MCDONALD, J., concurring in part and dissenting in part.

I agree with part I of the majority opinion.

As to part II of the majority opinion, the defendant, John G., claims that the court improperly admitted the testimony of his granddaughter, B, that when she was age eight, nearly ten years before trial, he digitally penetrated her vagina. I would hold that the evidence of B was admitted improperly as to count one of the information charging the defendant with sexual assault in the first degree.

Our Supreme Court has stated that "evidence of prior misconduct is inadmissible to prove that a defendant is guilty of the crime of which he is accused. . . . Nor can such evidence be used to suggest that the defendant has a bad character or a propensity for criminal behavior. . . . Evidence of prior misconduct may be admitted, however, when the evidence is offered for a purpose other than to prove the defendant's bad character or criminal tendencies." (Citations omitted; internal quotation marks omitted.) *State* v. *Merriam*, 264 Conn. 617, 659–60, 835 A.2d 895 (2003); *State* v. *Nunes*, 260 Conn. 649, 684, 800 A.2d 1160 (2002); Conn. Code Evid. § 4-5 (a). Such purposes include proving, among other things, intent. *State* v. *Merriam*, supra, 660. Our Supreme Court stated: "In order to determine whether such evidence is admissible, we use a two part test. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of [the prior misconduct] evidence must outweigh [its] prejudicial effect . . . ." (Internal quotation marks omitted.) Id., 661.

In this case, the state presented B as a witness to establish a common scheme or plan, intent and absence of mistake. The majority relies on intent and absence of mistake as the purpose for introduction of the evidence. As to the first count, sexual assault in the first degree, it was improper for the court to admit the testimony of B as being relevant to intent and absence of mistake because they were not at issue before the jury. The jury, as instructed, was not required to find intent, as there was no claim of involuntary digital penetration of the vagina of C, another of the defendant's granddaughters and the victim of the conduct alleged in count one. See *State* v. *Pierson*, 201 Conn. 211, 215–16, 514 A.2d 724 (1986), on appeal after remand, 208 Conn. 683, 546 A.2d 268 (1988), cert. denied, 489 U.S. 1016, 109 S. Ct. 1131, 103 L. Ed. 2d 193 (1989).[1] Our Supreme Court has stated: "The distinction between using evidence to prove an act and using evidence to prove intent is

consistent with our prior case law." *State* v. *Meehan*, 260 Conn. 372, 396, 796 A.2d 1191 (2002). Professor Wigmore describes the proper use of evidence of prior bad acts or offenses admitted to show intent as follows: "It will be seen that the peculiar feature of this process of proof is that the *act itself is assumed to be done*,—either because (as usually) it is conceded, or because the jury are instructed not to consider the evidence from this point of view until they find the act to have been done and are proceeding to determine the intent. . . . [T]he attempt is merely to discover the intent accompanying the act in question . . . ." 2 J. Wigmore, Evidence (Chadbourn Rev. Ed. 1979) § 302, p. 245.

Furthermore, at the trial, as to mistake, the defendant did not claim that he penetrated C's vagina by mistake or accident. To the contrary, he claimed he never digitally penetrated C's vagina. In the words of the New Jersey Supreme Court in *State* v. *G.V.*, 162 N.J. 252, 744 A.2d 137 (2000), "[i]ntellectual honesty compels the conclusion there is no genuine dispute that one who has sexual intercourse with" a twenty-two month old granddaughter "has made a mistake . . . ." (Internal quotation marks omitted.) Id., 261.

As to the first count, the only issue for the jury in this case was whether the act of digital penetration occurred. Because there was no issue as to intent and mistake, the evidence was not admitted properly on these issues. See id.; see also *United States* v. *Benedetto*, 571 F.2d 1246, 1249 (2d Cir. 1978); *People* v. *Woltz*, 228 Ill. App. 3d 670, 674, 592 N.E.2d 1182, leave to appeal denied, 146 Ill. 2d 650, 602 N.E.2d 474 (1992); *State* v. *Lipka*, 174 Vt. 377, 391–93, 817 A.2d 27 (2002).

Finally, when B testified on voir dire before her jury testimony, she did not state that the defendant had digitally penetrated her vagina, only that he had touched her vagina. The court ruled that B could testify as she did on voir dire. When B testified before the jury, however, she added that the defendant had penetrated her vagina. Thus, the court did not rule that the testimony's probative value outweighed its prejudicial effect, as our cases require. See *State* v. *Romero*, 269 Conn. 481, 502, 849 A.2d 760 (2004); *State* v. *Merriam*, supra, 264 Conn. 671.

I would conclude, as to the first count, that the admission of B's testimony was not harmless. Our Supreme Court, in *State* v. *Sawyer*, 279 Conn. 331, 352–57, 904 A.2d 101 (2006) (en banc), clarified the harmless error standard. "[T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . [I]t expressly requires the reviewing court to consider the effect of the erroneous ruling on the jury's decision. . . . Accordingly . . . a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substan-

tially affect the verdict." (Citations omitted; internal quotation marks omitted.) Id., 357.

In this case, the state's evidence as to digital penetration was not overwhelming. It was based on testimony of C's father and a physician that C's reaction, indistinctly videotaped in a darkened room, indicated that the defendant inserted his finger into C's vagina under C's diaper. That physician never examined C, and the state presented no evidence of physical injury indicating vaginal penetration. The defendant denied any penetration in a recorded telephone conversation and in his trial testimony. Furthermore, the court's instructions directed to the counts of the information in which intent was at issue did not safeguard against the jury's using B's evidence improperly as to count one, in which intent was not at issue.[2] In effect, the jury was not instructed how to use the evidence as to count one. See *State* v. *G.V.*, supra, 162 N.J. 262. The danger was that the evidence could have been used to prove that penetration did occur.

The majority does not reach the admissibility of the evidence under the common scheme or plan exception. In *State* v. *Shindell*, 195 Conn. 128, 133–34, 486 A.2d 637 (1985), our Supreme Court described such common plan or scheme evidence as that which proves the existence of a larger continuing plan, scheme or conspiracy, of which the present crime on trial is a part. The prior misconduct is not an unrelated incident but part of a continuing system of criminal activity. Id., 135. In *State* v. *Sawyer*, supra, 279 Conn. 349 n.15, our Supreme Court noted the difference between using prior misconduct evidence to establish identity and using it to "establish [a] broader scheme of criminal activity . . . ."

In the present case, the court did not instruct the jury that it could use B's evidence to find such a broader scheme in the commission of the prior misconduct and the criminal acts alleged in the information. The jury, rather, was told that the evidence could be used on the issues of the "existence of a plan or scheme in the commission of the criminal acts alleged in the information . . . ." See footnote 2 of this opinion.

Moreover, in its brief before us, the state does not argue that B's evidence was relevant other than to prove intent or absence of mistake. The state's failure to raise the claim that B's evidence was relevant other than to intent or absence of mistake constitutes a waiver of those claims on appeal. See *State* v. *Sawyer*, supra, 279 Conn. 342 n.11. Accordingly, I would not consider the common scheme or plan exception as supporting the admission of B's evidence as to count one.

As to the other counts charging sexual assault in the fourth degree and risk of injury to a child by sexual contact, the evidence would be relevant to the issues of intent, required by the sexual assault offenses, and

mistake, as to both charges, which were in dispute. The defendant was charged with multiple counts of sexual assault in the fourth degree under General Statutes § 53a-73a (a).[3] The defendant's intent and lack of mistake was relevant and material in relation to the fourth degree sexual assault counts because proof that the defendant committed the act of intentionally touching for the purpose of his sexual gratification are elements of the crime. As to contact with the intimate parts of the children under risk of injury,[4] the defendant claimed that his touching was accidental, and, therefore, his intent and lack of mistake were relevant to rebut that defense.

Although I do not agree with the statement in footnote 9 of the majority opinion that remoteness is not relevant as to intent, I would conclude that the evidence, even if improperly admitted, was not harmful as to the charges of sexual assault in the fourth degree and risk of injury to a minor by sexual contact in view of the defendant's highly damaging admissions in a telephone conversation recorded by the police, which the jury heard. In that conversation, the defendant stated that since 1989, he had touched "the peeper" of his young granddaughters without penetrating any of them and that he had been undergoing therapy.

Accordingly, I would reverse the defendant's conviction as to count one and order a new trial.[5] I concur with the majority as to the remaining counts.

[1] The court charged the jury as to count one as follows: "A person is guilty of sexual assault in the first degree when such person engages in sexual intercourse with another person, and such other person is under thirteen years of age and the actor is more than two years older than such person.

"The elements of the offense: the state must prove all of the following elements beyond a reasonable doubt in order to justify a verdict of guilty. One, that the defendant engaged in sexual intercourse with another person; two, that the other person was under thirteen years of age at the time of the sexual intercourse; three, and that the defendant was more than two years older than such person.

"I am now going to go through these elements one by one and in detail for you. The first element that the state must prove beyond a reasonable doubt is that the defendant engaged in sexual intercourse with C. Sexual intercourse is defined by statute and means, for the purpose of this case, vaginal intercourse. Sexual intercourse means penetration into the genital opening. Its meaning is limited to persons not married to each other.

"Penetration is an element of the offense of sexual assault in the first degree, which the state must prove beyond a reasonable doubt.

"Our law provides that penetration, however slight, is sufficient to complete sexual intercourse and does not require emission of semen. The phrase penetration, however slight, is intended to cover penetration of the labia majora. Penetration may be committed digitally, that is, by the finger or fingers into the genital opening of the victim's body.

"If you find beyond a reasonable doubt that there was sexual intercourse, the state must also prove beyond a reasonable doubt that at the time of the sexual intercourse, C had not yet reached the age of thirteen, and the defendant was more than two years older than such other person.

"If you find that the state has established these elements beyond a reasonable doubt, then that is sufficient for conviction of this offense. There is no need for the state to prove force or compulsion by the defendant, and it is not a defense even if the victim consented to sexual intercourse.

"Now, the state contends in count one, that, on or about September 12, 2002, in New Britain, Connecticut, the defendant engaged in sexual intercourse with C, who at the time was under thirteen years of age and the defendant was more than two years older than she, by penetrating her

vagina with his finger or fingers. The defendant, on the other hand, denies all of the state's allegations.

"In order for you to reach a verdict of guilty of count one, you must find beyond a reasonable doubt that all the elements of the offense of sexual assault in the first degree were proven, namely, that the defendant engaged in sexual intercourse with C, and that, at the time, C was under thirteen years of age and the defendant was more than two years older than she."

[2] The court charged the jury as follows concerning B's testimony: "Evidence of prior acts of misconduct of the defendant against B, and his statements on the audiotape regarding the granddaughters that are not mentioned in the information, are not being admitted to prove the bad character of the defendant or his tendency to commit criminal acts.

"Such evidence and the testimony of B is being admitted solely to show or establish the existence of a plan or scheme in the commission of the criminal acts alleged in the information, *or the existence of the intent, which is a necessary element of the crimes charged*, or to show the absence of mistake on the part of the defendant.

"You may not consider such evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charged or to demonstrate a criminal propensity.

"You may consider such evidence if you believe it, and further find that it logically, rationally and conclusively supports the issues for which it is being offered by the state. But only as it may bear here on the issues of the existence of a plan or scheme in the commission of the criminal acts alleged in the Information, *or the existence of the intent, which is a necessary element of the crimes charged*, or to show the absence of mistake on the part of the defendant.

"On the other hand, if you do not believe such evidence, or even if you do, if you find that it does not logically, rationally and conclusively support the issues for which it is being offered by the state, namely, the existence of a plan or scheme in the commission of the criminal acts alleged in the Information, *or the existence of the intent, which is a necessary element of the crimes charged*, or to show the absence of mistake on the part of the defendant, then you may not consider that testimony for any other—for any purpose.

"You may not consider evidence of prior misconduct of the defendant even for the limited purpose of attempting to prove the crimes charged in the information because it may predispose your mind uncritically to believe that the defendant may be guilty of the offenses here charged merely because of the alleged prior misconduct. For this reason, you may consider this evidence only on the issues of the existence of a plan or scheme in the commission of the criminal acts alleged in the information *or the existence of the intent, which is a necessary element of the crimes charged*, or to show the absence of mistake on the part of the defendant and for no other purpose." (Emphasis added.)

[3] General Statutes § 53a-73a (a) provides in relevant part: "A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age . . . or (C) physically helpless . . . or (2) such person subjects another person to sexual contact without such other person's consent . . . ." Sexual contact is defined as "any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor . . . ." General Statutes § 53a-65 (3).

[4] The defendant was also charged with multiple counts of risk of injury to a child under General Statutes § 53-21 (a), which provides in relevant part: "Any person who . . . (2) has contact with the intimate parts . . . of a child under the age of sixteen years . . . in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty . . . ." In this case, the jury was instructed, on the issue of contact in a sexual and indecent manner, that such contact must not be innocent, accidental or inadvertent.

[5] I, therefore, would not reach the issue of the limited testimony of the defendant's expert witness.