

No.

IN THE
MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY WARD JACKSON, a/k/a TIMOTHY
WARD-JACKSON,

Defendant-Appellant.

UNPUBLISHED

Op 4 April 10, 2014

Rec 6-4-14

No. 310177

Wayne Circuit Court

LC No. 10-013476-FC

J. Callahan

WAYNE COUNTY CRIMINAL DIVISION

Circuit Court No. 10-13476-01

Court of Appeals No. 310177

149798

AMC DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

8/26

B44141

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JURISDICTIONAL STATEMENT

Defendant-Appellant was convicted of three counts of first degree criminal sexual conduct (“CSC1”) against a minor, pursuant to MCL 750.520(b)(1)(a) and three additional counts of CSC1, pursuant to MCL 750.520b(1)b(iii) (coercion by use of authority) by jury on March 26, 2012. He was sentenced to concurrent prison terms of 25-37 ½ years for his first three convictions (pursuant to MCL 750.520(b)(1)(a)) and 15-22 ½ years for two convictions pursuant MCL 750.520b(1)b(iii). Defendant was sentenced to a consecutive prison term of 15-22 ½ years for his remaining MCL 750.520b(1)b(iii) count for coercion by use of authority. [See Judgment of Sentence dated 4/17/12 attached as **Appendix A**]. Mr. Jackson appealed as of right. On April 10, 2014, the Michigan Court of Appeals affirmed his conviction in an unpublished Per Curiam opinion. *See People v Jackson*, No. 310177, 2014 Mich App LEXIS 633 (Mich Ct App Apr 10, 2014). [Attached as **Appendix B**]. On May 1, 2014, Mr. Jackson timely filed a Motion for Rehearing in the Michigan Court of Appeals. The Michigan Court of Appeals denied his Motion for Rehearing on June 4, 2014. [A copy of the Order Denying Motion for Rehearing is attached as **Appendix C**].

The Court of Appeals had jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, § 20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A); and MCR 7.204(A)(2). This Court has jurisdiction to consider this application for leave to appeal pursuant to MCR 7.301(A)(2). This application is being filed within 56 days from the date of the opinion. Defendant submits that, for the reasons that follow, the decision of the Court of Appeals affirming his convictions is clearly erroneous and will cause material injustice. MCR 7.302(B)(5). Defendant requests that this Court grant the Application for Leave to Appeal.

STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals abuse its discretion by affirming the admission of clear "other acts" character evidence under the res gestae exception and in violation of MRE 404(b)?

Defendant-Appellant says yes.

Appellee says no.

The Michigan Court of Appeals said no.

II. Did the Court of Appeals error by failing to recognize the prosecutor's blatantly improper efforts to attack Mr. Jackson's character, which constituted prosecutorial misconduct, and deprived Mr. Jackson of his right to a fair trial under the federal and Michigan Constitutions?

Defendant-Appellant says yes.

Appellee says no.

The Michigan Court of Appeals said no.

ORDER APPEALED FROM AND REASONS WHY LEAVE SHOULD BE GRANTED

On April 10, 2014, the Court of Appeals affirmed Mr. Jackson's convictions for CSC1 in an unpublished per curiam decision. On May 1, 2014, Mr. Jackson timely filed a Motion for Rehearing challenging the Court of Appeals decision, which Mr. Jackson asserts improperly justified the admission of "other acts" character evidence under the res gestae exception and which ignored the prosecutor's blatant and improper efforts to attack defendant's character. On June 4, 2014, the Court of Appeals denied Mr. Jackson's Motion for Rehearing on these issues.

Mr. Jackson appeals the Court of Appeals April 10, 2014 Order, pursuant to MCR 7.302(B)(5), on the basis that the decision is erroneous and will cause material injustice if permitted to stand, as the Court of Appeals excused both the admission of improper character evidence and prosecutorial misconduct, which denied Mr. Jackson a fair trial.

More specifically, the Court of Appeals improperly ruled that "other acts" evidence was admissible under the res gestae exception and in doing so, ignored clear Michigan precedent and the facts of this case. Moreover, the prosecutor intentionally elicited "other acts" testimony for the purpose of improperly attacking defendant's character, and did so in blatant disregard for the court rules and notice requirements, the result of which was not harmless and deprived defendant of a fair trial.

Accordingly, Mr. Jackson's requests that this Court grant his Application for Leave to Appeal.

STATEMENT OF FACTS

A. Factual Background

Mr. Jackson, a husband, father, and pastor with a masters in theology, was convicted of three counts of criminal sexual conduct in the first degree (for an offense against a minor) pursuant to MCL 750.520(b)(1)(a) and three additional counts of criminal sexual conduct in the first degree (for coercion by use of authority) pursuant to MCL 750.520b(1)b(iii) against Shania Swift, date of birth 8/19/1996, (“complainant”), who was fifteen years old at the time of trial. The testimony provided at trial included Shania Swift (complainant), Yasharon Williams, (complainant’s mother), Jacklyn Price (complainant’s aunt), Jessica Drager (forensic scientist), Julie Goddard-Lyons (forensic examiner), and Kim Turner (investigating officer). Testimony for the defense included Timothy Jackson (defendant-appellant), Kendesha Jackson (church nurse), Tiara Bennett (church nurse), Gerald Gordon (church deacon and church armor bearer), Toni Yvette Gordon (church parishioner), Eddie Buford (church armor bearer), and Bria Porter (church nurse). With the exception of the forensic examiners and investigating officer, every witness was, at some point, an active member in Mr. Jackson’s church.

Mr. Jackson dedicated his life to religion, having served as a pastor for thirteen years. His parishioners have described him as devoted, generous, and an energetic preacher who spoke with emotion and who was always willing to help someone in need. Mr. Jackson first came into contact with complainant and her family while serving as the pastor at Outreach Cathedral of Faith Ministries in Detroit, Michigan. Complainant’s mother, Lasharon Williams, served as an assistant pastor at Mr. Jackson’s church and worked closely with Mr. Jackson. Complainant began attending the church at the age of three. The summer before complainant entered the eighth grade, Ms. Williams approached Mr. Jackson regarding complainant’s behavior, which

had become increasingly problematic. Ms. Williams asked Mr. Jackson to guide complainant onto a righteous path. Complainant had been expelled from school for fighting and had been in trouble numerous times for lying and for insolence. Complainant was also disrespectful to her mother and had issues lying. Complainant did eventually confess some of her transgressions to Mr. Jackson, including that Shania had inappropriately touched a young girl from her church.

Throughout his career, Mr. Jackson had helped many parishioners through struggles and personal problems, and he welcomed the challenge of serving as a mentor to complainant—she was like a daughter to him. Complainant described Mr. Jackson as a nice and generous pastor.

Prior to entering high school, complainant had been forced to change middle schools three times due to behavioral problems. Her behavior appeared to greatly improve under Mr. Jackson's tutelage. Ms. Price testified that a Facebook conversation (unsubstantiated and improperly admitted) with a disgruntled former adult church member prompted her to wonder if complainant might have been inappropriately touched a month prior to complainant's disclosure, but Ms. Price chose not to approach complainant or her mother; instead, she decided to observe complainant to assess the situation. Ms. Price testified that complainant acted normal during this time, but she decided to approach complainant anyway on August 1, 2010. According to Ms. Price's testimony, when she directly asked if complainant had been inappropriately touched by Mr. Jackson, complainant said that he had inappropriately touched her on numerous occasions between 2009 and 2010. Complainant was between the ages of 12 and 13 at this time. Complainant testified that the touching included fellatio and intercourse.

After speaking with complainant about the alleged sexual acts, complainant, her mother, and Ms. Price approached Mr. Jackson inside the church. Mr. Jackson adamantly denied complainant's allegations. On August 3, 2010, complainant reported the incident to the police.

The investigation which followed failed to uncover any DNA evidence or corroborating witnesses. In addition to these evidentiary shortcomings, complainant's testimony was riddled with implausible and inconsistent statements.

1. The Prosecution's Case

The crux of the prosecution's case centered on the testimony of Shania Swift and Jacklyn Price. Ms. Price is complainant's aunt and a former parishioner at Mr. Jackson's church. [Trial Transcript, 3-21-12, Vol. 3, p. 137 ¶ 3-5]. Ms. Price testified that on Sunday, August 1, 2010, she approached complainant between services to discuss an issue that "had been weighing on her mind." It was during this conversation that complainant first disclosed the alleged details of her illicit relationship with Mr. Jackson. [Trial Transcript, 3-21-12, Vol. 3, p. 155-57]. Ms. Price testified that she had suspicions that complainant may have been inappropriately touched a month prior to actually confronting her. [Trial Transcript, Transcript, 3-21-12, Vol. 3, p. 157 ¶ 2-15].

In support of Ms. Price's suspicions, the prosecution elicited exaggerated testimony from Ms. Price which constituted impermissible character evidence. Specifically, the prosecution evoked testimony from Ms. Price regarding a conversation that she had had with an old acquaintance and former church member, Latoya Newsome. Ms. Price testified that Ms. Newsome contacted her on Facebook several years after leaving the church and revealed some troubling information regarding Mr. Jackson. According to Ms. Price, Ms. Newsome left the church under somewhat mysterious circumstances. Ms. Price's testimony alluded to an inappropriate relationship between Ms. Newsome and Mr. Jackson, which allegedly caused Ms. Newsome's departure from the church. Ms. Price testified that her conversation with Ms. Newsome prompted her to speak with complainant. [Trial Transcript, 3-21-12, Vol. 3 p. 161 ¶

17]. Instead of confronting complainant immediately or approaching complainant's mother, Ms. Price opted instead to first observe complainant for a period of time to assess if anything appeared out of the ordinary. [Trial Transcript 3-21-12, Vol. 3 p. 162 ¶ 6-11]. According to Ms. Price, complainant appeared fine. [Trial Transcript 3-21-12, Vol. 3 g. 162 ¶ 6-11, 25].

During her testimony, Ms. Price began to discuss her own interactions with Mr. Jackson, which allegedly included some kissing and heavy petting. [Trial Transcript, 3-21-12, Vol. 3 p. 168 ¶ 18-19]. Defense counsel objected that this testimony constituted "other bad acts" evidence under MRE 404(b), which had been improperly admitted. The prosecution admitted to attempting to admit Ms. Price's testimony regarding these alleged interactions, but argued that these statements did not constitute other acts evidence. [Trial Transcript, Vol. 3, p. 168-169]. The prosecution maintained that the testimony was admissible because Ms. Newsome and Ms. Price were purportedly of age when the alleged acts occurred. Defense counsel contended that these statements were still other acts evidence. [Trial Transcript 3-21-12, Vol. 3 p. 170 ¶ 11-18]. Moreover, defense counsel argued that the prosecution failed to provide the required notice of its intention to present this character evidence. Defense counsel further argued that the other acts evidence tainted Mr. Jackson's character in the minds of the jury. The trial court overruled defendant's objection, stating on the record that defense counsel's conclusion that Ms. Price's testimony constituted other "other acts" evidence was a "quantum leap." [Trial Transcript, 3-21-12, Vol. 3 p. 174 ¶ 19-20]. Defense counsel moved for mistrial twice on these same grounds—both motions were denied. [Trial Transcript, 3-21-12, Vol. 3 p. 179 ¶ 24-25].

Ms. Price testified that on August 1, 2010, complainant disclosed having sexual contact with Mr. Jackson that very morning. [Trial Transcript, 3-21-12, Vol. 3 p. 184 ¶ 14-23]. This testimony was inconsistent with Ms. Price's statement to police on August 3, 2010, when she

stated that complainant had told her that the last sexual encounter took place in Ohio (in July 2010). [Trial Transcript, 3-21-12, Vol. 3 p. 221]. After learning of the alleged sexual relationship between complainant and Mr. Jackson, Ms. Price sent complainant back into the church and instructed her to act as if nothing was wrong. When questioned about she felt about Mr. Jackson, Ms. Price testified that she did not harbor a grudge against Mr. Jackson even though he refused to preside over her wedding and despite allegedly engaging in consensual extramarital sexual activities with him. [Trial Transcript, 3-21-12, Vol. 3 p. 196, ¶ 25].

Complainant testified that she was a nurse at the church. She tended to Mr. Jackson and his family. She provided him with clean towels and beverages. According to complainant, her alleged sexual relationship with Mr. Jackson began on a church trip with her mother to Alabama in June 2009. [Trial Transcript, 3-21-12, vol. 3 p. 244, ¶14-15]. The first time something allegedly happened, complainant's mother agreed to let her watch a movie in Mr. Jackson's room. Shortly after entering his room, Mr. Jackson asked her for a back massage. [Trial Transcript, 3-21-12, Vol. 3 p. 241-42]. At some point complainant and Mr. Jackson allegedly got undressed and he attempted to insert his penis in her vagina. The specific details of this alleged encounter are unclear, as complainant provided inconsistent testimony at the preliminary examination and trial. [Trial Transcript, 3-21-12, Vol. 3, p. 248-49]. There was contradictory testimony presented on whether complainant undressed herself, cried during the encounter, talked to Mr. Jackson during the encounter, what was said, and whether Mr. Jackson stopped attempting to penetrate complainant or kept going. [Trial Transcript, 3-21-12, Vol. 3, p. 248-49].

Following the alleged encounter, complainant returned to her mother's hotel room. Complainant did not tell her mother that night, nor did she tell her mother anything during the ride back from Alabama. Complainant continued that the sexual encounters continued after she

returned home from Alabama; that the encounters generally took place in Mr. Jackson's office, located in the church basement, or at Mr. Jackson's residence. [Trial Transcript, 3-21-12, Vol. 3 p. 254 ¶ 19-22]. Complainant first estimated that she had some form of sexual contact with Mr. Jackson every other day, and then later testified that it was more like five days a week. [Trial Transcript, 3-21-12, Vol. 3 p. 265 ¶ 11-14; p. 282 ¶ 9]. According to complainant, these encounters included both fellatio and sexual intercourse. Complainant further testified that Mr. Jackson did not wear protection and that he would ejaculate in his hands and then clean them with a towel. [Trial Transcript, 3-21-12, Vol. 3 p. 260-61; 286]. Complainant confirmed during cross-examination that she used the same towels as Mr. Jackson to clean up with after their alleged rendezvous. [Trial Transcript, 3-21-12, Vol. 4 p. 58 ¶ 21-23]. These towels were seized during a search warrant; however, the testing of the towels excluded complainant as being a donor to the biological material found on the towels.

Complainant also provided testimony regarding an identifying mark that Mr. Jackson has on his inner thigh. Mr. Jackson attributes complainant's knowledge of the mark to an incident where complainant accidentally walked in on Mr. Jackson in a state of undress while he was in his office at church. [Trial Transcript, 3-21-12, vol. 5, pp. 181-183]. At the time, Mr. Jackson was lying in a relaxed position with his legs open on the couch. The office door was shut. Photographs of the birth mark revealed a large circular black mark, which was big enough to see from a distance and which could have been seen while Mr. Jackson was laying naked on his couch. As a result of this incident, Mr. Jackson instructed his armor-bearers to stand guard outside his office at all times, so that he could change clothes between services without fear of intrusion. Complainant denied walking in on Mr. Jackson. [Trial Transcript, 3-22-12, Vol. 4 p. 89 ¶ 6-12]. Both of Mr. Jackson's armor bearers contracted her assertion and that as a result of

this, their duties as armor bearers changed. [Trial Transcript, 3-23-12, Vol. 5 p. 61-62; Trial Transcript, 3-23-12, Vol. 5, p. 126 ¶ 15-25].

During the complainant's initial disclosure, Ms. Price informed complainant of additional alleged sexual liaisons that Mr. Jackson had in the past with other parishioners from the church. [Trial Transcript, 3-21-12, Vol. 3 p. 305 ¶ 17-24. Complainant testified that she had heard rumors of inappropriate contact between Mr. Jackson and another young female parishioner, Kendesha Jackson. [Trial Transcript, 3-22-12, Vol. 4 p. 55 ¶ 2-7. However, Kendesha Jackson later took the stand and flatly denied any impropriety in the ten plus years she has known Mr. Jackson. [Trial Transcript, 3-23-12, Vol. 5 p. 98 ¶ 21-23].¹

Complainant admitted at the preliminary examination to having disciplinary issues at school, although she attempted to downplay the severity of her issues at trial by testifying that she did not get expelled from school for fighting, although later conceding that she had. [Trial Transcript, 3-22-12, Vol. 4 p. 67-70]. Complainant was also involved in a sexual encounter with another young female parishioner. [Trial Transcript, 3-23-12, Vol. 5 p. 219]. It was the culmination of complainant's problems that prompted complainant's mother to reach out to Mr. Jackson for help.

Complainant testified that nearly every encounter occurred in Mr. Jackson's basement office, where the door was never locked or closed all the way. [Trial Transcript 3-24-12, Vol. 4 pp. 80-81]. The office in question was also connected to the fellowship hall of the church, an area frequently used by parishioners to share meals and socialize between services. [Trial Transcript 3-24-12, Vol. 4, p. 81 ¶ 4-15]. The amount of the foot traffic in this area was heavy, as the office was also located next to the women's bathroom. Complainant further testified that

¹ Pursuant to

Mr. Jackson would use his laptop as a prop, so that if someone walked in on them having sex, he could explain the situation away by saying he was preparing for a service—even though this would be difficult to do if they both were naked. [Trial Transcript 3-24-12, Vol. 4, pp. 79-80].

Another plausibility issue arose when complainant testified to an incident in Ohio in July 2010 while she was on a trip with Mr. Jackson and other members of the church. Complainant testified that while the other parishioners were preparing to swim in the hotel's swimming pool, she was having sex with Mr. Jackson, which lasted approximately twenty-five minutes. However, Mr. Jackson had his young son with him on this trip, and because his son was afraid to go swimming, Mr. Jackson remained in his room with him. A member of the church, Toni Yvette Gordan, corroborated this contradictory and more feasible assertion. [Trial Transcript, 3-23-12, Vol. 5, p. 118 ¶ 20-23].

2. Results of Forensic Testing for DNA Evidence

Police officers seized several items, including sheets from Mr. Jackson's home and several towels from his office at the church. The items were tested by Jessica Drager, a forensic scientist with the Michigan State Police. Biological stains were detected on several items, which excluded complainant from being a donor. [Trial Transcript, 3-22-12, Vol. 4, p. 202 ¶ 8-22]. Police discovered Mr. Jackson's sperm on one of the washcloths, which Mr. Jackson explained. [Trial Transcript, 3-22-12, Vol. 4, p. 203 ¶ 6-8]. On occasion, he and his wife engaged in intercourse in his office after hours. Again, the lab results excluded complainant as being a donor to the DNA taken from the washcloth. [Trial Transcript, 3-22-12, Vol. 4, p. 206-207].

Julie Goddard-Lyons, the program director and forensic examiner for the Wayne County Sexual Assault Forensic Examiner program ("SAFE") was qualified as an expert in sexual assault forensic nurse examination. Ms. Lyons testified that she examined complainant

following her report to police. Upon conducting a physical examination on complainant's genital area, Ms. Lyons found circumferential redness to the hymen and labia minor sulkis. [Trial Transcript, 3-22-12, p. 152 ¶ 6-7]. Ms. Lyons also found a 0.5 centimeter by 0.5 centimeter red open abrasion, and a red abraded area to the inner surface of the labia minora, which combined indicated some form of friction resulting in an acute injury. However, Ms. Lyons admitted during cross-examination that these injuries in and of themselves do not prove that someone had been assaulted. In response to a question from the court, Ms. Lyons stated that she did not find any acute injury to the complainant's hymen. [Trial Transcript, 3-22-12, Vol. 4 p. 177 ¶ 22-25].

Jessica Drager, a forensic scientist in the biology unit with the Michigan State Police was qualified as an expert in DNA analysis and testified that she tested and compared the DNA of Mr. Jackson and complainant to the DNA from an Evidence Collection Kit (rape kit), and several seized items, including a towel, washcloths, and a set of bed sheets. Ms. Drager testified that Orchid Cellmark tested the rape kit and that she reviewed the results. Orchid Cellmark detected no biological stains on the rape kit, as a result, the kit was not subjected to further DNA testing. The testing of the remaining items—a towel, washcloths, and bed sheet, was performed by the Michigan State Police. Mr. Jackson's DNA was detected, but complainant was excluded from all of them. None of the complainant's DNA was found. [Trial Transcript 3-22-12, Vol. 4 p. 228 ¶4-5].

Yasharon Williams, complainant's mother, and Kim Turner, the officer in charge of investigating this case also testified. Ms. Williams testified regarding her extensive involvement in the church, and having a very close relationship with her daughter. [Trial Transcript, 3-22-12, Vol. 4 p. 237 ¶ 2-6]. Ms. Williams confirmed that complainant had disciplinary issues at school.

Specifically, she testified to an instance involving complainant fighting with another girl, which resulted in complainant being kicked out of school. [Trial Transcript, 3-22-12, Vol. 4 p. 239 ¶ 7-10]. Ms. Williams confirmed that she had attended the church retreat to Mobile, Alabama with complainant and Mr. Jackson. Ms. Williams testified that complainant did not tell her that any improper sexual contact had taken place. Ms. Williams was angry and surprised upon learning of complainant's involvement with Mr. Jackson, which complainant first disclosed to Ms. Price. Ms. Williams waited two days following the disclosure to take complainant to make a police report.² During the intervening days, complainant burned the clothes she was wearing on the date of the last alleged sexual encounter.

Kim Turner, the officer in charge of the case, testified that she assisted in securing search warrants to obtain the times for DNA testing and obtained photographs of the alleged crime scenes and of Mr. Jackson's body.

3. The Defendant's Case

Several parishioners from Mr. Jackson's church testified for the defense. Tiara Bennett is Mr. Jackson's niece, and like complainant, served as a nurse at the church. [Trial Transcript, 3-23-12, Vol. 5 p. 43]. Ms. Bennett testified that she and complainant were close friends and routinely had sleepovers together, until they got in trouble for sneaking out to meet up with boys. [Trial Transcript, 3-23-12, Vol. 5 p. 44 ¶ 11-15]. As a nurse, Ms. Bennett routinely came into contact with Mr. Jackson on a one-on-one basis, and she testified that he never touched her inappropriately. [Trial Transcript, 3-23-12, Vol. 5 p. 47 ¶ 9-14].

² This fact appeared to arouse suspicion in the court room, as Judge Callahan asked Ms. Williams if she was "aware of the fact that the longer time goes by from the time of a sexual assault until the victim of that assault is examined by professionals, that it becomes increasingly more difficult to link the sexual assault with the victim." [Trial Transcript, 3-22-12, Vol. 4 p. 315 ¶ 2-8].

Gerald Gordon, a deacon and church armor bearer testified regarding Mr. Jackson's office, which he confirmed did not lock. [Trial Transcript, 3-23-12, Vol. 5 p. 58-59]. Mr. Gordon further testified Mr. Jackson's office was connected to the fellowship hall—a popular meeting place for parishioners. Due to the close proximity, conversations Mr. Jackson's office could be overheard in the fellowship hall. [Trial Transcript 3-23-12, Vol. 5 p. 59-60]. Mr. Gordon also testified that following an incident at the church, his duties as an armor bearer changed. This change required the armor bearers to be physically present with Mr. Jackson more often and this included standing guard outside his office while he changed his clothes between services. [Trial Transcript, 3-23-12, Vol. 5 p. 96 ¶16-17].

Eddie Buford, Mr. Jackson's other armor bearer corroborated Mr. Gordon's testimony that the door to Mr. Jackson's office did not close or lock. Mr. Buford confirmed that Mr. Jackson altered the armor bearer duties, which Mr. Buford attributed to an incident where complainant walked into Mr. Jackson's office while he was changing his clothes. [Trial Transcript, 3-23-12, Vol. 5 p. 147 ¶ 15-25]. Mr. Buford admitted, that he too, had almost walked in on Mr. Jackson while he was in a state of undress.

Kendesha Jackson, who served as a church nurse with complainant, testified that she routinely received rides from school from Mr. Jackson and spent countless hours alone in the church with him acting as his secretary. Like complainant, Kendesha would visit Mr. Jackson's home to perform chores. Kendesha stated unequivocally that Mr. Jackson never touched her inappropriately and never sexually assaulted her. [Trial Transcript, 3-23-12, Vol. 5 p. 98 ¶ 21-23]. Another member of the nurse's guild, Bria Porter, testified that Mr. Jackson never did anything inappropriate to her during her tenure as a nurse in the church. [Trial Transcript, 3-23-12, Vol. 5 p. 156 ¶ 19-25].

Toni Yvette Gordon, a parishioner, was present on both church trips where the alleged sexual encounters between Mr. Jackson and complainant occurred. Ms. Gordon testified that while on the Ohio trip, Mr. Jackson shared a room with his son who was about 4 or 5 years old at the time; [Trial Transcript, 3-23-12, Vol. 5 p. 118 ¶ 2-7] and that Mr. Jackson stayed behind with his son while several members of the church decided to go swimming. This conflicted with the time that complainant alleged that she and Mr. Jackson had sex. Ms. Gordon witnessed Mr. Jackson in his hotel room with his son.

Mr. Jackson was the final witness to take the stand. Mr. Jackson explained that he began to mentor complainant after being approached by complainant's mother following an incident where complainant had inappropriately touched a young child. [Trial Transcript, 3-23-12, Vol. 5 p. 176 ¶ 5-8]. As a high-energy speaker, Mr. Jackson routinely would sweat through his clothing—as a result he would shower and change his clothing in his office in between services. [Trial Transcript, 3-23-12, Vol. 5 p. 178-79]. On one such occasion, complainant walked in on him while he was nude. [Trial Transcript, 3-23-12, Vol. 5 p. 181]. Mr. Jackson testified that it was during this intrusion that complainant must have witnessed the birth mark on his inner thigh. Following this disturbance, Mr. Jackson changed the duties of his armor bearers and required from that point forward, that an armor bearer be inside the office or outside the door to ensure that no one, aside from his family, was to enter his office without first checking in. [Trial Transcript, 3-23-12, Vol. 5 p. 184-85].

With respect to the church trip to Ohio in July 2010, Mr. Jackson testified that his son accompanied him and that he stayed behind with his son in his hotel room while other members of the group went swimming. [Trial Transcript, 3-23-12, Vol. 5 p. 187]. Ms. Gordon observed

Mr. Jackson in his room and corroborated these facts. It was during this time frame that complainant alleged a sexual encounter took place.

The only sexual activity that occurred in Mr. Jackson's office was between he and his wife, which would occasionally happen in his church office during after-hours. [Trial Transcript, 3-23-12, Vol. 5, p. 262, ¶ 11-23]. Mr. speculated that complainant was simply a troubled teen or motivated by revenge, attention or money—as her motivation to fabricate these charges against him. It is undisputed that complainant has a troubled past and had a pattern of lying. Mr. Jackson believes that this case was orchestrated by Ms. Price, who may have been motivated by revenge following Mr. Jackson's refusal to preside over her wedding or who may have instigated the allegations for her own financial gain, as complainant and her family later filed a civil suit seeking monetary damages against Mr. Jackson and the church. [Trial Transcript 3-23-12, vol. 5, p. 190].

Mr. Jackson's version of the events in this case are corroborated by numerous parishioners, including, Kendesha Jackson, Tiara Bennett, Gerald Gordon, Toni Gordon and Eddie Bedford whereas complainant has no corroborating witnesses. There was no DNA evidence to indicate that these encounters ever took place and complainant's testimony was replete with inconsistencies when compared with her prior testimony at the preliminary examination and statements made in the initial police report. In addition to these evidentiary issues, the court permitted the prosecution to admit inadmissible character evidence through Ms. Price and complainant's testimony regarding alleged other acts between Mr. Jackson and former parishioners, which was discussed in the presence of the jury without limiting instructions.

On March 26, 2012, Mr. Jackson was found guilty by the jury on all counts. On April 17, 2012, he was sentenced to concurrent prison terms of 25-37 ½ years for his first three

convictions of criminal sexual conduct in the first degree against a minor and 15-22 ½ years for two of his convictions for criminal sexual conduct based on coercion by use of authority. Defendant was sentenced to a consecutive prison term of 15-22 ½ years for his remaining conviction for criminal sexual conduct based on coercion.

B. Procedural History

Following the trial, Mr. Jackson appealed as of right on April 12, 2013. In his Appellant Brief, Mr. Jackson asserted that: (1) the trial court denied him his fundamental right to a trial before an impartial jury comprised of a fair cross-section of the community; (2) that the trial court erred by permitting the admission of character evidence and that this admission was not harmless; and (3) that the evidence produced at trial was insufficient to sustain Mr. Jackson's conviction beyond a reasonable doubt. [See Defendant-Appellant's Brief, attached as **Appendix D**]. On April, the Michigan Court of Appeals affirmed Mr. Jackson's conviction in an unpublished Per Curiam opinion. *See People v Jackson*, No. 310177, 2014 Mich App LEXIS 633 (Mich Ct App Apr 10, 2014). [Attached as **Appendix B**]. First, the Court of Appeals held that defendant failed to meet his evidentiary burden with respect to presenting evidence that African-Americans were underrepresented in the venire or that said underrepresentation was due to systematic exclusion. Second, the Court of Appeals held that although Price's testimony did constitute other-acts evidence within the contemplation of MRE 404(b), that is was nonetheless admissible under the res gestae principle and necessary to allow the jury to hear the "complete story." The court also downplayed the significance of the other-acts evidence by indicating that "both Price and Newsome were older than the age of consent at the time of the alleged relationships." As a result, the court concluded that the prosecution was not required to provide

notice in advance of presenting such evidence based on the res gestae exception. Notably, Justice Shapiro issued a concurring opinion, which criticizes the majority's analysis:

The majority suggests that because this prior bad act testimony was part of the res gestae of the case, no notice needed to be provided, yet cites no authority for this proposition. Moreover, MRE 402(b)(2) states that "the prosecution in a criminal case *shall* give reasonable notice in advance of trial," or during trial on a finding of good cause, of the "nature of the evidence" and "the rationale . . . for admitting the evidence." (emphasis added). This language certainly appears to apply to evidence offered under the rationale of res gestae. Moreover, the notice requirement of MRE 404(b)(2) does not place an extraordinary burden on the prosecution, comports with fundamental fairness, and, as written in mandatory terms, must be enforced."

Nevertheless, Justice Shapiro did not believe this error merited reversal. Finally, the Court of Appeals disposed of the Defendant's third argument by holding that the prosecution presented sufficient evidence at trial to support the convictions.³

On May 1, 2014, Mr. Jackson timely filed a Motion for Rehearing in the Michigan Court of Appeals. In this Motion, Mr. Jackson reasserted that the Court of Appeals erred by failing to find that impermissible character evidence was admitted. Mr. Jackson also asserted that rehearing was required because of the prosecutor's blatantly improper efforts to attack defendant's character through the use of unfair tactics, which deprived defendant of his right to a fair trial under the federal and Michigan Constitutions. On June 4, 2014, the Michigan Court of Appeals denied Mr. Jackson's Motion for Rehearing. [A copy of the Order Denying Motion for Rehearing is attached as **Appendix C**].

Mr. Jackson respectfully maintains that the trial court erred, and that the Court of Appeals abused its discretion when it affirmed the trial court's decision. The Court of Appeals failed to recognize the inadmissibility of improper character evidence, which significantly impacted the

³ The Court of Appeals disposed of Defendant-Appellant's great weight of the evidence argument, stating that it was not properly presented for appellate review because it was not set forth in defendant's statement of the questions presented. The Court of Appeals held, "[d]espite the presence of conflicting testimony, we cannot conclude that the jury's verdict was against the great weight of the evidence."

jury's perception of Mr. Jackson, and warrants reversal by this Court. The Court of Appeals also clearly erred when it failed to recognize the prosecutorial misconduct in this case, despite trial counsel's objection, which resulted in a deprivation of Mr. Jackson's right to a fair trial. Accordingly, Mr. Jackson respectfully requests that this Honorable Court grant leave to appeal the April 10, 2014 decision of the Court of Appeals, which is clearly erroneous and will result in a material injustice to Mr. Jackson and to the integrity of the rules of evidence if permitted to stand.

STANDARD OF REVIEW

Pursuant to MCR 7.302(B), an application for leave to appeal to the Michigan Supreme Court “*must*” demonstrate at least one of the following grounds in order for leave to be granted:

- (1) the issue involves a substantial question as to the validity of a legislative act;
- (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
- (3) the issue involves legal principles of major significance to the state's jurisprudence;
- (4) in an appeal before decision by the Court of Appeals,
 - (a) delay in final adjudication is likely to cause substantial harm, or
 - (b) the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid;
- (5) **in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or**
- (6) in an appeal from the Attorney Disciplinary Board, the decision is erroneous and will cause material injustice.

ARGUMENT

I. THE COURT OF APPEALS ABUSED ITS DISCRETION WHEN IT AFFIRMED THAT THE TRIAL COURT'S ADMISSION OF "OTHER ACTS" EVIDENCE WAS PERMISSIBLE UNDER THE RES GESTAE EXCEPTION BECAUSE THE EVIDENCE CONSTITUTED IMPERMISSIBLE CHARACTER EVIDENCE THAT SHOWED ONLY A PROPENSITY FOR COMMITTING SEX CRIMES.

Mr. Jackson preserved review of the prior bad acts issue through his counsel's objection during trial. Therefore, the MRE 404(b) ruling is reviewed for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). *See also, People v Small*, 467 Mich 259, 261; 650 NW2d 328 (2002) (recognizing that the admission of evidence is reviewed for an abuse of discretion); *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006) (same). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). Both the due process guarantees of the Michigan and United States constitutions require fundamental fairness in the use of evidence against a criminal defendant. US Const, Am XIV; Mich Const 1963, art 1, § 17; *See generally, Lisenba v California*, 314 US 219; 62 S Ct 280 (1941).

Under MRE 404(b) "[e]vidence 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." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998)⁴. In *People v VanderVliet*, 444 Mich 52;

⁴ In *Crawford*, Justice Brickley writing for the Court held that the Government is not permitted to simply offer a shotgun justification for admission of this testimony, (e.g. that it is offered for "character, scheme, plan, and identity," or some other superfluous purpose from the laundry list of purposes), but instead must *offer a clear and cogent ground for the admission of this testimony*:

Federal circuits similarly *requiring the government to articulate, in a clear and logical manner, at least one proper non-character purpose for admission of prior bad acts evidence include*: *United States v Rackstraw*, 7 F3d 1476, 1478_1479 (CA 10, 1993) ("When offering 404(b) evidence, the government 'must articulate precisely the evidential hypothesis by which a fact of consequence maybe inferred from the evidence of other acts.'... Concomitantly, the trial court must identify specifically the purpose for which the evidence is admitted... *There must be a clear and logical connection between the 'other acts' evidence and the case being tried*"; *United States v Mayans*, 17 F3d 1174, 1181 (CA 9, 1994) ("the government 'must articulate precisely the evidential

(1993) the Court held that other act evidence must be relevant under MRE 401 and 402 as endorsed through MRE 104(b) in order to be admissible at trial. Courts have consistently held that relevancy is not a blank check under 404(b). A court “*must determine that the evidence is relevant; that is, the evidence must relate to a matter which is “in issue,”*” and must deal with conduct substantially similar and reasonably near in time to the offenses for which the defendant is being tried.” *United States v Blakenship*, 775 F2d 735, 755 (6th Cir. 1985).

The prosecution is foreclosed from producing evidence as to a defendant’s “ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.” *People v Springs*, 101 Mich App 118, 124; 300 NW2d 315 (1980). In addition, *People v Sabin*, 463 Mich 43, 614 NW2d 888 (2000), goes on to suggest that *the trial court must make truly informed decisions about what matters were actually “at issue” in the trial before allowing 404(b) evidence to come in.* The goal was to make certain that the evidence would only come in if it were truly germane to a matter actually “at issue” in the trial. Justice Cavanaugh’s dissent focused on this concern:

VanderVliet teaches that *something more than a mechanical recitation of MRE 404(b) list of “proper purposes” is required in order to move forward to the remaining three legs of its test. A determination must be made that the purpose claimed is relevant to an issue other than propensity * * ** In order to provide a proper purpose under 404(b), the evidence must be relevant to a material fact

hypothesis by which a fact of consequence may be inferred from the other acts evidence”); *United States v Yeagin*, 927 F2d 798, 803 (CA 5, 1991) (“A trial judge faced with the problem of admissibility of other crimes evidence should exercise caution and should require the government to explain why the evidence is relevant and necessary on a specific element that the government must prove”); *United States v Arias Montoya*, 967 F2d 708, 713 (CA 1, 1992) (*admission of prior acts evidence “is by no means a routine exercise and should not be accepted unless the government articulates with suitable precision the “special” ground for doing so”*); *United States v Mothershed*, 859 F2d 585, 589 (CA 8, 1988); *United States v Zelinka*, 862 F2d 92, 99 (CA 6, 1988).

The Supreme Court in *Crawford* also cautioned that this Court must exercise some skepticism in accepting the Prosecution’s justification.

or issue in the case. *That is, the purpose for which the 404(b) evidence is offered must relate to an issue of consequence other than defendant's arguably MRE 401 relevant propensity to commit certain bad acts.* Whether the purpose is proper is a fact-specific, case-by-case determination").

People v Sabin, 463 Mich 43, 614 NW2d 888 (2000) (Cavanaugh, J. Dissenting).

The central issue with other acts testimony not that the character is irrelevant, but instead that it is "said to weigh too much with the jury and to so over-persuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Id.* Therefore, the primary danger of prior bad act evidence is that it tends to be overvalued by the jury, denying the accused a fair opportunity to defend against the charged crime. *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988). In Mr. Jackson's case, the implied reference to inappropriate relationships with other female parishioners has the same effect. The pinnacle issue before the trial court is whether the Prosecutor proves beyond a reasonable doubt that Mr. Jackson committed a sexual assault to this complainant. The other relationship evidence has no probative value, only prejudicial effect. Jurors can misuse evidence of a defendant's criminal past in three ways:

First, . . . jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no 'innocent' man will be forced to endure punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he is probably guilty of the crime with which he is charged.

Allen, supra, at 569.

In addition to prejudicial considerations, the prosecutor was required to provide notice of her intent to admit such evidence. Specifically, MRE 404(B)(2) provides:

- (2) The prosecution in a criminal case *shall provide reasonable notice* in advance of trial, or during trial if the court excuses pretrial

notice on good cause shown, *of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence.* If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

(Emphasis added). The prosecution failed to comply with this evidentiary rule—notice was never provided. The prosecutor even admitted that she did not feel that the character evidence fell within the scope of other acts and explained “that’s why there was no other notice presented.” [Trial Transcript, 3-21-12, Vol. 3, p. 177-178]. Because the prosecution did not provide appropriate notice under the rule, this Court’s inquiry should end at this point. In addition to failing to provide notice, the prosecutor failed to establish a proper purpose for admission of the evidence.

To admit otherwise character-based evidence of prior bad acts, the party offering the evidence must establish four criteria: (1) the evidence must be offered for a proper non-character purpose; (2) the evidence must be relevant under MRE 402; (3) its probative value cannot be substantially outweighed by the danger of unfair prejudice; and (4) the court must limit the jury’s use of the evidence to a proper purpose upon request. *Crawford, supra* at 385; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). **The absence of any one factor requires exclusion.** A proper purpose was never presented. The other criteria will be discussed in greater detail below.

MRE 403 also plays a particularly important role in assuring trial fairness by requiring the exclusion of evidence that is otherwise relevant where there is a danger that it will draw the jury’s attention to largely irrelevant and unfairly prejudicial aspects of a defendant’s life.

Crawford, supra, at 398. Violations of court rules, especially evidentiary rules, can violate a defendant's due process right to a fair trial. *Cooper v Sowders*, 837 F2d 284 (6th Cir 1988).

In this case, the prosecutor failed to offer a proper purpose for the admission of other bad acts evidence. Moreover, the other acts evidence was improperly permitted under the res gestae exception.

A. The prior bad acts evidence was irrelevant in this case and improperly excused under the res gestae exception

The trial court admitted evidence in the form of testimony from Ms. Price and complainant, that Mr. Jackson had engaged in inappropriate sexual relationships with other female parishioners, including Kendesha Jackson and Latoya Newsome. Specifically, Ms. Price testified that Ms. Newsome had contacted her on Facebook several years after leaving the church and allegedly revealed that she and Mr. Jackson had an inappropriate relationship. Ms. Newsome was never located and did not testify. This is not only highly prejudicial, it is impermissible hearsay and violates the Defendant's right to confront the witnesses against him. According to Ms. Price, it was Ms. Newsome's Facebook message that prompted her to reach out to complainant. Ms. Price also alluded to her own consensual extramarital relationship with Mr. Jackson, which she stated involved kissing and having petting. In addition, complainant testified that she had heard rumors that Mr. Jackson had been intimate with another young parishioner, Kendesha Jackson, however, Ms. Jackson flat out denied any sexual contact. The prosecutor claimed that the purpose was to provide the jury with an explanation of what prompted Ms. Price to talk to complainant. This explanation by the prosecution was insufficient. See *VanderVliet, supra* (explaining that the prosecutor cannot just list all the proper purposes outlined in the evidentiary rules, but instead, is required to have a legitimate reason and explain the purpose; in this case, the evidence does not have any probative value on any issue of pattern,

intent, motive or any other purpose and simply was not “similar” to the act in question to be relevant).

Defense counsel objected to this testimony as inadmissible 404(b) “other acts” evidence and moved twice for a mistrial. The trial court overruled defense counsel’s objections and denied defense counsel’s motions for mistrial. On appeal, the Court of Appeals characterized the evidence as “other acts”, but asserted that the res gestae exception applied. Although Justice Shapiro concurred with the majority opinion, he disagreed with the application of this exception, but believed the error was harmless. Mr. Jackson respectfully asserts that the trial court erred and that the Court of Appeals abused its discretion when it misapplied the res gestae exception in his case. The improperly admitted character evidence severely prejudiced his case and was not relevant or necessary to provide the jury with a “complete story.” Moreover, any contention that evidence assisted the prosecution in providing the jury with a “complete story” was far outweighed by its prejudicial impact.

Prior bad acts evidence does not become relevant for each and every potential theory simply because the defendant has denied guilt. *Sabin, supra*, at 55-57. Rather, the evidence must be relevant to prove or disprove a *material* fact that is of consequence to the case. *Sabin, supra* at 57. “A material fact is one that is ‘in issue’ in the sense that it was within the range of litigated matters in controversy.” *Id.* at 68. Where prior bad acts evidence is offered on an issue that is not truly in dispute or in question, the minimal probative value is outweighed by the prejudice. *VanderVliet, supra* at 75; *Sabin, supra* at 69.

The trial court permitted the prosecutor to admit this improper character evidence and the Court of Appeals excused this error under res gestae exception. “Res gestae are the circumstances, facts and declaration which grow out of the main fact, are contemporaneous with

it, and serve to illustrate its character.” *People v Kayne*, 268 Mich 186, 191; 255 NW 758 (1934). Generally, evidence of other acts may be admitted as part of the res gestae if the alleged acts are “so blended or connected with the [charged offense] that proof of one incidentally involves the other or explains the circumstances of the crime.” *People v Robison*, 128 Mich App 338, 340; 340 NW2d 303 (1983). In other words, the res gestae evidence is permissible in order to provide the jury with the complete story. However, in this case, there was no causal relationship between the events that led to complainant’s disclosure to Ms. Price and whether the crime actually occurred in this case—Ms. Price’s testimony regarding Mr. Jackson’s alleged relationships with other adult female parishioners, including herself, was unrelated to the CSC-1 charges Mr. Jackson faced. The only purpose of the testimony was to improperly show that Mr. Jackson had a propensity to act immorally, which undoubtedly had a prejudicial effect on the outcome of this case. Additionally it allowed the jury to draw out media-induced stereotypes about clergy and sex.

Significantly, the res gestae exception has been heavily critiqued by courts in Michigan and other jurisdictions. *See, e.g., People v Bowers*, 136 Mich App 284, 293; 356 NW2d 618 (1984) (rejecting application of res gestae exception); *People v Stoker*, 103 Mich App 800; 303 NW2d 900 (1981) (same); *United States v Green*, 320 F3d 452 (3rd Cir 2003) (noting the test to determine when other-acts evidence is admissible under the res gestae exception “creates confusion because, quite simply, no one knows what it means” and finding the standard to be “vague, overbroad and prone to abuse”); *United States v Bowie*, 232 F3d 923 (DC Cir 2000) (expressing concern that the res gestae exception undermines Rule 404(b)); *United States v Boone*, 628 Fed 927 (7th Cir 2010) (noting that the res gestae exception has outlived its usefulness and held that it is unavailable when determining a theory of admissibility).

In *People v Bowers*, 136 Mich App 284, 293; 356 NW2d 618 (1984), the Court of Appeals held that the trial court improperly admitted testimony concerning other acts evidence under the res gestae exception and that the error was not harmless. Defendant Bowers had been convicted of breaking and entering an occupied dwelling with intent to commit larceny and sentenced to a term of 6 to 15 years incarceration. The prosecution introduced evidence that on the same night of the break in that a neighbor's vehicle was stolen and found within miles of defendant's residence. The court held that the defendant was denied a fair trial by the introduction of this evidence, and reasoned, "it was error to allow the introduction of evidence concerning a separate and unrelated criminal offense absent some proof that the individual on trial for the primary offense (here, breaking and entering) had in actuality committed the other criminal activity" (vehicle theft). *Id.* at 296. The court further reasoned, "[s]upposition and speculation that both crimes are related are insufficient to warrant the introduction of such highly prejudicial evidence." *Id.* Ultimately, the court rejected the res gestae exception and remanded the matter for a new trial.

Likewise, in *People v Stoker*, 103 Mich App 800; 303 NW2d 900 (1981), the introduction of evidence showing that defendant was in possession of several different identification cards at the time of his arrest for armed robbery and felony-firearm was held to be reversibly erroneous and not within the res gestae exception. The Court of Appeals found that the relevance and probative value of the evidence was suspect considering the absence of proof that the identification cards had been stolen. *Id.* at 808. Given the obvious prejudicial impact of the evidence and the fact that the prosecutor had clearly implied during his examination of the witnesses and during closing argument that the items were stolen, reversal was required. Moreover, it was determined that the evidence concerning the status of the items as stolen

property was too speculative and the Court held that injection of this evidence operated to deprive defendant of a fair trial.

The prosecution in Mr. Jackson's case, like the prosecution in *Bowers* and *Stoker*, improperly admitted evidence of other crimes or wrongs—testimony implying that Mr. Jackson engaged in multiple inappropriate sexual relationships with parishioners—denied Mr. Jackson a fair trial. The prosecution did not offer any evidence to substantiate these claimed other acts, and no limiting instructions were provided to limit the scope in which this testimony could be used by the jury. The prejudicial effect of admitting this evidence is obvious. Accordingly, this Court should reverse the Court of Appeals decision and remand for a new trial.

B. The prejudice of Ms. Price's testimony far outweighed any minimal probative value

Even if evidence has some relevance, it is nevertheless inadmissible if its probative value is outweighed by the danger of unfair prejudice. MRE 404(b); MRE 403. The trial court completely failed to consider the relevancy of the evidence, or its prejudicial effect when weighed against its probative value. Admission of other acts evidence in the instant case was substantially more prejudicial than probative.

Any minimal relevance that Ms. Price's testimony may have had was far outweighed by its prejudice, and no limiting instruction was provided, therefore the jury was free to use Ms. Price's damaging testimony concerning Mr. Jackson's character as it pleased.⁵ It is highly likely that the jury concluded that Mr. Jackson had a history of engaging in inappropriate and extramarital relationships with female church parishioners, which is not a proper use of the evidence because it amounts to a propensity theory. Equally damaging, the jury likely concluded that Mr. Jackson must have done something wrong against someone, and therefore deserved to

⁵ "A limiting instruction will minimize to some degree the prejudicial nature of evidence of other criminal acts; it is not, however, a sure-fire panacea for the prejudice resulting from the needless admission of such evidence." *United States v Haywood*, 280 F3d 715, 724 (6th Cir 2002).

be punished. In other words, the trial court's ruling allowed the prosecutor to inappropriately attack Mr. Jackson's character allowed the jury to conclude he's a bad man so must be guilty alleviating the Prosecutor from its burden of proof and denying Mr. Jackson a fair trial.

As the Court is aware, the risks of miscalculating the effect of uncharged misconduct evidence can be great. One court has described the testimony as "the most prejudicial evidence imaginable against an accused." *People v Smallwood*, 722 P2d 197, 205 (1986). The result of this case would have been different had this damaging character evidence not been introduced.

C. The error under MRE 404(b) requires reversal

Since the error in admitting Ms. Price's testimony was likely outcome determinative, reversal of Mr. Jackson's conviction is required. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). In determining whether the error in admitting prior misconduct evidence is harmless, the court must focus on the nature of the error and assess its effect in light of the weight and sufficiency of the untainted evidence. *Crawford, supra*, at 399-400.

Here, the jury heard highly prejudicial character evidence in a case that hinged on a credibility contest between complainant and Mr. Jackson. Mr. Jackson adamantly denies that anything improper occurred between he and complainant. Mr. Jackson is actually innocent. There is no corroborating witness, DNA, or any other evidence implicating Mr. Jackson to the crimes complainant has alleged. The prosecution's case hinged on complainant's own testimony and that of her aunt, Ms. Price. Complainant's testimony contained numerous inconsistencies and implausible accounts, i.e. that Mr. Jackson would have sex with her between 3-5 times a week in his basement office which neither closed nor locked and was located by the fellowship hall where parishioners frequently gathered. On the other hand, numerous parishioners testified on Mr. Jackson's behalf, including both his armor bearers who testified that they stood guard at

his office door after complainant walked in on him in the nude, and Kendesha Jackson, who testified that she did not have a sexual relationship with Mr. Jackson, contrary to complainant's testimony. [Trial Transcript, 3-22-12, Vol. 4 p. 55 ¶ 2-7 (complainant's allegation); Trial Transcript 3-23-12, Vol. 5 p. 98 ¶ 21-23 (Ms. Jackson's testimony)].

Moreover, Ms. Gordon provided testimony for the defense, which disproved complainant's allegation that she and Mr. Jackson had sex in his hotel room during the Ohio church retreat. Ms. Gordon observed Mr. Jackson in his hotel room with his son during the alleged time that complainant was supposedly having sex with Mr. Jackson. Complainant's testimony was riddled with inconsistencies. The prosecution repeatedly had to remind complainant of her prior testimony every time she changed her story. [See, Trial Transcript, 3-21-12, Vol. 3, p. 248-249 (regarding incident in hotel room in Alabama); p. 259 (regarding number of times complainant and Mr. Jackson had sex); p. 266-267 (regarding sexual positions); p. 273-276 (regarding Mr. Jackson's bedding); p. 284-285 (regarding complainant's nurse's attire and how she would have sex with Mr. Jackson when wearing the uniform)]. During cross-examination, defense counsel uncovered even more inconsistencies regarding complainant's testimony. [Trial Transcript, 3-22-12, Vol. 4, p. 64 (regarding whether Mr. Jackson ejaculated during final sexual encounter); p. 67-68 (regarding whether complainant had been kicked out of school for fighting); p. 94-95 (regarding whether complainant had her period during the alleged sexual encounter in Ohio in 2010); p. 119 (regarding sequence of events during first sexual encounter); p. 124 (complainant provides a third version of events regarding first sexual encounter)].

The admission of improper character evidence was not harmless in Mr. Jackson's case—a case which hinged on a credibility contest between complainant and Mr. Jackson. Improper,

highly prejudicial, stereotyping evidence did not “complete the story” for the jury. Instead, this propensity evidence to commit sex crimes extremely prejudiced his case and denied him a fair trial.

II. THE PROSECUTOR COMMITTED BLATANT MISCONDUCT BY ELICITING IMPROPER CHARACTER EVIDENCE TESTIMONY AND BY FAILING TO PROVIDE DEFENSE COUNSEL WITH NOTICE OF THE PROSECUTOR'S INTENT TO USE 404(B) CHARACTER EVIDENCE, WHICH DEPRIVED MR. JACKSON OF A FAIR AND IMPARTIAL TRIAL UNDER THE FEDERAL AND MICHIGAN CONSTITUTIONS.

Remand is required in this case because of the prosecutor's blatantly improper efforts to attack the defendant's character. When the prosecution employs unfair tactics to gain an advantage, it deprives the defendant of his right to a fair trial under the federal and Michigan Constitutions. US Const amend XIV; Mich Const 1963, art 1, § 17.

Preserved claims of prosecutorial misconduct are reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003); *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Unpreserved issues of prosecutorial misconduct are reviewed for "plain error that affected [defendant's] substantial rights." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Issues of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. The appellate court reviews the pertinent portion of the record and evaluates the prosecutor's conduct and remarks in context. *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007); *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). "Appellate review of alleged misconduct is precluded absent an objection, unless an objection would not have cured the prejudice." *People v McGhee*, 268 Mich App 600, 633-634; 709 NW2d 595 (2005). Mr. Jackson's counsel objected to the prosecutor's lack of notice for the admission of character evidence, to the prosecutor's line of questioning, and moved for mistrial twice based on the testimony elicited by the prosecution, thereby preserving appellate review.

Specifically, the prosecutor proceeded down a line of questioning which provoked impermissible character evidence during Ms. Price's testimony. For example, the prosecutor asked Ms. Price what caused her to be concerned that Mr. Jackson may have touched the complainant [Trial Transcript, 3-21-12, Vol. 3, p. 157], which prompted Ms. Price to testify regarding her communications with former parishioner, Latoya Newsome. Ms. Price further testified regarding Ms. Newsome's sudden departure from the church and alluded to the cause being Ms. Newsome's sexual relationship with Mr. Jackson. [Trial Transcript, 3-21-12, Vol. 3, p. 157]. The prosecutor continued down this line of questioning by asking Ms. Price how the communication with Ms. Newsome affected her [Trial Transcript, 3-21-12, Vol. 3, p. 159], to which she replied "very badly". Ms. Price testified that it was this discussion that prompted her to talk to complainant about being inappropriately touched by Mr. Jackson. [Trial Transcript, 3-21-12, Vol. 3, p. 157-159, p. 161 ¶ 17]. Ms. Price also testified about her own inappropriate contact with Mr. Jackson, which caused defense counsel to object. Defense counsel argued that the prosecutor was "trying . . . to get in the supposed . . . other act evidence without ever having filed proper notice with the court and allowing us to have a hearing on it." [Trial Transcript, 3-21-12, Vol. 3, p. 170 ¶ 11-18]. Outside the presence of the jury, defense counsel pointedly told the court that "the jury now knows that not only did Ms. Newsome supposedly make some accusations against my client, but so did this witness [referring to Ms. Price]." [Trial Transcript, 3-21-12, Vol. 3, p. 171 ¶ 6-14]. The prosecutor argued that because Ms. Jackson and allegedly Ms. Newsome were of age when they engaged in this activity, that it did not fall within the scope of other acts evidence and that the testimony was relevant because it allowed the jury to understand why Ms. Price did the things that she did. [Trial Transcript, 3-21-12, Vol. 3, p. 178].

The trial court agreed with the prosecutor and the Court of Appeals affirmed the admission of this improper character evidence under the res gestae exception.

Mr. Jackson respectfully maintains that the prosecutor's direct-examination of Ms. Price resulted in the admission of inadmissible character evidence under MRE 404(b). The prosecutor admitted an intent to elicit this testimony and failed to provide the requisite notice. Mr. Jackson's defense attorney objected to this testimony as inadmissible evidence of "other acts." Mr. Jackson's defense attorney further objected to the prosecutor's failure to provide notice, which resulted in the admission of inadmissible evidence, interfered with defense counsel's ability to meet the evidence effectively and to call rebuttal witnesses. Additionally, this evidence tainted the jury's perception of Mr. Jackson. This prosecutorial misconduct deprived Mr. Jackson of a fair and impartial trial, and thus a new trial is necessary.

It is patently improper for a prosecutor to provoke improper character evidence from a witness because of the risk that such evidence will irreversibly taint the jury and prejudice a defendant's case. *See, e.g., People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996) (requiring reversal in a criminal sexual conduct case based on the prosecutor's repeated elicitation of references to defendant's previous beatings of his wife, where the prosecutor explicitly offered the evidence to show defendant's character, and where the evidence was more prejudicial than probative); *People v Carpenter*, 120 Mich App 574, 580; 327 NW2d 523 (1982) (holding that the prosecutor's inquiry into a prior arrest that did not result in a conviction was obviously calculated to bring the arrest to the jury's attention, and was reversible even absent defense counsel's objection); *People v Carner*, 117 Mich App 560, 573; 324 NW2d 78 (1982) (holding that reversal was required where the prosecutor's questions were severely prejudicial to defendant and admonishing the trial court for failing to exercise any discretion to exclude

inflammatory material concerning other alleged acts of sexual abuse by defendant which did not involve complainant). Here, the record supports Mr. Jackson's argument that the improperly elicited testimony related to improper "other acts" character evidence. The prosecution even admits to attempting to admit Ms. Price's testimony of her former interactions with Mr. Jackson as well as the discussion Ms. Price had with Ms. Newsome on Facebook regarding her interactions with Mr. Jackson. [Trial Transcript, 3-21-12, Vol. 3, p. 168-169].

Mr. Jackson was convicted solely on the ipse dixit testimony of complainant and Ms. Price, which was replete with inconsistencies, and bolstered by, what should have been, inadmissible character evidence. The prosecutorial misconduct in this case denied Mr. Jackson his right to a fair trial and thus his conviction should be reversed. At a minimum, this Court must remand the matter back to the circuit court for a new trial.

CONCLUSION

There can be no greater material injustice than the conviction of an innocent person. The record in this case is replete with evidentiary and prosecutorial errors, which effectively denied Mr. Jackson an opportunity to have a fair trial. Accordingly, Mr. Jackson requests that this Honorable Court grant his application for leave to appeal.

Respectfully submitted:

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