IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC99554**
	)	
JOHN HAMBY,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT
THE HONORABLE DANIEL G. PELIKAN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

James Egan, Mo. Bar #52913
Attorney for Appellant
Woodrail Centre
1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Phone: (573) 777-9977, Ext. 422
Fax: (573) 777-9974
Email: James.Egan@mspd.mo.gov

INDEX

TABLE OF AUTHORITIES

Page

CASES:

***CONSTITUTIONAL PROVISIONS*:**

STATUTES

RULES:

OTHER:

JURISDICTIONAL STATEMENT

Appellant, John Hamby ("John"), appeals his conviction for two counts of first-degree statutory sodomy, in violation of Section 566.062 RSMo. (2016) (Counts I and II); one count of incest, in violation of Section 568.020 RSMo. (2016) (Count III); one count of child molestation in the first degree, in violation of Section 566.067 RSMo. (Count IV); and one count of attempted rape in the first degree, in violation of Section 566.030 RSMo. (2016) (Count V).[1] The case was tried by a St. Charles County jury before the Honorable Daniel Pelikan (LF 19). On September 3, 2020, an amended judgment was filed that indicated Judge Pelikan sentenced John to fifteen years in prison on Counts I and II; four years in prison on Count III; and thirty years in prison on Counts IV and V (LF 19). Count I was ordered to run consecutively with Counts II and V; and Counts III and IV were ordered to run concurrently with all other counts (LF 19). A notice of appeal was timely filed on September 4, 2020 (LF 21).

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, Section 3, Mo. Const.; Section 477.060. This Court thereafter granted John's application for transfer, so this Court has jurisdiction. Article V, Sections 3 and 10, Mo. Const. and Rule 83.04.

---

[1] The Record on Appeal consists of a legal file (LF) and a transcript (TR).

STATEMENT OF FACTS

John was charged by way of a substitute information with two counts of first-degree statutory sodomy, in violation of Section 566.062 RSMo. (2016) (Counts I and II); one count of incest, in violation of Section 568.020 RSMo. (2016) (Count III); one count of child molestation in the first degree, in violation of Section 566.067 RSMo. (Count IV); and one count of attempted rape in the first degree, in violation of Section 566.030 RSMo. (2016) (Count V) (LF 9). Counts I and II alleged that John committed first degree statutory sodomy on H.D. by putting his mouth on her genitals; Count III alleged that John committed the offense of incest by putting his mouth on H.D.'s genitals and that H.D. was his step-daughter through marriage; Count IV alleged that John committed the offense of child molestation in the first degree by subjecting H.D. to sexual contact by placing his genitals on H.D.'s genitals; and Count V alleged that John committed the offense of attempted rape in the first degree by touching his genitals to H.D.'s genitals and such conduct was a substantial step in committing the offense of rape in the first degree and was done for the purpose of committing the offense of rape in the first degree (LF 9).

Patricia Hamby ("Patricia") is John's wife (TR 470). John is the stepfather of H.D. (TR 471-72). On April 29, 2019, H.D. and Patricia were arguing about H.D. doing the dishes (TR 478). John overheard the argument and decided to take H.D.'s TV away (TR 478). H.D. did the dishes and then came to Patricia and told her she had a secret to tell about John (TR 478). H.D. told Patricia that sometimes John came

into her bedroom at night and touched her "bladder" with his "bladder" (TR 479). H.D. also told Patricia that John puts his mouth on her bladder (TR 480). John would come into her room and wake her up (TR 480).

H.D. indicated she had told a friend named Maggie (TR 481). Specifically, H.D. told Maggie that "sometimes John would come into [H.D.'s] room while she was sleeping and do things to her that she didn't like" (TR 579). It was in the middle of the night (TR 587). To Maggie, it was very clear H.D. was talking about sex (TR 579). Maggie also stated that she knew that H.D. was talking about sex acts on her (TR 580). Maggie also confirmed that what H.D. told her "was in nature sexual intercourse" (TR 586). Maggie had encouraged H.D. to tell someone about this (TR 481). Maggie told H.D. to "tell her mom because John could go to jail for that" (TR 580). Maggie also stated:

> [H.D.] said that sometimes she was awake while it happened and that she would still pretend to be asleep and that she would just want to hit him while he was doing it.

(TR 580). Maggie testified that H.D. told her "that sometimes she's awake but most of the time she doesn't wake up" (TR 585). Maggie confirmed that H.D. told her that sometimes she was asleep when the abuse was happening (TR 586). Defense counsel asked Maggie if this seemed odd to her, but the State objected and the objection was sustained (TR 586).

Patricia confronted John about this and John stayed at a hotel (TR 484). John was very shocked at the allegation (TR 523). Patricia did not believe H.D. but felt she

needed to (TR 490). The next day, Patricia took H.D. to Family Services to look for a counselor (TR 486). Patricia was told to take H.D. to get examined at Children's Hospital (TR 487).

At the hospital, H.D. spoke to Elise Campara (TR 615). Ms. Campara asked H.D. if she knew why she was at the hospital (TR 619). H.D. told Ms. Campara it was because [John] had touched her private part (TR 619). H.D. indicated her private part was her vagina (TR 619). H.D. told Ms. Campara that when she is asleep, [John] "would come into her room and put his front private in her private and that it would hurt" (TR 619). Ms. Campara testified that H.D. actually said "his private in her private" (TR 619). H.D. also told Ms. Campara "[t]hat [John] put his mouth on her front private which was gross" (TR 620). H.D. told Ms. Campara "that she would pretend to be asleep and roll over to stop it from happening but that was not - - but that did not work" (TR 620). H.D. told Ms. Campara that this had "happened approximately five to six times since the New Year's Eve Party" (TR 620).

Dr. Houston gave H.D. a Sexual Assault Forensic Exam (SAFE) at the same hospital (TR 641). She did not interview H.D. (TR 642). The results of the exam did not show any trauma to H.D.'s vaginal or anal areas (TR 643). These results do not confirm or refute that H.D. was sexually abused (TR 652). Dr. Houston was told that the last time the abuse had occurred was on April 27th (TR 657).

After leaving the hospital, Patricia took H.D. to the Children's Advocacy Center (TR 500). H.D. spoke to a forensic interviewer and then came back next day

to continue the interview (TR 502-03). The first part of the interview was admitted and played for the jury as State's Exhibit 13 (TR 726).

In the first part of the interview, H.D. said that John had done some bad things more than one time (State's Exhibit 13 at 25:30; 28:20). H.D. said that John touched her in an inappropriate way (State's Exhibit 13 at 30:30). H.D. said the touching was on her private part (State's Exhibit 13 at 31:10). H.D. referred to her private part as her "bladder" (State's Exhibit 13 at 31:25). H.D. said John touched her "bladder" with his "bladder" (State's Exhibit 13 at 31:50). H.D. said her clothes were not on her (State's Exhibit 13 at 32:05). H.D. said John's clothes were on him (State's Exhibit 13 at 32:15). H.D. said that John has touched her "bladder" with his "bladder" more than one time (State's Exhibit 13 at 32:30). H.D. said she was in her bed (State's Exhibit 13 at 33:00). H.D. indicated that a person's "bladder" was his or her genitals by circling the genital area on drawings of a boy and girl (State's Exhibit 13 at 34:45). H.D. said John would take her underwear off (State's Exhibit 13 at 38:40). H.D. said it hurt when John would touch her "bladder" with his "bladder" (State's Exhibit 13 at 39:10). H.D. said when John touched her "bladder" with his "bladder," her legs were over his head (State's Exhibit 13 at 40:10). H.D. said John would be by the bed, with his knees on the floor and H.D. would have her legs around him (State's Exhibit 13 at 41:10).

The interview was continued the next day (State's Exhibit 18). H.D. said John's abuse happened a few more times after she told Maggie (State's Exhibit 18 at

28:10). H.D. said that John touched her "bladder" with his mouth (State's Exhibit 18 at 30:10). This happened more than one time (State's Exhibit 18 at 30:20). H.D. said that John did not touch her "bladder" with anything else (State's Exhibit 18 at 31:05). H.D. indicated that the skin of John's "bladder" touched her "bladder" (State's Exhibit 18 at 56:00). H.D. was asked where John's clothes were when the skin of his "bladder" touched her "bladder" and H.D. said they were on him (State's Exhibit 18 at 56:15). H.D. was asked to explain how the skin of John's "bladder" could have touched her "bladder" and H.D. said she did not know (State's Exhibit 18 at 56:25). H.D. was asked if his clothes at some time changed and H.D. said, "no" (State's Exhibit 18 at 56:40). H.D. said she did not see John's bladder (State's Exhibit 18 at 57:15). H.D. said it hurt and felt like it was pressing against the bones (State's Exhibit 18 at 59:00). H.D. also said she could hear the fans because they were really loud (State's Exhibit 18 at 59:15). H.D. was asked how her legs got over John's head and H.D. said that John put them there (State's Exhibit 18 at 1:01:00). H.D. said that when John did this, she would-be lying-in bed with her head on the pillow and her hands under the pillow (State's Exhibit 18 at 1:01:45). H.D. says when John put his "bladder" on her "bladder," her mom was asleep (State's Exhibit 18 at 1:11:15).

H.D. said the abuse only took place in one other place – the downstairs living room (State's Exhibit 18 at 1:11:30). H.D. said John did "those things" that he has done every other time (State's Exhibit 18 at 1:12:00). H.D. was asked to be more specific and she said that she did not want to talk about it (State's Exhibit 18 at

1:12:00). H.D. was asked if those things were the things she talked about with John's "bladder" and her "bladder," and she said "yes" (State's Exhibit 18 at 1:12:25). H.D. said her, her sister (Alexis), and her friend Kiersten were there (State's Exhibit 18 at 1:12:45). The abuse happened on the couch (State's Exhibit 18 at 1:13:45). Kiersten and Alexis were on the couch as well, though Kiersten was on the opposite side and Alexis was in a corner (State's Exhibit 18 at 1:15:30). Kiersten and Alexis did not see John as they were asleep (State's Exhibit 18 at 1:17:55). H.D. said when the abuse occurred, her legs were off the couch (State's Exhibit 18 at 1:18:25). H.D. said she had her pajamas on (State's Exhibit 18 at 1:18:55). H.D. said they stayed on (State's Exhibit 18 at 1:19:20). H.D. said she did not exactly know what John did (State's Exhibit 18 at 1:20:15). H.D. said she did not know what part of John's body touched her body (State's Exhibit 18 at 1:22:00).

One day, after a meeting at the prosecutor's office, H.D. asked Patricia what would happen if she had lied (TR 541). Patricia told H.D. that it would be OK and that she would not get into any trouble (TR 541). As a result of this, a deposition was set up for H.D. (TR 542). At this deposition, H.D. recanted (TR 542). Additionally, H.D. recanted on other occasions as well (TR 542). Patricia insisted she never prompted H.D. to recant (TR 543).

At trial, H.D. testified that her getting into trouble and her belief that John treated her sister better than he treated her was the main reason she made the allegations against John (TR 452-53). H.D. testified at trial that John never touched

her inappropriately (TR 453). H.D. testified that John never touched her "bladder"-to- "bladder" or mouth-to-"bladder" (TR 453). H.D. testified that John never touched her private parts in any way and that his private parts did not touch her in any way (TR 453). H.D. testified that what she said in the video a year ago was a lie (TR 455).

The original instruction conference was off the record (TR 927). The trial court then had the defense make his objections on the record, which it did (TR 927). John objected to all five verdict directors on the basis that they violated the his right to a unanimous verdict. John argued it was a multiple acts case and that "the verdict directors lack[ed] specificity as to the alleged crimes committed (TR 927). John cited MAI-CR4th 404.02, Notes on Use 6 and 7 (TR 27) as well as this Court's opinion in *State v. Celis-Garcia,* 344 S.W.3d 150 (Mo. banc 2011) (TR 927). John asked that the verdict directors include details that "would consist of a narrower time frame, the location, maybe more details about which offense the State is referring to" (TR 927). John argued that the lack of specificity could lead to John's right to a unanimous jury verdict being violated (TR 927-28). The trial court then asked the State to make its response for the record, which it did. The State argued it had distinguished Counts I and II and also Counts IV and V (TR 928). Specifically, the State argued:

> We have narrowed it down by date as best as the evidence would suggest and that we could produce, and that we've added to distinguish the counts, Count 1 and 2, by separate and distinct from each other as you see in there. And the same goes for 4 and 5, Your Honor.

(TR 928). The trial court overruled the objection (TR 928). The following verdict directors were then submitted to the jury over objection:

INSTRUCTION NO. 8

As to Count 1, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or between December 1, 2018, and April 25, 2019, in the State of Missouri, the defendant knowingly had deviate sexual intercourse with H.D. by placing his mouth on her genitals, separate and distinct from Count 2, and

Second, that at the time H.D. was a child less than twelve years old,

then you will find the defendant guilty under Count I of statutory sodomy in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR 4th 420.16
Submitted by the State

(LF 13:9).

INSTRUCTION NO. 9

As to Count 2, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or between December 1, 2018, and April 25, 2019, in the State of Missouri, the defendant knowingly had deviate sexual intercourse with H.D. by placing his mouth on her genitals, separate and distinct from Count 1, and

Second, that at the time H.D. was a child less than twelve years old,

then you will find the defendant guilty under Count I of statutory sodomy in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR 4th 420.16
Submitted by the State

(LF 13:10).

INSTRUCTION NO. 10

As to Count 3, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or between December 1, 2018, and April 25, 2019, in the State of Missouri, the defendant knowingly had deviate sexual intercourse with H.D. by placing his mouth on her genitals, and

Second, that H.D. was a stepchild of defendant by virtue of a marriage creating that relationship and which still existed at the time referred to in paragraph First, and

Third, that defendant knew H.D. was his stepchild at the time referred to in paragraph First, then you will find the defendant guilty under Count 3 of incest.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR 4th 422.04
Submitted by the State

(LF 13:11).

INSTRUCTION NO. 11

As to Count 4, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or between December 1, 2018, and April 25, 2019, in the State of Missouri, the defendant touched H.D.'s genitals with his genitals, separate and distinct from Count 5, and

Second, that defendant did so for the purpose of arousing or gratifying defendant's sexual desire, and

Third, that at the time H.D. was a child less than twelve years of age,

Fourth, that H.D. was defendant's stepchild by virtue of a marriage creating that relationship and which still existed at the time referred to in Paragraph First,

Fifth, that defendant knew H.D. was his stepchild at the time referred to in paragraph First,

then you will find the defendant guilty under Count 4 of child molestation in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR 4th 420.20
Submitted by the State

(LF 13:12).

INSTRUCTION NO. 12

As to Count 5, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or between December 1, 2018, and April 25, 2019, in the State of Missouri, the defendant touched H.D.'s genitals with his genitals, separate and distinct from Count 4, and

Second, that at the time H.D. was a child less than twelve years of age, and

Third, that such conduct was a substantial step toward the commission of the offense of rape in the first degree, and

Fourth, that defendant engaged in such conduct for the purpose of committing such rape in the first degree,

then you will find the defendant guilty under Count 5 of attempted rape in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

A person commits the offense of rape in the first degree if he or she knowingly has sexual intercourse with another person who is incapacitated, incapable of consent, or lacks the capacity to consent, or by the use of forcible compulsion.

As used in this instruction, the term "substantial step" means conduct that is strongly corroborative of the firmness of the defendant's purpose to complete the commission of rape in the first degree.

MAI-CR 4th 420.01
Submitted by the State

(LF 13:13).

The jury found John guilty of all five counts (TR 988-89). Judge Pelikan sentenced John to fifteen years in prison on Counts I and II; four years in prison on

Count III; and thirty years in prison on Counts IV and V (LF 19). Count I was ordered to run consecutively with Counts II and V; and Counts III and IV were ordered to run concurrently with all other counts (LF 19).

This appeal follows.

POINTS RELIED ON

I.

The trial court erred in submitting Instruction 8, the verdict director for Count I, to the jury, because the verdict director failed to specify a particular incident of statutory sodomy in the first degree and thereby violated John's rights to a fair trial, due process, and a unanimous verdict, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that evidence of multiple and distinct acts of mouth-on-genital contact was presented to the jury, yet the verdict director did not specify any one of these incidents, thereby making it unclear as to which incident John was found guilty on Count I and allowing the possibility that the jurors failed to find the same incident of statutory sodomy in the first degree unanimously. The fact that Instruction 8 specified that the mouth-on-genital contact had to be distinct from Count II was not sufficient to guarantee a unanimous verdict.

Hoeber v. State, 488 S.W.3d 648 (Mo. banc 2016);

State v. Celis-Garcia, 344 S.W.3d 150 (Mo. banc 2011);

State v. Pierce, 433 S.W.3d 424 (Mo. banc 2014);

State v. Rycraw, 507 S.W.3d 47 (Mo. App. E.D. 2016);

U.S. Const., Amend. VI & XIV;

Mo. Const., Art. I, Secs. 10, 18(a), and 22(a);

Rules 28.03 and 29.11; and,

MAI-CR 4th 404.02 and 420.16

II.

The trial court erred in submitting Instruction 9, the verdict director for Count II, to the jury, because the verdict director failed to specify a particular incident of statutory sodomy in the first degree and thereby violated John's rights to a fair trial, due process, and a unanimous verdict, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that evidence of multiple and distinct acts of mouth-on-genital contact was presented to the jury, yet the verdict director did not specify any one of these incidents, thereby making it unclear as to which incident John was found guilty on Count II and allowing the possibility that the jurors failed to find the same incident of statutory sodomy in the first degree unanimously. The fact that Instruction 9 specified that the mouth-on-genital contact had to be distinct from Count I was not sufficient to guarantee a unanimous verdict.

Hoeber v. State, 488 S.W.3d 648 (Mo. banc 2016);

State v. Celis-Garcia, 344 S.W.3d 150 (Mo. banc 2011);

State v. Pierce, 433 S.W.3d 424 (Mo. banc 2014);

State v. Rycraw, 507 S.W.3d 47 (Mo. App. E.D. 2016);

U.S. Const., Amend. VI & XIV;

Mo. Const., Art. I, Secs. 10, 18(a), and 22(a);

Rules 28.03 and 29.11; and,

MAI-CR 4th 404.02 and 420.16.

III.

The trial court erred in submitting Instruction 10, the verdict director for Count III, to the jury because the verdict director failed to specify a particular incident of incest and thereby violated John's rights to a fair trial, due process, and a unanimous verdict, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that Instruction 10 told the jury that the offense of incest was committed by mouth-on-genital contact, and evidence of multiple and distinct acts of mouth-on-genital contact was presented to the jury, yet the verdict director did not specify any one of these incidents, thereby making it unclear as to which incident of incest John was found guilty on Count III and allowing the possibility that the jurors failed to find the same incident of incest unanimously.

Hoeber v. State, 488 S.W.3d 648 (Mo. banc 2016);

State v. Celis-Garcia, 344 S.W.3d 150 (Mo. banc 2011);

State v. Pierce, 433 S.W.3d 424 (Mo. banc 2014);

State v. Rycraw, 507 S.W.3d 47 (Mo. App. E.D. 2016);

U.S. Const., Amend. VI & XIV;

Mo. Const., Art. I, Secs. 10, 18(a), and 22(a);

Rules 28.03 and 29.11; and,

MAI-CR 4th 404.02 and 422.04.

IV.

The trial court erred in submitting Instruction 11, the verdict director for Count IV, to the jury, because the verdict director failed to specify a particular incident of child molestation in the first degree and thereby violated John's rights to a fair trial, due process, and a unanimous verdict, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that evidence of multiple and distinct acts of genital-on-genital contact was presented to the jury, yet the verdict director did not specify any one of these incidents, thereby making it unclear as to which incident John was found guilty on Count IV and allowing the possibility that the jurors failed to find the same incident of child molestation in the first degree unanimously. The fact that Instruction 11 specified that the genital-on-genital contact had to be distinct from Count V was not sufficient to guarantee a unanimous verdict.

Hoeber v. State, 488 S.W.3d 648 (Mo. banc 2016);

State v. Celis-Garcia, 344 S.W.3d 150 (Mo. banc 2011);

State v. Pierce, 433 S.W.3d 424 (Mo. banc 2014);

State v. Rycraw, 507 S.W.3d 47 (Mo. App. E.D. 2016);

U.S. Const., Amend. VI & XIV;

Mo. Const., Art. I, Secs. 10, 18(a), and 22(a);

Rules 28.03 and 29.11; and,

MAI-CR 4th 404.02 and 420.20.

V.

The trial court erred in submitting Instruction 12, the verdict director for Count V, to the jury, because the verdict director failed to specify a particular incident of attempted rape in the first degree and thereby violated John's rights to a fair trial, due process, and a unanimous verdict, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that evidence of multiple and distinct acts of genital-on-genital contact was presented to the jury, yet the verdict director did not specify any one of these incidents, thereby making it unclear as to which incident John was found guilty on Count V and allowing the possibility that the jurors failed to find the same incident of attempted rape in the first degree unanimously. The fact that Instruction 12 specified that the genital-on-genital contact had to be distinct from Count IV was not sufficient to guarantee a unanimous verdict.

Hoeber v. State, 488 S.W.3d 648 (Mo. banc 2016);

State v. Celis-Garcia, 344 S.W.3d 150 (Mo. banc 2011);

State v. Pierce, 433 S.W.3d 424 (Mo. banc 2014);

State v. Rycraw, 507 S.W.3d 47 (Mo. App. E.D. 2016);

U.S. Const., Amend. VI & XIV;

Mo. Const., Art. I, Secs. 10, 18(a), and 22(a);

Rules 28.03 and 29.11; and,

MAI-CR 4th 404.02 and 420.01.

ARGUMENT

I.

The trial court erred in submitting Instruction 8, to the jury, the verdict director for Count I, because the verdict director failed to specify a particular incident of statutory sodomy in the first degree and thereby violated John's rights to a fair trial, due process, and a unanimous verdict, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that evidence of multiple and distinct acts of mouth-on-genital contact was presented to the jury, yet the verdict director did not specify any one of these incidents, thereby making it unclear as to which incident John was found guilty on Count I and allowing the possibility that the jurors failed to find the same incident of statutory sodomy in the first degree unanimously. The fact that Instruction 8 specified that the mouth-on-genital contact had to be distinct from Count II was not sufficient to guarantee a unanimous verdict.

A. Preservation of Error

"To preserve a claim of error, counsel must object with sufficient specificity to apprise the trial court of the grounds for the objection." *State v. Amick,* 462 S.W.3d 413, 415 (Mo. banc 2015) (citation omitted).

The original instruction conference was off the record (TR 927). The trial court then had the defense make his objections on the record, which it did (TR 927).

John objected to instructions 8, 9, 10, 11, and 12, the verdict directors for Count I, II, III, IV, and V, respectively, on the basis that they violated John's right to a unanimous verdict (TR 927). John argued it was a multiple acts case and that "the verdict directors lack[ed] specificity as to the alleged crimes committed (TR 927). John cited MAI-CR4th 404.02, Notes on Use 6 and 7 (TR 927) as well as this Court's opinion in *State v. Celis-Garcia,* 344 S.W.3d 150 (Mo. banc 2011) (TR 927). John asked that the verdict directors include details that "would consist of a narrower time frame, the location, maybe more details about which offense the State is referring to" (TR 927). John argued that the lack of specificity could lead to John's right to a unanimous jury verdict being violated (TR 927-28). The trial court then asked the State to make its response for the record, which it did. The State argued it had distinguished Counts I and II and also Counts IV and V (TR 928). Specifically, the State argued:

> We have narrowed it down by date as best as the evidence would suggest and that we could produce, and that we've added to distinguish the counts, Count 1 and 2, by separate and distinct from each other as you see in there. And the same goes for 4 and 5, Your Honor.

(TR 928). The trial court overruled the objection (TR 928). This issue was presented in John's motion for new trial (LF 17). This issue is preserved. Rules 28.03 & 29.11(d).

B. Standard of Review

The standard of review for whether the jury has been properly instructed is *de novo. State v. Richards,* 300 S.W.3d 279, 281 (Mo. App. W.D. 2009) (citing *Harvey*

v. Washington, 95 S.W.3d 93, 97 (Mo. banc 2003)). "A faulty instruction is grounds for reversal if the defendant has been prejudiced." *Id.* (citing *State v. Carson,* 941 S.W.2d 518, 523 (Mo. banc 1997)) (internal quotations omitted). "If the giving of [an] instruction is error, it will be held harmless only when the court can declare its belief that it was harmless beyond a reasonable doubt." *Id.* (citing *State v. Erwin,* 848 S.W.2d 476, 483 (Mo. banc 1993)) (internal quotations omitted). "A defendant need not establish that the jury was more likely than not to have misapplied the instruction." *Erwin,* 848 S.W.2d at 483 (citation and internal quotations omitted). "It is sufficient that there is a reasonable likelihood that the jury has misapplied the challenged instruction in a way which violates the defendant's constitutional rights." *Id.* (citing *Boyde v. California,* 494 U.S. 370, 380 (1990)) (internal quotations omitted).

C. Relevant Facts

H.D. told Patricia that sometimes John came into her bedroom at night and touched her "bladder" with his "bladder" (TR 479). H.D. also told Patricia that John puts his mouth on her bladder (TR 480). John would come into her room and wake her up (TR 480).

H.D. told Maggie that "sometimes John would come into [H.D.'s] room while she was sleeping and do things to her that she didn't like" (TR 579). It was in the middle of the night (TR 587). To Maggie, it was very clear H.D. was talking about sex (TR 579). Maggie also stated that she knew that H.D. was talking about sex acts

on her (TR 580). Maggie also confirmed that what H.D. told her "was in nature sexual intercourse" (TR 586). Maggie had encouraged H.D. to tell someone about this (TR 481). Maggie told H.D. to "tell her mom because John could go to jail for that" (TR 580). Maggie also stated:

> [H.D.] said that sometimes she was awake while it happened and that she would still pretend to be asleep and that she would just want to hit him while he was doing it.

(TR 580). Maggie testified that H.D. told her "that sometimes she's awake but most of the time she doesn't wake up" (TR 585). Maggie confirmed that H.D. told her that sometimes she was asleep when the abuse was happening (TR 586). Defense counsel asked Maggie if this seemed odd to her, but the State objected and the objection was sustained (TR 586).

H.D. told Ms. Campara that when she is asleep, [John] "would come into her room and put his front private in her private and that it would hurt" (TR 619). Ms. Campara testified that H.D. actually said "his private in her private" (TR 619). H.D. also told Ms. Campara "[t]hat [John] put his mouth on her front private which was gross" (TR 620). H.D. told Ms. Campara "that she would pretend to be asleep and roll over to stop it from happening but that was not - - but that did not work" (TR 620). H.D. told Ms. Campara that this had "happened approximately five to six times since the New Year's Eve Party" (TR 620).

In her forensic interview, H.D. said that John touched her in an inappropriate way (State's Exhibit 13 at 30:30). H.D said the touching was on her private part

(State's Exhibit 13 at 31:10). H.D. referred to her private part as her "bladder" (State's Exhibit 13 at 31:25). H.D. said John touched her "bladder" with his "bladder" (State's Exhibit 13 at 31:50). H.D. said her clothes were not on her (State's Exhibit 13 at 32:05). H.D. said John's clothes were on him (State's Exhibit 13 at 32:15). H.D. said that John has touched her "bladder" with his "bladder" more than one time (State's Exhibit 13 at 32:30). H.D. said she was in her bed (State's Exhibit 13 at 33:00). H.D. indicated that a person's "bladder" was his or her genitals by circling the genital area on drawings of a boy and girl (State's Exhibit 13 at 34:45). H.D. said John would take her underwear off (State's Exhibit 13 at 38:40). H.D. said it hurt when John would touch her "bladder" with his "bladder" (State's Exhibit 13 at 39:10). H.D. said when John touched her "bladder" with his "bladder," her legs were over his head (State's Exhibit 13 at 40:10). H.D. said John would be by the bed, with his knees on the floor and H.D. would have her legs around him (State's Exhibit 13 at 41:10).

H.D. said John's abuse happened a few more times after she told Maggie (State's Exhibit 18 at 28:10). H.D. said that John touched her "bladder" with his mouth (State's Exhibit 18 at 30:10). This happened more than one time (State's Exhibit 18 at 30:20). H.D. said that John did not touch her "bladder" with anything else (State's Exhibit 18 at 31:05). H.D. indicated that the skin of John's "bladder" touched her "bladder" (State's Exhibit 18 at 56:00). H.D. was asked where John's clothes were when the skin of his "bladder" touched her "bladder" and H.D. said they

were on him (State's Exhibit 18 at 56:15). H.D. was asked to explain how the skin of John's "bladder" could have touched her "bladder" and H.D. said she did not know (State's Exhibit 18 at 56:25). H.D. was asked if his clothes at some time changed and H.D. said, "no" (State's Exhibit 18 at 56:40). H.D. said she did not see John's "bladder" (State's Exhibit 18 at 57:15). H.D. said it hurt and felt like it was pressing against the bones (State's Exhibit 18 at 59:00). H.D. also said she could hear the fans because they were really loud (State's Exhibit 18 at 59:15). H.D. was asked how her legs got over John's head and H.D. said that John put them there (State's Exhibit 18 at 1:01:00). H.D. said that when John did this, she would-be lying-in bed with her head on the pillow and her hands under the pillow (State's Exhibit 18 at 1:01:45). H.D. says when John put his "bladder" on her "bladder," her mom was asleep (State's Exhibit 18 at 1:11:15).

H.D. said the abuse only took place in one other place – the downstairs living room (State's Exhibit 18 at 1:11:30). H.D. said John did "those things" that he has done every other time (State's Exhibit 18 at 1:12:00). H.D. was asked to be more specific and she said that she did not want to talk about it (State's Exhibit 18 at 1:12:00). H.D. was asked if those things were the things she talked about with John's "bladder" and her "bladder" (State's Exhibit 18 at 1:12:25). H.D. said her, her sister (Alexis), and her friend Kiersten were there (State's Exhibit 18 at 1:12:45). The abuse happened on the couch (State's Exhibit 18 at 1:13:45). Kiersten and Alexis were on the couch as well, though Kiersten was on the opposite side and Alexis was

in a corner (State's Exhibit 18 at 1:15:30). Kiersten and Alexis did not see John as they were asleep (State's Exhibit 18 at 1:17:55). H.D. said when the abuse occurred, her legs were off the couch (State's Exhibit 18 at 1:18:25). H.D. said she had her pajamas on (State's Exhibit 18 at 1:18:55). H.D. said they stayed on (State's Exhibit 18 at 1:19:20). H.D. said she did not exactly know what John did (State's Exhibit 18 at 1:20:15). H.D. said she did not know what part of John's body touched her body ((State's Exhibit 18 at 1:22:00).

The following verdict director for Count I was submitted to the jury over objection:

INSTRUCTION NO. 8

As to Count 1, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or between December 1, 2018, and April 25, 2019, in the State of Missouri, the defendant knowingly had deviate sexual intercourse with H.D. by placing his mouth on her genitals, separate and distinct from Count 2, and

Second, that at the time H.D. was a child less than twelve years old,

then you will find the defendant guilty under Count I of statutory sodomy in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR 4th 402.16
Submitted by the State

(LF 13:9).

D. Analysis

1. Jury unanimity is mandatory.

Article I, §22(a) of the Missouri Constitution protects the right to a unanimous jury verdict. *State v. Celis-Garcia,* 344 S.W.3d 150, 155 (Mo. banc 2011)). "For a jury verdict to be unanimous, the jurors [must] be in substantial agreement as to the defendant's acts, as a preliminary step to determining guilt." *Id.* at 155 (citations and internal quotations omitted). The issue of jury unanimity arises in cases referred to as "multiple acts" cases. *Id.* at 155-56). "A multiple acts case arises when there is evidence of multiple, distinct criminal acts, each of which could serve as the basis for a criminal charge, but the defendant is charged with those acts in a single count." *Id.*

When there is evidence of multiple, separate incidents of a sexual act, the verdict directors must differentiate between the various acts in a way that ensures the jury unanimously convicted the defendant of the same act or acts. *Id*. If the language is too broad, it allows each individual juror to determine which incident he or she would consider in finding the defendant guilty. *Id*. at 156. "The key to ensuring juror

unanimity in a multiple-acts case is a verdict director that requires a finding by the jury that encompasses the same criminal conduct and the same singular event." MAI-CR4th 404.02, Notes on Use 7. This can be done in one of two ways. First, "by either the state (1) electing the particular criminal act on which it will rely to support the charge or (2) the verdict director specifically describing the separate criminal acts presented to the jury and the jury being instructed that it must agree unanimously that at least one of those acts occurred." *Id.* at 157).

"To determine if a case is a multiple acts case, courts consider the following factors: (1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct." *Id.* at 156.

In *Celis-Garcia*, 344 S.W.3d at 154, the complaining witness testified to multiple, separate acts that occurred at different times and in different locations. Specifically, the complaining witness testified that the touching occurred on the back porch, in a bedroom, and in the bathroom. *Id.* Because the complaining witness testified to multiple, distinct criminal acts, it was a multiple-acts case and the verdict director needed to specify which criminal act the jurors must unanimously agree on to protect the defendant's right to a unanimous jury verdict. *Id.* at 156-58.

In *Celis-Garcia,* this Court gave an example of a multiple acts case by citing the case of *State v. Washington,* 146 S.W. 1164 (Mo. 1912). In *Washington,* the

defendant was charged with the felony of setting up a gambling device. *Id.* at 1165. Despite there being evidence of two gaming tables, the defendant was charged with only one count. *Id.* The jury instruction did not specify which gaming table. *Id.* at 1166. Since some jurors may have convicted for one table and other jurors may have convicted for the other table, this Court reversed the conviction. *Id.*

2. Jury unanimity is an issue in John's case.

John's case is also a multiple acts case. The facts of John's case fit the four multiple-acts criteria much better than the scenario in *Washington.* There is evidence that both types of contact, *i.e.,* mouth-on-genital contact as alleged in Counts I and II, and genital-on-genital contact as alleged in Counts IV and V, happened more than once, and that they happened five or six times (TR 620). H.D. said that the sexual abuse happened at least five or six times (TR 620). The evidence suggests that the incidents happened at separate times on different nights. Additionally, the evidence supports that there were two different places that the acts took place. The acts took place over a period of several months, and thus there were intervening acts and a fresh impulse motivating the conduct.

H.D. does not ever distinguish between times when John put his mouth on her "bladder" and when he put his "bladder" on her "bladder." However, when discussing the abuse on the living room couch, H.D. said John did "those things" that

he has done every other time (State's Exhibit 18 at 1:12:00). This suggests both types of abuse happened each time.[2]

The testimony presented establishes that there were at least three distinct acts of mouth-on-genital contact and genital-on-genital contact. The first distinct act of possible mouth-on-genital and genital-on-genital contact is when H.D. was asleep. This evidence came from Maggie's testimony where she specifically states that H.D. told her that sometimes H.D. was asleep when the abuse happened and sometimes she was only pretending to be asleep (TR 580, 585). This was a specific distinction and not simply an inconsistency. Maggie specifically said that sometimes H.D. was asleep, but usually she did wake up (TR 580, 585). The jury was free to believe this testimony and conclude that mouth on-genital and genital-on-genital contact happened in H.D.'s bedroom when she was actually asleep, and also when she was only pretending to be asleep. These are two separate and distinct acts.

Thus, the second distinct act of both types of possible contact is when H.D. was awake and pretending to be asleep (TR 580, 585). In addition to Maggie's testimony, there was also testimony from Ms. Campara that H.D. would be asleep and

---

[2] While this Point only addresses Instruction No. 8, an incident of mouth-on-genital contact, John is addressing both this type of sexual contact as well as genital-on-genital contact, since future points will simply be incorporating the analysis from this point.

that H.D. would try to stop it by rolling over (TR 620). Maggie did not mention H.D. rolling over while pretending to be asleep, but this inconsistency does not give rise to a distinct incident. Both Ms. Campara and Maggie stated that H.D. told them the abuse happened when John came into her room (TR 579, 619). Thus, the first two distinct acts of mouth-on genital contact and genital-on-genital contact took place in H.D.'s room.

The third distinct act of possible mouth-on-genital and genital-on-genital contact took place on the couch in the living room when H.D. had a sleep over (State's Exhibit 18 at 1:11:30). H.D. stated John did "those things" he has done every other time (State's Exhibit 18 at 1:12:00). This statement supports that there was both types of contact on the couch; and, again, that both types of contact took place every time there was sexual contact. H.D. did answer yes when she was specifically asked if "those things" referred to the "bladder"-on-"bladder" contact (State's Exhibit 18 at 1:12:25). However, while H.D. was not asked about the mouth-on-"bladder" contact in the living room, given that she had just said she did not want to talk about it when asked more generally what "those things" meant, as well as the fact that she said John did "those things" he has done every other time, the jury easily could have, and likely did, believe that H.D. meant that John also put his mouth on her "bladder" when they were on the living room couch. Moreover, H.D. did not say that the mouth-on-"bladder" contact did not happen on the couch.

The testimony presented at the trial allowed the jury to find three separate and distinct acts of mouth-on-genital contact. Despite the evidence of three distinct acts of mouth-on-genital contact, Instruction 8 only states that the act the jury finds John guilty of for Count I must be distinct from the act it finds him guilty of in Count II (LF 12:9). There is no certainty that the individual jurors agreed on the same two acts when rendering its verdict.

In *State v. Rycraw,* 507 S.W.3d 47, 62-63 (Mo. App. E.D. 2016), the Missouri Court of Appeals, Eastern District, used a chart to demonstrate "[a] hypothetical allocation of juror votes that illustrate[d] the possibility of a non-unanimous verdict when the jury had to consider three separate and distinct incidents of sexual misconduct and apply it to two different counts." In its hypothetical allocation, the Court demonstrated how it was possible that twelve jurors could have found that the defendant did expose himself two different times while possibly not all twelve agreeing on the same incident. *Id.* The chart below similarly shows how the factual distinction the State argued was sufficient was, in fact, not sufficiently distinct, as the jury could have convicted John of different acts of mouth-on-genital contact on both counts.

Incident	Jurors 1-3	Jurors 4-6	Jurors 7-9	Jurors 10-12
Bedroom Asleep	Count I	Not Guilty	Count I	Count II
Bedroom Pretending to be Asleep	Count II	Count I	Count II	Not Guilty
Living Room Couch	Not Guilty	Count II	Not Guilty	Count I

As this chart shows, twelve jurors do not agree that a specific, distinct act of mouth-on-genital contact took place even though all twelve jurors agree, *i.e.,* are unanimous, that two distinct acts of mouth-on-genital contact did take place. This allowed the jury to return a guilty verdict as to both Counts I and II even though there is no guarantee that the jury was ever unanimous on either count . Furthermore, it allowed the jurors to render a guilty verdict to a distinct act on either Count I or II and still not be unanimous. Thus, this hypothetical, like the one from *Rycraw* allows the jury to have followed the instructions of the Court (LF 13:14) while still not agreeing unanimously on the acts used to convict John of Counts I and II. *See Rycraw,* 507 S.W.3d at 63.

In *Rycraw,* the State argued that the defendant received a unanimous verdict since the prosecutor focused on specific events in its closing argument. *Rycraw,* 507 S.W.3d at 63. The *Rycraw* Court, however, stated that it could not presume the jury

followed the arguments of the prosecutor but could only presume the jury followed the instructions. *Id.* at 63-64. Conversely, in John's case, the prosecutor did not even try to connect a specific act to Count I or II. Instead, it simply argued that when the jury signed the verdict form, it had to distinguish the various acts from each other (TR 944-45). Regarding Counts IV and V, the prosecutor told the jury Counts IV and V had to be distinct acts, but not to worry about it as it was really just "legalese" (TR 946). As discussed, *supra,* however, the instructions allowed the jurors to convict John of two distinct acts in Counts I and II and still not have been unanimous.

3. The Eastern District abandoned core principles in its opinion.

"This Court has often said that the jury is the sole and final arbiter of the facts and, in that role, the jury is entitled to believe or disbelieve all or any part of the evidence before it." *State v. Pierce,* 433 S.W.3d 424, 432 (Mo. banc 2014). Despite the axiomatic principle the jury is the finder of facts, the Eastern District engaged in its own factual analysis and violated the principle reaffirmed by this Court in *Pierce* in several respects. John urges the Court not to similarly indulge in determining what the jury should have believed when considering the body of evidence relative to John's claims of a non-unanimous jury. Instead, John submits that the well-settled principles of the Court's *Celis-Garcia* and *Pierce* opinions are complementary. Thus, if, applying the principles from *Pierce* allows a jury to believe or infer that a separate and distinct act took place, then, for purposes of jury unanimity in a multiple-acts case, that separate and distinct act did take place. Accordingly, the following

analysis of the Eastern District's opinion is meant to illustrate why abandoning the Court's harmonized precepts from these cases is folly.

In its opinion, the Eastern District said there was insufficient evidence that mouth-on-genital contact on the downstairs couch took place (Memorandum Opinion, p. 18). This analysis demonstrates that the Eastern District made its own factual determinations. The evidence clearly established that mouth-on-genital contact happened in the bedroom on multiple occasions. Therefore, when H.D. told the forensic interviewer that the "same things he does every other time" happened on the downstairs couch, the jury was absolutely free to infer that mouth-on-genital was also amongst the "same things he does every other time" that contact happened on the downstairs couch. The Eastern District justified its holding by noting that H.D. "confirmed" that "those things" meant "bladder-to-bladder" contact (Memorandum Opinion, p. 18). The Eastern District continued:

> The jury could not have contemplated the downstairs couch "bladder-to-bladder" incident to convict Defendant of statutory sodomy committed by mouth-to-genital contact as charged in counts 1 and 2. H.D. never talked about mouth-to-genital contact occurring on the downstairs couch. H.D. then said she did not remember what Defendant did, despite her statement moments earlier that it was the same "things" as the other times. Then H.D. said she did not want to talk about it. H.D. refused to tell the interviewer or to identify on the anatomical drawings what part of Defendant's body touched hers during the downstairs couch incident. Based on this, we cannot say the record contains an evidentiary basis for the jurors to find a separate and distinct incident occurred on the downstairs couch as to any count.

(Memorandum Opinion, p. 18). This analysis is troubling for a couple of reasons.

First, the Eastern District discounted that the jury was free to believe H.D.'s comment that "those things" that happened every other time meant mouth-on-genital contact as well as genital-on-genital contact. The Eastern District also overlooked that the jury could also have disbelieved H.D.'s testimony that "confirmed" "those things" meant genital-on-genital contact. *See Pierce,* 433 S.W.3d at 432.

Moreover, the Court failed to look at the evidence in its totality, as it would for a sufficiency of the evidence claim. The forensic interview makes clear that H.D. was very reluctant to disclose the abuse. Thus, the jury could very easily have discounted her statements that she did not remember what happened. Additionally, when H.D. "confirmed" that the behavior on the downstairs couch was "bladder-on-bladder" contact, there was nothing in that answer that suggested it was only "bladder-on-bladder" contact. Given H.D.'s reluctance to disclose information, the jury could have reasonably inferred that H.D. was not more specific about the mouth-on-genital contact because she was not directly asked.

Second, the Eastern District also rejected John's argument of three distinct acts of sexual abuse because it was not logical. In a footnote on page 17 of the memorandum opinion, the Eastern District stated:

> Logic dictates that if H.D. was "sometimes" awake when Defendant abused her that she was also "sometimes" asleep when the incidents began. Logic also dictates that H.D. could not have disclosed what happened to her if she was asleep during the incidents.

The Eastern District's reliance on "logic" has been explicitly rejected by this Court. *See Pierce,* 433 S.W.3d at 432. It follows that if "logic" can play no role in the jury's unfettered right to believe or disbelieve any evidence, neither can "logic" cloud this Court's view of what the jury could believe. *See id*. This principle should seemingly always hold sway in the multiple-acts context, and John urges the Court to so hold. The evidence here showed that there were three separate and distinct acts of both types of sexual contact. The Eastern District violated this principle by stating that no reasonable jury could believe that the abuse could have happened while H.D. was asleep and that most of the time, she did not wake up. The Eastern District has essentially held that the jury was not allowed to believe Maggie's testimony about this. It seems that the principle addressed in *Pierce* continues to be difficult to abide. Therefore, this Court should clarify that circuit and appeals courts should never be in the business of declaring what the jury should have found when deciding whether a defendant's right to a unanimous jury was violated by a verdict director inviting a non-unanimous jury in a multiple-acts case. *See Pierce*, 433 S.W.3d at 432; *Celis-Garcia*, 344 S.W.3d at 156-58.

The Eastern District also held that the acts of mouth-on-genital contact could not be distinguished between the time H.D. was asleep and when H.D. was only pretending to be asleep (Memorandum Opinion, p. 17). The first reason the Court gave was that H.D. "provided no indication among the various incidents of when she

was actually asleep versus when she merely pretended to be asleep" (Memorandum Opinion, p. 17). This is absolutely irrelevant. There is nothing in the case law that suggests that this detail is necessary for the evidence to establish a distinct act of sexual contact. If, for example, there had been something more concrete to distinguish between certain acts, such as the use of handcuffs during some acts of abuse, an appellate Court would not have ruled that the failure of H.D. to provide some indication among the various incidents as to when handcuffs were used and when they were not was an insufficient basis to establish distinct acts of sexual contact. The very factor – here H.D. asleep versus pretending to be asleep – itself gives the jury the right to distinguish between incidents, regardless of what it is.

The Eastern District found that the distinction between being asleep and pretending to be asleep "would not resolve the issue of jury unanimity," since there were multiple incidents of abuse when H.D. was asleep, and multiple acts of abuse when H.D. was only pretending to be asleep (Memorandum Opinion, p. 17). Again, this is completely irrelevant, since if there was a more vivid fact to distinguish these acts of abuse, such as the use of handcuffs, the fact that there were multiple acts of abuse when handcuffs were used and multiple acts of abuse when handcuffs were not used would not have mean that the acts could not be distinguished. The fact remains that the Eastern District did not find the distinction between H.D. being asleep and her only pretending to be asleep a valid one since it defied that court's "logic."

4. The jury unanimity issue in this case has been preserved.

This Court has further cause to give John relief since, unlike *Celis-Garcia,* the issue here is *preserved.* Thus, John does not have to show that there has been a manifest injustice, but "must only show a 'reasonable likelihood' that the jury misapplied the faulty instruction to deprive him of his constitutional right." *Rycraw,* 507 S.W.3d at 64, n. 6 (citation omitted). As reasoned by the court of appeals:

> [W]e cannot pretend to know what occurred in the jury room[,] . . . [but] the overly generalized . . . verdict directors, lacking in any admonition that their unanimity on the specific acts was required, . . . allowed each individual juror to select any, all, or only one act of abuse from the larger pool of alleged acts presented by the State. The jurors could select specific instances from the alleged criminal acts, independently from each other, as their basis for returning convictions. . . . Accordingly, the plainly erroneous verdict directors created a juror free-for-all that resulted in manifest injustice by negating [the defendant's] constitutional right to a unanimous jury verdict.

State v. Carlton, 527 S.W.3d 865, 878 (Mo. App. E.D. 2017).

This analysis is just as applicable in John's case, yet only more so, since in *Carlton,* the issue was not preserved, whereas in John's case it is preserved. Having had the issue brought to its attention, the trial court could have required the State to put in more specific information in the five verdict directors. It could have named the place where the abuse happened by specifying the bedroom or the living room. It also could have made a distinction between H.D. being awake and being asleep. Finally, it could have specified the date of April 27, 2019, as there was testimony that the abuse

happened for the last time on that date (TR 657). Any of these changes would have addressed the issue of jury unanimity and would have been simple to make.

5. A unitary defense does not prevent relief.

Finally, the fact that the defense was a general defense, *i.e.,* in that the abuse did not happen because H.D. lied about it, does not preclude this Court from finding that John's constitutional right to a unanimous verdict was violated. *See Hoeber v. State,* 488 S.W.3d 648 (Mo. banc 2016). In *Hoeber,* the defendant argued that his attorney was ineffective for not objecting to verdict directors that were not specific enough about "hand-to-genital contact." *Id.* at 653. The State argued that there was no prejudice because the defendant argued that the incidents did not happen. *Id.* at 656. The State relied on the analysis of *State v. LeSieur,* 361 S.W.3d 458 (Mo. App. W.D. 2012), which held that when the defendant relies on a unitary defense, "manifest injustice does not exist." *Id.* at 465. The Missouri Supreme Court rejected this argument, stating:

> At no point in *Celis–Garcia,* however, did this Court conclude that a defendant asserting a general defense could never be prejudiced by non-specific verdict directors. Instead, this Court found that the fact that the defendant in *Celis–Garcia* "relied on evidentiary inconsistencies and factual improbabilities respecting each allegation of hand-to-genital contact makes it *more likely* that individual jurors convicted her on the basis of different acts." *Celis–Garcia,* 344 S.W.3d at 159 (emphasis added). In other words, while the act-specific defense in *Celis–Garcia* helped this Court find that the insufficiently specific verdict directors were prejudicial to the defendant, the Court was not required to find prejudice based on her defense. This Court's analysis and holding in *Celis–Garcia* was not that a

> defendant like Mr. Hoeber could not suffer prejudice from insufficiently specific verdict directors just because he employed a general or unitary defense. To the extent that *Lesieur* and its progeny suggest otherwise, they should no longer be followed.

Id. at 657. Additionally, the Court noted that the State "argued that Mr. Hoeber had abused [the child] multiple times and at least on two occasions." *Id.* The State did the same in John's case (TR 944).

Furthermore, there have been other cases where the defense was that the defendant did not engage in the acts. In *Carlton,* the defendant "testified in his own defense." *Carlton,* 527 S.W.3d at 869. "[The defendant] denied all allegations of abuse, testifying that Victim never touched his penis." *Id.* The defendant gave testimony that contradicted the Victim. *Id.* In *State v. Beck,* 557 S.W.3d 408, 413-14 (Mo. App. W.D. 2018), the defendant testified in his own defense and denied the allegations. He also testified he was out of the state or country for large periods of the charging period. *Id.* The Western District reversed three of the convictions because of a lack of specificity in the verdict directors. *Id.* at 419. Both *Carlton* and *Beck* provided relief on *plain error* review. In John's case, the issue is preserved, and a less stringent prejudice standard applies. *See Richards,* 300 S.W.3d at 281 (citing *Erwin,* 848 S.W.2d at 483).

Moreover, while John's defense was that the abuse did not happen, the defense also focused on some specific inconsistencies and facts that were arguably improbable. For example, in closing, the defense focused on the fact that one instance

of the abuse happened on the same couch where two other girls were sleeping (TR 970). Additionally, the defense pointed out that H.D. had said her pajamas were on for one incident and another time John's clothes were on (TR 970). Yet H.D. specifically said the genital-on-genital contact was skin-to-skin (State's Exhibit 18 at 56:15). She also said the same thing happened on the living room couch, but also stated that her pajamas were on and that they stayed on (State's Exhibit 18 at 1:18:55; State's Exhibit 18 at 1:19:20). Finally, the defense argued that H.D. had recanted her prior statements and had testified, under oath both at trial and in a deposition, that her statements in the video were a lie (TR 958, 965-66, 972).

These are precisely the types of substantial "conflicting statements" by the alleged victim that led the *Hoeber* Court to find the erroneous verdict directors not harmless because such conflicting statements "created a real risk the jury verdicts were not unanimous." *Hoeber*, 488 S.W.3d at 657-58. Because the substantial conflicting statements in the evidence of alleged abuse here created the same real risk of jury non-unanimity, this Court cannot say the trial court's issuance of the Count I verdict director was harmless beyond a reasonable doubt. *See id.*

John's constitutional right to a unanimous jury verdict for Count I was violated. Therefore, this Court should reverse his conviction on Count I and remand for a new trial.

II.

The trial court erred in submitting Instruction 9, the verdict director for Count II, to the jury, because the verdict director failed to specify a particular incident of statutory sodomy in the first degree and thereby violated John's rights to a fair trial, due process, and a unanimous verdict, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that evidence of multiple and distinct acts of mouth-on-genital contact was presented to the jury, yet the verdict director did not specify any one of these incidents, thereby making it unclear as to which incident John was found guilty on Count II and allowing the possibility that the jurors failed to find the same incident of statutory sodomy in the first degree unanimously. The fact that Instruction 9 specified that the mouth-on-genital contact had to be distinct from Count I was not sufficient to guarantee a unanimous verdict.

A. Preservation of Error

John incorporates the Preservation of Error from Point I here.

B. Standard of Review

John incorporates the Standard of Review from Point I here.

C. Relevant Facts

John incorporates the Relevant Facts from Point I here with the exception that the relevant instruction for Count II was Instruction 9, which stated:

INSTRUCTION NO. 9

As to Count 2, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or between December 1, 2018, and April 25, 2019, in the State of Missouri, the defendant knowingly had deviate sexual intercourse with H.D. by placing his mouth on her genitals, separate and distinct from Count 1, and

Second, that at the time H.D. was a child less than twelve years old,

then you will find the defendant guilty under Count I of statutory sodomy in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR 4th 402.16
Submitted by the State

(LF 13:10).

D. Analysis

John incorporates his Analysis from Point I here, except that the error in the instant Point was with Instruction 9, the verdict director for Count II, and that error was not harmless beyond a reasonable doubt. John's constitutional right to a

unanimous verdict on Count II was violated. Therefore, this Court should reverse John's conviction on Count II and remand for a new trial.

III.

The trial court erred in submitting Instruction 10, the verdict director for Count III, to the jury because the verdict director failed to specify a particular incident of incest and thereby violated John's rights to a fair trial, due process, and a unanimous verdict, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that Instruction 10 told the jury that the offense of incest was committed by mouth-on-genital contact, and evidence of multiple and distinct acts of mouth-on-genital contact was presented to the jury, yet the verdict director did not specify any one of these incidents, thereby making it unclear as to which incident of incest John was found guilty on Count III and allowing the possibility that the jurors failed to find the same incident of incest unanimously.

A. Preservation of Error

John incorporates the Preservation of Error from Point I here.

B. Standard of Review

John incorporates the Standard of Review from Point I here.

C. Relevant Facts

John incorporates the Relevant Facts from Point I here with the exception that the relevant instruction for Count III was Instruction 10, which stated:

INSTRUCTION NO. 10

As to Count 3, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or between December 1, 2018, and April 25, 2019, in the State of Missouri, the defendant knowingly had deviate sexual intercourse with H.D. by placing his mouth on her genitals, and

Second, that H.D. was a stepchild of defendant by virtue of a marriage creating that relationship and which still existed at the time referred to in paragraph First, and

Third, that defendant knew H.D. was his stepchild at the time referred to in paragraph First, then you will find the defendant guilty under Count 3 of incest.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR 4th 422.04
Submitted by the State

(LF 13:11).

D. Analysis

John incorporates the analysis from Point I here, except that the error in the instant Point was with Instruction 10, the verdict director for Count III, and that error

was not harmless beyond a reasonable doubt. Additionally, John submits that the analysis from Point I even more strongly suggests error for Point III, where there were three distinct incidents of mouth-on-genital contact but only one verdict director for incest. This modified chart from Point I shows how the jury could have voted to convict John of incest, but not have unanimously agreed on which incident to base its conviction.

Incident	Jurors 1-3	Jurors 4-6	Jurors 7-9	Jurors 10-12
Bedroom Asleep	Count I Count III	Not Guilty	Count I Count III	Count II
Bedroom Pretending to be Asleep	Count II	Count I Count III	Count II	Not Guilty
Living Room Couch	Not Guilty	Count II	Not Guilty	Count I Count III

John's constitutional right to a unanimous verdict on Count III was violated. Therefore, this Court should reverse his conviction on Count III and remand for a new trial.

IV.

The trial court erred in submitting Instruction 11, the verdict director for Count IV, to the jury, because the verdict director failed to specify a particular incident of child molestation in the first degree and thereby violated John's rights to a fair trial, due process, and a unanimous verdict, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that evidence of multiple and distinct acts of genital-on-genital contact was presented to the jury, yet the verdict director did not specify any one of these incidents, thereby making it unclear as to which incident John was found guilty on Count IV and allowing the possibility that the jurors failed to find the same incident of child molestation in the first degree unanimously. The fact that Instruction 11 specified that the genital-on-genital contact had to be distinct from Count V was not sufficient to guarantee a unanimous verdict.

A. Preservation of Error

John incorporates the Preservation of Error from Point I here.

B. Standard of Review

John incorporates the Standard of Review from Point I here.

C. Relevant Facts

John incorporates the Relevant Facts from Point I here with the exception that the relevant instruction for Count IV was Instruction 11, which stated:

INSTRUCTION NO. 11

As to Count 4, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or between December 1, 2018, and April 25, 2019, in the State of Missouri, the defendant touched H.D.'s genitals with his genitals, separate and distinct from Count 5, and

Second, that defendant did so for the purpose of arousing or gratifying defendant's sexual desire, and

Third, that at the time H.D. was a child less than twelve years of age,

Fourth, that H.D. was defendant's stepchild by virtue of a marriage creating that relationship and which still existed at the time referred to in Paragraph First,

Fifth, that defendant knew H.D. was his stepchild at the time referred to in paragraph First,

then you will find the defendant guilty under Count 4 of child molestation in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

MAI-CR 4th 420.20
Submitted by the State

(LF 13:12).

D. Analysis

John incorporates the analysis from Point I here, with the exception that his arguments centers on Counts IV and V, instead of Counts I and II. Additionally, the issue in Counts IV and V, and with Instructions 11 and 12, is that there was evidence of three distinct acts of genital-on-genital contact that were applied to only two charges.

While child molestation and attempted rape in the first degree are different charges, the manner in which they were committed was alleged to be the same: genital-on-genital contact. Additionally, Counts IV and V required the jury to find John guilty of an act of genital-on-genital contact distinct from each other. Thus, the analysis from Point I is just as applicable in Point IV, and it is impossible to tell if the jury was unanimous for either Count IV or V. The chart from Point I illustrates this perfectly. Instead of Counts I and II, this modified chart addresses the lack of juror unanimity for Counts IV and V.

Incident	Jurors 1-3	Jurors 4-6	Jurors 7-9	Jurors 10-12
Bedroom Asleep	Count IV	Not Guilty	Count IV	Count V
Bedroom Pretending to be Asleep	Count V	Count IV	Count V	Not Guilty
Living Room Couch	Not Guilty	Count V	Not Guilty	Count IV

As this chart hypothesizes, twelve jurors do not agree that a specific, distinct act of genital to genital contact took place even though all twelve jurors agree, *i.e.,* are unanimous, that two distinct acts of genital to genital contact did take place. This allowed the jury to return a guilty verdict to both Counts IV and V even though there is no guarantee that the jury was ever unanimous on either count. Furthermore, it allowed the jurors to render a guilty verdict to a distinct act on Counts IV and V and still not be unanimous. Thus, this hypothetical, like the one from *Rycraw,* allows the jury to have followed the instructions (LF 13:14) of the Court without unanimously agreeing on the acts used to convict John of Counts IV and V. *See Rycraw,* 507 S.W.3d at 63.

John's constitutional right to a unanimous verdict on Count IV was violated. Therefore, this Court should reverse his conviction on Count IV and remand for a new trial.

V.

The trial court erred in submitting Instruction 12, the verdict director for Count V, to the jury, because the verdict director failed to specify a particular incident of attempted rape in the first degree and thereby violated John's rights to a fair trial, due process, and a unanimous verdict, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 22(a) of the Missouri Constitution, in that evidence of multiple and distinct acts of genital-on-genital contact was presented to the jury, yet the verdict director did not specify any one of these incidents, thereby making it unclear as to which incident John was found guilty on Count V and allowing the possibility that the jurors failed to find the same incident of statutory sodomy in the first degree unanimously. The fact that Instruction 12 specified that the genital-on-genital contact had to be distinct from Count IV was not sufficient to guarantee a unanimous verdict.

A. Preservation of Error

John incorporates the Preservation of Error from Point I here.

B. Standard of Review

John incorporates the Standard of Review from Point I here.

C. Relevant Facts

John incorporates the Relevant Facts from Point I here with the exception that the relevant instruction for Count V was Instruction 12, which stated:

INSTRUCTION NO. 12

As to Count 5, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or between December 1, 2018, and April 25, 2019, in the State of Missouri, the defendant touched H.D.'s genitals with his genitals, separate and distinct from Count 4, and

Second, that at the time H.D. was a child less than twelve years of age, and

Third, that such conduct was a substantial step toward the commission of the offense of rape in the first degree, and

Fourth, that defendant engaged in such conduct for the purpose of committing such rape in the first degree,

then you will find the defendant guilty under Count 5 of attempted rape in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

A person commits the offense of rape in the first degree if he or she knowingly has sexual intercourse with another person who is incapacitated, incapable of consent, or lacks the capacity to consent, or by the use of forcible compulsion.

As used in this instruction, the term "substantial step" means conduct that is strongly corroborative of the firmness of the defendant's purpose to complete the commission of rape in the first degree.

MAI-CR 4th 420.01
Submitted by the State

(LF 13:13).

D. Analysis

John incorporates the analysis from Points I and IV here, except that the error in the instant Point is with Instruction 12, the verdict director for Count V, and that error was not harmless beyond a reasonable doubt.

John's constitutional right to a unanimous verdict on Count V was violated. Therefore, this Court should reverse his conviction on Count V and remand for a new trial.

CONCLUSION

For the reasons stated in Points I through V, this Court should reverse John's convictions for Counts I through V and remand his case for a new trial on those counts.

Respectfully submitted,

/s/ James Egan

James Egan, Mo. Bar No. 52913
Attorney for Appellant
Woodrail Centre
1000 W. Nifong, Building 7, Suite 100
Columbia, MO 65203
(573) 777-9977, ext. 422
Fax (573) 777-9974
Email: James.Egan@mspd.mo.gov

Certificate of Compliance

I, James Egan, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 13,174 words, which does not exceed the 31,000 words allowed for an appellant's substitute brief.

/s/ James Egan
_____
James Egan