

How Similar Is Similar?: Confusing the Similarity Standard for the Admission of Prior Crimes Evidence Under the Plan Exception in Child Molestation Cases

[*State v. Jones*, 85 P.3d 1226 (Kan. 2004)]

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*In the United States, society's historical attitude about sexual victimization of children can generally be summed up in one word: denial. Most people do not want to hear about it and would prefer to pretend that such victimization just does not occur.*¹

I. INTRODUCTION

The pervasive attitude, failing to appreciate how frequently child molestation occurs and the difficulties faced by the victims of such crimes, makes the prosecution of child molestation cases difficult. Frequently, no witnesses or physical evidence of the crime exists, a victim has difficulty remembering the traumatic event, and “prosecutions often become a swearing match between the victim and the defendant.”²

When faced with these problems, prosecutors must search for additional corroboration and testimony to support their case.³ Many times, such corroboration takes the form of testimony from a prior victim.⁴ In Kansas, one way to admit this testimony is through the plan exception to section 60-455 of the Kansas Statutes Annotated.⁵ If the prosecutor can prove that the defendant’s actions during the prior crime “show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes”⁶ and can connect the modus operandi to the charged crime, then the prosecutor can introduce the evidence under the plan exception.⁷ The rationale behind the plan exception is that “the method of committing the prior

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1. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAM, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS FOR LAW-ENFORCEMENT OFFICERS INVESTIGATING THE SEXUAL EXPLOITATION OF CHILDREN BY ACQUAINTANCE MOLESTERS, http://www.missingkids.com/en_US/publications/NC70.pdf (last visited Oct. 24, 2004) (emphasis omitted).

2. Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 383 (1996).

3. *Id.*

4. *Id.*

5. KAN. STAT. ANN. § 60-455 (1994).

6. *State v. Damewood*, 783 P.2d 1249, 1254 (Kan. 1989).

7. *See id.* at 1255.

acts is so similar to that utilized in the case being tried that it is reasonable to conclude the same individual committed both acts.”⁸ The prosecutor, therefore, must also overcome the similarity hurdle; the prior crime must be “similar” to the crime charged to qualify for admission.⁹ This is an exceptionally difficult task for prosecutors in a state like Kansas where the boundary for the similarity standard has been inconsistent.¹⁰

In *State v. Jones*,¹¹ the Kansas Supreme Court held that evidence of a prior crime for indecent liberties with a child was not similar enough to the charged crimes; therefore, the trial court abused its discretion when admitting the evidence under the plan exception to section 60-455.¹² The court found that the prior crime evidence did not meet any of the previously recognized similarity standards.¹³ Although the court did not explicitly overturn its precedent, the *Jones* decision changed the analysis previously employed by the court when admitting evidence under this statute in sexual misconduct cases.¹⁴ The court implied that prior crimes evidence must meet a high degree of fact-specific similarity that discounts factors that might be present in all child molestation scenarios to qualify for admission.¹⁵

The court created more confusion by basing its decision on a tortured analysis of the similarity standard and focusing on the fact-specific differences between the crimes to reach its conclusion that the prior crime was not similar.¹⁶ Taking into account the context of child molestation,¹⁷ and its own precedent, the court should have focused on a more objective similarity standard to admit the prior crime evidence under a lower degree of similarity when analyzing the facts of the abuse scenario.

Because the court chose not to follow precedent, this decision represents a new trend for the admission of prior crimes evidence in

8. *Id.*

9. *See id.* at 1254.

10. *See infra* Part III.A. (discussing cases that illustrate the Kansas Supreme Court’s inconsistent descriptions of similarity in sexual misconduct cases).

11. 85 P.3d 1226 (Kan. 2004).

12. *Id.* at 1231-32.

13. *Id.* at 1231. In its decision the court noted three recognized similarity standards: strikingly similar, signature, and similar enough. *Id.* at 1232. In addition to these three standards, Kansas Supreme Court decisions have used other language describing the word similar. *See infra* Part III.A.

14. *See Jones*, 85 P.3d at 1232. The dissent in *Jones* noted that *State v. Tiffany* is an example of a case in which the court focused on the similarities of the crime, rather than the dissimilarities. *Id.* at 1235 (Davis, J., dissenting) (citing *State v. Tiffany*, 986 P.2d 1064 (Kan. 1999)). The Kansas Court of Appeals decision in *State v. Kackley* demonstrates the type of analysis employed by the majority in *Jones*, in which the court compared similarities and differences in its analysis. *See* 92 P.3d 1128, 1133 (Kan. Ct. App. 2004).

15. *See Jones*, 85 P.3d at 1231-32.

16. *See id.* at 1231-33.

17. *See infra* notes 232-37 and accompanying text.

the context of sex abuse cases in Kansas.¹⁸ It is a dangerous precedent for those cases in which sexual abuse takes place over a number of years, victims react differently to a defendant's sexual advances, and the defendant's forms of abuse escalate. After the *Jones* decision, trial court judges no longer have a significant amount of discretion to admit prior crimes evidence in sexual misconduct cases under the similarity standard to the plan exception when the defendant claims that the abuse did not occur.¹⁹ Admitting such evidence could risk the jury's decision being overturned on appeal.²⁰ Furthermore, prosecutors now have a higher burden to meet when seeking to admit prior crimes evidence under the plan exception.²¹ If the evidence does not satisfy a high degree of fact-specific similarity, it is likely inadmissible.²²

The plain language of the current Kansas statute is the root of the problem because it does not codify Kansas' practice of liberally admitting prior crimes evidence in sexual misconduct cases.²³ Historically, the "[Kansas courts'] interpretation of the plan exception to [section] 60-455 in sexual misconduct cases is . . . more liberal than the plan exception in non-sexual misconduct cases."²⁴ Prior to and after the codification of section 60-455, Kansas courts have taken this approach to the admission of prior crimes evidence in sexual misconduct cases.²⁵ Kansas' subsequent incongruous interpretations since the passage of section 60-455 have created more confusion and resulted in the promulgation of at least seven different similarity standards.

This comment proposes a legislative solution to the problems behind interpreting section 60-455 of the Kansas Statutes Annotated that will promote fairness toward both the victim and the defendant. To avoid future convoluted analysis under the current Kansas statute

18. See *Jones*, 85 P.3d 1226. This case also represents the changes in the makeup of the Kansas Supreme Court. Justices Gernon, Luckert, and Beier joined the court in 2003, and Justice Nuss joined in 2002. KANSAS SUPREME COURT, KANSAS SUPREME COURT JUSTICES, at <http://www.kscourts.org/supct/scbios.htm> (last visited Oct. 24, 2004). These newest justices, along with Justice Allegrucci, now represent the majority regarding this issue. See *Jones*, 85 P.3d at 1226.

19. See *Jones*, 85 P.3d at 1232.

20. See *id.*

21. See *id.*

22. See *id.*

23. See KAN. STAT. ANN. § 60-455 (1994). Compare *State v. Damewood*, 783 P.2d 1249, 1253 (Kan. 1989) (admitting prior crimes evidence where the prior crime was strikingly similar to the charged crime), with *State v. Morgan*, 485 P.2d 1371, 1372 (Kan. 1971) (admitting prior crimes evidence where the prior crime had somewhat similar circumstances to the charged crime).

24. Troy W. Purinton, *Call It a "Plan" and a Defendant's Prior (Similar) Sexual Misconduct Is in: The Disappearance of K.S.A. 60-455*, 70 J. KAN. B. ASS'N 30, 30 (Sept. 2001).

25. Compare *State v. Stütz*, 206 P. 910, 911 (Kan. 1922) (admitting prior crimes evidence based on the defendant's lustful disposition before the passage of section 60-455), with *State v. Gonzales*, 535 P.2d 988, 990 (Kan. 1975) (admitting prior crimes evidence when the display of force used in the prior crime had sufficient similarity to the display of force used in the charged crime after the passage of section 60-455).

and to update an antiquated statute, the Kansas legislature should adopt a statute that codifies the Federal Rules of Evidence 413 to 415, along with Kansas' common law practice of liberally admitting prior crimes evidence in sex abuse cases. Federal Rules of Evidence 413 to 415 permit the inference that the defendant has a propensity to molest children, and thus is more likely to have committed the charged crime in accord with this character trait.²⁶

To protect the defendant, this statute should contain the recommendations from the Judicial Conference, including the set of factors outlined by the Conference that were omitted from the current Federal Rules of Evidence 413 to 415.²⁷ As part of a balancing test under the recommended factors, the court is required to consider similarities and differences between the prior crime and the charged crime.²⁸ To protect the victim, the similarity analysis under this balancing test should be flexible to account for differences that occur in child abuse cases because of the length of the abuse, the victim's response, and the defendant's escalating forms of abuse. Thus, the legislation should take a middle ground to provide fairness for both the victim and the defendant.

II. CASE DESCRIPTION

In 1988, Charlie M. Jones, Jr. was convicted of indecent liberties with a child, L.D.²⁹ He was released from prison in 1990.³⁰ After his release, Jones moved to Wichita, Kansas, and in 1993 he moved in with his common-law wife, Lorie W., and her nine-year old daughter, M.W.³¹ In January 2002, Jones was tried for molesting his stepdaughter, M.W., and his biological daughter, S.J.³² The trial court admitted evidence of Jones' prior conviction of indecent liberties with L.D. under the plan exception to section 60-455.³³

A. *The Abuse, Location, and Surrounding Circumstances*

At the trial for molesting M.W. and S.J., the State introduced Jones' 1988 conviction through a journal entry of the conviction and through testimony of the victim, L.D.³⁴ L.D. testified regarding the abuse she suffered at the hands of Jones.³⁵ Her birth mother, Loretta,

26. See FED. R. EVID. 413-415.

27. See *infra* notes 298-99 and accompanying text.

28. See *infra* note 299 and accompanying text.

29. State v. Jones, 85 P.3d 1226, 1228 (Kan. 2004).

30. *Id.*

31. *Id.*

32. *Id.* at 1228-29.

33. *Id.* at 1229.

34. *Id.*

35. *Id.* at 1229-30.

married Jones when L.D. was between eight and ten years old.³⁶ In May 1983, Loretta and Jones had a child together, S.J.³⁷ L.D. testified that the sexual abuse began when she was between eight and nine years old, around the time of S.J.'s birth, and ended when she was fourteen, after she reported the abuse.³⁸

L.D. stated that the abuse began with Jones "taking off her clothes, touching her with his hands and penis, and rubbing himself on her."³⁹ Jones would "masturbate, fondle her vagina and breast area, and tell her that he loved her. He also wanted her to say she loved him."⁴⁰ Moreover, L.D. testified that Jones attempted to have sexual intercourse with her but never succeeded because L.D.'s reaction prevented it.⁴¹

L.D. also described the location and other circumstances surrounding the abuse.⁴² She said that the abuse occurred in multiple rooms of the house.⁴³ It occurred "in her bedroom if no one was home, the dining room, and 'just wherever' in the house."⁴⁴ She stated that the abuse occurred at night or when Jones would take her home from school.⁴⁵ "Jones molested her in a little bathroom stall and once in a small travel trailer where the family lived."⁴⁶ L.D. said that her mother, Loretta, did not participate in any of the acts and "there was no talk of colors, rituals, or 'family values.'"⁴⁷

Jones moved in with Lorie, M.W.'s mother, and M.W. in October 1993.⁴⁸ M.W. was home schooled and testified that the sexual abuse began in 1996, when she was twelve years old.⁴⁹ At that time, Lorie and Jones had two children together and "Lorie was pregnant with the third."⁵⁰ M.W. described abuse, including intercourse, that took place in different rooms in the house.⁵¹ Sometimes M.W., Lorie, and S.J. had sex with Jones at the same time and sometimes Jones abused M.W. individually.⁵² M.W. said that Jones abused her on a weekly

36. *Id.* at 1229.

37. *Id.* S.J. is one of the alleged victims from the present case. *Id.* at 1228.

38. *Id.* at 1229-30.

39. *Id.* at 1229.

40. *Id.*

41. *Id.*

42. *Id.* at 1229-30.

43. *Id.* at 1229.

44. *Id.*

45. *Id.* at 1229-30.

46. *Id.* at 1230.

47. *Id.*

48. *Id.* at 1228.

49. *Id.* at 1228-29.

50. *Id.* at 1228.

51. *Id.*

52. *Id.*

basis until July 2001, after S.J. reported the abuse.⁵³ Like L.D., M.W. noted that Jones “told her he loved and cared for her very much.”⁵⁴

In 1999, S.J., Jones’ daughter from his marriage to Loretta, moved into the household; she was sixteen.⁵⁵ S.J. testified that the abuse, including intercourse, occurred several times per week after she moved in, and stopped when she moved out in 2001, after her eighteenth birthday.⁵⁶ S.J. stated that her first experience with Jones occurred as a group sex act with Lorie and M.W.⁵⁷ She said that “Jones had approached her about a ‘little cult . . . with witchery and things’ that existed in the family.”⁵⁸ Moreover, S.J. detailed that individual incidents of abuse occurred in “the living room, Jones’ bedroom, the bedroom she shared with M.W., the bathroom, the kitchen, the shed, and the camper.”⁵⁹ Jones also told S.J. that he loved her.⁶⁰

B. *Secrecy of the Abuse*

Jones required L.D. to keep the abuse a secret, so L.D. did not inform her mother.⁶¹ Finally, at fourteen, L.D. broke her silence and reported the abuse.⁶² As a result, Jones was convicted of indecent liberties with a child.⁶³

M.W. stated that she did not tell anyone about the abuse because Jones told her that her brothers and sisters would be taken away if anyone found out about the abuse.⁶⁴ On July 30, 2001, M.W. initially told the police that no abuse had occurred.⁶⁵ At that time, she “was extremely fragile and would often break down and cry.”⁶⁶ After a police interview, all of the children were removed from the home.⁶⁷ In October, investigators interviewed M.W. again and at that time she revealed the abuse.⁶⁸ After that interview, M.W. saw her younger siblings with more frequency.⁶⁹ S.J. also kept the abuse a secret until she moved out of the house in July 2001.⁷⁰

53. *Id.* at 1228-29.

54. *Id.* at 1228.

55. *Id.* at 1228-29.

56. *Id.* at 1229.

57. *Id.* at 1228.

58. *Id.*

59. *Id.* at 1229.

60. *Id.* at 1232.

61. *Id.* at 1230.

62. *Id.*

63. *Id.* at 1228.

64. *Id.* at 1229.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.*

C. Jones' Defense Testimony

Jones denied that he abused either M.W. or S.J. and claimed that he had a back injury during the time of the alleged group sex incidents.⁷¹ Jones' employer corroborated this story and testified that Jones was on leave from work during the dates of the alleged group sex act because of a back injury.⁷² Lorie also stated that she did not believe Jones abused M.W. or S.J. and that she did not participate in, or have knowledge of, any abuse.⁷³ A neighbor, who visited the home on a daily basis, said that she had no knowledge of the abuse.⁷⁴ M.W.'s grandmother testified that she visited the home weekly and never witnessed abuse.⁷⁵ When M.W.'s grandmother questioned her about the abuse, M.W. denied that anything had occurred.⁷⁶

D. Procedural History

Jones was charged and tried on several counts of sexual misconduct.⁷⁷ Prior to trial, the trial court judge determined that, pursuant to section 60-455, the State could introduce evidence of Jones' 1988 conviction for indecent liberties with a child to show Jones' plan to molest M.W. and S.J.⁷⁸ A jury found Jones guilty of rape, aggravated incest, incest, and aggravated indecent liberties with a child.⁷⁹ He was found not guilty of criminal threat and aggravated criminal sodomy.⁸⁰ Jones was sentenced to seventy years in prison.⁸¹ He later appealed his conviction.⁸²

The Kansas Supreme Court transferred the case on its own motion pursuant to section 20-3018(c) of the Kansas Statutes Annotated.⁸³ Jones presented four issues on appeal; the court gave him a new trial based on the first issue and therefore did not need to address the other three.⁸⁴ The court characterized the issue as whether "the district court err[ed] in admitting evidence regarding a prior convic-

71. *Id.* at 1230.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* For his conduct toward S.J., Jones was charged with incest, aggravated incest, and criminal threat. *Id.* For his conduct toward M.W., Jones was charged with rape, aggravated indecent liberties with a child, aggravated incest, aggravated criminal sodomy, and criminal sodomy. *Id.*

78. *Id.* at 1229.

79. *Id.* at 1230.

80. *Id.* The criminal threat was toward S.J. *Id.* The sodomy charge was for Jones' conduct with M.W. *Id.*

81. *Id.* at 1228.

82. *Id.*

83. *Id.*; see KAN. STAT. ANN. § 20-3018(c) (1995).

84. *Jones*, 85 P.3d at 1228. The court did not decide the following three issues:

2. During the time interval between *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), and the 2002 amendments to K.S.A. 21-4716, did the district court have authority to

tion for indecent liberties with a child under the plan exception of [section] 60-455.”⁸⁵ On a 5-2 vote, the court reversed the conviction and remanded the case for a new trial.⁸⁶

III. BACKGROUND

A. *A Brief History of Federal Propensity Evidence Rules*

“For over two centuries, American courts have adhered to the tenet that a litigant may not introduce testimony about a specific act by a person in order to establish the person’s character and then infer that on a particular occasion, the person acted consistently with his or her character.”⁸⁷ Although the traditional common law banned the admission of propensity evidence, “many states applied the prohibition more laxly in sex offense prosecutions.”⁸⁸

The adoption of the Federal Rules of Evidence on both federal and state levels began to change the common law practice of differentiating between admissibility of prior sexual misconduct and non-sexual misconduct.⁸⁹ Federal Rule of Evidence 404(b) bans propensity evidence by stating, “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”⁹⁰ This rule established exceptions to the admission of prior crime evidence “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”⁹¹ Arguably, the adoption of this rule on both national and state levels superseded prior lustful disposition case law that liberally admitted prior crimes evidence in sexual misconduct cases.⁹²

impose an upward durational departure sentence if a jury found the existence of aggravating factors?

3. If the district court was authorized to use a separate upward durational departure sentencing procedure, did such procedure violate the Sixth and Fourteenth Amendments to the United States Constitution?
4. Did the district court violate the Double Jeopardy Clause when sentencing Jones for rape based on a criminal history score of A and for aggravated incest based on the jury’s factual finding that he was a sexual predator?

Id.

85. *Id.*

86. *Id.* at 1233. Justice Nuss wrote for the majority, which included Justices Beier, Gernon, Luckert, and Allegrucci. *Id.* at 1226. Justice Davis wrote the dissenting opinion and Chief Justice McFarland joined the dissent. *Id.*

87. Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1125 (1993).

88. *Id.* at 1127; *see also* Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 170 n.238 (1993) (providing a review of case law from twenty-nine states that admit uncharged sexual misconduct evidence under some form of a lustful disposition exception).

89. Imwinkelried, *supra* note 87, at 1127-28.

90. FED. R. EVID. 404(b).

91. *Id.*

92. Imwinkelried, *supra* note 87, at 1127-28.

In 1995, despite protests from the Judicial Conference of the United States, Congress adopted Federal Rules of Evidence 413 to 415.⁹³ These rules admit prior crimes evidence in sexual assault and child molestation cases. Under Rule 413, “evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.”⁹⁴ Similarly, Rule 414 admits this evidence in child molestation cases.⁹⁵ Finally, Rule 415 addresses the admission of sexual abuse and child molestation evidence in civil trials.⁹⁶ In *United States v. Enjady*,⁹⁷ the Tenth Circuit found Rule 413 constitutional, but subject to the Rule 403 balancing test.⁹⁸ Thus far, federal circuit courts have not overturned these rules as unconstitutional.⁹⁹

The Kansas legislature has yet to pass these recent amendments to the Federal Rules of Evidence 413 to 415, relating to sexual assault and child molestation.¹⁰⁰ The effect of the Kansas courts’ broad interpretation of section 60-455 in sexual misconduct cases is like Federal Rules of Evidence 413 to 415 because prior crimes for sexual abuse are admitted more liberally than non-sexual crimes.¹⁰¹ With its decision in *Jones*, however, the Kansas Supreme Court digressed from its broad interpretation in favor of a strict rule of admissibility.¹⁰²

B. Evolution of Kansas Law

The Kansas legislature has not passed the most recent Federal Rules of Evidence, although they were designed as models for the

93. FED. R. EVID. 413-415. Congress adopted these rules as part of the Violent Crime Control Law Enforcement Act of 1994. See Judicial Conference of the United States, *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases*, 159 F.R.D. 51, 51-53 (1995).

94. FED. R. EVID. 413.

95. FED. R. EVID. 414.

96. FED. R. EVID. 415.

97. 134 F.3d 1427 (10th Cir. 1998).

98. *Id.* at 1433. The Tenth Circuit determined that to meet constitutional requirements, [the] Rule 403 balancing in the sexual assault context requires the court to consider: 1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing the probative dangers, a court considers: 1) how likely is it such evidence will contribute to an improperly-based jury verdict; 2) the extent to which such evidence will distract the jury from the central issues of the trial; and 3) how time consuming it will be to prove the prior conduct.

Id.

99. See, e.g., *United States v. Gabe*, 237 F.3d 954, 959-60 (8th Cir. 2001) (finding no abuse of discretion when a district court admitted the sexual abuse evidence under Rule 414 and performed a modified Rule 403 balancing test); *United States v. LeMay*, 260 F.3d 1018, 1027 (9th Cir. 2001) (concluding that Rule 414, subject to the Rule 403 balancing test, does not violate the Due Process Clause of the Constitution); *United States v. Larson*, 112 F.3d 600, 604-05 (2d Cir. 1997) (concluding that Rule 414 is subject to the Rule 403 balancing test).

100. See KAN. STAT. ANN. § 60-455 (1994).

101. See Purinton, *supra* note 24, at 31-32.

102. See *State v. Jones*, 85 P.3d 1226, 1232 (Kan. 2004).

states to address the controversy regarding the admission of prior crimes evidence in sexual misconduct cases.¹⁰³ Kansas follows the ban on propensity evidence with exceptions as established by section 60-455. Adopted in 1963, section 60-455 provides that

[s]ubject to K.S.A. 60-477 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but, subject to K.S.A. 60-455 and 60-448 such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.¹⁰⁴

This law has very little legislative history because the Kansas legislature passed it as part of Uniform Rule of Evidence 55, one of the uniform laws proposed by the National Commissioners on Uniform State Laws.¹⁰⁵

Controversy over section 60-455 continued with the landmark *State v. Bly*¹⁰⁶ case in which the court interpreted section 60-455 as an “exclusive” rule, that evidence must match one of the eight listed exceptions to qualify for admission.¹⁰⁷ Since that time, the Kansas Supreme Court has circumvented this holding by admitting evidence “independent of” section 60-455.¹⁰⁸ As the Kansas Supreme Court noted in *State v. Rucker*,¹⁰⁹ “[f]ew areas of our jurisprudence have been subject to more conflicting views and decisions than the application of [section] 60-455.”¹¹⁰

Historically, the Kansas Supreme Court has interpreted the plan exception to section 60-455 more liberally in sexual misconduct cases.¹¹¹ Conversely, the Kansas Supreme Court follows a strict standard for admitting prior crimes evidence in non-sexual misconduct cases.¹¹² In *State v. Damewood*,¹¹³ the Kansas Supreme Court recognized two theories used to admit prior crimes evidence under the plan exception in sexual misconduct cases.¹¹⁴ These theories include:

103. See KAN. STAT. ANN. § 60-455; Sherry L. Scott, *Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials*, 35 HOUS. L. REV. 1729, 1765 (1999).

104. KAN. STAT. ANN. § 60-455 (emphasis added).

105. See generally Christopher M. Joseph, Comment, *Other Misconduct Evidence: Rethinking Kansas Statutes Annotated Section 60-455*, 49 U. KAN. L. REV. 145 (2000) (detailing the history of section 60-455).

106. 523 P.2d 397 (Kan. 1974).

107. *Id.* at 403-04; Joseph, *supra* note 105, at 146.

108. See, e.g., *State v. Crossman*, 624 P.2d 461, 464 (Kan. 1981).

109. 987 P.2d 1080 (Kan. 1999).

110. *Id.* at 1087.

111. See Purinton, *supra* note 24, at 31-32.

112. See, e.g., *State v. Marquez*, 565 P.2d 245, 250-51 (Kan. 1977) (requiring the prior crime of burglary to have strikingly similar features to the charged crime of burglary); Purinton, *supra* note 24, at 31-32.

113. 783 P.2d 1249 (Kan. 1989).

114. *Id.* at 1254.

(1) “the evidence, though unrelated to the crimes charged, is admitted to show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes[;]”¹¹⁵ and (2) “[the] evidence of prior crimes or acts is admissible to show plan where there is some direct or causal connection between the prior conduct and the crimes charged.”¹¹⁶

In Kansas, the similarity standard dictates whether the evidence represents the defendant’s plan to commit similar crimes.¹¹⁷ The Kansas Supreme Court has upheld admission of evidence in sexual misconduct cases under a variety of different descriptions: strikingly similar,¹¹⁸ signature,¹¹⁹ marked similarity,¹²⁰ substantially similar,¹²¹ sufficient similarity,¹²² similar enough,¹²³ and somewhat similar circumstances.¹²⁴ Thus, the Kansas Supreme Court has admitted prior crimes evidence under the plan exception by using at least seven different descriptions of the word “similar.”

The highest standards for similarity described by the Kansas Supreme Court are the strikingly similar, signature, marked similarity, and substantially similar standards.¹²⁵ The court in *Damewood* approved the strikingly similar standard.¹²⁶ In its decision, the court found that the evidence of the prior crime was strikingly similar because, during both crimes, the defendant lured young boys with no previous relationship to the defendant into helping him with his bee-keeping operation and then sexually abused them.¹²⁷ Without fully describing the nature of the sexual abuse in the first case, the court found no error in admitting the evidence under the plan exception.¹²⁸ Moreover, the court in *State v. Tolson*¹²⁹ found that the *Damewood* decision also represented the signature standard when it stated that in *Damewood* “there was a method of operation, and it was so distinct as to be a ‘signature.’”¹³⁰

115. *Id.* The *Jones* decision falls under this theory. *See id.*

116. *Id.* at 1255.

117. *See id.* at 1254.

118. *Damewood*, 783 P.2d at 1253.

119. *State v. Tolson*, 56 P.3d 279, 283 (Kan. 2002) (describing the method used in *Damewood* as signature).

120. *State v. Hampton*, 529 P.2d 127, 130 (Kan. 1974).

121. *State v. Rucker*, 987 P.2d 1080, 1088 (Kan. 1999).

122. *State v. Gonzales*, 535 P.2d 988, 990 (Kan. 1975).

123. *State v. Clements*, 843 P.2d 679, 682 (Kan. 1992).

124. *State v. Morgan*, 485 P.2d 1371, 1372 (Kan. 1971).

125. *State v. Damewood*, 783 P.2d 1249, 1253 (Kan. 1989) (strikingly similar); *State v. Tolson*, 56 P.3d 279, 283 (Kan. 2002) (describing the method used in *Damewood* as signature); *Hampton*, 529 P.2d at 130 (marked similarity); *Rucker*, 987 P.2d at 1088 (substantially similar).

126. *Damewood*, 783 P.2d at 1253.

127. *Id.* at 1252-53.

128. *Id.* at 1253, 1255.

129. 56 P.3d 279 (Kan. 2002).

130. *Id.* at 283.

The Kansas Supreme Court established the marked similarity standard in *State v. Hampton*.¹³¹ The court in *Hampton* found marked similarity because, even though the defendant did not have intercourse with each of the victims, the victims “were choked or strangled,” the defendant had a knife, and he offered “to pay for intercourse in the future.”¹³²

In *State v. Rucker*,¹³³ the Kansas Supreme Court found the crimes substantially similar when both victims were abused from age five until puberty, were Rucker’s children, were subject to similar sex acts, were slapped for protesting, and were threatened that Rucker would kill their pets if they did not keep the abuse a secret.¹³⁴ Thus, in *Rucker* the substantially similar standard included similarities in age, familial status, circumstances of the abuse, and threats by the defendant to keep the abuse a secret.¹³⁵

The lowest standards for admitting prior crime evidence identified by the Kansas Supreme Court are sufficient similarity, similar enough, and somewhat similar circumstances.¹³⁶ In *State v. Gonzales*,¹³⁷ the court found sufficient similarity because the defendant attempted to rape his victims and used force on each occasion.¹³⁸ Because of adverse responses from some of the victims at the time of the crime, the defendant did not rape each one, but the display of force was present in each.¹³⁹ The display of force established sufficient similarity to allow the admission of the prior crimes evidence.¹⁴⁰

In *State v. Clements*,¹⁴¹ the court described the similar enough standard. The defendant’s prior crime was performing oral sex on an eleven-year-old boy he sometimes saw at a baseball card shop.¹⁴² He was later tried for developing “a relationship with a family,” hiring young boys in the family to help him with “odd jobs at the house,” and then molesting them.¹⁴³ The court in *Clements* found that “[t]he general method used by Clements to entice young boys is similar enough to show a common approach that is tantamount to a plan.”¹⁴⁴

131. 529 P.2d 127 (Kan. 1974).

132. *Id.* at 130.

133. 987 P.2d 1080 (Kan. 1999).

134. *Id.* at 1088.

135. *See id.*

136. *State v. Gonzales*, 535 P.2d 988, 990 (Kan. 1975) (sufficient similarity); *State v. Clements*, 843 P.2d 679, 682 (Kan. 1992) (similar enough); *State v. Morgan*, 485 P.2d 1371, 1372 (Kan. 1971) (somewhat similar circumstances).

137. 535 P.2d 988 (Kan. 1975).

138. *Id.* at 989-90.

139. *Id.*

140. *Id.* at 990.

141. 843 P.2d 679 (Kan. 1992).

142. *Id.* at 681.

143. *Id.* at 680.

144. *Id.* at 682.

Finally, in *State v. Morgan*,¹⁴⁵ the court articulated the somewhat similar standard. The defendant had allegedly raped two women on separate occasions, and he was later prosecuted for raping a third victim.¹⁴⁶ In that case the court upheld the admission of the evidence and noted that the “two other women . . . had been forcibly raped by defendant under somewhat similar circumstances.”¹⁴⁷

The Kansas Supreme Court has admitted evidence under both high and low degrees of similarity.¹⁴⁸ Only in *State v. Davidson*¹⁴⁹ did the Kansas Court of Appeals begin to divert from Kansas Supreme Court precedent that allowed for varying degrees of similarity. In *Davidson*, the court articulated some of the similarities: “All of the victims were related to the defendant by marriage and under the age of 10; some form of fondling to ejaculation was among the sex acts; the abuse happened when other adults were not present; and all of the victims were threatened.”¹⁵⁰ These similarities probably would have met the lowest similarity standard under Kansas Supreme Court precedent; however, in *Davidson* the court found that “some of the similarities between the prior acts and the charged acts, *e.g.*, isolation of and threats toward the victim, are present in nearly all child sexual abuse scenarios.”¹⁵¹ The court described the dissimilarity such that “the charged acts do not match the behavior engaged in with the girls, and the victims were different genders.”¹⁵² The court in *Davidson* found the evidence was not strikingly similar and was therefore inadmissible.¹⁵³

While Kansas has had a divisive history over the interpretation of section 60-455 and the plan exception, the Kansas Supreme Court has historically allowed the admission of sexual misconduct evidence under both high and low degrees of similarity.¹⁵⁴ Since the *Davidson* decision from the Kansas Court of Appeals and most recently the Kansas Supreme Court’s decision in *Jones*, Kansas courts seem to be

145. 485 P.2d 1371 (Kan. 1971).

146. *Id.* at 1372.

147. *Id.*

148. Compare *State v. Damewood*, 783 P.2d 1249, 1253 (Kan. 1989) (strikingly similar), with *Morgan*, 485 P.2d at 1372 (somewhat similar circumstances).

149. 65 P.3d 1078 (Kan. Ct. App. 2003), *rev. denied* 2003 Kan. LEXIS 380, at *1 (June 26, 2003). Justice Carol Beier wrote the opinion in *Davidson* before being appointed to the Kansas Supreme Court. *Id.* at 1082. Justice Beier joined the majority in *Jones*. See *State v. Jones*, 85 P.3d 1226 (Kan. 2004).

150. *Davidson*, 65 P.3d at 1087.

151. *Id.*

152. *Id.*

153. *Id.*

154. Compare *State v. Damewood*, 783 P.2d 1249, 1253 (Kan. 1989) (strikingly similar), with *State v. Morgan*, 485 P.2d 1371, 1372 (Kan. 1971) (somewhat similar circumstances).

restricting their precedent of liberally admitting prior crimes evidence in sexual misconduct cases.¹⁵⁵

IV. ANALYSIS

In his appeal, Jones argued that the trial court abused its discretion by admitting evidence of his prior crime that did not address a material issue of fact.¹⁵⁶ He asserted that the admitted evidence was not similar to the charged crime; therefore, it was more prejudicial than probative and violated Jones' constitutional right to a fair trial.¹⁵⁷ In response, the State argued that the evidence qualified for admission under the plan exception because Jones denied the abuse; a dispute existed regarding the charged sex offenses; the evidence was relevant to prove Jones' plan to molest M.W. and S.J.; the crimes were similar; and the court did not abuse its discretion.¹⁵⁸ The majority, focusing on the differences between the crimes, decided the prior crime evidence was inadmissible because it did not meet the strikingly similar, signature, or similar enough standards.¹⁵⁹ The dissent argued the court did not abuse its discretion by admitting evidence because the trial court has the latitude to admit this evidence consistent with Kansas Supreme Court precedent.¹⁶⁰

A. Parties' Arguments

1. Charlie Jones

Arguing that the court abused its discretion by admitting evidence used to demonstrate his criminal propensity, Jones called for the court to reverse his conviction.¹⁶¹ Jones contended the court admitted evidence of his prior crime that did not address a material issue of fact; that violated his due process right to a fair trial; and that lacked similarity to the crime charged because it was more prejudicial than probative.¹⁶² Because plan was not disputed and the evidence was irrelevant, L.D.'s testimony "unfairly bolster[ed] [M.W.'s and S.J.'s] testimony."¹⁶³

Under his similarity argument, Jones asserted that the only similarity between the two crimes was that he lived in the same household

155. See *State v. Jones*, 85 P.3d 1226, 1232 (Kan. 2004). In the *Jones* case, neither the trial court judge nor the parties had an opportunity to follow or argue *Davidson*, because *Davidson* was not decided until after briefs were filed by both parties for the appeal.

156. Brief of Appellant at 9, *Jones* (No. 88,720).

157. *Id.*

158. Brief of Appellee at 9, *Jones* (No. 88,720).

159. *Jones*, 85 P.3d at 1232.

160. See *id.* at 1236-37 (Davis, J., dissenting).

161. Brief of Appellant at 16, *Jones* (No. 88,720).

162. *Id.* at 9.

163. *Id.* at 15.

with the girls and that such evidence was not striking enough to qualify as a plan.¹⁶⁴ Because the evidence was not similar, Jones believed the evidence served to unfairly impeach him at trial; without this evidence, the jury may have believed his defense.¹⁶⁵

Furthermore, Jones stated that the prior crime evidence improperly influenced the jury because both girls had reasons to lie and no physical evidence corroborated their stories.¹⁶⁶ M.W. might have lied so that she could see her brothers and sisters.¹⁶⁷ S.J. could have lied because she was upset with Jones and Lorie for their role in her termination from Wendy's, where she and Lorie worked.¹⁶⁸ During an argument related to her firing, S.J. asserted that Jones had threatened to show her "what the business end of a shotgun was for."¹⁶⁹ Conversely, Jones testified that "[w]hen S.J. was fired from Wendy's, she told him he'd be sorry."¹⁷⁰ Jones asserted that because the crimes were not similar and because both girls had motives to lie, L.D.'s testimony unfairly prejudiced the jury.¹⁷¹

2. State of Kansas

The State argued that the trial court did not abuse its discretion by admitting the prior crimes evidence because the crimes were similar and the court's decision was not "arbitrary, fanciful, or unreasonable," and therefore did not violate the standard of review.¹⁷² The State contended that the evidence was admitted to prove a material fact because Jones denied that any abuse had occurred.¹⁷³ The State also wanted the evidence admitted to show that Jones' conduct during the prior crime demonstrated Jones' plan for molesting the girls in the present case.¹⁷⁴

Even though the abuse suffered by M.W. and S.J. is common in sexual misconduct cases, the State noted *Clements*, which rejected the argument that features common to all crimes do not demonstrate plan when it stated that "the existence of a structured design, not common features, . . . determine admissibility."¹⁷⁵ Thus, the State argued that in sexual misconduct cases it did not have to prove that a detailed plan existed.¹⁷⁶ The State contended the defendant's general method for

164. *Id.* at 14-15.

165. *Id.* at 14-16.

166. *Id.* at 16.

167. *Id.* at 5.

168. *Id.* at 3.

169. *Id.*

170. *Id.* at 7.

171. *Id.* at 16.

172. Brief of Appellee at 15-16, *Jones* (No. 88,720).

173. *Id.* at 10.

174. *Id.*

175. *Id.* at 13 (quoting *State v. Clements*, 843 P.2d 679, 681 (Kan. 1992)).

176. *Id.* at 14.

sexually abusing the girls was enough to qualify as strikingly similar to L.D.'s experience.¹⁷⁷ There were similarities in the age, gender, and familial relationship of the girls.¹⁷⁸ Additionally, Jones abused the girls when no one else was around; he fondled the girls and achieved penetration with M.W. and S.J.; he expressed his love for them after the abuse and wanted a similar response; and the abuse occurred in multiple rooms inside and outside the house.¹⁷⁹ Based on these similarities, the State maintained that the trial court's decision to admit this evidence was not fanciful or arbitrary.¹⁸⁰

B. *Court's Holding*

Justice Lawton R. Nuss delivered the opinion of the majority.¹⁸¹ The majority held that the trial court erred in admitting the prior crime evidence of Jones' conviction of indecent liberties with a child under the plan exception to section 60-455.¹⁸² In doing so, the court determined that the evidence did not meet the required standard for similarity.¹⁸³

In its analysis, the court compared the facts of L.D.'s abuse to that of M.W. and S.J.¹⁸⁴ Specifically, the court noted the similarities between L.D. and M.W.¹⁸⁵ These similarities included the familial relationship, gender, age, location of the abuse, Jones' expression of love, and secrecy.¹⁸⁶ Despite these similarities of abuse experienced by both girls, the court's decision focused on the dissimilarities.¹⁸⁷ The dissimilarities were that Jones failed to have intercourse with L.D. and achieved intercourse with M.W., and that L.D. was always abused alone while M.W. had participated in group sex acts.¹⁸⁸

When comparing L.D.'s experience to that of S.J., the court described the dissimilarities.¹⁸⁹ The court found differences in the familial relationship because S.J. was Jones' biological daughter.¹⁹⁰ Additionally, the abuse began later in S.J.'s life, S.J.'s experience began with a group sex act, and S.J.'s experience involved sexual intercourse.¹⁹¹ The court primarily focused on the dissimilarity found in

177. *Id.* at 13-15.

178. *Id.* at 14-15.

179. *Id.*

180. *Id.* at 15-16.

181. *Jones*, 85 P.3d at 1226; *see supra* note 86.

182. *Jones*, 85 P.3d at 1232.

183. *Id.*

184. *Id.* at 1231-32.

185. *Id.*

186. *Id.*

187. *Id.* at 1232.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

S.J.'s first experience with Jones.¹⁹² Unlike M.W. and L.D., S.J.'s first experience involved Jones bringing S.J. into a group sex act involving talk of rituals, witchery, and a requirement that all the women dress up in their own colored lingerie.¹⁹³ The court noted that the only similarities were gender, Jones' expression of love, and location of the abuse.¹⁹⁴ The court in *Jones* agreed with the Kansas Court of Appeals' reasoning in *Davidson* that similarities in gender and various locations of abuse "may be present in many child sexual abuse scenarios."¹⁹⁵

The court found that admission of the evidence was not harmless error because the jury could have believed Jones' story had L.D.'s testimony not been admitted.¹⁹⁶ In reevaluating the testimony given at trial, the court considered whether M.W. and S.J. lied about the abuse.¹⁹⁷ The court's analysis emphasized the circumstances surrounding M.W.'s disclosure.¹⁹⁸ Noting that the trial resulted in a "credibility battle,"¹⁹⁹ the court reasoned that the admission of L.D.'s testimony unfairly allowed the jury to infer that Jones had a propensity to commit sexual offenses.²⁰⁰ For this reason, the court remanded Jones' case for a new trial excluding testimony from L.D.²⁰¹

C. *Dissenting Opinion*

Justice Robert E. Davis, joined by Chief Justice McFarland, dissented because the court failed to follow its standard of review and the evidence qualified as similar under the plan exception.²⁰² The dissent disagreed with the majority's conclusion that the trial court erred by admitting prior crimes evidence that did not match any similarity standard.²⁰³ Under the abuse of discretion standard of review, the court had to find that no reasonable person would have ruled in the same manner as the trial judge.²⁰⁴ Justice Davis reasoned that the majority failed to follow its standard of review because "at the very least, reasonable persons could differ as to the propriety of the action taken by the trial court."²⁰⁵

192. *Id.*

193. *Id.* at 1228-29, 1232.

194. *Id.* at 1232.

195. *Id.*

196. *Id.* at 1233.

197. *Id.* at 1232-33.

198. *Id.* at 1233.

199. *Id.* at 1232.

200. *Id.* at 1233.

201. *Id.*

202. *Id.* at 1236-37 (Davis, J., dissenting).

203. *Id.* at 1236 (Davis, J., dissenting).

204. *Id.* at 1231.

205. *Id.* at 1236 (Davis, J., dissenting).

Justice Davis found the prior crime was similar enough to the charged crimes to qualify for admission under the plan exception.²⁰⁶ The defendant's plan was one in which Jones' modus operandi was to become friends with and then marry a woman who had a young daughter.²⁰⁷ He would become the daughter's stepfather, gain her trust, and molest her.²⁰⁸ There were numerous similarities between L.D. and M.W., including the defendant's familial relationship to the girls, the defendant began to abuse the children when his wife was pregnant with another child, and the defendant molested the "girls' genital regions."²⁰⁹ Additionally, in both cases the defendant required secrecy and the abuse occurred throughout the house.²¹⁰ S.J.'s initiation into the abusive situation resulted from Jones' escalating forms of abuse and did not diminish the facts necessary to support admission under the plan exception.²¹¹ Jones' actions supported his plan to "satisfy his increasing sexual desire for young girls involved in a familial relationship with him."²¹² Focusing on the similarities, rather than the differences, Justice Davis illustrated that the modus operandi necessary to admit the prior crime under the plan exception existed in this case.

The dissent disagreed with the majority's reliance on the *Davidson* decision.²¹³ Distinguishing the facts from that case, Justice Davis noted that "in comparing Davidson's prior conduct and the charged crime, the court found some . . . dissimilarities as 'most of the charged acts do not match the behavior engaged in with the girls, and the victims were different genders.'"²¹⁴ In contrast to the majority's conclusion that followed *Davidson*, the dissent found that in this case Jones' actions were similar because the girls were related and were the same gender.²¹⁵

Justice Davis argued that the court should follow *State v. Tiffany*,²¹⁶ which focused on the similarities of the crimes rather than the dissimilarities.²¹⁷ In *Tiffany*, the defendant's prior crime was "forcing the 7-year-old granddaughter of a friend to masturbate him until he ejaculated."²¹⁸ The defendant was charged with masturbating in front of his daughters and a fourteen-year-old boy living in the house and

206. *Id.* (Davis, J., dissenting).

207. *Id.* at 1234 (Davis, J., dissenting).

208. *Id.* (Davis, J., dissenting).

209. *Id.* (Davis, J., dissenting).

210. *Id.* (Davis, J., dissenting).

211. *Id.* at 1235 (Davis, J., dissenting).

212. *Id.* (Davis, J., dissenting).

213. *Id.* (Davis, J., dissenting).

214. *Id.* (Davis, J., dissenting) (citation omitted).

215. *Id.* (Davis, J., dissenting).

216. 986 P.2d 1064 (Kan. 1999).

217. *Jones*, 85 P.3d at 1236 (Davis, J., dissenting).

218. *Id.* at 1235 (Davis, J., dissenting).

forcing them to “rub his penis until ejaculation.”²¹⁹ The court in *Tiffany* admitted the prior crime evidence.²²⁰ Justice Davis contended that had the court in *Tiffany* focused on dissimilarities, it could have found the prior crime dissimilar because the defendant’s relationship to the victim was different, the victim had a different age and gender, and the sexual acts were different.²²¹ For this reason, Justice Davis supported focusing on the numerous similarities rather than the differences.²²²

Justice Davis also argued that the Kansas Supreme Court has a history of liberally admitting prior crimes evidence in sexual misconduct cases involving minors.²²³ He supported this liberal view, which is also taken by the current Federal Rules of Evidence, because frequently defendants have the same modus operandi when they abuse minors in a trusting, familial relationship.²²⁴ The dissent also agreed with the Tenth Circuit’s holding that supported the constitutionality of the Federal Rules of Evidence in child molestation cases.²²⁵ Justice Davis reasoned that there is a need to provide corroborative evidence in child molestation cases when such crimes occur in secret and the only witness is the child.²²⁶

Finally, the dissent supported admission of the evidence because it was not more prejudicial than probative.²²⁷ Justice Davis believed that because the court gave a limiting instruction the jury reached a fair verdict.²²⁸ Therefore, the trial court did not abuse its discretion by admitting the prior crime evidence.²²⁹

D. Commentary

The Kansas Supreme Court incorrectly held that evidence of Jones’ prior crime for indecent liberties with a child did not qualify as similar under the plan exception to section 60-455. By stating that the prior crime evidence in this case did not match any standard of similarity, the court’s decision injected more confusion into the interpretation of this law and ignored its own precedent that would allow for the admission of the evidence under a lesser degree of similarity.²³⁰ Fo-

219. *Id.* (Davis, J., dissenting).

220. *Id.* at 1236 (Davis, J., dissenting).

221. *Id.* (Davis, J., dissenting).

222. *Id.* (Davis, J., dissenting).

223. *Id.* (Davis, J., dissenting).

224. *Id.* (Davis, J., dissenting).

225. *Id.* (Davis, J., dissenting).

226. *Id.* (Davis, J., dissenting).

227. *Id.* at 1237 (Davis, J., dissenting).

228. *Id.* (Davis, J., dissenting).

229. *Id.* (Davis, J., dissenting).

230. For example, the somewhat similar circumstances description from the court in *State v. Morgan* is precedent that would have allowed the evidence in under a lower degree of similarity. See 485 P.2d 1371, 1372 (Kan. 1971).

cusing on the dissimilarities of the crimes, the court established a new form of analysis that requires trial courts to find that prior crimes evidence has a high degree of similarity with few differences before admitting it under section 60-455.²³¹ Such a fact-specific analysis fails to appreciate the overall concept behind child molestation.

The concept of child molestation in many ways relates to other situations of abuse. In child molestation cases, much like domestic violence cases, the adult maintains a “dominant position . . . that allows him or her to force or coerce a child into sexual activity.”²³² The adult has a progressive addiction.²³³ The abuse “may start with touching or fondling, but can progress to some form of penetration—vaginal, oral, anal . . . or all three.”²³⁴ Child molestation promotes secrecy because as long as the abuse remains a secret the victim will be available to the abuser and the abuser will not have to face the consequences of his actions.²³⁵ Thus, “[t]he offender usually knows that this conduct is against the law, and is, therefore, not adverse to telling the child that bad things will happen if the secret gets out.”²³⁶ This child molestation scenario makes for a difficult fact-specific analysis when the abuse is controlled by a person with a dominant position, a progressive addiction, and the desire to keep the abuse a secret.²³⁷

The plain language of the current Kansas statute is at the root of the problem because it does not codify Kansas’ practice of liberally admitting prior crimes evidence in sexual misconduct cases.²³⁸ Because of the context of child molestation and the confusion created by the Kansas Supreme Court, the Kansas legislature should amend the current statute. The legislature should take an approach similar to Arizona and create a rule of evidence that adopts a combination of Federal Rules of Evidence 413 to 415 and Kansas’ own common law practices prior to *Jones*.

231. See *supra* notes 14-15 and accompanying text.

232. AMERICAN PSYCHOLOGICAL ASSOCIATION, UNDERSTANDING CHILD SEXUAL ABUSE: EDUCATION, PREVENTION, AND RECOVERY, at <http://www.apa.org/releases/sexabuse> (Oct. 1999). One court noted that “family incest as [a] pattern of behavior tak[es] place over long period of time and . . . characteristically involves secrecy, denial, power imbalances, and isolation.” *State v. Forbes*, 640 A.2d 13, 15 (Vt. 1993) (citing *D. BERSHAROV, RECOGNIZING CHILD ABUSE* 93-95 (1990)).

233. C.J. Newton, *Child Abuse: An Overview*, TherapistFinder.net Mental Health Journal, at <http://www.therapistfinder.net/Child-Abuse/Sexual-Abuse.html> (April 2001) (quoting David and Anne Delaplaine, *Victims of Child Abuse, Domestic Violence, Elder Abuse, Rape, Robbery, Assault, and Violent Death: A Manual for Clergy and Congregations*, at <http://www.ojp.usdoj.gov/ovc/publications/infores/clergy/welcome.html>).

234. *Id.*

235. *Id.*

236. *Id.*

237. See *infra* note 253.

238. See KAN. STAT. ANN. § 60-455 (1994). The plain language of this statute does not allow for a different standard in sexual misconduct cases. See *id.*

The legislation would allow a propensity inference that the defendant acted in accord with a character trait to molest children, while requiring the court to balance the set of factors recommended by the Judicial Conference.²³⁹ As part of the similarity analysis required by these factors, the legislation should include a flexible definition of similarity that considers the concept of child molestation, accounts for escalating forms of abuse, and takes a middle road between both extremes to promote fairness to both the victim and the defendant.²⁴⁰ Before proposing this solution, this commentary will consider problems inherent in the Kansas Supreme Court's decision in *Jones* as well as the two sides of the argument for admitting evidence under Federal Rules of Evidence 413 to 415.

1. The Court Misapplied Precedent and Its Standard of Review in *Jones*

The Kansas Supreme Court in *Jones* failed to adequately consider its own precedent that would allow for admission of the prior crime in this case under Kansas' similarity standards. Kansas Supreme Court decisions have recognized at least seven different similarity standards.²⁴¹ Although the crimes in this case may not have met the striking similarity or signature standard, the court could have allowed the evidence in under a lower degree of similarity as it has done in the past. In *Gonzales*, for example, the court found sufficient similarity because, even though the defendant did not rape each victim, he displayed force.²⁴² Additionally, in *Morgan*, the court found that the defendant had forcibly raped the women under somewhat similar circumstances.²⁴³ Each of these similarity standards would have worked in *Jones*. Although *Jones* did not achieve penetration with each victim, all three girls were violated in the vaginal area.²⁴⁴ There was a difference in S.J.'s first sexual encounter with *Jones*, but other sexual violations occurred under similar circumstances when the girls were alone with *Jones* during the sex acts, kept the acts a secret, and

239. See *infra* note 299 and accompanying text.

240. See De Sanctis, *supra* note 2, at 374-78 (suggesting that in a domestic violence situation similarity tests should focus on the concept of domestic violence rather than specific fact scenarios).

241. State v. Damewood, 783 P.2d 1249, 1253 (Kan. 1989) (strikingly similar); State v. Tolson, 56 P.3d 279, 283 (Kan. 2002) (describing the method used in *Damewood* as signature); State v. Hampton, 529 P.2d 127, 130 (Kan. 1974) (marked similarity); State v. Rucker, 987 P.2d 1080, 1088 (Kan. 1999) (substantially similar); State v. Gonzales, 535 P.2d 988, 990 (Kan. 1975) (sufficient similarity); State v. Clements, 843 P.2d 679, 682 (Kan. 1992) (similar enough); State v. Morgan, 485 P.2d 1371, 1372 (Kan. 1971) (somewhat similar circumstances).

242. *Gonzales*, 535 P.2d at 989-90.

243. *Morgan*, 485 P.2d at 1372.

244. See State v. Jones, 85 P.3d 1226, 1232 (Kan. 2004).

were told by Jones that he loved them or he requested them to return the expression of love.²⁴⁵

The court in *Clements* found that the defendant's approach was similar enough even though the defendant's prior crime was for performing oral sex on an eleven-year-old boy he sometimes saw at a baseball card shop, and the charged crime was for developing a relationship with a family, hiring young boys in the family to help him, and then molesting them.²⁴⁶ Had the court in *Clements* focused on the dissimilarities as the *Jones* court did, it probably would not have admitted the evidence. As in *Jones*, the defendant in *Clements* placed himself in a situation in which he had access to his victims.²⁴⁷ *Clements* gained their trust and then molested them.²⁴⁸ Jones also placed himself in situations in which he had access to young girls through his relationship with their mother.²⁴⁹ He gained their trust and then molested them.²⁵⁰ Thus, analogous to the circumstances and context in *Jones*, the evidence would have met the similarity standard articulated in *Clements*. The court in *Jones*, however, failed to even consider the facts of *Clements* before it stated that this standard was not met in *Jones*.²⁵¹

In *Jones*, the court noted several differences from the prior crime, but failed to explain why those differences would not allow for admission under a lower degree of similarity.²⁵² A strikingly similar or high degree of fact-specific similarity in child molestation cases is not fair to the victim because such an analysis does not consider the overall concept behind child molestation when a defendant, for example, uses his position in the family to gain the trust of a child in order to molest her.²⁵³

Courts might support a high standard of similarity because it best illustrates the defendant's plan or modus operandi.²⁵⁴ Distinctive acts by the defendant demonstrate the defendant's plan for molesting children. Such distinctive acts are easy to identify in cases in which the abuse does not take place over a long period of time. For example, in

245. *Id.* at 1228-29, 1232.

246. *Clements*, 843 P.2d at 680-81.

247. *See id.*

248. *See id.*

249. *See Jones*, 85 P.3d at 1228-30.

250. *See id.*

251. *Id.* at 1231.

252. *See id.* at 1231-32.

253. *See supra* notes 232-37 and accompanying text. De Sanctis makes a similar argument that it is difficult to find a high degree of similarity in domestic violence cases because they "can appear extremely dissimilar on their facts." De Sanctis, *supra* note 2, at 377. In addition, similarity tests in domestic violence situations are flawed because they "require similarity based on their facts, not on their concept. Acts of domestic violence are similar in their concept." *Id.* at 395.

254. *See Purinton, supra* note 24, at 31.

State v. Kackley,²⁵⁵ a recent case from the Kansas Court of Appeals distinguishing *Jones*, the court found a distinct signature because in each case the defendant placed the victim's hand on his penis.²⁵⁶ The court of appeals in that case indicated that the defendant's actions to initiate the abuse served to illustrate his signature.²⁵⁷ Because the molestation did not take place over a long period of time, the court of appeals could not evaluate any significant differences that occurred based on the passage of time.²⁵⁸

The majority in *Jones* also did not account for differences that occurred because of escalating forms of abuse. Requiring a high degree of similarity in child molestation cases is problematic because it does not take into account the context of abuse that occurs over a significant period of time, or a defendant's escalations in abuse.²⁵⁹ In *Jones*, the abuse took place over a period of years, and Jones had different opportunities with M.W. and S.J. than were available when he abused L.D.²⁶⁰ For example, in the second abuse scenario, the victim's mother was willing to participate in the sex acts.²⁶¹ L.D.'s mother, on the other hand, did not participate.²⁶² This participation or influence from the victim's mother, as well as Jones' escalations of abuse, could account for the dissimilarities from *Jones*.

The Kansas Supreme Court should not have considered differences that occurred because of the victims' varied responses to Jones. A court should not look at the victim's response to the abuse to determine whether the abuse was similar because it does not show similarity in the *defendant's actions*. The court noted in *Jones* that the defendant did not achieve intercourse with L.D.²⁶³ This failure should not be considered dissimilar because Jones attempted intercourse with L.D. but was unsuccessful because of her adverse response.²⁶⁴ Jones would have had intercourse with L.D. had her reaction not prevented him.²⁶⁵

255. 92 P.3d 1128 (Kan. Ct. App. 2004).

256. *Id.* at 1133.

257. *Id.*

258. *See id.* at 1131.

259. *See supra* notes 232-37 and accompanying text; De Sanctis, *supra* note 2, at 376. De Sanctis makes a similar argument, that in a domestic violence situation it is unlikely that the act of killing a former girlfriend's pet would be sufficiently similar to slapping a current girlfriend, or stalking an ex-wife. Even though they are conceptually similar - violent acts committed upon an intimate partner for the purpose of maintaining power, dominance, and control - they are factually dissimilar and therefore likely to be held inadmissible.

Id.

260. *See State v. Jones*, 85 P.3d 1226, 1228-30 (Kan. 2004).

261. *Id.* at 1228.

262. *Id.* at 1230.

263. *Id.* at 1232.

264. *Id.*

265. *Id.*

In *Jones*, the court incorrectly focused on the dissimilarities between the experiences of S.J. and L.D.²⁶⁶ The court decided that one incident of rituals, group sex, and discussion of each victim wearing their own colored lingerie meant that the whole abusive situation was not similar.²⁶⁷ The court failed to look at the other acts of abuse that occurred over a long period of time between S.J. and Jones, as well as other acts of abuse between M.W. and Jones.²⁶⁸ Had the court considered this overall context of the abusive situation, rather than one particular incident, it could have concluded that the crimes were similar.

In addition to the court's failure to apply its precedent, the court also failed to follow its purported abuse of discretion standard of review. While the majority's decision cited this standard as the proper standard for review, it did not articulate how the trial judge's decision violated that standard by being "arbitrary, fanciful, or unreasonable."²⁶⁹ The majority's review of the case never explained why the trial judge's decision was so irrational that no reasonable person would have ruled in that manner.²⁷⁰ As the dissent noted, "reasonable persons could differ as to the propriety of the action taken by the trial court."²⁷¹ In short, the dissenting opinion demonstrates that reasonable persons could disagree on this point, thus the trial judge did not act unreasonably by admitting the prior crimes evidence in *Jones*.

Finally, *Jones* has negative consequences for both trial court judges and prosecutors throughout Kansas. First, it severely limits a trial court judge's ability to admit prior crimes evidence under the plan exception to section 60-455 in child molestation cases when the defendant claims that the abuse did not occur.²⁷² In addition, even if judges weigh and balance the probative and prejudicial value of the prior crimes evidence, they risk reversal because the evidence did not qualify as similar.²⁷³ As a result, judges cannot consider the context of child molestation, but will instead have to participate in a convoluted, fact-centered analysis. In turn, prosecutors will have difficulty convincing a judge that the prior crime was similar if the abuse scenario contains differences. The new Kansas Supreme Court will curb its liberal view of admission in plan exception cases by requiring a high de-

266. See De Sanctis, *supra* note 2, at 379 (arguing that in a domestic violence situation "acts of domestic violence are seemingly dissimilar on their facts and yet extremely similar in their concept: dominating, terrorizing, and controlling an intimate partner or ex-partner").

267. See *Jones*, 85 P.3d at 1232.

268. See *id.* at 1228-29.

269. *Id.* at 1236 (Davis, J., dissenting).

270. See *id.* at 1226-33.

271. *Id.* at 1236 (Davis, J., dissenting).

272. See *id.* at 1232.

273. See *id.*

gree of fact-specific similarity before the evidence will qualify for admission.²⁷⁴

2. Arguments For and Against the Federal Rules of Evidence

If the Kansas legislature had adopted Federal Rules of Evidence 413 to 415, then the Kansas Supreme Court could have easily admitted the evidence in the *Jones* case. Under Rule 414(a), the propensity inference is allowed, and the evidence is considered “for its bearing on any matter to which it is relevant.”²⁷⁵ In *Jones*, the evidence of Jones’ prior conviction for molesting L.D. was clearly relevant to the present child molestation case involving M.W. and S.J.²⁷⁶ Thus, under the current federal rules, the prior crimes evidence would have been admitted in *Jones*.

Although Rule 414 would have admitted the evidence in the *Jones* case, opponents to this rule have described a number of drawbacks to the rule, including fairness to the defendant. Criticism has centered on two main arguments: “[r]isk of misdecision” and “[r]isk of overevaluation.”²⁷⁷ Under misdecision, critics assert that juries will convict a defendant based on prior crimes evidence because they perceive the defendant as a bad person.²⁷⁸ In turn, this prejudice will circumvent the due process requirements of reasonable doubt.²⁷⁹ A misdecision by a jury will then lead to overevaluation.²⁸⁰ Critics assert that a jury will rely too heavily on its negative perception of the defendant in sexual misconduct cases and wrongly convict.²⁸¹

Opponents also contend that Rules 413 to 415 are poorly written. They point out that the text does not indicate whether the rules are subject to the Rule 403 balancing test.²⁸² They also say that the rule does not require a judge to give a jury limiting instructions.²⁸³ Additionally, the rules do not clearly indicate that a defendant can introduce evidence that rebuts the prior crimes evidence.²⁸⁴ In sum, the ambiguous language of these rules does not indicate whether Rules 413 to 415 will displace or coincide with other rules of evidence.²⁸⁵

274. See *supra* note 18 and accompanying text.

275. FED. R. EVID. 414(a).

276. According to the Tenth Circuit, the decision would also have been subject to the Rule 403 balancing test. *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998).

277. Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 289-92 (1995).

278. *Id.* at 291.

279. *Id.* at 293; see Adam Kargman, Note, *Three Maelstroms and One Tweak: Federal Rules of Evidence 413 to 415 and Their Arizona Counterpart*, 41 ARIZ. L. REV. 963, 965 (1999).

280. Imwinkelried, *supra* note 277, at 292.

281. *Id.*

282. Kargman, *supra* note 279, at 974-75, 986.

283. *Id.* at 977-78, 986.

284. See *id.* at 982-83, 986.

285. *Id.* at 974-75.

Proponents of the federal rules also articulate a number of arguments, including fairness to the victim. Advocates believe that prior crime evidence should be admitted because it addresses the “swearing matches that occur between victims and defendants.”²⁸⁶ They argue that gender bias and stigmas associated with sex crimes create a disadvantage for victims.²⁸⁷ Moreover, prosecution in these cases is difficult because of the secretive nature of the abuse and because prosecutors frequently struggle with victim testimony.²⁸⁸ Proponents also argue the doctrine of chances: someone who molested a child in the past would not likely have the “bad luck” of being falsely accused of molesting another child.²⁸⁹ Furthermore, current personality theories warrant this propensity inference.²⁹⁰

Each of these arguments has merit and represents the extreme view of each side. Many scholars have considered the pros and cons of this issue.²⁹¹ The purpose of this comment is not to revisit the merits of each side, but to propose a common ground that will avoid future convoluted analysis under an antiquated statute. This common ground can give prosecutors and judges a predictable framework for analyzing prior crimes evidence in sexual misconduct cases, and can offer fairness to both the victim and the defendant.

3. A Middle Ground

Kansas courts have not participated in the debate about Federal Rules of Evidence 413 to 415. Their decisions, however, struggle with the same issue. Before passing section 60-455, Kansas courts liberally admitted prior crimes evidence under the lustful disposition framework.²⁹² Even after section 60-455 was promulgated, Kansas courts, essentially allowing a propensity inference concealed by the similarity standard, continued to liberally admit prior crimes evidence in sexual molestation cases, but did so by circumventing the plain language of the statute.²⁹³ Only recently, in *Jones*, did the Kansas Supreme Court begin to restrict this precedent, and therefore move away from the structure promoted by Rules 413 to 415.

By articulating seven different similarity standards, the Kansas Supreme Court has continued to perpetuate an incongruous interpretation of section 60-455.²⁹⁴ The plain language of the statute does not

286. De Sanctis, *supra* note 2, at 383.

287. *Id.* at 384.

288. *Id.* at 383.

289. Imwinkelried, *supra* note 87, at 1130-31.

290. De Sanctis, *supra* note 2, at 385.

291. *See e.g.*, De Sanctis, *supra* note 2, at 383-77 (advocating for Rules 413 to 415); Imwinkelried, *supra* note 87, at 1125-50 (advocating against Rules 413 to 415).

292. *See, e.g.*, State v. Stitz, 206 P. 910 (Kan. 1922).

293. *See* Purinton, *supra* note 24, at 31-32.

294. *See supra* Part III.A. (explaining the different similarity standards).

allow different treatment under the plan exception for sexual and non-sexual cases, though Kansas has liberally admitted prior crimes evidence in sexual misconduct cases.²⁹⁵ Thus, under the plain language of the statute, sexual misconduct cases would not be treated any differently than non-sexual misconduct cases, and the evidence in *Jones* would not have come in.

The current language of section 60-455, the lack of legislative history for the statute, and the inconsistency of Kansas Supreme Court decisions interpreting this law all substantiate the need to change the law. To address the context of child molestation and the confusion created by the Kansas Supreme Court, and to be fair to both the victim and the defendant, the Kansas legislature should adopt the Federal Rules of Evidence 413 to 415, along with some of the recommendations from the Judicial Conference. Like the approach taken in Arizona, Kansas should incorporate its common law practices when drafting the legislation.²⁹⁶ Thus, the Kansas rule should allow a court, when balancing the factors articulated by the Judicial Conference, to include a test that incorporates its common law practice of admitting evidence that allows for varying degrees of similarity.

Congress enacted Federal Rules of Evidence 413 to 415 without including recommendations from the Judicial Conference.²⁹⁷ Although the Conference did not agree with the policy decision behind these rules, the Conference suggested that Rules 413 and 414 be subject to the Rule 403 balancing test.²⁹⁸ Along with that recommendation, the Judicial Conference suggested that a trial court should consider the following factors when admitting prior crimes evidence: “(i) proximity in time to the charged or predicate misconduct; (ii) similarity to the charged or predicate misconduct; (iii) frequency of the other acts; (iv) surrounding circumstances; (v) relevant intervening events; and (vi) other relevant similarities or differences.”²⁹⁹ Because Congress did not include these recommendations, some commentators have suggested that the plain language of these rules is problematic and confusing. They argue that the plain language does not determine whether the rules are subject to the Rule 403 balancing test, whether a judge must instruct the jury as to the limited purpose of the evidence, or whether the defendant can offer evidence that would rebut the prosecution’s damaging evidence.³⁰⁰

295. See KAN. STAT. ANN. § 60-455 (1994); Purinton, *supra* note 24, at 30.

296. See *infra* note 302-03 and accompanying text.

297. See FED. R. EVID. 413-415; Judicial Conference of the United States, *supra* note 93, at 51-57.

298. Judicial Conference of the United States, *supra* note 93, at 51-54.

299. *Id.* at 55.

300. See Kargman, *supra* note 279, at 986.

Currently, Arizona takes a different approach than Kansas to the admission of sexual misconduct evidence by addressing the commentators' concerns with Rules 413 to 415. In 1997, to overcome weaknesses in the rules, the Arizona Supreme Court³⁰¹ revised its evidence law to include Rules 413 to 415 with the necessary revisions.³⁰² This law both codifies and modifies Arizona's common law practices.³⁰³

301. In Arizona, the Arizona Supreme Court has the authority to promulgate laws for its state courts, and the Arizona legislature cannot repeal these laws. *Id.* at 982.

302. The comprehensive Arizona Rule of Evidence 404(c) states:

- (c) Character evidence in sexual misconduct cases. In a criminal case in which a defendant is charged with having committed a sexual offense, or a civil case in which a claim is predicated on a party's alleged commission of a sexual offense, evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.
- (1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:
- (A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.
 - (B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.
 - (C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:
 - (i) remoteness of the other act;
 - (ii) similarity or dissimilarity of the other act;
 - (iii) the strength of the evidence that defendant committed the other act;
 - (iv) frequency of the other acts;
 - (v) surrounding circumstances;
 - (vi) relevant intervening events;
 - (vii) other similarities or differences;
 - (viii) other relevant factors.
 - (D) The court shall make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1).
- (2) In all cases in which evidence of another act is admitted pursuant to this subsection, the court shall instruct the jury as to the proper use of such evidence.
- (3) In all criminal cases in which the state intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the state shall make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause. The defendant shall make disclosure as to rebuttal evidence pertaining to such acts as required by Rule 15.2, no later than 20 days after receipt of the state's disclosure or at such other time as the court may allow for good cause. In all civil cases in which a party intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the parties shall make disclosure as required by Rule 26.1, Rules of Civil Procedure, no later than 60 days prior to trial, or at such later time as the court may allow for good cause shown.
- (4) As used in this subsection of Rule 404, the term "sexual offense" is as defined in A.R.S. § 13-1420(C).

ARIZ. R. EVID. 404(c).

303. Kargman, *supra* note 279, at 984-86. In addition to incorporating Rules 413 to 415, this rule of evidence also codifies Arizona's common law practice of admitting evidence based on the defendant's "continuing emotional propensity to commit the offense charged." *Id.* Kargman also compares and contrasts Rules 413 to 415 and Arizona common law with the new rule adopted in 1997. *Id.*

Arizona's statute is comprehensive in nature and avoids many of the pitfalls of Rules 413 to 415.³⁰⁴

In criminal and civil cases, the Arizona law admits evidence "to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged."³⁰⁵ Unlike Rules 413 to 415, the plain language of the Arizona statute allows a defendant to present rebuttal evidence as a counter to the prosecution's sexual misconduct evidence.³⁰⁶ It also requires that the court make specific findings to determine whether the prejudicial effect of the evidence outweighs any probative value.³⁰⁷ The court must give jury instructions that limit the jury's use of the evidence during deliberations.³⁰⁸ Finally, the prosecution or plaintiff must give the defendant at least forty-five days' notice in criminal cases and sixty in civil cases that she intends to introduce sexual misconduct evidence.³⁰⁹ These requirements are in the Arizona statute to overcome the ambiguities in Rules 413 to 415. This Arizona statute serves as a model rule that incorporates the Federal Rules of Evidence, the recommendations from the Judicial Conference, as well as the state's common law.

Considering Rules 413 to 415 and the Arizona approach, the Kansas legislature should amend section 60-455 to include language from Rules 413 to 415, along with the recommendations of the Judicial Conference. When balancing the factors proposed by the Judicial Conference, the legislation should also include a similarity definition that encompasses the Kansas Supreme Court's practice of admitting evidence under both high and low similarity standards in sexual misconduct cases.

The Judicial Conference's recommendations offer the necessary safeguards to a defendant charged with a sexual misconduct crime. The Kansas rule should be subject to a balancing test; the trial judge should have a set of factors to evaluate; the defendant should receive adequate notice and have the ability to present rebuttal witnesses; and the jury should have a limiting instruction.³¹⁰

304. *Id.* at 986. Kargman noted that Arizona Rule 404(c) put[s] to rest such questions as whether judges need to conduct 403 balancing tests, whether judges must issue limiting instructions, and whether defense counsel can introduce evidence to rebut other acts evidence. As a result, the Arizona rule poses much less of a hazard to the truth-seeking function of criminal trials.

Id.

305. ARIZ. R. EVID. 404(c).

306. *Id.*

307. ARIZ. R. EVID. 404(c)(1)(C)-(D).

308. ARIZ. R. EVID. 404(c)(2).

309. ARIZ. R. EVID. 404(c)(3).

310. *See supra* notes 297-309 and accompanying text.

In addition to the safeguards recommended by the Judicial Conference, the Kansas law should encompass Kansas' common law practice of liberally admitting prior crimes evidence in sexual misconduct cases.³¹¹ Although Kansas adopted section 60-455 in 1963, the Kansas Supreme Court has not followed the statute's plain language in sexual misconduct cases.³¹² When adopted, section 60-455 provided no legislative history, and the Kansas Supreme Court found ways to interpret the law consistent with its common law practices, rather than applying the plain language of the statute.³¹³ Although contrary to notions of statutory interpretation, Kansas Supreme Court decisions that have liberally admitted evidence in these cases reflect the nature of sexual abuse.³¹⁴ The proposed Kansas law should reflect this common law practice of the Kansas Supreme Court prior to *Jones*.

To implement Kansas' common law, the proposed law should allow the trial court to consider evidence that has both high and low degrees of similarity when balancing the similarity factors proposed by the Judicial Conference.³¹⁵ When evaluating the similarity of the prior crime to the charged crime, the court should consider the following factors, among others: gender, age, familial and trust relationships, the defendant's conduct including location of the abuse, circumstances surrounding the abuse, and language used by the defendant.

The degree of similarity should vary from high to low, according to the definitions stated in Kansas common law.³¹⁶ These descriptions include: strikingly similar, signature, similar enough, marked similarity, substantially similar, sufficient similarity, and somewhat similar circumstances.³¹⁷ In addition, the court's analysis should center on the defendant's actions and not on dissimilarities that arise from victims' responses. In weighing the factors, the court should focus on the entire picture of abuse and its surrounding context and should not find dispositive the differences that occur because of a defendant's escalating behavior and abuse that occurs over a long period.³¹⁸

Amending the law to include Rules 413 to 415, Judicial Conference recommendations, and Kansas common law would be effective because it takes the middle ground between the two extremes and would put to rest dispute over the application of section 60-455 in sexual misconduct cases. The Kansas Supreme Court would no longer have to look for reasons to admit this evidence despite the plain lan-

311. See Purinton, *supra* note 24, at 30.

312. *Id.*

313. *Id.*

314. See *supra* notes 232-37 and accompanying text.

315. See Judicial Conference of the United States, *supra* note 93, at 55.

316. See *supra* Part III.A.

317. See *supra* Part III.A.

318. See *supra* notes 232-37 and accompanying text

guage of the law.³¹⁹ Such a law would also put discretion back in the hands of the trial court and give prosecutors a tool in cases where prosecution is difficult. Finally, the law, like Arizona's approach, would remedy weaknesses in Rules 413 to 415.³²⁰

In *Jones*, the proposed law would have given the trial court a framework to admit the prior crimes evidence. Balancing the similarity factors, the court could have considered the entire context of the abusive situation to conclude that the evidence was similar. The court would not have been required to consider that Jones did not achieve sexual intercourse with L.D. but did with M.W. and S.J. Additionally, the court would have been able to look at the entire abusive situation, rather than determining that an incident in which M.W. and S.J. participated in a ritualistic form of group sex was dispositive.

Considering Jones' escalating forms of abuse, the court could have concluded that despite this incident, the overall context of the abuse in *Jones* was similar to L.D.'s experience. As in L.D.'s case, Jones put himself in a position as a father figure toward young girls and used that position of trust to molest young girls under his control.³²¹ Additionally, Jones molested the girls in their vaginal area, required that the abuse remain a secret, and in the case of L.D. and M.W. requested that the girls return his expressions of love.³²² Jones' escalating forms of abuse with S.J. would not be dispositive and would be admitted under a lesser degree of similarity. Under a similarity standard incorporating the factors from the Judicial Conference and the Kansas Supreme Court's precedent allowing varied degrees of fact-specific similarities, the court could have admitted the prior crimes evidence in *Jones*.

V. CONCLUSION

In *State v. Jones*, the Kansas Supreme Court incorrectly held that evidence of a prior crime for indecent liberties with a child did not qualify as similar under the plan exception to section 60-455 of the Kansas Statutes Annotated. In doing so, the court created more confusion by basing its decision on a tortured analysis of the similarity standard, by failing to follow precedent and the announced standard of review that would allow for admission under a lower degree of similarity, and by failing to consider the context in which child molestation occurs.

319. See Purinton, *supra* note 24, at 30.

320. Kargman, *supra* note 279, at 86.

321. See *State v. Jones*, 85 P.3d 1226, 1234 (Kan. 2004) (Davis, J., dissenting).

322. See *id.* (Davis, J., dissenting).

Because the court chose not to follow its own precedent, *Jones* represents a new trend for the admission of prior crimes evidence in sex abuse cases in Kansas. It is a dangerous precedent for those cases in which abuse occurs over a long period and victims react differently to a defendant's sexual advances. After *Jones*, trial court judges no longer have discretion to admit prior crimes evidence in sexual misconduct cases under the similarity standard to the plan exception when the defendant denies that any abuse occurred. Admitting such evidence could result in a reversal of the jury's decision. As a result, prosecutors will have a high burden to meet when seeking to admit prior crimes evidence.

In response to this confusion, the Kansas legislature should pass legislation that adopts a middle ground, which is fair to both the victim and the defendant. The legislation should also implement suggestions made by the Judicial Conference. Under the Conference's factors, the legislation should encompass Kansas' practice of liberally admitting prior crimes evidence in sexual misconduct cases. Such legislation would create a more balanced playing field for both victims and defendants in sexual misconduct cases. In addition, it would have allowed the trial court judge in *Jones* to admit the evidence at his discretion, while providing necessary safeguards to the defendant.