Thoren's motive, intent, absence of mistake, and lack of accident and to show that L.R. had not imagined that Thoren touched her genitals.

Although motive is not an element of an offense, the law generally permits the government to show a defendant's motivation for committing the crime. In addition, evidence of motive is generally admissible even if the offered evidence would show or tend to show the commission of another crime. "'It is always competent to prove a motive for the commission of a crime, and evidence relative thereto is admissible as having more or less weight according to the other proved facts and circumstances with which it is related.'" *Spencer,* 2018 WL 6131916, at *6 (quoting *State v. Campbell*, 239 N.W. 715, 719 (Iowa 1931)). Here, evidence of Thoren's other acts was admissible to show that Thoren had a sexual motivation for his actions. Because Thoren touched L.R. in the course of a massage, the jury could have believed that any touching had a therapeutic motive.

The testimony of the other women helped establish that Thoren's act was, instead, a sex act.

The challenged evidence was also admissible to show absence of mistake and lack of accident. Our Court has noted that prior bad acts may be relevant to demonstrate motive or intent when a defendant claims touching was accidental. *Cf. State v. Elston*, 735 N.W.2d 196, 200 (Iowa 2007) (noting within the context of a motion to sever that pornographic images of young females tended to prove touching of victim was not accidental). While the State was not required to prove specific intent, *see State v. Cox, 781 N.W.2d 757, 770 (Iowa 2010), Tague*, 310 N.W.2d 209, 211 (Iowa 1981), the State was required to prove that Thoren committed a sex act. See, Iowa Code section 709.4 (2018) (defining sexual abuse in the third degree).

To establish that there was a sex act, the prosecution was required to prove that the touching of L.R.'s genitals was sexual in nature. *Pearson*, 514 N.W.2d at 455. Under the somewhat unusual facts of this case, Thorsen's purpose and intent in touching L.R. was a legitimate issue and the testimony of his other victims was probative of that issue.

The victim in this case, L.R., testified that on November 21, 2018, she was scheduled for a cranial massage session with Thoren. It was her second such massage with him. Tr. III, p. 30, line 3 – p. 31, line 11. Craniosacral therapy focuses on the head and spine down to the sacrum bone at the base of the spine. Tr. III, p. 87, line 22 – p. 88, line 10. It involves very gentle pressure to the head and spinal column. Tr. III, p. 89, line 22 – p. 91, line 22.

During her session, Thoren put a cloth over L.R.'s eyes so that she could not see. He did not ask her permission to do so. Then, Thoren told L.R. that he was going to "work on your vaginal area." Tr. III, p. 33, line 21 – p. 34, line 12. He rubbed her stomach over her pubic bone. Tr. III, p. 34, lines 13-18. Then, Thoren rubbed L.R.'s "clitoris area and on down toward [her] anal area," rubbing really briskly and "really insisting, tell me how it feels, tell me how it feels." Tr. III, p. 34, lines 19-20; p. 36, lines 1-18. Thoren was rubbing with a circular motion over L.R.'s vaginal area, over the top of her clothing. Tr. III, p. 35, lines 6-25.

In addition, on cross-examination, the defense attempted to establish that when booking her second appointment online, L.R. might have accidentally booked an appointment for a Reiki session

rather than for cranial massage. Tr. III, p. 53, line 53 - -p. 59, line 5; p. 70, lines 21-25. There had been testimony at trial that Reiki is a hands-on healing method, though touch is not required to perform Reiki therapy. Tr. III, p. 84,line 14 – p. 86, line 10.

Had there been a therapeutic reason for Thoren to touch L.R.'s genitals or if he had only accidentally touched her genitals in the course of a legitimate therapeutic practice, Thoren would not be guilty of sexual abuse. Evidence that defendant had also touched other women in a sexual manner during the course of their sessions with him was highly probative of whether Thoren's contact with L.R. was sexual in nature.

In addition, the defense elicited testimony during its cross-examination of State witness Debra Elliot that during craniosacral therapy some people can experience false sensations. Tr. III, p. 91, line 23 – p. 93, line 13. In the defense's case-in-chief, there was additional evidence that clients can "feel" touches in spots where there was no touching. Tr. IV, p. 21, line 9 – p. 24, line 25; p. 26, line 4 – p. 27, line 10. Evidence of Thoren's other bad acts was relevant on the issue of whether L.R. mistakenly perceived where and how defendant touched her or imagined that he touched her genitals.

Testimony of other women that defendant touched them in a sexual manner during their sessions was admissible to counter defendant's claim that L.R. may have inaccurately sensed that he was touching her. *See, State v. Spaulding*, 313 N.W.2d 878, 881–82 (Iowa 1981) (The victim's sister's testimony that Spaulding had sexually abuse her gave considerable credence to the victim's story, and tended to contradict the defendant's claim that the victim may have dreamed the occurrence.).

Thus, the testimony of Theron's other clients was relevant to legitimate and disputed factual issues. There is also clear proof that Thoren committed the prior bad acts.

In assessing whether clear proof of prior misconduct exists, the prior act need not be established beyond a reasonable doubt, and corroboration is unnecessary. *Putman*, 848 N.W.2d at 9; *State v. Taylor*, 689 N.W.2d 116, 130 (Iowa 2004). "There simply needs to be sufficient proof to prevent the jury from engaging in speculation or drawing inferences based on mere suspicion." *Putman*, 848 N.W.2d at 9 (cleaned up); *State v. Rodriquez*, 636 N.W.2d 234, 243 (Iowa 2001). The record shows that the witnesses in question testified in court about Thoren's acts. This was sufficient to satisfy the

requirement that the prior acts be established by clear proof. *Putman*, 848 N.W.2d at 9; *and see*, 7 Ia. Prac., *Evidence* § 5.404:6 ("clear proof would appear to be a fairly minimal threshold, requiring only that the evidence connecting an actor to the uncharged conduct rest on more than mere suspicion or speculation. This would seem even lower than the federal standard that requires the trial court to determine whether a reasonable jury could find it more likely than not that the defendant committed the prior act before admitting the evidence.").

Finally, the probative value of the challenged testimony substantially outweighs the danger of unfair prejudice to the defendant. In making that determination, the Court considers 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. *Putman*, 848 N.W.2d at 9-10; *Taylor*, 689 N.W.2d at 124.

"Evidence that is unfairly prejudicial is evidence that has an undue tendency to suggest decisions on an improper basis commonly,

though not necessarily, an emotional one." *State v. Newell*, 710 N.W.2d 6, 20 (Iowa 2006) (cleaned up); *accord*, *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988). As noted in Division I, unfairly prejudicial evidence is evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise causes the jury to decide the case on an improper basis. *Rodriquez*, 636 N.W.2d at 240; *Plaster*, 424 N.W.2d at 231; 2 *Weinstein's Evidence* ¶ 403[03], at 403–33 to 403–40. If the danger of the evidence's prejudicial effect substantially outweighs its probative value, the evidence must be excluded. *Putman*, 848 N.W.2d at 10; *Henderson*, 696 N.W.2d at 12.

Weighing probative value against prejudicial effect "is not an exact science," so the Court gives "a great deal of leeway to the trial judge who must make this judgment call." *Putman*, 848 N.W.2d at 10; *Newell*, 710 N.W.2d at 20–21. Here, the probative value of the evidence that Thoren engaged in sexual acts in his professional sessions with other clients outweighed any danger of unfair prejudice.

The probative value of the other acts evidence was very high. The charges in this case arose out of an act committed in the course of a therapeutic session with L.R. Thoren denied that he touched L.R.'s

genitals and raised a suggestion that L.R. only imagined that he did so. The evidence of Thoren's other acts provided a motive for Thoren to commit his offense against L.R. and helped establish that his act was sexual in nature rather than for a therapeutic purpose. That evidence also helped disprove any suggestion that Thoren touched L.R.'s genitals accidentally in the course of a legitimate massage and helped disprove the suggestion that L.R. might have been mistaken in her impression or imagined that Thoren touched her genitals.

Thoren argues that the other bad acts evidence had only limited probative value because some of the prior acts occurred a number of years before the act for which he was on trial. Remoteness did not make evidence of Thoren's prior acts inadmissible. "[T]emporal separation" of the prior bad acts goes to the weight of the evidence rather than its admissibility. *State v. Graham*, 2014 WL 4629585 (Iowa Ct. App. Sept. 17, 2014) (Iowa Ct. App. 2014) (citing *Sullivan*, 679 N.W.2d at 29 (noting three-year time span between past and present act "cast[ ] doubt on the weight of th[e] evidence")). In addition, Thoren repeatedly touched clients in a sexual manner over a period of years. Far from diminishing the probative value of the other acts, that pattern greatly increases the probative value of the

testimony of Thoren's clients. *Cf. Clarey v. K-Prod., Inc.*, 514 N.W.2d 900, 903 (Iowa 1994) (Testimony of other employees, all of whom had filed workers' compensation claims and were subsequently harassed by the employer established a pattern of conduct and was admissible to show motive, intent, plan, or absence of mistake or accident under rule of evidence 404(b)).

On the other side of the balance, the probative value of the challenged evidence outweighed the danger of unfair prejudice to Thoren in this case was low. The evidence of his prior bad acts was damaging to his defense; however, the fact that evidence is damaging does not make it inadmissible. *State v. Walsh*, 318 N.W.2d 184, 187 (Iowa 1982). Only evidence which is unfairly prejudicial is subject to exclusion. Iowa R. Evid. 5.403. Testimony regarding Thoren's touching of other clients would not roused the jury to "overmastering hostility," given the serious nature of the crime charged. *See State v. Larsen*, 512 N.W.2d 803, 808 (Iowa Ct. App. 1993) ("One factor often considered by courts in balancing the probative value of evidence against its potential for unfair prejudice is the comparative enormity of the charged and uncharged crimes."). The acts described by the other women were less serious than that act for which Thoren was on

trial. Those other acts were not, therefore, likely to provoke the factfinder to convict Thoren on an improper basis. *State v. Kula*, 2017 WL 3283285 (Iowa Ct. App. Aug. 2, 2017) (evidence that defendant on trial for second-degree sexual abuse and sexual exploitation committed virtually identical acts with other girls was not unduly prejudicial); *State v. Larsen*, 512 N.W.2d 803, 808 (Iowa Ct. App. 1993) (holding that potential prejudicial effect of subsequent acts evidence was "neutralized by equally reprehensible nature of the charged crime").

In addition, the district court gave Thoren's jury a limiting instruction informing it of the permissible use of the other bad acts evidence. See, Jury Instruction No. 15; App. 37. A limiting instruction can help to eliminate the danger of unfair prejudice. *State v. Redd*, 2000 WL 1724523, at *4 (Iowa Ct. App. Nov. 20, 2000) (citing *State v. Delaney*, 526 N.W.2d 170, 176 (Iowa App. 1994)).

The challenged testimony regarding Thoren's prior acts with clients other than L.R. was admissible under Rule 5.404(b). The trial court did not abuse its discretion in admitting that evidence.

Alternatively, even if the district court had erred in admitting the other bad acts evidence, any error would be harmless. Reversal is

required in cases of nonconstitutional error when it appears "that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice." *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004); *see also* Iowa R. Evid. 5.103(a). In applying this test, the Court "presume[s] prejudice—that is, a substantial right of the defendant is affected—and reverse[s] unless the record affirmatively establishes otherwise." *Sullivan*, 679 N.W.2d at 30 (emphasis omitted).

The evidence of Thoren's guilt was very strong. Even without the other bad acts evidence, the jury would have found that Thoren committed third-degree sexual abuse based on the credible testimony of L.R. In addition, as noted, his jury was instructed on the proper use of other bad acts evidence, minimizing any danger that the jury considered the evidence for an improper purpose. Thus, any error in admitting the challenged bad acts evidence would be harmless. *Rodriquez*, 636 N.W.2d at 245 (Finding that any error in admission of other bad acts evidence was harmless as even without the other bad acts evidence, there was overwhelming evidence of the defendant's guilt.).

The district court did not abuse its discretion in admitting prior bad acts evidence consisting of testimony from Thoren's clients that he had touched them in a sexual manner during their sessions with him. Alternatively, even if the district court had erred, any error would be harmless. Thoren's challenge to his conviction should be rejected.

CONCLUSIONG

The Court should affirm Kevin Thoren's conviction for sexual abuse in the third degree.

REQUEST FOR NONORAL SUBMISSION

Oral argument is unlikely to assist the Court in deciding the issue raised on appeal. Therefore, the State waives oral argument. However, if appellant is granted oral argument, counsel for appellee desires to be heard in oral argument, as well.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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