STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 6, 2001
v	No. 216176 Muskegon Circuit Court
GEORGE LAWRENCE VERNON, Defendant-Appellant.	LC No. 97-141419-FC

Before: White, P.J., and Talbot and R.J. Danhof,* JJ.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct (CSC), 750.520b; MSA 28.788(2). He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to twenty to forty years' imprisonment. He appeals as of right. Because other acts evidence was admitted in error and the error was not harmless, we reverse and remand for a new trial.

I

In the instant case, defendant was accused of digitally penetrating an eight-year-old girl; the daughter of a couple with whom defendant and his wife were friends. Defendant and his wife were at the couple's home on Thanksgiving night in 1997, along with another adult and the couple's two children, the victim, and her four-year old brother. The five adults and children were in the basement for a while, the adults talking and drinking, and the children playing. For a time the children "roughhoused" with their father and defendant, running at them, being picked up and tossed on the couch. After a time, the children were asked to go upstairs to watch television, and the adults remained in the basement. Later, the four-year-old boy came down to the basement and complained that he did not want to see the television show his sister was watching. One of the adult women asked defendant to go and check on the kids, and defendant went upstairs for about five to ten minutes, at which point he returned to the basement. Shortly after, the victim asked that her mother come upstairs, seemed upset, and told her mother that defendant had touched her private parts. The victim testified at trial that when defendant came upstairs that evening, he sat down next to her on one couch while her brother was on another couch, held her like a baby and, while talking constantly, put his hand up the pant leg of her shorts and under her underwear, put his finger inside her, and moved it around.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The prosecution was allowed to present evidence that in 1989, defendant had had sexual intercourse with a fifteen-year-old friend of his niece at his home, after providing her with alcohol, forcing her to dance with him and taking her clothes off.

II

Defendant argues that the trial court improperly admitted other acts testimony in violation of MRE 404(b). We review the trial court's admission of other acts evidence for abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). MRE 404(b) provides:

> (1) 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in this case.

The standard for determining the admissibility of other acts evidence is:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v VanderVliet,* 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

In *Crawford, supra* at 385, the Court addressed the test set forth in *VanderVliet* and stated:

> Under this formulation, the prosecution bears the initial burden of establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b). Where the only relevance is to character or the defendant's propensity to commit the crime, the evidence must be excluded. Where, however, the evidence also tends to prove some fact other than character, admissibility depends on whether its probative value outweighs its prejudicial effect, taking into account the efficacy of a limiting instruction in cushioning the prejudicial effect of the evidence.

It is insufficient for the prosecution to merely recite one of the purposes articulated in MRE 404(b). *Id.* at 387. "If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character." *Id.* at 390.

The prosecution filed a notice of intent to introduce other acts evidence before trial, arguing that, in 1989, defendant was charged with third-degree CSC of a fifteen-year-old female, at a time when defendant was thirty-one years old. The prosecution argued that it sought to

introduce the testimony "in order to show the intent (sexual gratification) behind defendant's touching of the youngster in the instant case and to show lack of mistake or accident." Defendant objected to the admission of the testimony.

The trial court's opinion and order admitting the other acts testimony stated in pertinent part:

> Here, the prior bad-acts evidence is offered, not to show that Mr. Vernon is a person of bad character or has a propensity for committing certain crimes, but, rather, for the purpose of providing defendant's intent or absence of accident or mistake, proper purposes under MRE 404(b).
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> As to the issue of relevancy required by MRE 404(b) in the case at hand, the proffered prior bad act was similar to the charged crime *in that it involved criminal sexual activity with a minor female in an environment in which the victim felt or was led to feel safe and secure*. Intent is a necessary element of the charged crime and will be a material issue in this case. Likewise, since the Court has already ruled that it will allow the testimony of Sgt. Tillman, the issue of accident or mistake will also be before the jury. The testimony concerning the prior case need only be sufficiently similar to the charged crime to be relevant to the issue at hand; they need not be exact in every respect. According to *VanderVliet*, [w]hen other acts are offered to show intent, logical relevance dictates only that the charged crime and the proffered other 'are of the same general category.'" *VanderVliet*, *supra* at 79-80, quoting Imwinkelried, Uncharged Misconduct Evidence, Sec 3:11, p. 23. Accordingly, the Court finds that the relevance requirement of MRE 404(b) is satisfied.
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> * * *
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> As indicated above, intent and absence of mistake or accident are expected to be important issues in this case. The issues of intent and those of absence of mistake or accident are inextricably connected. Whether or not the Defendant chooses to raise mistake or inadvertence as a defense, it is still incumbent upon the People to prove each and every element of the offense which includes proving beyond a reasonable doubt that the Defendant intended to penetrate her and that it was not accidental or inadvertent. [Emphasis added.]

At trial, the prosecutor elicited testimony from the alleged former victim that in the summer of 1989 she was a friend of defendant's niece, went with defendant's niece to babysit at defendant's house, and that defendant bought beer and wine coolers for her, his niece, and his niece's boyfriend, who was there at the time as well. She testified that while the four of them played Yahtzee and listened to the radio, defendant rubbed her back and that it made her feel uncomfortable. At some point defendant's niece and her boyfriend left, and she remained with defendant, drinking and listening to the radio. She testified that she was pretty intoxicated, that defendant asked her to dance, that she said she did not want to, but he kept insisting and eventually grabbed her by the hands and dragged her to dance with him. She testified that he danced her into the bedroom, started taking off her shirt and that, although she said to him that

she was not comfortable and that he was way too old for her, he persisted and kept taking off her clothes. She testified that "then we ended up having sex," that they had sexual intercourse, and that defendant then got up, got dressed, and left. She testified that she reported the incident to the police a few months later. On cross-examination, defense counsel asked only five questions: her date of birth, whether she had been fifteen years old when the 1989 incident occurred, rather than fourteen years old as she had testified, whether she had any familiarity with the incident that led to the instant charge against defendant, and whether she had discussed the case with any of the victim's family. The witness agreed that she had been fifteen years old at the time of the incident and testified that she did not know and had had no discussion with any of the people involved in the instant case.

The trial court gave a cautionary instruction after her testimony and as part of the final instructions.

A

The prosecution argues on appeal that to demonstrate intent and absence of accident, other acts evidence does not have to be as similar as when demonstrating plan or scheme, and that the 404(b) evidence admitted in the instant case "did resemble the charged act in certain respects. In both, the defendant after drinking manipulated a minor's clothing and penetrated her after engaging in grooming behavior. These acts per VanderVliet were of the . . . 'same general category.'"

When used as in the instant case to prove intent, or absence of mistake or accident in doing an act, the admissibility of other acts evidence is based on the doctrine of chances. In discussing the absence of mistake or accident exception of Federal Rule of Evidence 404(b),[1] Wright & Graham, 22 Federal Practice & Procedure, § 5246, pp 517-519, state in pertinent part:

> The final exception listed in Rule 404(b), "absence of mistake or accident", is simply a special form of the exception that permits the use of other crimes to prove intent. . . . Often the absence of mistake or accident is proved on a notion of probability; i.e., how likely is it that the defendant would have made the same mistake or have been involved in the same fortuitous act on more than one occasion. *The relevance of other crimes for this purpose depends very much on the nature of the act involved*; one might inadvertently pass more than one counterfeit bill but two accidental shootings of the same victim seem quite unlikely.
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> The justification for admitting evidence of mistake or accident is the same as for the other exceptions involving proof of the defendant's state of mind. When

[1] MRE 404(b) is identical to FRE 404(b) except that the word "plan" is replaced by the phrase "scheme, plan, or system in doing an act," and there is added the phrase "when the same is material, whether such other crime, wrongs, or acts are contemporaneous with, or prior or subsequent to the crime charged." See Institute of Continuing Legal Education, Michigan Rules of Evidence Annotated, Note to Rule 404, p 104 (1999-2000 ed).

> offered for this purpose, no inference to any conduct of the defendant is required and, in addition, in many cases the evidence does not require any inference as to the character of the accused. [Emphasis added.]

The Michigan Supreme Court discussed the logical underpinnings of the doctrine in *Crawford, supra*:

> To establish the probativeness of the evidence, the prosecutor invokes the "doctrine of chances," also known as the "doctrine of objective improbability." [Footnote deleted] This theory, which is attributed to Professor Wigmore, is widely accepted, although its application varies with the issue for which it is offered. Where material to the issue of mens rea, as here, it rests on the premise that "the more often the defendant commits an actus reus, the less is the likelihood that the defendant acted accidentally or innocently." Imwinkelried, Uncharged Misconduct Evidence, § 3:11, p 45. Consequently, the forbidden intermediate inference to defendant's subjective character is not implicated:
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> > [T]his theory of logical relevance does not depend on a character inference. The proponent is not asking the trier of fact to infer the defendant's conduct (entertaining a particular mens rea) from the defendant's personal, subjective character. The intermediate inference is an objective likelihood under the doctrine of chances rather than a subjective probability based on the defendant's character. [*Id*., § 5:05, p 12.]
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> However, Imwinkelried cautions against the routine admission of prior misconduct evidence under the doctrine of chances because the theory is prone to abuse and may result in the admission of character evidence in disguise:
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> > [The doctrine of chances theory] can easily be abused. . . . [I]ntent is an essential element of every true crime. Whenever the prosecutor has evidence of an uncharged crime similar to the charged offense, the prosecutor can attempt to invoke Wigmore's doctrine of chances; [. . . .] If the courts accept these arguments uncritically, the prosecutor may be able to introduce bad character evidence in disguise. . . . []
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> Elaborating on the foundational requirements for triggering the doctrine of chances to prove mens rea, Imwinkelried explains that the prosecutor must "make persuasive showings that each uncharged incident is similar to the charged offense and that the accused has been involved in such incidents more frequently than the typical person."[12] We find this reasoning to be sound. The applicability of the doctrine of chances depends on the similarity between the defendant's prior conviction and the crime for which he stands charged. [Footnote deleted.] [*Crawford, supra* at 392-395.]

[12] Weinstein states:

> In each individual case, the trial judge must decide whether the proffered evidence tends to make the consequential fact more or less probable. If the connection between the other crime and the charged crime is strong, admission may be appropriate. If the connection is weak, exclusion is generally sound. If enough time has passed, the other crime may be of such attenuated probative value as to warrant exclusion. [2 Weinstein, n 7 *supra* at § 404.21(2)(c), pp 404-54 to 404-55.]

In *Crawford*, although both the prior conviction and the act charged involved narcotics, the Court found the two offenses insufficiently similar to warrant admission of the similar acts evidence under the doctrine of chances.

Regarding the intent exception generally and the need for similarity, Wright & Graham, *supra* at § 5242, pp 490-493, state in pertinent part:

> Some cases have added a requirement that other crimes evidence used to prove intent involve crimes that are similar to the crime charged . . . This is not necessarily so. Whether the offenses must be similar and the degree of similarity required turns upon the theory on which the other crime is relevant to prove intent. Suppose that the defendant claims that he was too insane or intoxicated to have had the requisite intent. Evidence that at about the same time he had committed a wholly dissimilar crime requiring even greater mental cogency than crime charged [sic] would be relevant on the issue of intent. Or take a case in which the defendant claims that a crime was committed under duress. Proof that she engaged in other criminal acts to aid her accomplices in the absence of any duress from them would be relevant on the issue of intent without regard to the similarity or dissimilarity of the two crimes.
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> *Similarity of offenses is an important consideration when the evidence of other crimes is offered to prove intent on Wigmore's theory of improbability.* A good example is United States v. Jaqua, [485 F2d 193 (CA 5, 1973)], where the defendant was charged with an assault on a Border Patrolman when in the course of an altercation following an arrest his car had moved forward twelve inches and struck the victim on the shins. The defendant claimed that this was an accident. To prove intent, the prosecution put in evidence the fact that the defendant had been put on a peace bond in 1962 after someone shot into the home of his ex-wife, that he had struck a lady in 1965, and that after an altercation with an employer he had burned firewood valued at less than $5.00. The appellate court held this was improper because of the dissimilarity of the other incidents.
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> If the prosecution in Jaqua had offered evidence of prior assaults on law enforcement personnel, such evidence would tend to make it less likely that the instant assault was accidental. It can be argued that prior assaults show that the

> defendant does not intend to submit to the authority of peace officers. But the evidence offered in Jaqua said nothing on this crucial issue. It simply showed that the defendant may have had a belligerent disposition and therefore have been more likely to have engaged in assaultive behavior. But the commission of the act was not in issue and the dissimilarity of the prior acts made them irrelevant on the question of intent. There is no reason to suppose that persons with a violent disposition are more likely to intend to assault officers than others except by resort to the forbidden inference as to character.
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> The degree of similarity that is necessary to make other crimes evidence admissible to prove intent depends very much on the circumstances of the case. In Jaqua the nature of the crime charged was such that it was unlikely to have been planned; if the defendant had intended to assault the officers, that intent must have arisen in response to the immediate situation. Therefore, *only evidence of his response in quite similar circumstances would shed much light on his present intent*. Where the crime involved greater forethought, the need for similarity is somewhat less. Hence, evidence of prior offenses for dealing in drugs or alcohol are admissible to show intent without the same degree of similarity.

When other acts evidence is admitted as relevant on the issue of intent, or absence of accident or mistake, the evidence is admitted to prove mens rea, not the actus reus. In other words, the evidence is admitted to show that the act, otherwise established, was not done by accident or mistake, but with the requisite criminal intent. Thus, the defendant's intent or lack of mistake or accident must truly be in issue. The standards for admitting other acts to establish the actus reus are higher, *VanderVliet, supra* at 87 n 47, and the purposes should not be confused. Lastly, even where the requisite purpose, relevance and similarity are shown, the trial court must still weigh the probative value against the prejudicial impact under MRE 403.

We conclude that the admission of the prior acts evidence in this case was error. The circumstances in the instant case were not similar to those in the 1989 incident. The instant case involved alleged digital penetration; an eight-year-old; at a house at which defendant's wife, the child's parents, and another adult were present; and a four-year-old was present in the room and at the time the alleged penetration occurred. The 1989 case involved a fifteen-year-old with whom defendant and several teenagers had been drinking and listening to music, and defendant's seduction of and sexual intercourse with the girl at a time when defendant and the girl were alone on defendant's property. It is a stretch to conclude that the 1989 incident sheds light on defendant's state of mind during the charged incident through an inference based on the doctrine of chances, rather than an inference based on character.

Even if we were to conclude that the 1989 incident was sufficiently similar to be relevant under the doctrine of chances, we would nevertheless conclude that the testimony concerning the incident should have been excluded under MRE 403 because the danger of unfair prejudice substantially outweighed the probative value. The asserted relevance pertained to intent[2] or the

[2] The instant offense is a general intent crime, *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). Thus, the prosecution was not required to prove that defendant committed the actus
(continued…)

absence of mistake or accident. However, contrary to the trial court's statements in its opinion admitting the evidence, mistake or accident was only marginally material in the instant trial. The issue was interjected by the prosecution's admission of a statement attributed to defendant, which defendant denied making or intending as an admission that the act itself may have occurred. Defendant did not claim that there was an accidental touching or penetration. He maintained that there was no touching or penetration. He denied sitting with the victim in the manner described by her. His defense was fabrication on the part of the victim, coached by the victim's mother. Thus, notwithstanding the testimony from the second officer, that certain admissions were made that could raise the issue of accident, the real issues at trial were not drawn in this fashion, and the jury was really asked to decide whether the acts occurred, not whether they occurred accidentally. Counterpoised against evidence that was of questionable relevance to an issue that was not really material, was the clear prejudicial impact of the evidence. Faced with a doubt whether the incident occurred at all, not the intent with which it was done, there was a clear risk that the jury would tip the scales against defendant, concluding that he had a propensity for such conduct. *Crawford, supra* at 398-399.

B

The prosecution also argues that another permissible rationale for the admission of the 404(b) evidence was that defendant claimed that the victim's mother had coerced the victim into fabricating the charges because defendant had rebuffed the victim's mother's sexual advances a few days before the incident. The prosecution argues that "[i]f another victim disclosed defendant's sexual abuse it is much less likely" that defendant's claim of fabrication is true, citing *People v Starr*, 457 Mich 490; 577 NW2d 673 (1998). The prosecutor misanalyzes *Starr*.

In *Starr, supra*, the defendant was charged with criminal sexual conduct involving his minor adopted daughter. The minor victim in *Starr* told her mother, in response to questions, that the defendant had sexually abused her two years earlier, in 1992, when she was six years old. When the victim told her mother about the abuse, her parents had been divorced about two years and were engaged in a dispute regarding visitation. The defendant asserted that the charges were fabricated in order to prevent him from exercising visitation. The Supreme Court upheld the admission of evidence of the defendant's uncharged prior sexual conduct with his younger half-sister on the basis that it was admissible to rebut the defendant's claim that the victim's mother had fabricated the allegations.

> One of the theories presented by the defense was that the victim's mother fabricated these allegations of sexual abuse to prevent defendant from having any future contact with his adopted daughter. To refute this claim that the allegations were fabricated by the victim's mother, the prosecutor introduced defendant's half-sister who testified, on cross-examination, that the victim did not reveal the abuse until the victim was directly asked about it by her mother, two years after the abuse occurred. The mother began asking questions about defendant's

(…continued)

reus with a particular intent, but only that he intended to commit the actus reus, i.e. that the touching and penetration was not accidental.

> behavior with the victim in response to a conversation she had with defendant's half-sister. During this conversation defendant's half-sister confided that she had been abused by her brother since age four and over the course of several years. This information prompted the mother to ask the victim pointed questions about her relationship with defendant, at which time the victim admitted that two years prior, the victim was forced to engage in sexual conduct with him on several occasions. Absent the half-sister's testimony, the prosecutor could not effectively rebut defendant's claim that the charges were groundless and fabricated by her mother. As in *People v VanderVliet*, we find that "[w]ithout such evidence, the factfinder would be left with a chronological and conceptual void regarding the events . . ." Thus, we find the proffered evidence to be probative to refute the defendant's allegations of fabrication of charges. [457 Mich at 501-502.]

The Supreme Court did not reason, as does the prosecutor in the instant case, that because the half-sister reported abuse, it made it more likely that the victim was being truthful. Rather, the Court reasoned that the half-sister's disclosure explained the timing of the mother's inquiry, and the similarity in age and living arrangement explained the mother's concern. No such factors are present here.

Finally, we conclude that reversal and retrial is required. "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). Viewing the entire record, we conclude that it is more probable than not that the error was outcome determinative. This case presented a classic credibility contest between the witnesses for both sides. There was no physical evidence, and no confession. There was an explanation for the claim of fabrication, and one of the police officers supported defendant's position of absolute denial. While a reviewing court, or even a trial court, can never be sure regarding the course of a jury's deliberations, we think it likely that this evidence played a major role in the instant case. We conclude that the error was not harmless and that retrial is required.

III

Defendant also argues that the trial court abused its discretion in allowing a police officer who administered a polygraph examination of defendant to testify about statements defendant made in the pre-polygraph interview. Defendant argues that any statements made before the actual polygraph test violated his Fifth and Sixth Amendment rights to counsel because his counsel was prohibited from representing him during the pretest interview. We disagree.

Statements made before, during, or after the administration of a polygraph examination are not excluded from trial if they are voluntarily made. *People v Ray*, 431 Mich 260, 267-268; 430 NW2d 626 (1988).

> Once the Sixth Amendment right to counsel has been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective with respect to the formal charges filed against the defendant. However, *if an accused chooses to initiate communications*, the accused must be sufficiently aware of

> both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of such rights. [*People v McElhaney*, 215 Mich App 269, 273-274; 545 NW2d 18 (1996) (emphasis added; citations omitted).]

"The existence of a knowing and intelligent waiver of the Sixth Amendment right to counsel depends upon the particular facts and circumstances surrounding the case, including background, experience, and conduct of the accused." *McElhaney*, *supra* at 274 (citation omitted). "*Miranda*[3] warnings are sufficient to ensure that a defendant's waiver of his right to counsel during postindictment questioning is "knowing and intelligent." *Id.* at 275-276, citing *Patterson v Illinois*, 487 US 285, 299; 108 S Ct 2389; 101 L Ed 2d 261 (1988).

In this case, defendant requested a polygraph. When defendant learned that his counsel would not be allowed to sit with him during the examination, he conferred with counsel about whether he should nevertheless take the examination and decided to take the polygraph. He was fully aware that he would not be represented. In addition, defendant received *Miranda* warnings before being questioned at all in conjunction with the polygraph process. He waived his rights in writing, including his right to counsel. Defendant's waiver was knowingly and intelligently made. Thus, defendant's claim that his Sixth Amendment right to counsel was violated has no merit.

Defendant's claim that his Fifth Amendment right to counsel was violated also fails. A defendant's Fifth Amendment right to counsel attaches at custodial interrogations. *Id.* at 277.

> The term "custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way." To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave. The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officer or person being questioned. [*People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999) (citations omitted).]

Here, defendant requested the polygraph pursuant to MCL 776.21(5); MSA 28.1274(2). He was not in custody at the time; he came voluntarily to police headquarters for the examination. Defendant was advised that he could stop the questioning at any time after it began and he understood that he did not have to take the examination at all. The objective circumstances demonstrate that the polygraph examination was not a custodial interrogation.

IV

Defendant also argues that the trial court abused its discretion when it allowed Barbara Cross to testify as an expert in child sexual abuse. Because defendant failed to object to Cross'

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

testimony, this issue is unpreserved, *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). However, because the issue may arise on retrial, we observe that *People v Peterson*, 450 Mich 349; 537 NW2d 857, amended 450 Mich 1212 (1995), should guide the trial court on remand, and that expert testimony regarding the victim's immediate disclosure and defendant's grooming behavior should be carefully scrutinized under *Peterson.*

V

Defendant argues that prosecutorial misconduct occurred when the prosecutor questioned defendant's wife about why she did not come forward with exculpatory evidence before trial, and when the prosecutor questioned witnesses, including police officers, about whether defendant denied the sexual penetration. We find no error.

At trial, defendant's wife testified that, before the victim's mother made the allegations of sexual abuse, the victim told defendant's wife that defendant had only hurt the victim's thigh. The prosecutor attacked defendant's wife's credibility on this issue, asking whether defendant's wife ever brought this information to the attention of the police or prosecutor. Contrary to defendant's claim, the prosecutor's cross-examination on this issue did not shift the burden of proof to defendant. Defendant's wife's testimony that the victim said only that defendant hurt her thigh assisted the defense theory of the case, which was that there was no penetration. "[T]he questioning at issue did not improperly shift the burden of proof, but rather was proper because it directly challenged the credibility of testimonial evidence elicited by the defense in support of its theory of the case." *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999). The prosecution was entitled to test defendant's wife's credibility. *Id.* at 477-478.

In addition, the prosecution's questioning of witnesses regarding whether defendant denied the sexual penetration did not constitute an infringement of defendant's right to remain silent or shift the burden of proof. The defense was that there was no penetration, that the prosecution's witnesses lacked credibility, that defendant had denied the charge to the police and that he continued to deny the alleged conduct. Defendant did not invoke is right to remain silent and so improper references to that right are not involved. *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999).

In this case, defendant made statements to the police after being given *Miranda* warnings and thus did not exercise his right to remain silent. Questions about what he told the police and how those statements differed from his trial testimony were appropriate. *Id.* Moreover, we note that, in opening statement defense counsel stated that defendant had denied the charged conduct and would show at trial that he had denied the conduct. It was therefore proper for the prosecutor to question witnesses about whether defendant, who had not exercised his right to remain silent, had actually denied the conduct. In addition, where a defendant has taken the stand, comments or questions that point out the weaknesses in his case do not improperly shift the burden of proof. See *People v Harris*, 113 Mich App 333, 338; 317 NW2d 615 (1982).

VI

Defendant also claims error in sentencing. We need not address these issues given that we are remanding for a new trial.

Reversed and remanded. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Michael J. Talbot
/s/ Robert J. Danhof*