STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CAROL EGE,

Defendant-Appellant.

UNPUBLISHED
September 17, 1996

No. 173448
LC No. 93-125655-FC

Before: White, P.J., and Fitzgerald and E.M. Thomas,* JJ.

PER CURIAM.

Defendant appeals her conviction by a jury of first-degree murder, MCL 750.316(c); MSA 28.548(c). We affirm.[1]

I

In April 1993, defendant was charged by grand jury indictment with the murder of Cindy Thompson, in Pontiac, nine years earlier, in the late evening of February 21, 1984, or early morning of February 22, 1984. Thompson was bludgeoned and stabbed to death, and was found in a pool of blood in her upstairs bedroom, her organs laying beside her. Mark Davis, with whom defendant had lived since the late 1970s and still lived at the time of the murder, had been having a sexual relationship with Thompson as well as defendant. Thompson was seven months pregnant at the time of the murder. Davis testified that he found Thompson some time before 5:00 a.m. on February 22, 1984.

There was testimony at trial that on February 20, 1984, Davis and three friends of his, Bob Dunn, and Cheryl Blankenberg Hooker (Blankenberg) and David Hooker, had helped move some of Thompson's things into Thompson's house and stayed there partying until very late that night. Dunn stated that he left Thompson's around midnight and the others were still there. The next day, February 21, 1984, Thompson baby-sat until around 8:00 p.m. for the couple who lived across the street and who owned the house Thompson was living in, Barbara Lambert and Jack Segal. Thompson then went to see Lambert at her workplace, and that is when she was last seen alive, between 8:45 p.m. and 9:15

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

p.m. on February 21, 1984. Thompson's neighbor testified that she heard what she believed was Thompson's car pull in the driveway around 8:45 or 9:00 p.m. that night and that she heard a second car pull in shortly after, stay several minutes, and then leave. A friend of Thompson's testified that there was no answer at Thompson's number at 6:00 or 6:30 p.m. and that at about 8:00 p.m., the phone was busy and remained so until 9:00 p.m., when she stopped trying to reach Thompson. There was no sign of forced entry at Thompson's home. Rather, the back door was found unlocked. Davis and Segal had keys to the house. The phone chords had been cut.

The parties agree that the initial police investigation, which continued only until April 1984, was inadequate. Years later, in 1992, the investigation was reopened by Pontiac detectives Serna and McLaurin as a result of persons coming forward with alleged evidence incriminating defendant. In June 1992, evidence collected at the murder scene in February 1984 was submitted to the Michigan State crime lab for the first time. None of the evidence submitted to the crime lab connected defendant to the crime. Rather, it yielded fingerprints of Davis and Thompson and hairs of Thompson and others, not defendant. Thompson's body was exhumed in 1993, apparently to investigate a mark on her left cheek visible in photographs taken at the murder scene, which the initial autopsy report concluded was livor mortis. The prosecution's experts opined that the mark was a bite mark consistent with defendant's dentition, while the defense experts opined it was livor mortis, and that even if it were a bite mark, it was not consistent with defendant's dentition.

The prosecution's theory of the case as presented in its opening statement was that defendant was obsessed with Mark Davis, Thompson and the child Thompson was carrying, and that defendant plotted and solicited others to kill Thompson. The prosecution said that the evidence would show that defendant had, before the murder, become violent and smashed several gifts Thompson had bought Davis, that defendant attempted to hire several people to kill Thompson, and made statements to others that Thompson would not have the baby, and that defendant and Thompson had a violent argument the day before the murder.

The defense's theory as presented in its opening statement was that defendant could not have been at the crime scene on the evening of the murder because as she was at the home all evening, and that although there was some evidence pointing to defendant, none of the many witnesses the prosecution would present at trial would say defendant committed the crime. Defense counsel stated that he would be able to show a more compelling circumstantial case against several of the prosecution's witnesses, who were suspects, and an overwhelming case against Davis. Defense counsel stated that the connections between the prosecution's witnesses were frightening and suggest another agenda. He stated there was no proof that Davis was the father of Thompson's baby, that this was a classic love triangle, and that defendant did not like Thompson and had made statements, as everyone has, that she would like to kill Thompson. Defense counsel stated that he would prove that Karen Reppuhn, a witness for the prosecution, was "an absolute outright lying perjurer," along with a number of other witnesses. Defense counsel further stated that the initial police investigation concluded that Thompson's murder was an unsolved mystery, with a lot of suspects but no hard proof as to any of them, and that the murder remained an unsolved mystery.

Defendant filed a pre-trial motion in limine to exclude evidence of prior similar acts as to two alleged prior statements of defendant regarding Thompson and two alleged incidents involving defendant and Thompson: 1) that on or about November 1983, defendant told Karen Reppuhn that she wanted to slice Thompson's throat and would pay someone to do so; 2) that in December 1983 or January 1984, defendant told Timothy Apker that she wanted Thompson dead and wanted Apker to kill Thompson; 3) that on December 13, 1983, defendant went to Thompson's sister's home, where Thompson was staying, and physically and verbally assaulted Thompson;[2] and 4) that on February 20, 1984, defendant went to Thompson's home and argued with her on the front porch. The trial court denied defendant's motion.

At a fifteen-day trial in December 1993 and January 1994, many of the prosecution's witnesses, other than police officers and experts, were good friends of Mark Davis and the victim and were impeached on the stand with prior testimony or statements. At the time of the murder ,most of the witnesses drank heavily and used drugs.

Sergeant Steven Sitar of the Pontiac Police Department testified that on February 22, 1984 he was dispatched to 97 Seneca Street in regard to suspicious behavior. After Sitar arrived at the house with Officer Clark, they knocked on the door and received no answer. Officer Michael Story also arrived shortly after. About two minutes later, two vans pulled into a parking lot next door. A man later identified as Mark Davis got out of one of the vans and approached the officers. Davis was very excited and told the officers that his girlfriend needed help; that she had been "cut-up." Davis fumbled with his keys and eventually produced the correct key and unlocked the front door of the house.

Dried blood was found on the bottom of the stairs as well as a clump of hair and more blood further up the stairs. In an upstairs bedroom there was a female body lying on the floor face down in a large pool of blood. There was a large laceration starting from the middle of her spine and going around to her right side. Sergeant Sitar said that the wound was very extensive and was gaping open and that she had been disemboweled. He said that there was blood everywhere.

There was a vanity table overturned by the victim's feet and a telephone which had been pulled apart from the receiver. The walls inside the bedroom were also splattered with blood. Officer Story found a bloody towel in the kitchen area. There were no signs of forced entry into the home.

Mark Davis testified that he had known defendant for the majority of their lives. They began living together in the late 1970's. They lived in California for some time and then moved to Auburn Hills, Michigan. Davis testified that he had been involved in a relationship with Thompson, and Thompson became pregnant in 1983 with Davis' baby. At the time of the murder, she was seven months pregnant. Davis testified that he had intended to move out of defendant's home and move in with Thompson, that he believed defendant probably knew about Thompson, and that was not sure that he ever discussed with defendant his plans to move in with Thompson.

On February 21, 1984, Davis went out drinking with his friend, Robert Dunn, early in the day. He came home around 6:30 p.m., had something to eat and began drinking some more. He played

video games at home until some time in the evening. At some point later in the evening he decided to go to Thompson's house to see how she was doing. By this time, he had drunk approximately five bottles of wine. When he arrived, Thompson's dog was on the front porch, which he said was unusual. Davis went into the house and found Thompson lying on the floor upstairs in the dark. Davis said that after he replaced a light bulb in the room and turned the light on, he saw a lot of blood and tried to feel a pulse.[3] Davis claimed that he tried to grab the telephone but that the line had been cut. He decided to go to his friends' house which was 4 ½ miles away and get help. He drove there quickly without stopping.[4]

Davis drove to Cheryl Blankenberg's and David Hooker's house. Blakenberg testified that Davis arrived at 5:00 a.m., was very upset, and said that there was something wrong with Thompson -- that there was a lot of blood, and asked Blankenberg to call the police and an ambulance. They made the call and followed Davis back to Thompson's house in their van. The police had already arrived by the time they got there and checked them for traces of blood. Davis testified that he let the police into the house with his key and waited while the officers conducted their investigation. Later, the officers took all three in for interviews. At trial, Davis testified that he did not kill Thompson and that her murder had ruined his life. On cross-examination, he testified that he never believed that defendant killed Thompson. He also reaffirmed that defendant was home all night.

Blankenberg testified that she had not been satisfied with the progress of the investigation, that she discovered after the murder that a woman named Sheila Walker had witnessed a man and a woman arguing with Thompson on her porch, that seven weeks after the murder, Blankenberg showed photographs to Walker of different people in an attempt to ascertain who they were, that Walker identified defendant as the woman that she had witnessed arguing with Thompson on her porch, that Walker identified Davis as someone who might have been the man who was with defendant, and that Blankenberg gave this information to Detective Jarvis.

Walker testified at trial regarding the incident. She testified she did not know defendant, Thompson or Davis. She saw a man and a woman on the porch arguing with someone in the doorway, who sounded like a woman. The woman on the porch had long, sandy-blonde hair and was very thin. She called the other woman a "lying bitch," said she wanted to "stomp her ass" and "kick her ass," and said "you're going to pay." She also heard discussion regarding whether the man was the father of a baby. In 1992, Walker identified defendant from photographs shown to her by Detectives Serna and McLaurin. She was quite definite regarding this identification. She picked out one photograph of defendant, but not another. At trial, Walker could not say that defendant was the woman she had seen on the porch. Nor could she do so at the preliminary examination. She did not know why the record of her report to police at the time did not state that the woman had blonde hair. She had no recollection of meeting with Blankenberg or being shown photographs by her.

Barbara Lambert testified that she had previously lived in an apartment across the hall from Thompson. In late 1982, Thompson was in Lambert's apartment and they heard a lot of commotion coming from Thompson's apartment. They walked across the hall and saw that defendant was in Thompson's apartment destroying some of Thompson's T-shirts. Thompson and Lambert confronted

defendant, who was very angry with Thompson because Thompson wanted Davis to move in with her. Defendant told Thompson that she would never have Davis. At the time of the murder, Thompson was living in a house owned by Lambert and her ex-husband, Jack Segal. She did not pay rent, but baby-sat for Lambert's children. Segal had a key to Thompson's apartment, did not like Thompson much, though he could be getting rent if Thompson did not live there, and failed to convey information to the police that Lambert had relayed to him for that purpose. Segal was an ex-Pontiac police officer.

Debra Dunn testified that she went with defendant to Thompson's apartment sometime in 1981 or 1982. Defendant was angry because Thompson had purchased some T-shirts and a watch case for Davis for his birthday. Defendant went to Thompson's apartment and tore the T-shirts with her hands. Dunn claimed that after Thompson became pregnant, defendant said to her that "Cindy was not going to have the baby; that she didn't know how or why, and she didn't want to get me involved, but that she wasn't going to have the baby".

Shirley Howells, Thompson's sister, testified that Thompson had lived with her shortly before Thompson moved to Seneca Street. On December 13, 1983, Howells was in the basement of her house talking on the telephone. Thompson had taken Howells' daughter to the corner store. Howells' said that she began having trouble with her telephone connection and also heard a knock on her back door. Howells went upstairs and looked out and saw a blonde woman. Howells opened the door and the woman told her that her name was Lisa, and said that she was a friend of Thompson's. The woman left when Howells told her that Thompson was not there. When Thompson came back, Howells told her about the visitor. Thompson said that she did not have a friend named Lisa and that she thought that it had been defendant. Subsequently, the woman knocked on the door again. Thompson and Howells went to the door. Thompson looked out and said that it was defendant. Howells opened the door and told defendant that Thompson did not want to talk to her and that she should leave. Defendant would not leave and eventually forced her way into the house. Howells took her by the shoulders and tried to push her back out the door. A man suddenly came in from outside, shoved Howells and told her to let go of defendant. Defendant grabbed Thompson and they struggled. Thompson was five months pregnant at the time. Thompson yelled for someone to call the police. The man yelled for defendant to get out of there and they left.

Thompson told her that while Thompson and defendant were struggling, defendant told her that she had better stay away from Davis. Thompson had three or four long scratches on her back. When the police arrived, they determined that Howells' old telephone wires had been tampered with. Howells later told Thompson that she would have to either stay away from Davis or move out of her home.

Lieutenant Wojnaroski interviewed defendant on the morning of February 23, 1984. Wojnaroski testified that at the conclusion of the interview he told defendant that he felt that she was not telling the truth. He said that he asked her whether the information she was withholding had anything to do with her relationship with Davis and Thompson and Thompson's death and she replied: "probably".

Carol Parker testified that she had been living with defendant for about one week prior to the murder. She recalled that defendant frequently expressed that she wanted to have Thompson killed. Defendant told Parker that she could live with her for free as long as she would be her alibi. Defendant told her that she believed Thompson's baby would be deformed in some way[5] and that killing Thompson would be doing Davis a favor. Parker said that defendant was searching for someone to kill Thompson and that defendant had asked Richard Lingnau and Timothy Apker if they would do it. Defendant also discussed it with Thompson's cousin, Bobby Thompson. However, Parker was not present when defendant offered anyone money to kill Thompson. Defendant told Parker that she had gone to Thompson's home and tried to cause her to lose the baby by arguing with her and trying to push her down the stairs. Parker testified that she was with defendant when she said she was going to the bank to withdraw money to use to pay someone to kill Thompson. She did not see the cash. When they got home later, defendant tore up her bank book and put it in the bottom of a milk carton which she threw in a dumpster. Detective Serna later testified that he tried to follow up on Parker's account of having gone to the bank with defendant, but could not find the bank or any records.

After Thompson was murdered, Parker went with defendant to the police station. Defendant told Parker to say that she had been with her all night. However, Parker had been working at McDonald's until about 3:00 a.m. Initially, Parker told the police that she did not know anything but that defendant was home, sleeping, when she got home from work Parker wore a wire for the police in 1992 and meet with defendant. Defendant did not confess during that meeting.

Timothy Apker, Carol Parker's ex-husband, testified that defendant spoke with him on several occasions about hiring someone to kill Thompson. Apker said that the first time she mentioned it to him was after a party. She asked him to go to a Taco Bell restaurant where defendant asked him if he was interested in killing Thompson for money or if he knew of anyone who would be. Apker claimed that defendant wanted Thompson dead because of the baby and because of the potential charges that Thompson would file against her. Defendant said that she would pay between $350 and $500. Apker said that defendant contacted him several times after that to find out if he had found anyone to kill Thompson. Apker claimed that he was trying to ignore her and that he did not accept her offer. After Thompson's death, Apker contacted the police in order to tell them what he knew. Apker participated in the investigation by wearing a wire and talking to defendant.

On cross-examination, Apker admitted that he did not like defendant, that Nancy Davis, Davis' mother, did not like Thompson and expressed her desire to see Thompson killed, that when he first spoke to detectives he could not remember whether defendant or his ex-wife contacted him about killing Thompson, and that he had told police that he could not remember whether he and defendant went to a Taco Bell.

The Oakland County Chief Medical Examiner, Dr. Ljubisa Dragovic, testified that when he reviewed Thompson's autopsy records, he found that some of the important features and findings within the photographs were omitted from the report. He suggested to the prosecutor's office that the body be exhumed for further examination, and it was in April 1993. The original report mentioned the stab

wounds caused by a sharp instrument but not the injuries to the head and hands caused by a blunt instrument. After his examination, he determined that Thompson had received sharp force injuries to the chest and neck. One of the cuts to the neck also severed the spinal cord. She also received blunt force injuries to her face and head. These injuries were likely to have been caused by a hammer. The abdominal organs were protruding out of a gaping slash of the right side of the abdomen. The seven-month-old fetus had not been injured but it died along with the victim. Thompson's left arm had superficial cuts. Her right hand had been cut with a sharp instrument. Both hands had multiple bruises. Dr. Dragovic characterized Thompson's injuries to her hands as defensive injuries. The cause of death was characterized as multiple sharp and blunt force injuries. It was likely that a person who inflicted the injuries would have been splattered with blood.

Dr. Dragovic also discovered a blunt force injury to the left cheek which caused him to request the aid of a forensic odontologist. This expert, Dr. Alan Warnick, opined that the injury was a bite mark. Dr. Warnick compared dental impressions and chartings ("dentitions") of Apker, Davis, Lingnau, Bobby Thompson, Troy Collings and Jack Segal and found that none of them could have made the bite mark. He also checked defendant's dentition and concluded that it was highly consistent with the bite mark. Dr. Warnick opined that the mark was made by defendant. On cross examination, Dr. Warnick conceded that since the victim was found lying on her left side, face down on her left cheek, an oval mark, possibly a "pseudo bite mark," could have been impressed on her face.

Karen Reppuhn, Cheryl Blankenberg's sister, testified that she and a girlfriend of hers, Debbie Shelby, met defendant once at the Back Seat Salooon during deer hunting season in 1983. Reppuhn was at the saloon to "party" and was drinking Tequila Sunrises. Kim Davis, a friend Debbie Shelby's came in the bar. Kim and Debbie introduced Reppuhn to defendant, and they all sat down at a table. Tim Apker, a bouncer there, occasionally came by to talk. Reppuhn testified that she and defendant discussed their respective boyfriends, and that defendant talked about Mark Davis, and told Reppuhn that she hated Cindy Thompson, that Thompson had gottten pregnant to trap Mark, that the baby was not going to be right, and that Thompson should have an abortion. Defendant told Reppuhn that she could stomp the baby out of her, slit her throat, rip her up in little pieces and think nothing of it, that Thompson was a parasite and deserved to die. Reppuhn said that she did not like Thompson either, and said a lot of nasty things about Thompson, and that she and her sister, Cheryl, never got along. Reppuhn testified that she advised defendant not to do it herself, and defendant said she would not do it herself, she would hire someone, and asked Reppuhn how much it would cost and whether she knew anyone who would do that. Reppuhn suggested Apker.

Reppuhn further testified that after she heard about the murder she thought that her "sister's friends were a bunch of kooks anyway," and Reppuhn "didn't want anybody to know" about the conversation because she was just starting a relationship and it was too embarassing to "tell somebody that you sat in a bar and was stupid enough to talk about killing somebody." She eventually told her mother about the saloon incident and spoke to detectives Serna and McLaurin in October 1992, after the case was reopened.

On cross-examination, Reppuhn testified that Debbie Shelby did not remember that evening at the saloon. She was impeached with earlier testimony that she was not sure who brought up the subject of hiring someone to kill Thompson. Reppuhn testified that she was not an alcoholic back then, but was at the time of trial. She testified that she probably told her sister, Blankenberg, about the conversation the following summer, 1984. She testified that she did not know whether defendant had been drinking that night but that "she wasn't doing no shots with me. That's for sure." She admitted testifying previously that she did not think defendant had been serious, that she was blowing off steam or making a joke.

Kim Davis denied being at the bar anytime after 1980. Blankenberg denied that Reppuhn told her that defendant was the person she met in a bar. Blankenberg did not mention Reppuhn to police in 1984. Apker denied being solicited by defendant in Reppuhn's presence. Many witnesses testified that the Back Seat Saloon ceased doing business in October 1982.

Richard Lingnau testified he had known defendant since 1975, when she was a neighbor. He dated her for about two years, about 1980-81. He testified that he met Cindy Thompson only once, and that defendant never discussed with him her relationship with Davis and Thompson. Lingnau then testified that defendant wanted Thompson "really hurt bad, either beat her up bad or kill her." He considered doing it, and defendant offered $ 200-300. Lingnau was unaware Thompson was pregnant. On December 13, 1983, he went to Thompson's house with defendant He said his intent was to kill Thompson. Lingnau shoved Thompson's sister and told her to go upstairs, and Thompson ran downstairs and was presumably calling the police. Lingnau said to defendant they should get out of there, and he cut what he thought were phone wires. Lingnau testified that because there were witnesses there, he decided not to do anything. Lingnau later called defendant and told her to forget it, because he was thinking of the consequences.

On cross examination, Lingnau testified that he considered himself an honest person. He was hurt when defendant broke off their relationship, he believed her a kind and gentle person and, other than this incident, never knew her to want to harm anyone. In late 1983 and early 1984 he averaged about ten beers a day. Shortly before December 13, 1983, he was institutionalized 26 days in Clinton Valley beginning October 30, 1983, due to having a police stand-off in his neighborhood. He denied being hospitalized through December 12, 1983. He was impeached with previous testimony regarding dates, and with having told detectives Serna and McLaurin that defendant did not offer him money, and that defendant never said she wanted Thompson killed, she just wanted to hurt her. He admitted not having taken a weapon with him to Thompson's. Lingnau testified that Thompson first grabbed defendant's hair and that that made him mad, and that defendant had not been doing anything, except saying that she wanted to talk to Thompson. He denied that defendant ever pushed anyone or hit anyone.

Additional prosecution witnesses testified. Defendant's statement to police in April 1993 was presented to the jury. In it, she made several assertions that were contradicted by the evidence at trial, including that Lingnau did not accompany her to Howell's house in December, 1983.

Defendant called Dr. Werner Spitz, a pathology professor at Wayne State University, and pathologist for Macomb and Monroe counties. At defense counsel's request, Dr. Spitz reviewed the two autopsy reports and photographs in connection with this case. He did not believe that Thompson's head injuries were caused by a knife with a bent tip, rather by a blunt object. Regarding the alleged bite mark on Thompson's left cheek area, he concluded it was livor mortis, also known as post-mortem lividity, and not a bite-mark. He discussed the case with Dr. Sopher, a forensic pathologist and dentist, and read Dr. Warnick's trial testimony.

Dr. Irvin Sopher, a dentist and medical doctor, testified at length about bite marks, and opined the mark on Thompsons' cheek was livor mortis and not a bite mark, and even if it were a bite-mark, the pattern did not align with defendant's dentition or bite.

Elwood Webb of the Michigan Liquor Control Commission testified that the Back Seat Saloon ceased doing business sometime prior to October 1982, when the license became inactive, and that the license never became active again.

Ronald Crichton of the Oxford police department testified that the Back Seat Saloon ceased to exist around 1980 or 1981 and became known as The Way Station, which went out of business sometime in 1982. Another witness brought a copy of a foreclosure on the property dated September 1982.

Defendant testified that she had known Mark Davis since they were small children. They began dating in 1978, five years after graduating from high school. Defendant said that she did not realize that Davis was also seeing Thompson in a romantic way until December 1982 when Thompson gave Davis some birthday presents. She said that Davis ripped up the shirts because they were too small and then she returned them to Thompson's apartment. She testified that she told Thompson to leave Davis alone and Thompson told her to leave her apartment. Defendant described attending a party that Thompson was also at where they did not have any unpleasant interactions. Defendant learned in the fall of 1983 that Thompson was pregnant with Davis' child. She said that she had been angry and hurt.

Defendant denied ever approaching Apker and asking him to go to a Taco Bell. She said that she never asked him to kill Thompson or to find someone to do it.

Defendant testified that she did go to Howells' home to talk to Thompson. She was frustrated with the situation with Davis and wanted to find out if Thompson knew what Davis was going to do. Defendant denied ever having planned to kill or hurt Thompson. She claimed that when Howells would not let her in the door, she pushed it open because she really wanted to talk to Thompson. She said that she did not push Thompson down the stairs.

Defendant denied asking Carol Parker to be her alibi or to lie to the police for her. Defendant said that she did not visit Thompson's house on February 20, 1984. She testified that on the evening of February 21, 1984, she and Davis had dinner together at their house. After dinner, Davis started to play video games and she went to bed around 11:00 p.m. Defendant recalled that Parker came home

later that night. At some point in the middle of the night, Davis came in and told defendant that he was leaving to go to Thompson's. The next morning, Parker called defendant at work and told her to come home because Davis was very upset because he had found Thompson dead. Defendant said that she was shocked.

II

Defendant raises three issues on appeal. She first argues that the trial court erred in allowing the introduction of her statements to police officers at the Cape Coral, Florida police department in April 1993, which were given without *Miranda* warnings. Defendant argues she had a reasonable belief that she was in custody because the police came to her place of employment, took her to the police station, never told her she was free to leave or that she could have taken her own car, and put her under oath for over one hour. Defendant argues that she eventually gave incriminating statements in that her statements contradicted statements and testimony given by many witnesses. Defendant argues that the prosecution did not prove voluntariness by a preponderance of the evidence.

A

At a *Walker*[6] hearing, defendant testified that in April 1993 she lived in Cape Coral, Florida, and worked at a cable company as an assistant supervisor. In the mid-morning of April 26, 1993, while at work, she was called to the General Manager's office, where there were two male detectives from the Cape Coral police dressed in plain clothes. One of the detectives, Furderer, introduced them, and said that they were going to take her to the Cape Coral Police Department to ask her questions about a 1984 incident. Defendant presumed it was in reference to Thompson. Defendant testified that she had been interviewed by the police in 1984 in reference to that homicide, and that she did not specifically know in 1984 whether she was considered a suspect. Defendant testified that the detectives walked on either side of her as they left the building, that she went back in the building to get her purse as they waited outside, that she had her car at work that day, that the police department was "very close," about half a mile away, and that the detectives never suggested or gave her the option of taking her own car. The detectives put her in the back seat of their car and escorted her into the police department. She was taken to a conference room, where there were two detectives from Pontiac, Michigan, detectives McLaurin and Serna. Defendant testified that they identified themselves as police officers and that the conference room door was closed. The detectives did not tell her she was free to go home or free not to make a statement. She was not read *Miranda* rights, and both detectives questioned her.

Defendant testified that once the audio tape was started, detective Furderer asked if she might be put under oath. She did not recall being asked permission for the conversation to be taped. Defendant testified she did not feel she had a choice whether to answer the questions and she did not feel free to leave before she began answering questions. She was not told that she could have an attorney present. She was interrogated for an hour or hour and a half, and was then allowed to go. Before leaving, she was given a subpoena to appear before a grand jury.

On cross-examination, defendant testified that when she was questioned in this matter in 1984, she voluntarily went to the police department, and was not placed under arrest or under custody. Defendant testified as to the April 1993 questioning that she did not feel that she was under arrest, but felt that she was in custody. She denied being told she was not under arrest, but was then impeached with a portion of the taped interview in which she was advised prior to being questioned that she was not under arrest, was asked if she understood, and responded that she did. Defendant testified:

> I felt I was in custody. I did not feel I was under arrest from the simple fact that I couldn't just stand up and leave. I mean, two gentlemen took me from work, drove me over there, you know. It wasn't like I had an option to come later after I got off of work, or take my own car.

Defendant testified she was not put in handcuffs, was not told she was under arrest, was not told she was a suspect, and that, as far as she knew, she was simply a witness. She testified that she did not consider herself a suspect at that time and that, throughout the entire interview, she thought she was just a citizen giving information. Defendant testified she had no problem being put under oath, and that detective Furderer did ask her if it was okay for her to be placed under oath, to which she responded that it was. She testified that she thought she was asked if she wanted water or anything. She further testified that she did not feel either coerced or threatened in any manner, and that she had no problem giving information to the police.

Under questioning by the court, defendant testified that she desired to cooperate with the police during this interview. The court then asked "So you didn't feel that you were compelled to tell them anything at this time, did you?" to which she responded:

> Well, not compelled, no. I mean, I felt that I needed to answer the questions. Like I said, it was kind of an abrupt way to be brought, but they didn't, you know—they weren't mean to me by any stretch of the imagination.
>
> THE COURT: What did you feel would happen if you had said, "I don't want to answer questions?"
>
> THE WITNESS: I felt that they would have detained me. I don't know as I actually felt they would arrest me, but I didn't feel they would agree to that.
>
> THE COURT: Okay; but, I mean, in spite of that, it was your desire to cooperate?
>
> THE WITNESS: Yes.

The parties stipulated to admit a transcript of the taped interview. Neither the tape nor transcript are before us.

Detective Furderer testified that detectives Serna and McLaurin initially contacted him around mid 1992 regarding obtaining certified documents, defendant's driver's license, divorce decree and

marriage certificate. On April 26, 1993, pursuant to a request by detectives Serna and McLaurin, Furderer and his partner went to defendant's employer and spoke to her in her supervisor's office. Furderer testified that he indicated to defendant that two detectives from Pontiac were interested in talking to her and requested that she voluntarily accompany them to the Cape Coral police department. He testified he told defendant she was not under arrest and that he would transport her to and from the police department. The vehicle was unmarked, did not have a cage between the front and back seats, and the police department was a mile or less away. Defendant was not searched or handcuffed. When they arrived at the police department they went to a conference room, and he introduced defendant to detectives Serna and McLaurin. Furderer was present throughout the interview. Defendant was advised on tape that she was not under arrest, and Furderer placed her under oath, which is a standard policy. The interview lasted approximately one hour and fifteen or twenty minutes and, after the interview, defendant was issued a subpoena to appear in front of a Michigan grand jury, which she signed. Furderer then drove her back to work and dropped her off.

On cross-examination, Furderer testified that he met with the Pontiac detectives several days before the interview, that they had told him defendant was a suspect and the focus of their investigation of the Thompson homicide, and that there was a grand jury in Oakland County, Michigan investigating that murder. Furderer testified that he was unsure whether he asked defendant if she would "voluntarily" come to the police department. He never told her she could leave. Furderer testified that he intended when he went to defendant's employer for defendant to ride in the car with him, but that had she asked to drive her own car, he would have allowed it, although he did not offer defendant that option.

Furderer further testified that both he and his partner were in plain clothes and were not wearing guns. Defendant was not read Miranda rights and was not told she could leave. On further cross-examination, Furderer testified he was positive that he transported defendant to the police department but it was possible that he did not transport her back to work after the interview, although some officer did.

On re-direct, Furderer testified that he told defendant's supervisor that defendant would be returning back to work, that he was present at the end of defendant's interview and that defendant left with knowledge she was going back to work. Furderer testified that he told defendant she was not under arrest before they got into the unmarked police car to drive to the police station, and that she readily accepted and did not hesitate when asked to go to the police department.

Detective Serna testified that he interviewed defendant on April 26, 1993, in "a large conference room, well lit, nice chairs," at the Cape Coral police department. He advised defendant prior to the interview that he wanted to talk about what happened regarding a murder and told her she was not under arrest. Serna testified he did not have a warrant for defendant's arrest with him, and that the grand jury at that point had not issued an indictment. He only had a grand jury subpoena with him. He thought that the interview lasted from 11:00 a.m. to 12:14, and that the tape was reactivated for several minutes at 12:23. After the interview, Serna thanked defendant and she left. Serna testified that

defendant was not detained at any time, not handcuffed and was not told she was under arrest or in custody.

On cross-examination, detective Serna testified that in 1984 he was not an officer in charge of the case, and described himself as "very peripheral" to the investigation. In 1986 or 1987, Serna met with a man who gave him some information, which Serna relayed to the officers in charge. He next became involved around May 1992 and that summer became a co-officer in charge. He interviewed many witnesses, went over the evidence from 1984, and called into question the original autopsy report done by Dr. Brooks. Serna testified that in 1984 the investigation had focused on two people, one of them being defendant, who at that time was named Carol Sanders. When he went to Cape Coral in late April 1993, the investigation was focused on defendant. Serna did not recall whether the grand jury had already started at that point or started just after the interview. When asked by defense counsel "you had a large body of evidence that pointed towards Carol Ege as the killer by late April of 1993?" Serna responded "Not enough to get a warrant apparently, cause [sic] I couldn't get one." Serna testified that at that time he had statements by Apker saying that defendant had solicited him to kill Thompson and a statement by Reppuhn that defendant had talked to her about killing Thompson. Serna testified that he wanted to get a statement from defendant to round out the investigation and give her a chance to tell her side. Serna testified that during the interview defendant denied soliciting Apker to kill Thompson and denied discussing the victim with Reppuhn, also denying other inculpatory things.

Serna did not tell defendant she was free to leave. The conference room doors were closed because of the noise level, and there were three police officers present during the interview. Serna specifically told defendant she was not under arrest, but did not state that she was not in custody. Defendant did not have an attorney present and answered all the questions put to her; she did not refuse to answer any question.

Serna testified he was in plain clothes and that no one involved in the 1993 interview was in uniform, that the interview took place at the police department to spare defendant any possible embarrassment at work, and that the Cape Coral police provided a comfortable conference room with 12 or 14 chairs, not a small windowless room. Serna testified that nothing prevented him from interviewing defendant at home.

The court denied defendant's motion to suppress, stating:

> Clearly, the detectives from Pontiac went to Florida to further their investigation with regard to the subject matter of this particular case, which I am—based upon the records and files, ultimately led to the arrest and charging of Carol Ege with the crime.
>
> Looking at the totality of the circumstances surrounding this particular interview, would a person in Ms. Ege's shoes believe that she was in custody so that the Miranda rules would be applicable?
>
> This Court is satisfied that in the totality of the circumstances, that would not have been a reasonable belief. What you have here is a situation where the police officers from

Cape Coral went to her place of employment and as a courtesy to her, talked to her employer so as to keep the number of people who would know at work what was going on to a minimum. She was asked to go to the police department for an interview. She was told that she was not under arrest at that circumstances [sic]. There's nothing in the evidence to indicate that she did not want to cooperate. In fact, based upon the evidence, it appears as f she wanted to go and clear up what was going to be the subject of the interview. Apparently—and, again, I don't have total familiarity with the background and history of this case—it had been several years since the alleged offense occurred and it was certainly something that she was familiar with. She knew what it was all about. They did not tell her, "Come to the police station; we want to talk to you about something," without indicating—and she knew that it was about the death or homicide in this particular case.

When she went to Cape Coral, it was never an issue. She never asked whether or not she could take her own car. They indicated they would drive her and take her back. That's consistent in this Court's mind with a person who wants to cooperate and to go the police station and cooperate.

At the station, she met the two Pontiac officers along with the detective sergeant from the local police department. She wasn't handcuffed. She wasn't searched. There's nothing to indicate that anything was done on the way from the employment to indicate in her mind that she was under—that she was in custody.

At the station, apparently she was taken into an interview which was [sic] a big conference room; not placed under bars, not handcuffed, et cetera, and was once again clearly told, and apparently it's on tape, that she was absolutely not under arrest. And they asked for her cooperation, and she went ahead and cooperated. She wasn't arrested. She was taken back just as the police officers indicated, and she was given a subpoena.

Taking all of those circumstances into consideration, this Court cannot conclude as a matter of law or fact that she was in custody, and whether or not there had been a focus or whether or not she was a suspect, is another issue, but under Michigan law applicable in this case, this Court is satisfied that she was not subjected to custodial interrogation. That, in fact, she voluntarily wanted to speak with the officers and, therefore, I'm not going to suppress the statement.

B

There is no dispute that in the instant case defendant was not read *Miranda* warnings. Absent such warnings and a waiver of Fifth Amendment rights, the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant. *Miranda v Arizona*, 384 US 436, 444, 477, 479; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Custodial interrogation

is questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of her freedom of action in any significant way. *Miranda*, 384 US at 444; *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993). The totality of the circumstances must be examined to determine whether an accused was in custody at the time of the questioning. The key question is whether the accused reasonably could have believed she was not free to leave. *Id.*

In *People v Marbury*, 151 Mich App 159, 162; 390 NW2d 659 (1986), the defendant voluntarily agreed to go to the police station when police came to his house and advised him that they were investigating a homicide that possibly involved two friends of his. The two friends had been interrogated earlier that day and one of them indicated that the defendant was a good friend. The police decided to send a sergeant to pick the defendant up for questioning. After arriving at the station, the sergeant began interviewing the defendant at 6:00 p.m. without giving him *Miranda* warnings. At 9:28 p.m. the defendant began talking about an armed robbery unrelated to the homicides under investigation, at which point the police suspected he may have been involved in criminal activity and advised him of his rights. The defendant thereafter confessed to participating in different homicides than those about which his friends were being investigated. *Id*. at 161. The defendant appealed, challenging the trial court's ruling following a *Walker* hearing that his confession was admissible. This Court affirmed, holding that the trial court's determination that the defendant was not subjected to "custodial interrogation" when questioning began upon his arrival at the police station was not erroneous.

Similarly, in *People v Wasson*, 31 Mich App 638, 642; 188 NW2d 55 (1971), the court held there was no custodial interrogation where the subject voluntarily complied with a police request to come to the station for investigatory questioning and was allowed to leave freely after the interview concluded. See also other cases cited in *Annotation: What Constitutes "Custodial Interrogation" Within Rule of Miranda v Arizona Requiring that Suspect be Informed of his Federal Constitutional Rights Before Custodial Interrogation*, 31 ALR 3d 565, 1995 supp § 15b, pp 101-124.

Although defendant was not explicitly told that she was free to decline to accompany the detectives, and was not later told she was free to leave the police station without speaking to the detectives, she was not told she was under arrest or custody, and was not told she could not leave the station. Nor was she handcuffed or searched. She was transported in an unmarked car by detectives in plain clothes, and there are no allegations of physical force or coercion. The questioning was done in a large conference room. The detectives testified at the *Walker* hearing that defendant was told both before being transported to the police department and when the interview began that she was not under arrest. Defendant testified at the *Walker* hearing that she did not feel either coerced or threatened in any manner, that she had no problem giving information to law enforcement, that she desired to cooperate with the police during this interview, and voluntarily had given her version of what happened earlier in 1984.

We conclude under the circumstances presented here that, in light of defendant's desire to cooperate with police, defendant's being told she was not under arrest, and the absence of record

support for any show of police coercion, physical or otherwise, the court did not err in concluding that the police conduct did not constitute custodial interrogation. Although defendant rightly argues that at the time of the questioning the investigation was focused on her, both the United States Supreme Court and the Michigan Supreme Court have held that *Miranda* warnings need only be given where there is custody and, absent custody, the fact that an individual has become the focus of an investigation does not trigger the *Miranda* requirement. *Beckwith v United States*, 425 US 341; 96 S Ct 1612; 48 L Ed 2d 1 (1976); *People v Hill*, 429 Mich 382, 389-390; 415 NW2d 193 (1987). Moreover, defendant testified that she believed she was being questioned as a witness, not a suspect. We thus reject defendant's argument that she was in custody and that her statements must be suppressed as the fruit of an illegal detention. See *People v Marbury*, 151 Mich App 159, 162; 390 NW2d 659 (1986), and *People v Myers*, 158 Mich App 1; 404 NW2d 677 (1987).

II

Defendant next argues that the trial court abused its discretion in admitting evidence of prior statements allegedly made by defendant regarding Thompson and similar acts regarding Thompson. We review evidentiary determinations for abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Defendant's pre-trial motion in limine sought to exclude evidence: 1) that on or about November 1983, defendant told Karen Reppuhn that she wanted to slice Thompson's throat and would pay someone to do so; 2) that in December 1983 or January 1984, defendant told Timothy Apker that she wanted Thompson dead and wanted Apker to kill Thompson; 3) that on December 13, 1983, defendant went to Shirley Howells' home and physically and verbally assaulted Thompson; and 4) that on February 20, 1984, defendant went to Thompson's home and argued with her on the front porch.

Defendant argued that the first two incidents involved statements with little relevancy because they occurred three months before the homicide and because they were statements of future intent, which are very common -- statements like "I'd like to kill him," or the statement of a parent to a child, "if you do that again, I'll kill you." Defense counsel argued these types of statements are not necessarily relevant to prove, if the child ends up dead, that the parent killed the child. Defense counsel argued that the statements are overwhelmingly prejudicial where the victim was brutally murdered as Thompson was. Defendant argued that the statements were hypothetical, were exercises in the venting of anger, and were highly inflammatory. Lastly, defendant argued that she did not contend Thompson's death was accidental, nor did the defendant identify someone else as the perpetrator, factors which lowered the relevance of the statements.

As to the two alleged similar acts, defense counsel argued they did not meet the admissibility test of *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), under which 1) there must be substantial evidence that the defendant perpetrated the bad act; 2) there must be some special quality or circumstance of the act tending to prove the defendant's identity or motive, intent, etc.; 3) one or more of these facts must be material to the determination of defendant's guilt; and 4) the probative value must not be substantially outweighed by danger of unfair prejudice. [7]

The trial court admitted all the challenged evidence under MRE 404(b), finding it relevant to establish motive and intent:

> THE COURT: Defendant seeks to suppress testimony of Shirley Howell [sic], Richard Lingnau and Sheila Walker regarding two physical altercations involving the victim, Cindy Thompson at her own residence. The motion does not specifically state which portions of the testimony are claimed to be objectionable, but that has been pointed out on the record. Apparently, the objectionable testimony identified Carol Ege as the person who verbally and physically assaulted the victim. Defendant notes that the testimony is irrelevant and inconsistent and is prejudicial.
>
> The Court finds that such evidence is relevant to motive and intent of the defendant, whether she planned the murder of Cindy Thompson due to the fact that Cindy Thompson had been impregnated by defendant's boy friend. Richard Lingnau testified that he conspired with defendant to kill the victim. The violent argument between the defendant and the victim is relevant to establish the animosity between them which may have led to the murder.
>
> In People v Hill,[8] 167 Mich App 756, a 1988 case, evidence of a defendant's earlier assault against a homicide victim was admissible as evidence of intent.
>
> MRE 404(B) states that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, 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 the case.
>
> In this case, the evidence is not presented to show defendant's bad character in order to show she had acted in conformity therewith; rather, it is presented to show motive, identity and intent, and, therefore, I will deny the motion to suppress.

On appeal, both parties argue that the first two challenged pieces of evidence, defendant's alleged statements to Reppuhn and Apker, are prior statements, and not prior bad acts. Both parties note that a prior statement of general intent is not a prior act for purposes of MRE 404(b). *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988). As the statement of a party opponent, the admissibility analysis involves whether the statement is relevant, and whether its probative value is outweighed by its possible prejudicial effect. *Id.* at 515.

In *People v Miller*, 211 Mich App 30; 535 NW2d 578 (1995), a stalking case in which the defendant was convicted of first-degree murder in the death of his former girlfriend's boyfriend, this Court held that the defendant's prior threatening statements were relevant with regard to the defendant's intent and his obsession with his former girlfriend. *Id.* at 39. About ten months before the murder, the

defendant had sent his former girlfriend a videotaped response to one of her letters in which he told her that she should not see other men "because I do have the ability and the capability and the mind where I will kill somebody." *Id.* at 35, 38. The prosecution had offered the tape to show the defendant's intent and that he acted in conformity with the threats made on tape. *Id.* at 38. This Court held that the trial court did not abuse its discretion in admitting the tape, as it was relevant with regard to defendant's intent and, because the case involved stalking, his obsession with his former girlfriend. *Id.* at 39.

Although the trial court did not specifically determine whether each piece of challenged evidence was more prejudicial than probative, referring collectively to incidents involving defendant both verbally and physically assaulting Thompson, we conclude the alleged prior statements to Apker and Reppuhn were admissible as admissions of a party opponent, MRE 801(d)(2), and were relevant to defendant's motive. The court did not abuse its discretion in impliedly concluding that the probative value was not outweighed by the danger of unfair prejudice and that it was for the jury to decide whether the statements were actually made and, if so, their probative value. *People v Fisher*, 449 Mich 441; 537 NW2d 577 (1995).

As to the prior similar acts, we similarly conclude that the trial court did not abuse its discretion in ruling the evidence admissible. Applying *People v Vandervliet*, 444 Mich 52; 508 NW2d 114 (1993), we conclude the evidence was offered to show motive, not propensity. Further, the trial court could reasonably conclude that the probative value was not outweighed by the danger of unfair prejudice. While Walker's testimony was not overwhelming, she sufficiently described the incident, and identified the picture of defendant with sufficient certainty, to justify the admission of the evidence, allowing its weight to be assessed by the jury. Simiarly, defendant admitted at trial that the December 13, 1983 incident at Thompson's sister's house did occur. While defendant, Lingnau and Howells gave varying accounts of what actually transpired, there was consistent testimony that defendant went to the house to confront Thompson about Davis and that a fight ensued. The evidence was properly admitted.

III

A

Defendant next argues that the trial court abused its discretion in allowing the jury to hear irrelevant, prejudicial and inflammatory testimony that she had been impregnated and had aborted pregnancies by Lingnau and Mark Davis, both prosecution witnesses who had not been asked about that subject. Defendant argues that the questioning was irrelevant, had nothing to do with defendant's credibility and was designed to improperly inflame the jury and unfairly prejudice defendant.

At the conclusion of the prosecution's cross-examination of defendant, the questioning turned to defendant's relationship with Richard Lingnau:

Q: With Richard Lindgow [sic], did you ever live with Richard Lindgow?

A: No.

Q: Just dated him?

A: Kind of a date/friend situation.

Q: How good a friend?

A: He lived two doors down from my mother so you know, we'd watch TV together, go out to dinner a couple of times.

Q: Ever have sexual relations with him?

A: Yes.

Q: Were you ever made pregnant by him?

A: Yes.

Q: Okay, and that child was aborted?

A: Yes.

Q What about Mark? Did you get pregnant by Mark?

A Yes.

Q Was that child aborted?

A Yes.

THE COURT: Anything else?

MR. TOWNSEND: I don't think so.

THE COURT: Redirect?

MR. HOWARTH: Yes, Your Honor.

THE COURT: Go ahead.

Defendant never objected to this questioning and did not seek a cautionary instruction or any inquiry into the jurors' ability to disregard the testimony. The prosecutor did not mention the evidence in closing argument.

The prosecution argues on appeal that the testimony was relevant to the issue whether defendant had the necessary frame of mind to commit first-degree murder, arguing that the prosecution intended to elicit testimony that tended to show that defendant was capable of committing the heinous

murder of Thompson who was seven months pregnant. The prosecution goes on to argue that had defendant professed to be against abortion and testified that she never subscribed to such conduct, it would have tended to support the proposition that she could not have committed this crime. Defendant, however, did not defend on the basis that she would have been incapable of the murder because she was against abortion and would never be able to kill a pregnant woman. Further, we reject the argument that a person's willingness to have an abortion is probative of guilt of murder. Thus, we reject the prosecutor's argument on appeal that the evidence was admissible. We again note that while the prosecutor has so argued on appeal, no such argument was made to the trial court, because there was no defense objection, and, more important, the prosecutor did not mention or argue the relevancy of the evidence to the jury in closing argument.

Defendant argues that although a trial court has wide discretion in determining the scope of cross-examination, the trial court abused its discretion, and asserts that objecting would have been futile, as it would have emphasized to the jury the importance of the highly caustic questions or suggested that defendant would have answered in the affirmative. We fail to see how the trial court abused its discretion when it was never asked to rule on the subject. The crucial questions are thus whether defendant's failure to object or otherwise address the matter is excused under the circumstances, and if not, whether there is manifest injustice. *People v Hunter* 201 Mich App 671, 677; 506 NW2d 611 (1993).

Defendant cites *People v Bouchee*, 400 Mich 253; 253 NW2d 626 (1977), a case where the defendant was convicted by a jury of assault with intent to commit rape. The Supreme Court reversed on several grounds, one of them being the prosecutor's questioning the defendant and his wife as to the legitimacy of their four children. During the prosecutor's cross-examination of Mrs. Bouchee, the prosecutor was allowed to establish, over objection, that the youngest child of the defendant and his wife was nine years old, while they had been married only seven years. The prosecutor was allowed to pursue the matter further while cross-examining the defendant, again over objection that the subject matter was irrelevant. *Id.* at 265-266. The Supreme Court held that character evidence offered to impeach or support a witness's credibility, other than evidence of prior conviction for crime, must be limited to the particular trait of truthfulness or untruthfulness, further stating:

> The inquiry regarding the birth of the Bouchees' four children before their marriage was an attempt to show that Bouchee and his wife were either possessed of a bad general character or, more narrowly, a bad character for truthfulness by showing them to be guilty of specific acts of misconduct not resulting in conviction.
>
> . . . the evidence was inadmissible because it was not competent to impeach the witnesses' credibility by showing them to be possessed of a bad general character. We cannot agree with the apparent assumption of the trial court, and the express holding of the Court of Appeals, that the legitimacy of the Bouchees' four children related to the truthfulness or untruthfulness of the defendant or his wife as witnesses. In light of the unfairly prejudicial nature of the testimony, we hold that its admission on the issue of the

> credibility of the defendant or his wife amounted to an abuse of discretion. [400 Mich at 268.]

It is clear that the defendant in *Bouchee* objected, unlike the instant case. However, defendant cites several cases where there was no objection and prosecutorial misconduct was found to have created manifest injustice.

The first of these is *People v Sterling*, 154 Mich App 223, 232-233; 397 NW2d 182 (1986), cited in support of defendant's argument that this Court has long held that a prosecutor's questions regarding a defendant's sex life are not probative of guilt. In *Sterling*, the defendant was convicted by a jury of two counts of first-degree criminal sexual conduct and questioned about his sex life. The Court held that that questioning, along with the prosecution's improper appeal to the civic duty of the jury to rid the community of rapists, its having implied in closing argument that there might have been other inadmissible evidence and the trial court's having invaded the province of the prosecutor several times created manifest injustice despite lack of timely objections. *Id*.

Another case where there was no objection is *People v Thangavelu*, 96 Mich App 442; 292 NW2d 277 (1980), a first-degree criminal sexual conduct case in which the defendant, a medical doctor, allegedly performed oral sex on a patient during an examination. The defendant argued that he was denied a fair trial by the prosecutor's references to women being raped on the street, daughters being raped by their fathers, and patients being raped by their doctors. *Id.* at 451. This Court concluded that despite the absence of objection, the prosecutorial comments resulted in the denial of a fair trial, having had the effect of arousing the passions of the jury and diverting its attention from the proper issues. *Id*.

We find the prosecutor's improper arguments in *Sterling* and *Thangavelu* to have been particularly significant, and conclude that the instant case must be distinguished on that basis.

Defendant also cites *People v Flanagan*, 129 Mich App 786, 793; 342 NW2d 609 (1983), a first-degree criminal sexual conduct case. This Court held that the trial court abused its discretion in permitting the prosecutor, over defense objection, to cross-examine the defendant about marital problems around the time the sexual assaults occurred. The prosecutor argued that the defendant's ability to fulfill his sexual desires was probative of his motive to rape the complainants, and attempted to inject the possibility that the defendant's impending divorce affected his propensity to commit criminal sexual assaults. *Id*. at 793. Again, the defendant had objected at trial.

Defendant also cites *People v Rohn*, 98 Mich App 593; 296 NW2d 315 (1980). The defendant in *Rohn* was found guilty of arranging to have her husband killed. This Court held it was reversible error for the prosecutor in closing argument to appeal to the jury's religious duties in calling for the defendant's conviction. Defense counsel, however, had objected below and moved for a mistrial. *Id*. at 598.

We conclude that defendant's failure to object precludes review except for manifest injustice. We are unable to say that the court could not have rectified the situation had a timely objection been

made. Counsel could have interrupted the questioning and asked for a conference in a manner that would not have emphasized the testimony. The court could have taken measures to strike the evidence from the jury's consideration, and, if doubts were expressed as to the jury's ability to do so, could have developed an appropriate record.

Further, we are unable to conclude that manifest injustice resulted from the questioning. The prosecutor never returned to the subject and, while the general subject is one about which individual jurors may have intense views, it is pure speculation to assume that these jurors were prejudiced in this case.

We observe, however, that despite our conclusion that the failure to object precludes reversal, we find the prosecutor's conduct irresponsible. A competent and responsible attorney involved in a lengthy trial, civil or criminal, should foresee the problems that inhere in this type of questioning and should bring his or her intent to embark on such a line of questioning to the trial court's attention outside the presence of the jury.

B

Lastly, defendant argues that the prosecutor's impeachment of defense expert Dr. Spitz was improper. The credibility of a witness is always an appropriate subject for the jury's consideration. *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). However, the evidence should be probative of credibility, and not unduly prejudicial. The prosecutor questioned Dr. Spitz regarding his reason for leaving the Wayne County medical examiner's officer, and Dr. Spitz stated that it was because of a disagreement regarding hiring practices. The prosecutor then inquired whether Dr. Spitz had filed a lawsuit against Wayne County and whether there had been a restraining order preventing him from entering his former office. As defendant did not object to this line of questioning, we review for manifest injustice. *Hunter, supra*. Dr. Spitz fully explained the circumstances surrounding the restraining order, and testified that the restraining order was lifted, and the county delivered his equipment to him and paid for the equipment he agreed the county could retain. In light of the context in which the evidence was admitted, and the manner in which Dr. Spitz handled the inquiry, we conclude there was no manifest injustice.

Defendant also argues that it was improper for the prosecutor to have inquired as to Dr. Spitz' possible misidentification of an accident victim in Macomb County. Again, defense counsel did not object. We conclude that Dr. Spitz adequately dealt with the questions and that there was no manifest injustice.

Finally, the prosecutor was permitted to ask Dr. Spitz how much he was being paid for his work on the instant case. Defense counsel objected and the court overruled the objection. Dr. Spitz answered the question and the prosecutor moved on. The trial court did not abuse its discretion in allowing the question in light of its wide discretion in determining the scope of cross-examination. *Lucas, supra*, 188 Mich App 572. Further, the prosecutor did not argue that Dr. Spitz should not believed because he was being paid.

Affirmed.

/s/ Helene N. White
/s/ Edward M. Thomas

I concur in result only.

/s/ E. Thomas Fitzgerald

[1] This is a troubling case. The crime is horrific. The initial investigation was deficient. Defendant was not charged until nine years after the murder. There are others who are logical suspects. No one saw defendant at the scene the evening of the murder. No physical evidence links defendant to the crime except testimony that a mark on the victim's cheek is a bite mark that is highly consistent with defendant's dentition. Two other experts testified that it was not a bite mark, one testifying that even if it was a bite mark, it did not match defendant's dentition. Other evidence against defendant concerned alleged threats, statements and solicitations made to others regarding the victim and a prior incident with the victim. The credibility of much of this evidence was called into question. On the other hand, the volume of evidence concerning defendant's animosity towards Thompson and her desire to see her killed was considerable, and defendant's statement to police in 1993 was inconsistent with testimony at trial. At this juncture, we simply observe that we have carefully reviewed the record and address our analysis to the issues presented.

[2] Defendant was charged in connection with this incident with trespassing and assault and battery. She pleaded guilty of trespassing.

[3] The question was raised why Davis had no blood on his shoes given this testimony.

[4] There was testimony that there was a thirty minutes lapse from the time Davis discovered the body and the time police were called.

[5] Apparently, Thompson had had kidney surgery in July, 1993 and found out she was pregnant. She had been told to consider a clinical abortion because of the dyes and x-rays taken during her illness.

[6] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[7] *People v Vandervliet*, 444 Mich 52; 508 NW2d 114 (1993), was issued the day before the trial court's hearing on the similar acts motion. Under that case, similar acts evidence offered for a legitimate purpose other than to show a defendant's propensity for committing a crime is not barred provided its probative value is not substantially outweighed by the danger of unfair prejudice.

[8] In *People v Hill*, 167 Mich App 756; 423 NW2d 346(1988), the defendant was convicted by a jury of first-degree murder of his former girlfriend, who died as a result of multiple gunshot wounds. The defendant admitted shooting the victim but argued it was accidental and there was no premeditation. At trial, the victim's prior recorded testimony at a preliminary examination regarding a felonious assault

allegedly perpetrated by the defendant against her one month before her death was admitted. Id. at 760. This Court held that there was no error in that admission, noting that evidence of a prior assault is admissible to show motive or intent, factors listed in MRE 404(b), particularly where the defense of accident is asserted, that the testimony was highly probative of the defendant's motive and intent to kill, and thus the probative value outweighed the danger of unfair prejudice. Id. at 762-763. We recognize that the issue of intent was present in *Hill* and is not present here.