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STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee

SC:147743  
COA.308244  
BAY CC. 10-10892-FH

v.  
ROBERT RICHARD-HOWARD NELSON,  
Defendant-Appellant

\_\_\_\_\_  
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DEFENDANT-APPELLANT'S ROBERT RICHARD-HOWARD NELSON'S  
SUPPLEMENTAL BRIEF ON APPEAL  
(ORAL ARGUMENT REQUESTED)



ORIGINAL

**TABLE OF CONTENTS**

INDEX OF AUTHORITIES... ..ii

STATEMENT OF QUESTIONS PRESENTED... ..v

STATEMENT OF JURISDICTION... ..vi

STATEMENT OF FACTS AND OF THE CASE... ..1

ARGUMENT... ..1

THIS COURT SHOULD GRANT LEAVE TO APPEAL AND REVERSE THE MICHIGAN COURT OF APPEALS’ DECISION WHERE THE 22-YEAR OLD MENTALLY IMPAIRED DEFENDANT, CHARGED WITH A SINGLE INCIDENT, WAS DEPRIVED OF HIS 6<sup>TH</sup> AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND OF HIS 14<sup>TH</sup> AMENDMENT RIGHT TO DUE PROCESS WHEN DEFENSE TRIAL COUNSEL (1) SOUGHT TO INTRODUCE UNFAVORABLE 404B EVIDENCE OF MULTIPLE UNCHARGED INCIDENCES IN HIS OPENING STATEMENT AND ALSO IN THE TESTIMONY HE ELICITED FROM THE MAJORITY OF WITNESSES WHICH PROVED THAT THE DEFENDANT’S ACTIONS WERE INTENTIONAL, UNMISTAKEN, AND A PATTERN OF CONDUCT... ..1

CONCLUSION AND RELIEF REQUESTED... ..9

**INDEX OF AUTHORITIES**

*People v Ginther*, 390 Mich 436, 443, 197 NW2d 281 (1973)... ..2

*People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999)... ..1

*People v LeBlanc*, 465 Mich 575, 579 (2002)... ..1,9

*People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994)... ..2

*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001)... ..3

*Powell v Alabama*, 287 US 45, 71; 53 S Ct 55; 77 L Ed 158 (1932)... ..2

*Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674  
(1984).....2,3,8,9

**STATUTES, COURT RULES AND CONSTITUTIONAL AMENDMENTS**

*Const 1963, art 1, § 17* .....2  
*Const 1963, art 1, § 20* .....2  
*MCL 750.520(C)(1)(a)* .....v,1  
*MCL 750.520(G)(2)* .....v,1  
*MCL 750.520a(q)* .....5  
*MCR 7.301(A)(2)* .....vi  
*MCR 7.302(H)(1)* .....v  
*MRE 403* .....5  
*MRE 404b* .....5  
*MRE 404(b)(1)* .....2  
*US Const Am VI* .....2  
*US Const Am XIV* .....2

**STATEMENT OF QUESTIONS PRESENTED**

1. SHOULD THIS COURT GRANT LEAVE TO APPEAL AND REVERSE THE MICHIGAN COURT OF APPEALS' DECISION WHERE THE 22-YEAR OLD MENTALLY IMPAIRED DEFENDANT, CHARGED WITH A SINGLE INCIDENT, WAS DEPRIVED OF HIS 6<sup>TH</sup> AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND OF HIS 14<sup>TH</sup> AMENDMENT RIGHT TO DUE PROCESS WHEN DEFENSE TRIAL COUNSEL (1) SOUGHT TO INTRODUCE

UNFAVORABLE 404B EVIDENCE OF MULTIPLE UNCHARGED INCIDENTS IN HIS OPENING STATEMENT AND ALSO IN THE TESTIMONY HE ELICITED FROM THE MAJORITY OF WITNESSES WHICH PROVED THAT THE DEFENDANT'S ACTIONS WERE INTENTIONAL, UNMISTAKEN, AND A PATTERN OF CONDUCT?

The Court of Appeals answered "No."

Plaintiff-Appellee answers "No."

Defendant-Appellant answers "Yes."

#### **STATEMENT OF JURISDICTION**

Defendant-Appellant, Robert Richard-Howard Nelson, was charged as follows: Count 1, Criminal Sexual Conduct, 2<sup>nd</sup> degree, *MCL 750.520(C)(1)(a)*; Count 2, Assault with Intent to Commit Criminal Sexual Conduct, 2<sup>nd</sup> degree, *MCL 750.520(G)(2)*. After a 5-day jury trial commencing on October 18, 2011, Defendant-Appellant was found guilty on count 1. The parties stipulated to the dismissal of count 2, Assault with Intent to Commit Criminal Sexual Conduct, 2<sup>nd</sup> degree on the 4<sup>th</sup> day of trial. (TR, Jury Trial, Vol. IV, 10/21/2011, pp. 3,4). On January 13, 2012, Defendant-Appellant was sentenced to 300 days on count 1. Appellate counsel was appointed on January 19, 2012.

On July 30, 2013, the Michigan Court of Appeals affirmed the defendant's conviction. On September 19, 2013, Defendant-Appellant filed an In Pro Per Application to the Michigan Supreme Court. On September 30, 2013, the Bay County Prosecutor filed a letter that the Prosecutor did not intend to file a brief. On June 18, 2014, this court issued an order (1.) directing the Clerk to schedule oral argument on whether to grant the

application or take other action. *MCR 7.302(H)(1)*; and (2.) directing the Bay Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint appellate counsel Wendy Barnwell, if feasible. On June 25, 2014, the Bay County Circuit Court appointed Attorney Wendy Barnwell as appellate counsel in the Michigan Supreme Court. The trial court appointed Attorney Wendy Barnwell as appellate counsel on June 25, 2014. Attorney Barnwell filed a Motion to Extend the Time to File the Supplemental Brief in this court on August 4, 2014. This court granted the Motion to Extend the Time to File Appellant's Supplemental brief, extending the deadline to August 26, 2014.

Jurisdiction is conferred upon this court by *MCR 7.301(A)(2)*.

## STATEMENT OF FACTS AND OF THE CASE

Defendant-Appellant incorporates the Statement of Facts filed in the Brief on Appeal, filed in the Michigan Court of Appeals.

## ARGUMENT

**I. THIS COURT SHOULD GRANT LEAVE TO APPEAL AND REVERSE THE MICHIGAN COURT OF APPEALS' DECISION WHERE THE DEFENDANT, CHARGED WITH A SINGLE INCIDENT, WAS DEPRIVED OF HIS 6<sup>TH</sup> AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND OF HIS 14<sup>TH</sup> AMENDMENT RIGHT TO DUE PROCESS WHEN DEFENSE TRIAL COUNSEL (1) SOUGHT TO INTRODUCE UNFAVORABLE 404B EVIDENCE OF MULTIPLE UNCHARGED INCIDENCES IN HIS OPENING STATEMENT AND ALSO IN THE TESTIMONY HE ELICITED FROM THE MAJORITY OF WITNESSES WHICH PROVED THAT THE DEFENDANT'S ACTIONS WERE INTENTIONAL, UNMISTAKEN, AND A PATTERN OF CONDUCT.**

### **Standard of Review/Issue Preservation**

A defendant may raise ineffective assistance of trial counsel for the first time on appeal, with review limited to mistakes apparent in the existing record. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

“Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579 (2002). Findings of fact are reviewed for clear error and questions of constitutional law are reviewed *de novo*. *Id.* This Court decides ineffective assistance of counsel claims based on the existing record. In the instant case, the errors which constituted ineffective assistance of counsel, all occurred on the record from counsel’s misunderstanding of the felony information, and his consequent interjection of 404b evidence in his opening

statement and elicitation of 404b evidence from most of the witnesses, including the defendant. See *People v Williams*, 223 Mich App 409, 414, 566 NW2d 649 (1997); *People v Ginther*, 390 Mich 436, 443, 197 NW2d 281 (1973).

An accused's fundamental right to representation by counsel includes the constitutional right to effective counsel. *US Const, Ams VI, XIV; Const 1963, art 1, sec 17, 20; Powell v Alabama*, 287 US 45, 71; 53 S Ct 55; 77 L Ed 158 (1932); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defense attorney is ineffective when his actions or omissions are not the result of "reasonable professional judgment" and when his performance is "deficient." *Id. at 690, 687*. To establish ineffectiveness under either the federal or state constitutional provision, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *Id. at 687; People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To show prejudice, the defendant must demonstrate a "reasonable probability" that the result of the proceeding would have been different absent counsel's errors. *Strickland*, 466 US at 694. This Court must reverse if trial counsel rendered objectively deficient performance and there is a reasonable probability that the outcome of the trial would have been different but for trial counsel's error. *Strickland v Washington*, 466 US 668, 687-688, 694, 104 S Ct 2052, 80 L Ed 2d 674 (1984); *LeBlanc, supra*.

A defendant has a due process right to a fair trial undeterred by the admission of improper evidence. *US Const. Ams V; XIV; Mich Const 1963, art 1, § 20. MRE 404(b)(1)*, provides:

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 the case.

(Emphasis added).

In the *case sub judice*, the Michigan Court of Appeals recognized that defense counsel made errors in his Opening Statement, pointing out (at page 2 of the Opinion) that “defense counsel was clearly wrong in his assertion that the camping trip outside Bay County was a charged offense.” In footnote 1, the Court of Appeals noted that the “prosecutor had referred only to the couch incident in his opening statement...” The Court of Appeals’ conclusion that the 404B evidence was used by defense counsel to show that the complainant was a liar was an unreasonable finding, in view of the testimony elicited from the witnesses by defense counsel which actually showed that the young complainant was consistent in her prior statements. However, the Court of Appeals still recognized the bizarreness of defense counsel’s trial strategy, characterizing trial counsel’s introduction and mention of the other acts and camping trip as “unusual” trial strategy. However, the more accurate characterization should have been “unfair,” “unreliable,” and “falling below objective standards of reasonableness.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). *Strickland supra*.

At no point in time did the prosecution intend to introduce the 404 B evidence that was actually introduced by defense trial counsel. (TR, Jury Trial, 10/19/2011, pp. 17-23). As was pointed out in the Defendant’s Brief filed originally in the Michigan Court of

Appeals, the prosecutor specifically asked for a recess so that he could instruct the witnesses that they could testify about the other incidences defense counsel introduced into his opening statement. After the defense opening statement, the prosecution (outside the presence of the jury), cautioned the court that it had to talk to its witnesses because they had been specifically instructed not to bring up 2 incidences addressed by defense counsel in his opening which did not occur in Bay County: (1.) a swimming incident; and (2.) an incident where Kylei's flier was unzipped. The prosecution indicated to the court that his witnesses had mistakenly not been sequestered during the opening statements. The prosecution stated that the felony information comprised of alternative theories as to an incident that occurred on the couch at the address 400 Ionia Street, (the defendant's residence). The court also noted that the felony information charged 2 counts alleged to have occurred at 400 W. Ionia Street, in Bay City, Bay County, Michigan. The prosecution once again clarified that the Preliminary Examination contained testimony about one incident. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 27-33, 44).

As a result of defense counsel's blatant errors, Robert Richard-Howard Nelson *was essentially being tried for 3 incidences--the incident alleged to have occurred at 400 W. Ionia Street in Bay City, and 2 other incidences which allegedly occurred outside of Bay County, a Camping swimming incident, and a unzipped zipper incident.* The Michigan Court of Appeals characterized this as an "unusual" trial strategy. Counsel's actions were bizarre, unreliable, harmful, prejudicial as they truly illustrated intentional acts on the part of the defendant that were not as a result of an accident or mistake. Defense counsel's strategy established a plan or scheme on the part of the defendant

Robert Richard-Howard Nelson. Assuming arguendo that the other acts evidence (brought out in defense counsel's Opening Statement and during cross-examination of witnesses) showed that the complainant was a liar, it also showed that the Robert Richard-Howard Nelson acted intentionally within the meaning of *MCL 750.520a(q)*. No reasonable attorney would place evidence that is both useful (showing multiple inconsistencies in the complainant's story) and bad (establishing deliberate/intentional acts of the accused, and a pattern of behavior) before a jury where the allegation is sexual abuse of a very young child. A reasonable attorney would see that the negative aspect of the evidence would substantially outweigh any positive aspect. *Strickland supra*.

Following are excerpts of defense counsel's cross-examination of several witnesses that establish his deficient performance, and proved to the jury that the defendant actions were intentional, non-accidental, and unmistakable:

Defense counsel questioned the complaining witness about other incidences of sexual touching, contrary to *MRE 404b* and *MRE 403*, as follows:

"Q. Okay. And when--when--when Robbie--you said he put his--his—his, ah, his finger was inside the waistband of your panties?

A. Yes.

Q. Okay. And it was in between the--the crotch and the--and the--and the top of the panties, right?

A. Yes.

Q. Okay. *Was that the only time he ever did that?*

A. No.

Q. *What other time he did do that?*

A. *I don't know, but he did it a lot of times.*

Q. *A lot of times?*

A. *Yes.*"

(TR, Jury Trial, Vol. III, 10/20/2011, p. 26, lines 2-14).

In response to defense counsel opening the door, the prosecution then asked (on redirect) whether she had testified that Robbie had touched her lots of times when she was on the couch and on the chair. Kylie again responded that Robbie had touched her lots of times. (TR, Jury Trial, Vol. III, 10/20/11, p. 48, lines 4-7).

Likewise, defense counsel continued to insist on cross examination of the child witness on prior testimony that was actually unfavorable to the defense:

"Q. Was it only in the chair?

A. Um, no. An--It was in - - on the couch, too.

Q. Okay. And on both--*was it just once on the couch and once on the chair then?*

A. No. *It was more than once.* (Emphasis added).

(TR, Jury Trial, Vol. III, 10/20/2011, p. 29, lines 3-7).

\* \* \*

Defense counsel sought to cross examine the child on prior preliminary examination testimony that was unfavorable to the defense. Furthermore the prosecution had not even questioned the witness in this regard:

“Q. Do you remember two months ago when you--when you got on the chair and --told what happened, do you remember at that time --

A.No.

Q.Do--*Do you remember at that time saying when Robbie had touched you, he said- -he was like being quiet and he said, Ssh and some- -some stuff. Did he ever say those things or not?*

A.I don't know.

Q. Okay. Do you remember saying that two months ago?

A. No.

Q. Okay. So you- -just to be clear, you never- -you never said that- -that **Robbie** told you “*Sssh, be quiet*” or anything like that?”

(TR, Jury Trial, Vol. III, 10/20/2011, p. 30, lines 18-25, p. 31, lines 1-11).

As was argued in the original brief filed in the Court of Appeals, the defense gave the prosecution a gift and asked questions, as were quoted in the above-referenced excerpts, which illustrated that there was no mistake nor accident, but rather a pattern of conduct. As was stated in the brief originally filed in the Court of Appeals, this above-excerpted line of questioning by defense counsel was never broached by the prosecution at trial. Yet defense counsel insisted on cross examining the child about Robbie's demeanor which amounted to consciousness of guilt or consciousness of wrongdoing. There was no benefit to the defendant to cross-examine the child about his (Robbie's) efforts to keep his behavior a secret. Contrary to the Court of Appeals' conclusion that line of questioning did not show that she was lying. Rather, it showed that Robbie was

conscious that he was doing something wrong. (TR, Jury Trial, Vol. III, 10/20/2011, p. 30, lines 18-25, p. 31, lines 1-11). Defense counsel's actions were unequivocally not the result of "reasonable professional judgment" in asking questions and eliciting responses, detrimental to Robbie Nelson. The responses elicited by these questions showed consciousness of guilt, and lack of accident or mistake. *Strickland supra*. Rather than showing that the complainant was lying, the evidence tended to show that the complainant was consistent in her statements.

It is indisputable that defense counsel and *not* the prosecution, elicited the prejudicial 404 B evidence. The Court of Appeals stated (on page 3 of the Opinion) that the evidence would have been admissible anyway. Even if that evidence was ruled admissible after a prosecutor had filed the proper notice, and the court had done the proper balancing test, a defense attorney who had failed to object to its introduction would likely have been ineffective as counsel. It is indisputable that the defense attorney essentially proved the prosecutor's case by eliciting the testimony. The duty of the criminal defense attorney is to zealously represent the client, and not to prove the prosecutor's case. *Strickland supra*.

Multiple incidences of inappropriate touching could only be reasonably viewed as *intentional* and a *lack of accident or mistake*. Counsel's continuous weaving of this camping trip and the other acts was not just "unusual," it was objectively deficient and preposterous. Robert Richard-Howard Nelson was prejudiced by defense counsel's action, as there was a "reasonable probability" that the result of the proceeding would have been different absent counsel's errors. *Strickland, 466 US at 694*. This Court

should reverse as trial counsel rendered an objectively deficient performance and there is a reasonable probability that the outcome of the trial would have been different but for trial counsel's error. *Strickland v Washington*, 466 US 668, 687-688, 694, 104 S Ct 2052, 80 L Ed 2d 674 (1984); *LeBlanc*, supra.

**CONCLUSION AND RELIEF REQUESTED**

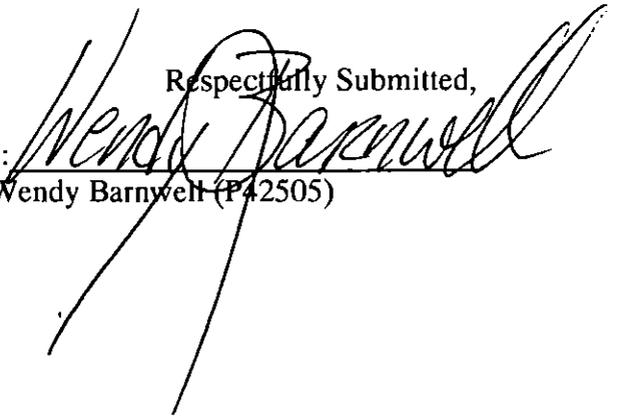
WHEREFORE, Defendant-Appellant respectfully requests that this Honorable Court reverse his convictions.

Dated: August 25, 2014

BY:

Wendy Barnwell (P42505)

Respectfully Submitted,



STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee

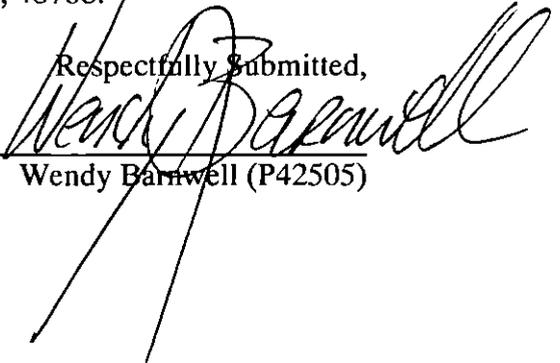
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PROOF OF SERVICE

I, Wendy Barnwell, Attorney-At-Law, P42505, do hereby swear and affirm that on August 25, 2014, I did send by 1<sup>st</sup> class mail a copy of DEFENDANT-APPELLANT'S ROBERT RICHARD HOWARD NELSON'S SUPPLEMENTAL BRIEF ON APPEAL to APA Sylvia Linton, Bay County Prosecuting Attorney, Appeals Division, at 1230 Washington Ave Suite #768, Bay City, MI, 48708.

Respectfully Submitted,  
BY:   
Wendy Barnwell (P42505)