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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

John incorporates the jurisdictional statement from his initial brief here.

STATEMENT OF FACTS

John incorporates the statement of facts from his initial brief here.

REPLY ARGUMENT

I.

The issues in this case have been preserved for appellate review and the State's argument to the contrary is different than its position when John's case was pending in the Eastern District.

A. The State has changed its position on the issue of preservation.

When John's case was in front of the Eastern District, the State made no challenges to John's arguments on preservation grounds. It also did not make any argument regarding preservation at oral argument. Moreover, the Eastern District's opinion treated the issue as preserved.

When John's application for transfer was pending, this Court asked the State to file suggestions in opposition. In its suggestions, the State, in a footnote, argued:

> Defendant assumes that his objection preserved this issue for appeal, but the objection was arguably insufficient. Although defense counsel generally identified the legal basis for his objection, he failed to identify the multiple distinct acts in evidence that he believed created a risk of a non-unanimous verdict.

(State's Suggestions in Opposition, p. 3) (citation omitted). In a reply to the State's suggestions in opposition to transfer, John argued not only had the State not made this argument in front of the Eastern District, but also that "the objections were more than adequate in their specificity and were not general objections, particularly where the

prosecutor indicated her understanding of John's objection by making a response to it" (Appellant's Reply, p. 2).

Now, the State no longer claims John's preservation to be "arguably" insufficient. Instead, the State's position has continued to evolve as the State now claims that John's objection at trial "only met half of Rule 28.03 requirements" (State's Brief, p. 16). The State further argued:

> Defense counsel's objection only met half of Rule 28.03's requirements. He identified the legal "grounds of the objection" as *Celis-Garcia*… But defense counsel did not "stat[e] *distinctly* the matter objected to….Defense counsel generally argued that this is a "multiple acts case" and vaguely requested that "more details" be included in the verdict directors, but counsel never informed the trial court why he believed it was a multiple acts case or identified the "details" that he believed the instructions should include.

(State's Brief, pp. 16-17) (emphasis in original). The State, however, gave no explanation as to why its argument was not presented at any time during the pendency of the case in front of the Eastern District and gave no explanation as to what had changed to lead it to reconsider the issue of preservation. Moreover, the State did not give this Court any substantial argument in its suggestions in opposition to transfer why this issue was not preserved for appellate review.

John respectfully submits the State has waived any chance to argue the issues in his case have not been preserved. Moreover, as will be shown, *infra,* John was more than specific enough to satisfy all preservation requirements of Rule 28.03.

B. John's objections were more than sufficient to preserve the issues for appellate review.

"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). "Our rules for preservation of error for review are applied, not to enable the court to avoid the task of review, nor to make preservation of error difficult for the appellant, but, to enable the court—the trial court first, then the appellate court—to define the precise claim made by the defendant." *Id.* (internal citation and quotation omitted). "Further, trial judges are presumed to know the law and to apply it in making their decisions." *Id.* (internal citation and quotation 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 all five verdict directors on the basis that they violated 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, 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 asked John to confirm his argument (TR 927-28). Below is the specific exchange directly from the transcript:

> **TRIAL COURT:** Now that Susan is on the record, would you restate your Defense objections to the verdict directors of the Prosecution?
>
> **DEFENSE COUNSEL:** Yes, Your Honor. Defense objects to all five verdict directors on the specific basis of Missouri Approved Instruction Number 404.02, Notes on Use 6 and 7, and also Supreme Court Case *State v. Celis-Garcia.* Because this [is] a multiple acts case, we believe the verdict directors lack specificity as to the alleged crimes committed.
>
> We would request there be more details included which would consist of a narrower time frame, the location, maybe more details about which offense that the State is referring to.
>
> **TRIAL COURT:** And you're stating that the separation of the events for the jury and the verdict director is not sufficient enough?
>
> **DEFENSE COUNSEL:** Our argument would be yeah, that this could lead –
>
> **TRIAL COURT:** By saying separate and distinct from Count 3, Count 3 [*sic*], for example?
>
> **DEFENSE COUNSEL:** Because the Defendant has a right to a unanimous verdict that this could lead to the jury maybe unanimously agreeing upon different acts but not necessarily the same act.
>
> **TRIAL COURT:** Okay.

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 defendant's motion for new trial stated the following:

> The Court erred in submitting Jury Instruction Nos. 8, 9, 10, 11, and 12 to the jury, and in accepting the verdicts of guilty, because the instruction proffered by the State and given by the Court did not require the jury to agree on a specific act of misconduct beyond a reasonable doubt in that the instruction failed to instruct the jury that it must agree unanimously that all of the acts described in Jury Instruction Nos. 8, 9, 10, 11, and 12 occurred, which deprived Defendant of his right to a unanimous verdict and his rights to due process and a fair trial as guaranteed by Article I, Sections 10, 18(a), and 22(a) to the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

(LF 17:2). These objections were more than sufficient to preserve these issues for appellate review.

When John made his objection, he did not "generally suggest" anything as the State contended in its brief (State's Brief, p. 17). As the transcript clearly shows, John requested the trial court submit verdict directors that gave a narrower time frame, that gave a specific location, and that gave other details that which offense was being referred to (TR 927). The request clearly brought it to the trial court's attention that the State could have specified the location that the abuse took place: bedroom or the downstairs couch. Indeed, the Notes on Use for MAI-CR 4th 404.02, Number 6,

which John specifically cited, states that location may be an important factor and should be included upon request. Additionally, John also requested that the State submit a verdict director that had other details that could have helped the jury distinguish between events. These arguments were renewed in John's motion for new trial (LF 17:2).

Moreover, the reaction of the trial court, as well as the response of the prosecutor clearly indicate that the objections were specific enough for the trial court to understand what John's objections were. The State's arguments are in direct conflict with this Court's holding in *Amick.*

In *Amick,* the defendant was charged with first-degree murder and second-degree arson. *Id.* at 414. Before the jury began deliberating, the alternate juror was excused. *Id.* After deliberating for five hours, one of the jurors was sent home for health reasons. *Id.* The trial court summoned the alternate back to the courthouse and put the alternate with the jury. *Id.* Before this was done, the defense asked for a mistrial on the grounds that: (1) the alternate could not get caught up with the jury; and (2) it was possible the alternate had discussed the case with someone else. *Id.* The defense also argued that the substitution "would create an enormous amount of error at this point." *Id.* (internal quotations omitted). The defense did not cite the statute, nor did it argue that the law prohibited the trial court from doing what it planned to do. In his motion for new trial, the defendant renewed the objection, but

again did not cite the statute or even argue that the trial court did not have the authority to replace the sick juror with the alternate. [1]

This Court held that the actions of the defendant, both at trial and in his motion for new trial, were more than sufficient to preserve the issue for appeal, even though the defendant did not cite the statute. *Id.* at 415. This is because trial judges are presumed to know the law and apply it in their decisions. *Id.* Thus, when the defendant in *Amick* told the trial court substituting the alternate juror would "create an enormous amount of error at this point," the trial court, being aware of the applicable statute, would have been put on notice as to the claim the defense was raising.

The same principle applies to John's case. Just as a trial judge is presumed to know the law, a trial judge must also be presumed to know the evidence presented at trial. They would have to be in order to make correct rulings on motions for judgment of acquittal and motions for new trial. Additionally, a trial judge would have to be aware of the evidence presented in order to determine whether sufficient evidence had been presented to submit a self-defense instruction or a sudden passion instruction. When John requested more details about the location and more details about which offense the State was referring to, the trial court's awareness of the evidence

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[1] John asks this Court to take judicial notice of its own case, SC94324, pages 225-26 of the legal file. *See* Section 491.130 RSMo. (Cum. Supp. 2001). This has been attached as an appendix to this substitute reply brief as pages A-1 through A-2).

presented would have put it on notice that the instructions could have specified the actual location of the offense – either the bedroom or the downstairs living room. The request for more details would have put the trial court on notice that the instructions could have provided details about whether H.D. was actually asleep or only pretending to be asleep. Thus, John's objections were, *at the very least,* as sufficient as the objections made by the defendant in *Amick.* The instructional issues in John's case have been preserved and the State's arguments to the contrary are without merit.

Moreover, the case that the State cited in its brief, *State v. Davis,* 564 S.W.3d 649 (Mo. App. W.D. 2018), was not analogous. In *Davis,* the defendant was convicted of two counts of sexual abuse in the second-degree. *Id.* at 651. On appeal, the defendant argued that the trial court abused its discretion in submitting verdict directors that did not require them to agree on the specific act for which it found him guilty. *Id.* at 654-55. The defendant argued that the issue was preserved for appellate review, but the Western District disagreed.

At trial, defense counsel made the following objection:

> Your Honor, I do object to certain instructions on the basis of the fact that the charging date allows—is June 24th to 25th, June 24th or 25th. So the specific instructions I would be objecting to are No. 6, No. 7, No. 8, No. 9, and No. 10, two of those of course being converse instructions, the 7 and the 9.
>
> But all of those have the dates from June 24th to the 25th. I object on that because I believe it will serve to confuse the jury. I also believe that it will allow the possibility of jurors finding Mr. Davis guilty on different offenses.

Id. at 655. In response, the trial court stated:

> All right. And the reason the Court is allowing the submission of the case—this is done—the dates were the State's request and we had considered and discussed that.
>
> But there was evidence certainly from [M.D.] today that the events occurred on June 25th; however, there's some earlier evidence that was admitted that made reference to the day before, I believe her videotaped interview and some other out-of-court statements that were received into evidence.
>
> And so I think the State is allowed to allege that it happened between June 24th and June 25th. The Court has focused the jury on the event that they're to find and that is the allegation which—of [M.D.] that the defendant touched her breast in his bedroom and that's what paragraph first covers.
>
> So I note your objection. The Court's considered it and the Court overrules it. Okay?

Id. The defendant's motion for new trial also focused on the dates.

The Western District held that because the defendant focused only on dates, and not on acts, the defendant was broadening his argument on appeal. *Id.* at 656. Therefore, the issue could only be considered for plain error. *Id.*

In its brief, the State argued that the objection John made "was even more deficient" (State's Brief, p. 20). This of course begs the question that if the objection was indeed so deficient, why did the State not make an argument when this case was pending before the Eastern District? The State's argument implies that the deficiency is so glaring that it could not possibly be overlooked. Yet, both the State and the Eastern District *did* overlook it.

John's case is not analogous to the *Davis* case. John's objections, both at trial, and in the motion for new trial, *did* focus on the issue of the acts of the defendant and how the verdict directors did not have sufficient specificity to ensure a unanimous verdict. This was not a general objection as the State contended in its brief (State's Brief, p. 20-21). The State's argument that the issue is not preserved for appellate review is a red herring and should be given no weight by this Court.

II.

The State erroneously argued that the evidence presented to the jury did not consist of multiple, distinct acts of mouth-to-genital contact between John and H.D., because it failed to consider the evidence in its totality. (Replies to section 4 of the State's brief - pages 34 through 40).

A. There was evidence of three separate and distinct acts of sexual abuse.

In its brief, the State argued:

> [E]ven if the jury could infer from Maggie's testimony that Victim was talking about mouth-to-genital and genital-to-genital contact, Maggie's statement that she was "sometimes" awake and other times she was asleep does not identify distinct incidents of the charged conduct. At no point did Maggie testify that Victim described any specific instance when Defendant committed the charged conduct in which Victim remembered being either awake or asleep. Rather, Maggie's statements at most describe a variation in an otherwise undifferentiated pattern of conduct. Indeed, Maggie's testimony would not preclude an inference that Victim was at some point awake and asleep during each incident. That would also be consistent with Victim's statements to Mother and the social worker that Defendant would come into her room when she was asleep to engage in the charged conduct, and that she would pretend to be asleep and roll over in an attempt to stop it from happening.

(State's Brief, pp. 35-36). The State's reasoning, however, fails for three reasons.

First, the State's argument erroneously implied that it would not be a reasonable inference for the jury to have inferred that H.D. told Maggie about specific acts since, according to the State:

> Maggie's testimony did not specifically identify any conduct that Defendant committed: she testified that Victim related only that Defendant did "things" that she did not like, which Maggie deduced were sexual in nature.

(State's Brief, p. 35). This argument, however, fails to fully look at the record.

Maggie specifically testified that the way H.D. described these "things she did not like" made it very clear she was talking about sex (TR 579). She also testified she knew H.D. was talking about sex acts on her (TR 580). Finally, Maggie confirmed she knew what H.D. had told her "was in nature sexual intercourse" (TR 586). The testimony about what H.D. told her being "in nature sexual intercourse" would certainly cover genital-on-genital contact, and H.D.'s statements to Maggie about "sex acts on her" would cover mouth-on-genital contact. Thus, Maggie did not have to deduce anything. She was given more than enough information to know what John was doing to H.D. Indeed, contrary to the State's argument that her "testimony did not specifically identify any conduct that [John] committed," Maggie's testimony did specifically identify conduct when she said it was "in nature sexual intercourse."

Second, the State failed to look at the evidence in its totality. The State argued that this testimony was not sufficient to "identify distinct incidents of the charged conduct," since Maggie never testified that H.D. told her about a specific instance of this conduct where she was asleep or pretending to be asleep (State's Brief, pp. 35-36). Thus, the State argued, "Maggie's statements at most describe a variation in an otherwise undifferentiated pattern of conduct" (State's Brief, p. 36). But the State

does not explain why John engaging in a sexual act with H.D. while she was asleep did not constitute a distinct act, or why engaging in a sexual act while she was only pretending to be asleep did not constitute a distinct act. The State overlooked the fact that Maggie's testimony indicated that they were *distinct to her*, so it is only reasonable to infer that they would be distinct to a juror as well.

A hypothetical helps to illustrate this. Assume the State submitted the following verdict directors:

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 **while she was asleep in her bedroom**,

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.

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 **while she was in her bedroom and only pretending to be asleep**, 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.

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 **while she was on the downstairs couch in the living room**, 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.

Now assume the defense objected to the verdict directors on the grounds that there was not sufficient evidence to support them. The defense cited the cases of *State v. Hallmark,* 635 S.W.3d 163, 171 (Mo. App. E.D. 2021) and *State v. Avery,* 275 S.W.3d 231, 233 (Mo. banc 2009), which state that a jury instruction must be supported by substantial evidence. The question this Court must ask itself is how would it rule to this challenge? Would it hold that there was sufficient evidence to support these instructions and affirm the convictions?

The answer is, of course, that it would. It would hold that there was enough evidence to support the submission of these instructions since, based on the evidence as a whole, there was evidence to support that these events happened, and that a reasonable juror could have concluded that these events happened. This is because looking at the evidence in its totality shows that there was sufficient evidence to show three separate and distinct acts of mouth-on-genital contact took place.

Thus, when the jury was voting to convict John of engaging in mouth-on-genital contact, as well as genital-on-genital contact, it had three separate and distinct acts that it could have been thinking about. As John showed in his initial brief, this

could have led to a non-unanimous verdict on all counts. *See* Appellant's Substitute Brief, pp. 41, 56, and 60.

Finally, the State misconstrued Maggie's testimony when it argued that her testimony "would not preclude and inference that [H.D.] was at some point awake and asleep during each incident" (State's Brief, p. 36). This is simply not accurate. Maggie explicitly testified that most of the time, H.D. did not wake up. This testimony, if believed, explicitly prevents this inference from being drawn.

B. The cases the State relied on are not applicable to John's case.

In its brief, the State took Maggie's use of the word "sometimes" and argued how this word was used in two cases: *State v. Jones,* 619 S.W.3d 138 (Mo. App. E.D. 2018) and *State v. Adams,* 571 S.W.3d 140 (Mo. App. W.D. 2018). The State's argument fails for the simple fact that in both *Jones* and *Adams,* the Court was applying a plain-error standard of review. *See Jones,* 619 S.W.3d at 146; *Adams,* 571 S.W.3d at 143. Cases applying a plain-error standard of review cannot be analogized to cases applying a *de novo* standard of review.

Moreover, the analysis in *Adams* showed that there was not as great a distinction, if there was even one at all, between the acts of mouth-on-genital contact (and genital-on-genital contact) in John's case. In *Adams*, the Court stated:

> H.M.'s testimony generally described that Adams touched her privates while she was sitting on his lap. This testimony does not describe an incident that can be differentiated from the specific incident H.M. described in the [forensic] interviews. *The incident H.M. described where she and Adams were on his*

> *couch watching "God of Rings" could very well have included the details that H.M. was sitting on Adams' lap while she and Adams were playing crafts.* Though the response of "sometimes" to the suggestion that H.M. and Adams were playing crafts supports H.M.'s general report during the [forensic] interviews that Adams touched her more than once, the vague reference to "sometimes" playing crafts is not sufficient to describe a distinctly separate incident from the only incident H.M. specifically described in the [forensic] interviews.

Id. at 151-52 (emphasis added). The emphasized part of the Court's analysis is critical because it points out that the incident testified to could have included the incident where she was watching a movie. The evidence presented in John's case does not allow for this possibility. Maggie's testimony was clear: H.D. was either asleep for the abuse, or she was pretending to be asleep. *Jones* and *Adams* do not help the State.

The State continued to argue that John's argument that minor discrepancies were sufficient to establish separate and distinct acts was neither supported by case law nor supported in logic (State's Brief, p. 38). The State's argument, however, that there is no case law fails to acknowledge that the first question presented in John's application for transfer was: in a multiple acts case where the issue was *preserved,* should the standard of review in determining whether there are separate and distinct acts be the same as sufficincy of the evidence? John's argument is that it should be, since just as a jury could convict a defendant for an offense when there is sufficient evidence, that same jury could also consider separate and distinct acts that have

suffiiecnt evidence when deciding on which act to actually convict the defendant. Indeed, to not apply a sufficiency standard would usurp the providence of the jury in deciding what the facts are. The fact that there is no case law is precisely why this question presented was one of general interest and importance.

The State's arguments regarding the lack of logic fare no better (State's Brief, pp. 38-39). The State argued that "the purportedly distinguishing detail must be something that necessarily separates different instances based on evidence in the record" (State's Brief, p. 38). John does not disagree, but notes that the State overlooked the fact that H.D. was sometimes awake during the acts, but usually did not wake up, was enough of a distinction for Maggie; thus, logically, it would also be enough of a distinction for a juror.

Moreover, the State was correct when it stated that there needed to be evidence that established distinct acts, and that distinctiveness was the lynchpin of the inquiry (State's Brief, p. 39). What the State failed to acknowledge is that the degree of distinctiveness will depend on whether the issue is preserved or not. In John's case, the issue is preserved. The State had no problem accepting this when John's case was in front of the Eastern District. Now that this Court has accepted transfer and is considering John's argument, the State has moved the goalposts and is arguing that the issue is not preserved so it can apply case law that also was based on plain-error review.

The State's arguments fail. There was enough evidence of three distinct acts of both mouth-on-genital-contact and genital-on-genital contact.

III.

The State's argument in section 5 of its brief is an appropriate one for a jury, not an appellate court. (Replies to section 5 of the State's brief – pages 41 – 43).

In its brief, the State argued that H.D.'s statements to the forensic interviewer that John did "those things he does every other time" was not sufficient to establish a third distinct act (State's Brief, pp. 41-42). [2] The basis for the State's argument is that H.D. never described those "things" and that H.D.'s statements to the forensic interviewer about what happened in the downstairs bathroom were "both vague and fleeting" (State's Brief, pp. 41-42). These arguments are more appropriate for a jury than this Court.

After telling the forensic interviewer about the acts in the bedroom, the forensic interviewer asked if there was any place else the abuse took place, and H.D. indicated that it happened in the downstairs living room (State's Exhibit 18 at 1:11:30). H.D. said that John did "those things he does every other time" (State's Exhibit 18 at 1:12:00). This statement easily allowed the jury to believe that the same

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[2] In his initial brief, John quoted H.D. as saying "those things he has done every other time." The quote in the reply brief is the correct one, and undersigned counsel apologizes for the mistake. He does submit there is no substantive change in the statement.

exact behavior took place downstairs as well, and the State's argument that H.D.'s failure to describe "those things" is relevant was woefully unconvincing.

The State did acknowledge that the jury was free to believe that statement and not give weight to H.D.'s statements that she did not remember, that she had her clothes on, and did not remember what part of her body John touched (State's Brief, p. 42). After acknowledging this fact, however, the State argued that would have been "exceedingly unlikely that the jurors would have dismissed the consistent evidence that the charged acts repeatedly in the bedroom and instead premised their verdicts on [H.D.'s] brief reference to the 'things that happened one time in the downstairs living room" (State's Brief, p. 43).

This type of argument has been explicitly rejected by this Court in *State v. Jackson,* 433 S.W.3d 390 (Mo. banc 2014), and *State v. Pierce,* 433 S.W.3d 424 (Mo. banc 2014), and their progeny. While the ultimate issue in *Jackson* and *Pierce* was the submission of nested lesser included offenses, the legal reasoning that this Court addressed was that facts were to be decided by a jury and *only* the jury. In both of those cases, this Court *explicitly* rejected *any* second-guessing of the jury's ability to believe or disbelieve any part of a witness's testimony. "To put it simply, evidence never proves any element until the jury says it does." *Jackson,* 433 S.W.3ed at 392. Furthermore, "[a]ll decisions as to what evidence the jury must believe and what inferences the jury must draw *are left to the jury, not to judges deciding what reasonable jurors must and must not do.*" *Id.* (emphasis added).

Since *Jackson* and *Pierce* were decided, both this Court and the appellate courts have been crystal clear that it is the *jury* that decides what the facts are. For example, in *State v. Barnett,* 577 S.W.3d 124, 126-27 (Mo. banc 2019), this Court held that an instruction must be given if there is evidence to support it even though the defendant's own testimony contradicts it. In *Barnett,* there was evidence to support that the defendant stabbed the victim in self-defense. *Id.* The defendant, however, denied stabbing the victim at all. *Id.* at 126. The defense offered a self-defense instruction but it was rejected. *Id.* On appeal, the State argued that the defendant was not entitled to a self-defense instruction because he denied stabbing the victim. *Id.* This Court rejected that argument. *Id.* The principal reason is that it is the *jury's* decision to decide what the facts are. *Id.* at 126-27.

The importance of the *Barnett* case cannot be overstated. The defendant in *Barnett* was not guilty of the offense if he either: (1) did not stab the victim; or (2) stabbed him in self-defense. The defendant maintained that he did not stab the victim at all. Applying the State's logic, it would not seem that there would be a reasonable probability that the jury would actually find the defendant acted in self-defense given that he adamantly denied doing so. One could say that under these circumstances, there was not even a remote possibility of this happening. Nevertheless, that is not the standard.

In *State v. Pliemling,* 645 S.W.3d 86, 88 (Mo. App. S.D. 2022), the defendant was convicted of unlawful receipt of public assistance. The evidence showed that the

defendant received over $2000. *Id.* at 88. The verdict director instructed the jury the defendant was guilty if it believed she unlawfully received over $500. *Id.* at 89. One of the issues addressed by the Court was whether the defendant had suffered a manifest injustice by being convicted for a felony instead of a misdemeanor. *Id.* at 91. Under the current law, the State had to prove the defendant stole over $750. *Id.* The State argued that the defendant did not suffer a manifest injustice because the evidence showed she stole over $750 and the defendant did not challenge this. *Id.* The Court rejected this argument, and, while acknowledging that it was "highly improbable" the defendant still would have been convicted for the felony with a correct verdict director, cited this Court's holding from *Jackson* where this Court held:

> No matter how strong, airtight, inescapable, or even absolutely certain the evidence and inferences in support of the differential element may seem to judges and lawyers, no evidence ***ever*** proves an element of a criminal case until all 12 jurors believe it, and no inference ***ever*** is drawn in a criminal case until all 12 jurors draw it.

Id. at 92 (citing *Jackson,* 433 S.W.3d 399-400) (emphasis in original). While this statement was made in the context of nested lesser included offenses, the legal principle that *no matter how obvious the evidence appears to be,* judges cannot usurp a jury's role as fact finder, applies in every jury trial.

The importance of the *Pliemling* case also cannot be overstated. Despite the fact that the value of the funds the defendant received was *uncontested* in *Pliemling,*

and the fact that the "high probability" the jury would have still convicted the defendant with a correct verdict director, the Court still acknowledged the jury could always disbelieve the State's evidence, *no matter how inescapable it appeared that would happen.* Applying the State's logic, it would not seem that there would be a reasonable probability that the jury would actually find the defendant not guilty had the instruction stated $750 instead of $500. One could say that under these circumstances, there was not even a remote possibility of this happening. Nevertheless, that is not the standard.

In *Jackson,* this Court stated that it "serves the criminal justice system best when it says what it means and means what it says." *Jackson,* 433 S.W.3d at 404. If this Court affirms John's convictions and holds that there is no possibility the jurors would have chosen to believe some evidence while rejecting other evidence, it will be overturning almost years of established jurisprudence. Moreover, it will return the issue of deciding the facts back to the Courts. John respectfully submits this is an untenable position.

Finally, the fact that H.D. gave contradictory statements fails to consider the two forensic interviews in their totality. It is irrefutable that H.D. was *very* reluctant to talk about the sexual abuse. Most, if not all, details that H.D. provided were only given after the forensic interviewer encouraged her to talk. On multiple occasions, H.D. tried to stop the questions by telling the forensic interview she did not want to talk about it. Under these circumstances, H.D.'s response to being asked if something

happened in another place and her answer that the same thing happened in this other place is strong evidence that sexual acts did take place in the downstairs living room. H.D.'s reluctance to give details and to backtrack could easily have been perceived by the jury as her reluctance to discuss the abuse, not that the incident did not happen.

H.D.'s statement about those same things taking place in the living room as in the bedroom was sufficient to establish a separate and distinct act.

IV.

The jury instructions were not sufficient to ensure jury unanimity.

(Replies to section 6 of the State's Brief - pages 43 – 51).

The premise of the State's argument in section 6 of its brief is that even if H.D.'s statement to the forensic interviewer established a separate and distinct act, the language in the verdict director for Counts I, II, IV, and V was sufficient to ensure jury unanimity (State's Brief, pp. 43-44). The State argued that the "separate and distinct language" in the instructions ensured this unanimity (State's Brief, p. 44). The charts on pages 41, 56, and 60 of John's initial brief refute that argument. Moreover, the State's reliance on *State v. Watson,* 407 S.W.3d 180, 185 (Mo. App. E.D. 2013), was unavailing (State's Brief, pp. 48-49). The special instruction given in *Watson* told the jurors they had to agree to one act and that act must be the same act. *Id.* Instructions Nos. 8, 9, 11, and 12 are more than just "not as artfully worded as the special instruction from *Watson,*" they are not even close. If the special instruction had been given in John's case, there would have been no issue.

Finally, this Court should give no weight to the State's newfound argument about preservation.

V.

The State's argument regarding Instruction 10 should be disregarded as it relies on a plain-error standard of review. Moreover, the State conceded that if the evidence about sexual acts in the downstairs living room established a distinct act, it was "arguably" error to submit the instruction. John has already established it was error. (Replies to Part D of the State's brief – pages 51-52).

VI.

Part E of the State's Brief erroneously argued there was no prejudice to John, and rehashed previous arguments including that the review on this case should be for plain error. Moreover, the State erroneously argued that believing one incident required that the jury believe another (Replies to section E of the State's brief – pages 52 – 57).

John incorporates the arguments from Point III of this reply brief here.

In Part E of its brief, the State argued that John had not shown he suffered prejudice or manifest injustice (State's Brief, pp. 52-53). The State also argued there was "no reasonable probability that the jurors would have relied on the [downstairs] incident to support their verdicts for any of the charged counts" (State's Brief, p. 54). The State also argued that there was not even a "remote possibility" that jurors would believe abuse took place downstairs but disbelieve that it did not take place upstairs (State's Brief, p. 55). All of these arguments fail.

As he argued in Point I of this reply brief, John again states that the issue was preserved and demonstrating manifest injustice was not necessary. Regarding prejudice, the State overlooked that the fact that when "the erroneous instruction may have influenced the jury adversely," the defendant is prejudiced. *See State v. Zetina-Torres,* 482 S.W.3d 801, 810 (Mo. banc 2016) (citation omitted). In a multiple-acts case, where the verdict directors lack sufficient specificity, the jury may have been influenced adversely because the defendant's right to a unanimous verdict may have

been violated. That violation *is* the prejudice. John explicitly demonstrated this prejudice in the charts from his initial brief on pages 41, 56, and 60. These charts show that there was a reasonable probability the verdict for Counts I though V was not unanimous. The same type of chart was used by the Eastern District to demonstrate prejudice in a multiple-acts case where the instructional issue was preserved in *State v. Rycraw,* 507 S.W.3d 47, 63-64 (Mo. App. E.D. 2016).

The State's next argument was that "there is no reasonable probability that any jurors would have disbelieved that the acts occurred in the bedroom and instead believed those same acts occurred in the downstairs living room" (State's Brief, p. 53) This argument is simply a rehashing of previous arguments made earlier in its brief (State's Brief, pp. 53-55). These were addressed in Point III of this reply brief and have been incorporated into this point.

Moreover, the two cases the State cited were unavailing. The standard of review in *State v. Ralston,* 400 S.W.3d 511, 520 (Mo. App. S.D. 2013) was for plain-error. The other case, *Barmettler v. State,* 399 S.W.3d 523, (Mo. App. E.D. 2013) was a post-conviction case with a different standard of review. Thus, it is not applicable here.

Finally, the State argued that it was not a "remote possibility" that jurors would believe the abuse took place in the downstairs living room without also believing it happened in the bedroom (State's Brief, p. 55).

Specifically, the State argued:

> [H.D.] told the interviewer that, on one occasion, [John] came downstairs and did the "things he does every other time." To believe that Defendant engaged in either mouth-to-genital or genital-to-genital contact in the living room, then, the jury must have believed that he committed that conduct "every other time" Victim had described—i.e., the five or six undifferentiated acts that occurred in her bedroom. In other words, any juror who might have believed that the charged conduct occurred in the downstairs living room must have also believed that the same conduct occurred in the bedroom. Thus, Defendant's chart showing the different ways jurors could have supported their verdicts with different acts is incorrect. While it is possible some jurors believed that the charged conduct occurred in the bedroom but not in the downstairs living room, it is not possible that any jurors believed that the charged conduct occurred only in the downstairs living room and not in the bedroom.

(State's Brief, pp. 55-56). The State's argument fails for two reasons.

First, individual jurors easily could have believed that genital-on-genital contact took place in the downstairs living room based on H.D.'s statements that there was "bladder-on-bladder" contact in the downstairs living room. Those jurors could also have disregarded H.D.'s statement about "those things he does every other time."

More importantly, however, is the fact that the State overlooked the fact that there were two distinct acts of mouth-on-genital contact in the bedroom. Thus, even if a juror who believed that the sexual acts took place in the downstairs living room "was required" to believe that the same sexual acts also took place in the bedroom, they were not required to believe that the acts happened *both* when H.D. was asleep *and* when she was simply pretending to be asleep. In other words, some jurors could have believed the sexual acts took place while H.D. was asleep while other jurors

could have believed the sexual acts took place while H.D. was only pretending to be asleep. "Those things he does every other time" referred to the sexual acts, not whether H.D. was asleep or simply pretending to be asleep. Thus, the charts from John's initial brief accurately show how jury unanimity was not ensured in this case.

Finally, the State argued that the fact that John's defense was a unitary defense mitigated against any prejudice (State's Brief, pp. 56-57). This argument was addressed in John's initial brief on pages 48 through 50 and will not be repeated here except to say that the cases the State cited to argue a unitary defense can be a factor in determining prejudice were cases where the instructional was not preserved. *See State v. Escobar*, 523 S.W.3d 545, 551 (Mo. App. W.D. 2017); *State v. Gilbert*, 531 S.W.3d 94, 100 (Mo. App. W.D. 2017); *State v. Denmark*, 581 S.W.3d 69, 75 (Mo. App. W.D. 2019).

CONCLUSION

For the reasons stated in Points I through V of his initial brief and this reply brief, 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

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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 7,570 words, which does not exceed the 7,750 words allowed for an appellant's substitute reply brief.

/s/ James Egan
_____
James Egan