EVIDENCE—Testimony of a Woman Other Than the Prosecutrix, and Also Testimony of Her Physician, Concerning a Prior Nonconsensual Sexual Incident with Defendant Was Admissible Because It Made It More Probable That the Prosecutrix Did Not Consent Under Similar Circumstances, and the Unfair Prejudice of Such Evidence Did Not Substantially Outweigh Its Probative Value—*State v. Plaster*, 424 N.W.2d 226 (Iowa 1988).

Kevin Ray Plaster was convicted by a Scott County jury of third-degree sexual abuse in violation of Iowa Code section 709.4[1] for acts arising out of what was initially consensual sexual activity.[2] Plaster met Christine, the complainant, one evening in 1986 at a laundromat.[3] At the defendant's suggestion the pair went to a bar and drank alcoholic beverages for approximately two hours.[4] They then left the bar and went to the defendant's apartment.[5] Christine testified that she assumed they would engage in sexual activity there.[6]

After they had performed consensual oral sex, "Plaster put his fingers into Christine's vagina and manipulated it very vigorously," causing her pain.[7] She told defendant to stop, but he did not, and she was forced to pull away from him.[8] Christine felt pain even after she pulled away and immediately noticed that she was bleeding.[9] At first Plaster tried to calm Christine because she was upset; however, he later attempted to have sexual intercourse with her.[10] When Christine refused, Plaster allegedly threatened to "use his hand again."[11] Christine then allowed him to have intercourse with her.[12] Afterward, Christine was friendly toward Plaster and gave him her

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1. Iowa Code § 709.4 provides in pertinent part: "[a]ny sex act between persons who are not at that time cohabiting as husband and wife . . . when the act is performed with the other participant . . . by force or against the will of the other participant" is sexual abuse in the third degree. Iowa Code § 709.4 (1989).
2. State v. Plaster, 424 N.W.2d 226, 226-27 (Iowa 1988).
3. *Id.* at 227.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* Christine's trial testimony was as follows:

> the next thing I remember is [that Plaster] got on top of me and told me that he wanted to have sex, and I said, no, I don't want to because I really hurt and I just said no. . . . [H]e said that if I didn't lift up my legs, that he would use his hand on me because he wanted to have sex with me, and I told him no and . . . . Well, I agreed to [the sexual intercourse] because I was afraid if I didn't that he would hurt me some more, so I went along with what he wanted and we had intercourse after

telephone number; however, she did not accept his invitation to spend the night.[13]

Christine went home two hours later, told her roommate of the incident, and was driven to the hospital.[14] She was examined by two doctors, both of whom testified that Christine had lacerations in her vagina that would have been very painful.[15] One of the doctors testified that the nature of the injuries was consistent with what Christine described to him as the cause of her injuries: vigorous vaginal manipulation.[16]

In a pretrial motion in limine, defense counsel sought to exclude testimony concerning a prior instance of sexual activity between the defendant and another woman, Melissa.[17] The incident with Melissa involved sexual activity similar to that of which Christine complained.[18] Defense counsel argued that the testimony of Melissa and her doctor would be unfairly prejudicial[19] and inadmissible evidence of a prior bad act.[20] The trial court overruled the motion, however, stating that it fell within one of the exceptions to Rule 404.[21]

At trial both Melissa and her doctor testified about a prior instance of sexual activity with Plaster.[22] Melissa testified that during consensual sexual activity at Plaster's apartment, he vigorously manipulated her vagina with his hand and caused her to bleed.[23] Plaster did not stop at Melissa's request, and later forced her to perform oral sex against her will.[24] Melissa's doctor testified that she had lacerations and bruises in her vaginal area from the manipulation.[25]

The tenor of Plaster's defense was to admit that the sex acts occurred,

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> that and I just—I just laid there kind of crying—I didn't want it at all. I wanted to go home.

Id. at 233.

13. *Id.* at 227, 232-33.
14. *Id.* at 227.
15. *Id.* at 227-28.
16. *Id.*
17. *Id.* at 228.
18. *Id.* at 232.
19. *Id.* at 228. Iowa Rule of Evidence 403 provides: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
20. State v. Plaster, 424 N.W.2d at 228. Iowa Rule of Evidence 404(b) provides:
> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

21. State v. Plaster, 424 N.W.2d at 228.
22. *Id.*
23. *Id.* at 228, 231.
24. *Id.* at 228.
25. *Id.*

and that he injured Christine by manipulating her vagina with his hand, but to deny that the sexual activity was not consensual.[26] He placed heavy emphasis on the initial consensual activity and Christine's friendliness toward him after the alleged non-consensual intercourse.[27] Ultimately, however, the jury found against him and returned a guilty verdict.[28]

Plaster appealed to the Iowa Supreme Court, asserting error in the admission of the testimony of Melissa and her doctor.[29] The Iowa Supreme Court transferred the appeal to the Iowa Court of Appeals, which upheld the trial court's ruling and affirmed the conviction.[30] On petition for further review, the Iowa Supreme Court affirmed the conviction.[31] Testimony by a woman other than the prosecutrix about a prior instance of nonconsensual sexual activity with the defendant, which was similar to the instance in question, made it more probable that the prosecutrix was telling the truth, that she did not consent to the sexual activity, that the defendant did not mistake her actions for consent, and that the defendant threatened the prosecutrix as she claimed. *State v. Plaster*, 424 N.W.2d 226 (Iowa 1988).

The opinion of the court, written by Justice Lavorato, affirmed the trial court's ruling on two grounds: the testimony of Melissa and her doctor was relevant and admissible for a proper purpose; and the testimony was not unfairly prejudicial. The court applied a two-step analysis. The court first considered whether the evidence was relevant to a legitimate issue in the case.[32] The court then decided whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.[33] The court stated that the trial court was required to act within its discretion in applying this analysis, and that the trial court's rulings could be reversed for abuse of its discretion.[34]

After recognizing that Iowa Rule of Evidence 404(b) places a limitation on the use of otherwise relevant evidence, the court stated that "[t]he key is whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit wrongful acts . . . . If the evidence meets this litmus test, it is prima facie admissible, notwithstanding

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26. *Id.* at 232. Plaster similarly contended that the sexual activity with Melissa happened as she described, but that it was consensual. *Id.*

27. *Id.* at 230.

28. *Id.* at 227.

29. *Id.* at 227-28. Plaster also challenged the sufficiency of the evidence on the issue of lack of consent. *Id.* at 227, 233. The court disposed of this issue on the basis of Christine's testimony, *see supra* note 12, and its prior holding in *State v. Bauer*, 324 N.W.2d 320 (Iowa 1982). *See infra* note 68.

30. State v. Plaster, 424 N.W.2d at 227.

31. *Id.* at 233.

32. *Id.* at 229.

33. *Id.*

34. *Id.* (citing State v. Kern, 392 N.W.2d 134, 136 (Iowa 1987)).

its tendency to demonstrate the accused's bad character."[35]

Evidence is relevant if it has "any tendency to make a fact of consequence to the determination of the action more probable or less probable than it would be without the evidence."[36] In applying this standard of relevancy, the court stated that the fact of consequence to the determination of the action was "whether Christine consented to the sexual intercourse following Plaster's hand manipulation of her vagina."[37] The court then posed the relevancy question: "Is the likelihood that Plaster did not have Christine's consent enhanced by evidence of past sexual abuse toward another in similar circumstances?"[38]

The court noted that other "courts have grappled with the question whether evidence of past sexual abuse toward another is relevant to the issue of the victim's consent."[39] The court answered the question by utilizing the rationale in three cases: *People v. Gray*,[40] *Youngblood v. Sullivan*,[41] and *State v. Spaulding*.[42]

In *Gray* the California Court of Appeal approved a trial court ruling which allowed three female witnesses to testify in rebuttal about the defendant's sexual advances toward them on prior occasions.[43] The testimony was proffered to establish that it was more likely than not that the defendant committed the rape and assault in question, as well as to rebut his consent defense.[44] One of the prior attacks was very similar to the incident in question, while the other two were not so similar.[45] The defendant testified that

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35. *Id.* (citing and quoting from State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987)).

36. *Id.* (citing IOWA R. EVID. 401).

37. *Id.* It is interesting that the court's formulation of the consequential fact includes no mention of force. The state argued that force was a "hotly contested issue," and the court previously stated that "[b]ecause he had allegedly forced Christine to have intercourse after the hand manipulation, Plaster was charged with third-degree sexual abuse." *Id.* at 228.

38. *Id.* at 229. The Iowa Supreme Court has "never adopted the [analogous] principle that a victim's consent to intercourse with one man implies her consent in the case of another." State v. Ball, 262 N.W.2d 278, 280 (Iowa 1978). The court in *Plaster* did not discuss the Iowa Court of Appeals decision by Judge, now Justice, Snell in *State v. Christensen*, which addressed the same question. State v. Christensen, 414 N.W.2d 843, 847 (Iowa Ct. App. 1987). The Iowa Court of Appeals held that testimony of a prior victim was irrelevant for the purpose of establishing the current victim's lack of consent. *Id.* In his dissenting opinion in *Christensen*, Judge Donielson would have held the testimony relevant for the purpose of establishing the defendant's intent to commit nonconsensual abuse. *Id.* at 849 (Donielson, J., dissenting).

39. State v. Plaster, 424 N.W.2d at 229. *See also* Annotation, *Admissibility in Rape Case of Evidence That Accused Raped or Attempted to Rape Person Other Than Prosecutrix*, 2 A.L.R.4th 330, 374-80 (1980).

40. People v. Gray, 259 Cal. App. 2d 846, 66 Cal. Rptr. 654 (1968).

41. Youngblood v. Sullivan, 52 Or. App. 173, 628 P.2d 400 (1968).

42. State v. Spaulding, 313 N.W.2d 878 (Iowa 1981).

43. People v. Gray, 259 Cal. App. 2d at ____, 66 Cal. Rptr. at 657-58.

44. *Id.*

45. *Id.* at ____, 66 Cal. Rptr. at 656. The first incident essentially involved an assault after a sexual overture. *Id.* During the second incident the defendant pulled up a woman's

he had previously had intercourse with the victim, and that they had visited each other at their respective homes.[46] "The tenor of the defense was to point up the improbability that the defendant would have resorted to force" with the victim.[47] The Iowa Supreme Court adopted the following language from *Gray*:

> These collateral events tend to show the same peculiar and characteristic behavior pattern which is manifested in the crime charged, and thus make it more probable that [the victim] was telling the truth about what happened to her. Defendant's behavior pattern tends to rebut the defense theory that the attack described by [the victim] was too senseless to be credible.[48]

In *Youngblood v. Sullivan* a woman testified that the accused had sexually assaulted her under circumstances similar to those alleged by the prosecutrix.[49] The Oregon Court of Appeals held that the testimony was properly admitted in the prosecution's rebuttal case.[50] The defendant had admitted that the sex acts occurred, but contended they were consensual;[51] for the purpose of contesting this defense the rebuttal witness was allowed to testify that she was similarly attacked by the defendant about a month earlier in another Portland park.[52] The Iowa Supreme Court adopted the rationale of the Oregon court to this effect:

> Even though *modus operandi* is usually used to establish identity . . . we conclude the evidence is admissible here to show a *modus operandi* which rebuts the defense of consent. . . . The evidence in this case of the other crime and of the crime defendant is charged with established that defendant committed those acts in a way so unique as to constitute a signature. . . . The evidence of the other crime is probative on the issue of consent. Defendant's story that the victim in this case *consented* tends to be rebutted by evidence that defendant has had a *nonconsenting* en-

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nightgown, but left when she threatened to scream. *Id.* In the third incident the defendant dragged his girlfriend out of a car and into his bedroom, beat her, and attempted to undress her. *Id.* This third incident was very similar to the case before the court. *Id.* at ____, 66 Cal. Rptr. at 655. The Iowa Supreme Court, in summarizing the facts of *Gray*, stated that "three women testified that the defendant, prior to this incident, had beaten them in a similar manner and attempted to rape them." State v. Plaster, 424 N.W.2d at 229.

46. People v. Gray, 259 Cal. App. 2d at ____, 66 Cal. Rptr. at 657.

47. *Id.*

48. *Id.* (quoted in State v. Plaster, 424 N.W.2d at 229).

49. Youngblood v. Sullivan, 52 Or. App. at ____, 628 P.2d at 402.

50. *Id.*

51. *Id.* The victim testified that she was grabbed from behind while walking in a Portland park one afternoon, led into a stall in a nearby men's bathroom, and forced to perform oral sex upon the defendant and to yield to his other sexual desires while sitting on the toilet seat. *Id.* at ____, 628 P.2d at 401.

52. *Id.* This attack occurred while she was in a women's restroom stall changing for a late morning soccer match. *Id.* The defendant also forced her to sit on the toilet seat while the sex acts were performed. *Id.*

counter with another person in this strikingly singular way.[53]

Finally, the Iowa Supreme Court utilized its prior decision in *State v. Spaulding*, which held that testimony about a prior sex act with a person other than the present victim was admissible because it was strongly probative of like acts on the occasion in question.[54] In *Spaulding* the defendant was charged with third-degree sexual abuse based on two instances of sexual intercourse with his fifteen-year-old daughter.[55] Over the defendant's objections the court allowed testimony about sexual relations between the defendant and his seventeen-year-old daughter, which occurred during the same time as the sex acts with the younger daughter.[56] The defense claimed that the alleged sex acts were the product of the daughter's dreams.[57] Without a great deal of discussion, the majority concluded: "[t]he victim's sister's testimony related an act occurring between the two involving her younger sister. It gave considerable credence to the victim's story, and tended to contradict the defendant's claim that the victim may have dreamed the occurrence."[58]

After noting that other courts had reached contrary conclusions based on the rationale that consent was unique to the individual,[59] the court in *Plaster* indicated that the analyses in *Gray*, *Youngblood*, and *Spaulding* were persuasive, and proceeded to apply them to the facts of the case at hand.[60] The court determined that the testimony of Melissa and her doctor was relevant to rebut Plaster's consent defense under four different theories.[61]

First, the court stated that the testimony of Melissa and her doctor "tends to show the same peculiar and characteristic behavior pattern manifested in the crime charged; consequently, such conduct makes it more probable that Christine was telling the truth."[62] The court did not elaborate fur-

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53. *Id.* at ____, 628 P.2d at 402 (emphasis in original) (quoted in State v. Plaster, 424 N.W.2d at 230).

54. State v. Spaulding, 313 N.W.2d 878, 881 (Iowa 1981). *Spaulding* was a six-to-three decision. *Id.* at 882. Consent was not an issue in *Spaulding*, as the defendant was charged under Iowa Code section 709.4(4) (1979). *Id.*

55. *Id.* at 879.

56. *Id.* at 880-81.

57. *Id.* at 881.

58. *Id.* at 881-82 (quoted in State v. Plaster, 424 N.W.2d at 230).

59. Under the reasoning of other courts, "the fact that one woman was raped has no tendency to prove that another woman did not consent," and therefore the evidence is irrelevant. *Id.* Judge Snell limited the *Spaulding* exception to very unusual sex crimes. State v. Christensen, 414 N.W.2d at 848. Otherwise, he argued, the exception would swallow the general prohibition contained in Rule 404(b). *Id.*

60. State v. Plaster, 424 N.W.2d at 230.

61. *Id.* at 230-31. The opinion itself gives no indication of the order of proof, but a review of the trial transcript indicates that the evidence was presented in the prosecution's case in chief.

62. *Id.* at 230 (citing People v. Gray, 259 Cal. App. 2d at 852-53, 66 Cal. Rptr. at 657;

ther on this statement.

The court next held that the unique nature of Plaster's sexual activity in both instances constituted his *modus operandi*,[63] and thereby rebutted "[h]is testimony that Christine consented to the sex act" by showing that he had a "*nonconsenting* encounter with another person in this strikingly similar way."[64] The court found it important that the two instances of sexual activity with Christine and Melissa were quite similar.[65]

The court further held that the testimony of Melissa and her doctor was relevant to rebut Plaster's consent defense because it established that he had knowledge of the injuries he caused to Melissa with his manipulation.[66] This made it less probable that Plaster could have mistaken Christine's actions or words for consent after she complained of the same injuries.[67] The court stated that "[t]he nature and extent of Melissa's injuries were well known to Plaster. Possessed of this special knowledge, Plaster would be unlikely to mistake Christine's actions as consent to sexual intercourse, especially in light of her complaints of pain."[68]

State v. Spaulding, 313 N.W.2d at 881-82). The court does not explain how the testimony of Melissa and her doctor enhances the credibility of Christine without utilizing the impermissible inference which Rule 404(b) precludes. Because the court indicates that it is not utilizing the testimony in an impermissible fashion, the difficulty for attorneys and judges will be to determine how the testimony of a prior victim is probative of a current victim's testimony. The prior victim's testimony most certainly cannot be used to establish that the defendant acted in a similar fashion on the occasion in question, because such a use would be an attempt to establish a propensity. If the court is arguing that, because Plaster acted as he did with Melissa, it was therefore more likely that Christine was telling the truth, this is no less impermissible under Rule 404(b). What the court may be saying is that, because Melissa did not consent after Plaster injured her by vigorously manipulating her vagina, it was therefore more likely that Christine also refused consent after suffering similar injuries. But does the fact that one person reacted in a specific way to a particular set of circumstances make it more probable that another reacted in the same way when confronted with similar circumstances?

63. *Id.* The court defined *modus operandi* as "a distinct pattern or method of procedure thought to be characteristic of an individual criminal and habitually followed by him." *Id.* at 231. The court appeared to find that Plaster had a *modus operandi* on the basis of just one prior incident. *Id.*

64. *Id.* (citing Youngblood v. Sullivan, 52 Or. App. at 178, 628 P.2d at 402) (emphasis in original). It is wholly unclear from the court's opinion just how this *modus operandi* theory interacts with Rule 404(b). If the court means to say that the prior incident with Melissa can be used to attack the credibility of Plaster's testimony that Christine consented to the sexual activity, then there would seem to be some conflicts with Iowa Rule of Evidence 608(b), which provides: "specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence." The testimony was offered in the state's case in chief, which is also a violation of Rule 608. *See* IOWA R. EVID. 608.

65. State v. Plaster, 424 N.W.2d at 231.

66. *Id.*

67. *Id.* (citing State v. Iaukea, 56 Haw. 343, 537 P.2d 724 (1975)).

68. *Id.* The court seems to be suggesting that, if Plaster mistakenly believed that he had Christine's consent, he would be able to establish a valid defense. The court in *State v. Bauer* expressly rejected the mistake defense in a sexual abuse case brought pursuant to Iowa Code §

Finally, the court held that Plaster's knowledge of the injury and pain that might result from his manipulation tended to "corroborate Christine's testimony that Plaster threatened to use his hand again if she did not consent to sexual intercourse."[69] Again, the court did not elaborate.

Having established that the evidence was relevant to the issue of consent, the court then set out to assess whether the testimony of Melissa and her doctor was unfairly prejudicial. Iowa Rule of Evidence 403, like the federal rule, protects the defendant against *unfairly* prejudicial evidence, which the court defined as evidence having "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one."[70] The court set forth the balancing test for determining if evidence of

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709.4(1). State v. Bauer, 324 N.W.2d at 322. In *Bauer* the court seems to have held that lack of consent is solely a question of the victim's subjective state of mind, which need not be established by manifestations of lack of consent or the defendant's awareness of the lack of consent. *Id.* The Iowa Court of Appeals interpreted the *Bauer* decision as holding that mistake of fact as to consent would not negate the element of lack of consent; therefore mistake does not constitute a defense to a charge of sexual abuse under Iowa Code § 709.4(1). State v. Christensen, 414 N.W.2d 843, 846-48 (Iowa Ct. App. 1987) (opinion written by Judge, now Justice, Snell, who joined the majority in *Plaster*). Simply put, "defendant's knowledge of his or her partner's lack of consent is not an element of section 709.4(1)." *Id.* at 846. Therefore, the Iowa Court of Appeals reasoned, evidence of mistake should always be irrelevant on the issue of consent because it "has no tendency to establish any material issue" in the case. *Id.*

The Iowa Court of Appeals may have overextended the *Bauer* decision when it interpreted it to preclude the mistake of fact defense in all cases. *See* State v. Christensen, 414 N.W.2d at 846. No force was used by Bauer to commit the sex act. State v. Bauer, 324 N.W.2d at 322. The *Bauer* opinion could be read to pertain only to § 709.4(1) cases involving no force beyond that incidental to the commission of the sex act. Sexual abuse under Iowa Code § 709.4(1) can occur "against the will" of a person in two very different situations. In the situation presented in *Bauer*, "against the will" meant without the subjective consent of the victim. *Id.* In the other situation, "[i]f the consent or acquiescence of the other is procured by threats of violence toward any person . . . the act is done against the will of the other." IOWA CODE § 709.1(1) (1989). In both situations the question of lack of consent is central, but because threat of violence is part of the definition of "against the will" in the second set of cases, intent to threaten violence would seem to be a necessary element of the state's proof. The *Bauer* opinion did not address the unique problem presented when one procures objective, but not subjective, consent through conduct which is not meant to be threatening and which one does not know is perceived as threatening. In such a case the accused might argue that he did not commit the sex act against the will of the other as he did not intentionally threaten violence to procure consent. He could argue that he was simply mistaken as to the prosecutrix's perception of his conduct. This would make his mental state relevant to his defense. This may be what the court is contending in *Plaster*, but it is unclear from the opinion.

69. State v. Plaster, 424 N.W.2d at 231. The court seems to be saying that the fact that Plaster knew he was capable of causing pain and injuring Christine with his hand made it more probable that he did threaten to injure her with his hand in order to obtain her consent. This undermines the purpose of Rule 404(b) by transforming the question of relevancy into a question of Plaster's knowledge of his ability to commit a crime in a case where knowledge was not a significant fact. The fact that a woman could be injured in this way is an almost undeniable aspect of every adult male's sexual knowledge.

70. *Id.* (citing FED. R. EVID., Advisory Committee's note). For the text of Rule 403, *see supra* note 19.

other crimes is unfairly prejudicial. Trial courts must:

> balanc[e], on the one side, the actual need for the other-crimes evidence in light of the issues and other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility.[71]

In applying this balancing analysis to the case at hand, the court indicated that it was convinced that the incident with Melissa had occurred as she described, and further that testimony about this incident was highly probative to rebut Plaster's consent defense, as demonstrated in its discussion on relevance.[72]

The court also found that there was a real need for Melissa's testimony, as well as her doctor's testimony, "in light of the consent issue and the other evidence available to the prosecution."[73] The court characterized the consent defense, without the other-act evidence, as having "considerable credence," due to the initial consent to sexual activity and Christine's friendliness after the alleged nonconsensual intercourse.[74] The court found that the evidence was necessary in these respects:

> without such other-crime evidence, Plaster could convincingly argue that he was not aware that Christine was injured and in pain. His testimony that other women enjoyed such vaginal manipulation would support this argument. He could create a scenario for the jury that he mistakenly perceived Christine's acquiescence as consent rather than a result of her fear of being further injured by his continued physical manipulation of her vagina. The challenged evidence was necessary to dispel these inferences supporting Plaster's consent defense.[75]

The court next assessed the "degree of emotion the evidence would rouse in the jurors' minds."[76] In making that assessment the court asked the question: Was it "reasonably apparent to the district court that the jury would convict Plaster solely because of" the testimony of Melissa and her

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71. State v. Plaster, 424 N.W.2d at 232 (quoting C. McCormick on Evidence § 190, at 453 (E. Cleary 2d ed. 1972)).

72. *Id.* *See also supra* notes 62-69 and accompanying text.

73. *Id.*

74. *Id.*

75. *Id.* The court seems to be arguing that the evidence was necessary to prevent Plaster from making some arguments that he might have made had the evidence not been offered in the prosecution's case in chief. *Id.* The fact that this evidence was only necessary to dispel certain arguments that Plaster might have made had he decided to waive his constitutional right to remain silent makes its necessity in the state's case in chief particularly questionable. As to whether mistake is a defense, *see supra* note 68.

76. *Id.*

doctor?[77] The answer to this question falls within the individual judge's discretion.[78] The court found it important that the trial court had given a cautionary instruction to the jury, instructing them that they must not convict Plaster because of the prior act with Melissa.[79] "[O]nly in extreme cases" would such an instruction be "deemed insufficient to nullify the danger of unfair prejudice."[80] The court indicated that it could not assume that the jury failed to follow the cautionary instruction.[81] Consequently, the court concluded that the probative value of the challenged evidence outweighed the danger of unfair prejudice.[82] Thus, the trial court did not abuse its discretion in admitting it.[83] The court therefore affirmed the rulings of both lower courts.[84]

Justice Schultz wrote a dissenting opinion.[85] He began by stating the general rule: proof of prior bad acts may not be used to show an increased probability that the defendant committed the bad act in question.[86] He noted further that: "the exclusionary force of the rule applies equally to instances where the proponent offers the evidence for another avowed purpose, but the court determines that in fact its only relevancy is to illustrate

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77. *Id.* This is a misstatement of the requirements of Rule 403. Under Rule 403 Plaster must establish that the danger of unfair prejudice substantially outweighs the probative value of the evidence. *See* IOWA R. EVID. 403, *supra* note 19.

78. State v. Plaster, 424 N.W.2d at 231.

79. *Id.* The court does not quote the instruction in its opinion.

80. *Id.* (citing State v. Conner, 314 N.W.2d 427, 429 (Iowa 1982)). In *Conner* cumulative evidence of the defendant's prior conviction for robbery was presented in a prosecution where the prior conviction was an underlying element of the offense. State v. Conner, 314 N.W.2d at 428. Unfair prejudice arose because the defendant would have been painted as a bad person, and therefore more likely to commit the crime in question. *Id.* at 429. This type of general prejudice differs from the type of specific prejudice which Plaster feared from the use of a closely similar prior bad act.

81. State v. Plaster, 424 N.W.2d at 231 (citing Shawhan v. Polk County, 420 N.W.2d 808, 811 (Iowa 1988)). Justice Schultz wrote the plurality opinion in *Shawhan*, from which Justice Lavorato cites this proposition. Shawhan v. Polk County, 420 N.W.2d at 809. The plurality stated that it "simply cannot assume that the jury failed to follow the court's instructions on negligence because it was prejudiced by the improper [character] evidence." *Id.* at 811. In *Shawhan* evidence of drug use by the plaintiff was offered on the issue of life expectancy. *Id.* at 809. While eight justices found the evidence to be inadmissible, the majority did not find reversible error. *Id.* at 811-12. It is interesting to note that Justice Lavorato wrote for the four dissenting judges and said that "[t]here comes a time when error in a trial is so patently prejudicial and unfair that we should not attempt to rationalize it away once it is properly brought to our attention." *Id.* at 812 (Lavorato, J., dissenting). If the court may not assume that the jury failed to follow the cautionary instruction, may Plaster call the jurors to testify in a post-conviction proceeding to establish that they had used the evidence in an impermissible manner? *See* IOWA CODE ch. 663A (1989); IOWA R. EVID. 606(b).

82. State v. Plaster, 424 N.W.2d at 232-33.

83. *Id.*

84. *Id.* at 233.

85. *Id.* (Schultz, J., dissenting, joined by Justices Carter and Andreasen).

86. *Id.* at 233-34 (Schultz, J., dissenting).

the character of the accused for purposes of establishing other actions in conformity with that character."[87]

Justice Schultz then stated, as had the majority, that the only issue of fact was whether the alleged victim consented to sexual intercourse.[88] Justice Schultz said that the more specific issue was whether the sexual intercourse was "done by force or against the will" of Christine.[89] He contended that "[t]he majority concludes that evidence of a prior, nonconsensual sex act committed by the defendant is relevant to prove that the sex acts in the present case were also nonconsensual. . . . The majority's conclusion involves a leap in logic that I am unwilling to make."[90] Justice Schultz pointed out that "[t]he issue of consent . . . focuses on the alleged victim's state of mind."[91] One woman's state of mind is not relevant to prove another woman's state of mind on another occasion.[92] Therefore Plaster's prior actions were simply irrelevant to the issue of consent.[93]

Justice Schultz further argued that even if the evidence were somehow relevant to the issue of consent, its probative value was so slight compared to its prejudicial effect that it should have been excluded in any event.[94] He noted that prior opinions of the court had recognized that the unfair prejudice of this type of evidence is substantial.[95] He pointed out that in *State v. Cott*[96] the court had recognized that other-crime evidence involves a type of prejudice which the majority opinion failed to address:

> [a] focus on the criminal or aberrant disposition of the defendant with regard to various victims is exactly the sort of prejudice which the general rule seeks to avoid. By creating an exception of this kind, we would seriously erode the impact of the general rule proscribing such evidence of prior criminal conduct, in the context of sex crimes. The resultant unfairness to those accused of sex crimes is self evident.[97]

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87. *Id.* at 234 (Schultz, J., dissenting) (quoting State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987)).

88. *Id.* (Schultz, J., dissenting).

89. *Id.* (Schultz, J., dissenting) (quoting IOWA CODE § 709.4(1)).

90. *Id.* (Schultz, J., dissenting).

91. *Id.* (Schultz, J., dissenting). The dissent did not argue this point on the basis of the court's prior decision in *State v. Bauer*, but relied on cases from other jurisdictions to find the evidence irrelevant on the issue of consent. *See supra* note 68.

92. *Id.* (Schultz, J., dissenting).

93. *Id.* (Schultz, J., dissenting) (citing Lovely v. United States, 169 F.2d 386, 390 (4th Cir. 1948); People v. Key, 153 Cal. App. 3d 888, 895, 203 Cal. Rptr. 144, 148 (1984); Meeks v. State, 249 Ind. 659, 664, 234 N.E.2d 629, 632 (1968); State v. Alsteen, 108 Wis. 2d 723, 730, 324 N.W.2d 426, 429 (1982)).

94. *Id.* (Schultz, J., dissenting) (citing IOWA R. EVID. 403).

95. *Id.* (Schultz, J., dissenting) (citing State v. Spaulding, 313 N.W.2d 878, 881 (Iowa 1981); State v. Cott, 283 N.W.2d 324, 327 (Iowa 1979)). In *State v. Spaulding* the court stated that "[w]ithout question the level of prejudice inherent in this type of evidence is high." State v. Spaulding, 313 N.W.2d at 881.

96. State v. Cott, 283 N.W.2d 324 (Iowa 1979).

97. State v. Plaster, 424 N.W.2d at 234 (Schultz, J., dissenting) (quoting State v. Cott,

Because this evidence has little or no probative value, while its nature is inherently prejudicial, Justice Schultz would have found an abuse of discretion in admitting this evidence and would have ordered a new trial.[98]

Both the majority opinion and the dissent involve difficulties which will create confusion in the prosecution, defense, and judicial analysis of sexual abuse cases under Iowa Code section 709.4(1). Because the majority in *Plaster* consisted of six justices, however, it is unlikely that a complete reversal of its holding is likely in the near future. However, the majority opinion is riddled with incomplete analysis and reasoning concerning the relevance of the prior act. Thus, it is probable that the court will have to further define the relevancy of this evidence to bring it into peaceable coexistence with Rule 404(b).

The court's initial argument for relevancy—that the testimony of Melissa and her doctor about the prior similar incident makes it more likely that Christine was telling the truth—is unclear.[99] Most of the reasoning in support of this argument requires use of the impermissible inference which Rule 404(b) prohibits.[100] If the permissible inference—that Melissa's lack of consent under circumstances similar to those which Christine faced is probative of Christine's mental state—is valid,[101] then what other relevancy arguments will the court allow the *defense*? Could a defendant call female witnesses to testify that they had consented to sexual activity with him under similar circumstances? Could an aggressive defense counsel argue that he ought to be able to inquire into the victim's past *consensual* sexual activity with other men in order to establish that it is more probable that the victim consented in a similar situation with the defendant?[102]

If the court allows these arguments, the conduct of sex abuse cases would revert back to the days when they were more a trial of sexual morals than a trial of the facts of a particular incident. It seems self-evident that such a rule would deter many prosecutions of sexual abuse cases. There is a danger that defense attorneys might attempt to fight fire with fire by delv-

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283 N.W.2d at 327). Compare this argument with the "emotional prejudice" argument the majority almost exclusively relies upon. *See supra* notes 76-79 and accompanying text. The majority apparently argued that the cautionary instruction precluded a finding of this type of unfair prejudice. *Id.* at 232.

98. *Id.* at 235 (Schultz, J., dissenting).

99. *See supra* note 62 and accompanying text.

100. *See supra* note 62.

101. *Id.*

102. If another woman's lack of consent makes it more probable that the current victim did not consent under similar circumstances, then the victim's own prior consensual or nonconsensual sexual activity under similar circumstances with men other than the defendant ought to be even more probative of her consent or lack of consent during the incident in question. However, as already noted, *see supra* note 38, the Iowa Supreme Court has held such testimony irrelevant when offered for such a purpose. Additionally, a defendant will probably have to comply with the mandates of Iowa Rule of Evidence 412 in order to be able to conduct such an inquiry.

ing into a victim's sexual background. In turn, prosecutors might be reluctant to argue for the admissibility of this type of evidence.

Even more difficult to accept is the court's reasoning that the evidence showed Plaster's *modus operandi*, and therefore somehow worked to rebut his consent defense.[103] This reasoning seems to fly directly in the face of Rule 404(b). It will be interesting to see how the court attempts to apply this principle in future cases without acknowledging that it is making an exception to the general rule for sex abuse cases. The court refused to recognize such a general exception in *State v. Cott*.[104]

The difficulties involved in the court's third relevancy argument—that the testimony of Melissa and her doctor was probative on the issue of mistake—have been discussed at length, but provide additional intriguing questions for the court to answer in future cases.[105] In short, as the Iowa Court of Appeals has pointed out, mistake does not *seem* to be a defense to sex abuse under Iowa Code section 709.4(1), and therefore evidence bearing upon it should be irrelevant.[106]

It is also difficult to accept the concept that Plaster's knowledge of his ability to injure Christine with his hand made it more probable that he threatened to do so.[107] Is it true that all males with this same knowledge are thereby made more likely to threaten injury to women who resist their sexual advances? This reasoning seems to work only when the impermissible inference—he did it before, therefore he probably did it again—is utilized. Further, evidence of Plaster's knowledge would seem to have almost no probative value concerning the fact of consequence—Plaster's threat—because the knowledge is not peculiar to Plaster either individually or as a member of a class of individuals possessing specialized knowledge.[108] The knowledge is common to adult males. The fact of its existence simply does not make it more probable that Plaster threatened Christine.

Given the apparent lack of probative value of this prior act evidence with respect to facts of consequence in the case, future courts may be reluctant to find that its unfairly prejudicial tendency does not substantially outweigh its probative value. The court in *Plaster* held that the probative value of this evidence actually outweighed the dangers of unfair prejudice.[109] Because this is a decision to be made by each judge under the facts of each case, contrary conclusions seem possible. This is particularly true when consideration is given to the Iowa Court of Appeals decision in *State v. Chris-*

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103. *See supra* notes 63-64 and accompanying text.

104. State v. Cott, 283 N.W.2d at 327. The court in *Cott* stated that it was not "disposed to endorse lewd disposition as a separate, exclusively adequate exception to the rule prohibiting the admission of testimony regarding prior victims." *Id.*

105. *See supra* notes 66-68 and accompanying text.

106. *See supra* note 68.

107. *See supra* note 69 and accompanying text.

108. *See supra* note 69.

109. *See supra* note 82 and accompanying text.

tensen, wherein the balance was tipped in favor of the defendant.[110] This issue will continue to remain an important point of contention in these cases.

Despite the difficulty in determining how this evidence is relevant and not unfairly prejudicial, the greater difficulty for trial judges and attorneys will be to craft a cautionary instruction for the jury should the evidence be admitted. It is interesting to note that the cautionary instruction in this case was not recited in the opinion, but all indications are that it was a mere restatement of Rule 404(b).[111] Because the arguments which might make this evidence relevant are complex and intricate, explaining its permissible and impermissible uses in a cautionary instruction would probably be confusing and not very beneficial. However, to fail to give such an instruction upon request would probably constitute reversible error.

In summary, the *Plaster* decision leaves more questions unanswered than answered. By creating an exception of this kind to character evidence rules, the court has opened the way to future litigation of a full range of evidentiary issues in sexual abuse cases which should end with the limiting of *Plaster* to such an extent that it becomes of very limited utility to prosecutors. In the interim, however, the trials of defendants in sex abuse cases where this type of evidence is allowed will be surrounded by an aura of unfairness.

Dean A. Stowers

110. State v. Christensen, 414 N.W.2d at 848.
111. *See supra* note 79.