No. SC99554

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

JOHN A. HAMBY,

Appellant.

Appeal from the Circuit Court of St. Charles County, Missouri
Eleventh Judicial Circuit
The Honorable Daniel G. Pelikan, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

John Hamby (Defendant) appeals from a St. Charles County circuit court judgment convicting him of two counts of statutory sodomy in the first degree, one count of incest, one count of child molestation in the first degree, and one count of attempted rape in the first degree. (LF Doc. 19). On appeal, Defendant argues that the trial court erred in instructing the jury on each of these counts because the verdict directors violated his right to a unanimous jury verdict.

Taking the evidence and reasonable inferences in the light most favorable to the jury's verdict, the following facts were adduced at trial.

Defendant became a stepfather to H.D. (Victim) when he married her mother (Mother) in April 2017. (Tr. 467-68, 471-72).

Victim was ten years old in early 2019. (Tr. 468). One day, Victim told a close friend (Friend) that Defendant "would come into her room while she was sleeping and then do things to her that she didn't like." (Tr. 424-26, 579). Victim 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). Victim said that this happened in the middle of the night, and that she was awake sometimes but most of the time she did not wake up. (Tr. 585, 587). Victim did not use the word sex, but it was clear to Friend that sex was what Victim described. (Tr. 579). Friend told Victim that

she should tell her mom because Defendant could go to jail for that. (Tr. 580). In the weeks that followed, Victim indicated to Friend that this was still happening. (Tr. 582).

Victim followed Friend's advice and disclosed Defendant's actions to Mother on April 29, 2019. (Tr. 428-29). That night, Victim got into an argument with Mother about doing her chores, and Defendant took Victim's TV away. (Tr. 478). Victim cried and finished her chores, and then she came to Mother and said that she had a secret about Defendant. (Tr. 478-79). Victim told Mother that Defendant would sometimes come into her room at night and would "take his bladder and touch her bladder." (Tr. 479). Mother asked Victim to be more specific, and Victim said that Defendant "touched [her] bladder with his bladder" and with his mouth. (Tr. 480). Victim described Defendant coming into her room in the middle of the night and waking her up. (Tr. 480). Victim said that she wanted a lock on her door so Defendant would stop. (Tr. 483).

Mother told Victim that this was very serious, not something to joke about, but Victim did not retract her statements. (Tr. 484). Victim seemed "very upset" and cried at times during the conversation. (Tr. 483). Mother then spoke to Defendant, who stayed at a hotel the following nights. (Tr. 484).

Mother called the Children's Division hotline, but she became frustrated because she "really just wanted someone to talk to [Victim] and explain to her that, you know, what she is saying, if it's true – you know, she has to

understand this is not something that we kid about. This is not something that we lie about." (Tr. 485).

The next day, Mother took Victim to the hospital at the direction of Family Services. (Tr. 486-87). At the hospital, Victim and Mother spoke to a social worker. (Tr. 490, 615). Victim told the social worker that Defendant "touched her private part," which she identified as her vagina. (Tr. 619). Victim said that "when she is asleep at night her stepfather would come into her room and put his front private in her private and that it would hurt." (Tr. 619). Victim also said that Defendant "put his mouth on her front private which was gross." (Tr. 620). Victim said she would "pretend to be asleep and roll over to stop it from happening" but that did not work. (Tr. 620). Victim said "it happened approximately five or six times since the New Year's Eve party." (Tr. 620). Victim's demeanor was very serious and sometimes tearful. (Tr. 620-21).

The social worker informed Mother of Victim's disclosures. (Tr. 622). Mother told the social worker that she did not believe Victim but felt that she needed to, as she herself had been abused as a child and had not been believed when she disclosed the abuse. (Tr. 490-91).

Mother also spoke to an investigator with Children's Division at the hospital. (Tr. 595). Mother told the investigator that her "gut feeling was to be angry at [Victim] for disrupting things." (Tr. 596).

A pediatric nurse practitioner examined Victim, and her exam results were normal. (Tr. 638-39, 641, 643). Mother was advised that Victim would need a follow-up appointment to test for sexually transmitted diseases two weeks later, but Mother never made the follow-up appointment. (Tr. 495, 653-54).

After leaving the hospital, Mother took Victim to the Children's Advocacy Center for a forensic interview. (Tr. 500). The interview began late in the evening, and Victim was exhausted, so she returned the following day to finish the interview. (Tr. 502-03). Both parts of the interview were played for the jury at trial. (Tr. 700, 726, 755-56).

Near the beginning of the first interview session, Victim stated that she did not want to talk about the issue she was having with her mom and dad because it could involve losing her stepdad, John, and without him, they could lose their house and their pets. (Ex. 13, 18:06-18:32, 20:25-21:50). Victim said she and Mother kept talking about it while they were driving earlier that day, and that Mother told her they might have to get an apartment. (Ex. 13, 22:03-22:20, 22:30-23:30).

Despite these concerns, Victim disclosed to the interviewer that her "Dad," which is how she often referred to Defendant, did "bad things" to her more than one time. (Ex. 13, 11:40-12:20, 26:22-26:30, 29:24-29:30). Victim said that Defendant touched her private part. (Ex. 13, 31:47-32:34). Victim referred

to her private part as her "bladder," which she indicated on a drawing was her vaginal area. (Ex. 13, 32:39-32:46, 35:09-35:31). Defendant touched her "bladder" with his "bladder," which is how Victim referred to the male genitals. (Ex. 13, 33:11-33:20, 35:40-35:55). Victim said that Defendant touched Victim's bladder with his bladder more than one time. (Ex. 13, 33:50-33:54).

Victim was in her bed when Defendant touched her bladder with his bladder. (Ex. 13, 34:00-34:09). Victim said that her clothes were not on when Defendant touched her bladder with his bladder, but that Defendant's clothes were on him. (Ex. 13, 33:25-33:48). She further explained that Defendant would take her underwear off her, and her other clothes were not on. (Ex. 13, 37:50-38:54). Victim said that her legs were over Defendant's head or around him when this happened, and Defendant was next to the bed with his knees on the floor and his hands on her legs. (Ex. 13, 40:08-41:32).

Victim said that it hurt when Defendant touched his bladder to her bladder, and that his bladder felt weird. (Ex. 13, 39:04-39:45).

Shortly thereafter, Victim went home for the evening. (Tr. 745). She resumed the interview the following day. (Tr. 745). Victim once again expressed reluctance to talk about what Defendant had done, and she told the

interviewer that she was afraid that if she talked about it more, they would get more evidence and throw him in prison. (Ex. 18, 9:13-9:42).[1]

Victim reiterated that it hurt when Defendant put his bladder on her bladder. (Ex. 18, 12:20-13:16). When this happened, Victim's body was spread out on her bed. (Ex. 18, 34:18-35:10). Victim said Defendant took her legs with his hands and put them over his head. (Ex. 18, 1:02:18-1:02:50). The rest of Victim's body would be how it normally is, with her head on her pillow, and her hands under the pillow. (Ex. 18, 1:02:56-1:03:24). Victim said that the skin of Defendant's bladder touched her bladder, although his clothes were on. (Ex. 18, 57:05-57:37). Victim did not know how that occurred, and she did not see his bladder. (Ex. 18, 57:38-58:36). Victim said that Defendant's bladder touched both the inside and outside of her bladder, which felt weird. (Ex. 18, 36:45-37:06, 59:34-59:50). Victim said this hurt her bladder, and it felt like it was "pressing against [her] bones." (Ex. 18, 1:00:05-1:00:19). When Defendant's bladder was pushing against the bones of her bladder, she could

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[1] At one point during the second day of the interview, members of the multidisciplinary team asked Mother to talk to Victim and release her from "the responsibilities and the adult consequences" of her disclosure because Victim made several comments that she did not want to talk about the abuse because of potential consequences that might result. (Tr. 599). Mother initially agreed to relay that message to Victim, but then she did not do so, and instead told Victim that "she has the right to not tell them anything. If she doesn't want to talk about it, she doesn't have to." (Tr. 504, 505-06, 600-01).

hear her fans, which were loud. (Ex. 18, 1:00:21-1:00:45). Victim said she did not think anything came out of Defendant's bladder. (Ex. 18, 1:01:24-1:01:40). She said that when Defendant would put his bladder on her bladder, Mother would be in bed. (Ex. 18, 1:13:57-1:14:05).

Victim said that this has happened in one other place, in her downstairs living room. (Ex. 18, 1:14:15-1:14:33). Victim said she was having a sleepover with someone, and Defendant came down and did the "things he does every other time." (Ex. 18, 1:14:36-1:14:50). When asked to describe those things, Victim said she did not want to talk about it, but she initially indicated that "those things" included the things she was talking about with her bladder and his bladder. (Ex. 18, 1:14:51-1:15:27). Victim said that she was on the couch when this occurred. (Ex. 18, 1:18:17-1:18:25). Victim said her legs were off the couch when Defendant did those things to her, and Defendant was also off the couch. (Ex. 18, 1:20:39-1:21:15). Victim was wearing PJs, which stayed on. (Ex. 18, 1:21:19-1:21:51). Victim then said that she did not remember what happened and did not know what Defendant did. (Ex. 18, 1:21:52-1:22:14). When the interviewer prompted Victim with her earlier statement that Defendant did the same thing that he did the other times, Victim said she did not remember, and did not want to talk about it. (Ex. 18, 1:22:14-1:22:44). Victim later clarified that some part of Defendant's body touched her body, but she did not know which part of the body it was. (Ex. 18, 1:23:40-1:24:10).

Victim also disclosed that Defendant touched her bladder with his mouth. (Ex. 18, 29:10-29:53). Victim said this happened more than one time. (Ex. 18, 30:01-30:07). Victim said it felt weird. (Ex. 18, 1:28:05-1:28:11). Victim stated that the inside of his mouth was touching her bladder. (Ex. 18, 1:28:48-1:28:54).

Based on this evidence, the State charged Defendant with five counts, all of which allegedly occurred between December 1, 2018 and April 25, 2019. (LF Doc. 9). Count 1 charged Defendant with statutory sodomy in the first degree, in that he knowingly placed his mouth on Victim's genitals for the purpose of arousing or gratifying his own sexual desire. (LF Doc. 9, p.1). Count 2 included an identical charge of statutory sodomy in the first degree. (LF Doc. 9, p.2). Count 3 charged that Defendant committed incest by engaging in deviate sexual intercourse by using his mouth on Victim's genitals. (LF Doc. 9, p.2). Count 4 charged that Defendant committed child molestation in the first degree by using his genitals to touch Victim's genitals for the purpose of arousing or gratifying his sexual desire. (LF Doc. 9, p.2-3). And Count 5 charged that Defendant committed attempted rape in the first degree, in that he used his genitals to touch the genitals of Victim, who was incapable of consent due to youth, and that this conduct was a substantial step toward the commission of the crime of rape in the first degree and was done for that purpose. (LF Doc. 9, p.3).

Victim's deposition was taken on September 11, 2019. (Tr. 511). Victim had not recanted at any time prior to that date. (Tr. 512-13). Mother testified that, as they drove home from the deposition, Victim asked her what would happen if she had lied. (Tr. 541). Mother arranged to have another deposition taken in December 2019, during which Victim recanted. (Tr. 515-16, 542).

Victim continued to recant at trial. Victim testified that she made the allegations against Defendant primarily because she was mad at Defendant for taking away her TV, and she felt like Defendant treated her sister, who was his natural daughter, better than he treated Victim. (Tr. 451-52). Victim testified that Defendant had not touched her inappropriately in any way, and that what she had said in her forensic interviews was a lie. (Tr. 453, 454-55).

The jury found Defendant guilty as charged on all counts. (Tr. 988-89). The trial court sentenced Defendant to a term of imprisonment for 15 years on Count 1, 15 years on Count 2, 4 years on Count 3, 30 years on Count 4, and 30 years to life on Count 5. (Tr. 1021). The court set Counts 1, 2, and 5 to run consecutively, with Counts 3 and 4 to run concurrently with all other counts. (Tr. 1021).

ARGUMENT

The trial court did not plainly err in giving the verdict directors for Counts 1-5, and Defendant has not established that he suffered a manifest injustice or miscarriage of justice as a result of the instructions. (Responds to Points I-V of Appellant's Brief).

A. Defendant's Unanimity claims are not properly preserved for appeal.

After an off-the-record instruction conference, the court resumed proceedings on the record by asking defense counsel to "restate" his objections to the verdict directors submitted by the State. (Tr. 927). Defense counsel objected to the verdict directors for all five of the charged counts at trial based on *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. banc 2011), and Missouri Approved Instruction 404.02, Notes on Use 6 and 7. (Tr. 927). He argued that that this case involved "multiple acts," and that the verdict directors "lack specificity as to the alleged crimes committed." (Tr. 927). Defense counsel requested that "more details" be included, "which would consist of a "narrower time frame, the location, maybe more details about which offense that the State is referring to." (Tr. 927).

The court asked the prosecutor if she wished to "respond for the record." (Tr. 928). The prosecutor said that the State had "narrowed it down by date as best as the evidence would suggest" and had "added to distinguish the counts,

Count 1 and 2, by separate and distinct from each other as you see in there." (Tr. 928). The prosecutor added that the same was done for Counts 4 and 5. (Tr. 928). The trial court overruled the objection and gave the verdict directors submitted by the State. (Tr. 928).

In his motion for new trial, Defendant argued that the court erred in submitting the verdict directors because the instructions "did not require the jury to agree on a specific act of misconduct" and "failed to instruct the jury that it must agree unanimously that all of the acts described in" the instructions occurred. (LF Doc. 17, p.2).

Defense counsel's objection at the instruction conference was not sufficient to preserve Defendant's unanimity claims in this appeal because it did not inform the trial court of what evidence counsel believed created a unanimity issue. The objection thus did not give the trial court an opportunity to address the issues raised in this appeal.

Rule 28.03 requires counsel to make "specific objections" to proposed instructions. "No party may assign as error the giving or failure to give instructions or verdict forms unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Rule 28.03.

Defense counsel's objection only met half of Rule 28.03's requirements. He identified the legal "grounds of the objection" as *Celis-Garcia*. (Tr. 927). But

defense counsel did not "stat[e] *distinctly* the matter objected to." Rule 28.03 (emphasis added). 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. (Tr. 927). Instead of specifically identifying what created the *Celis-Garcia* issue in the record before the court, defense counsel generally suggested that the State could use a "narrower time frame, the location, maybe more details about which offense the State is referring to." (927). Defendant's motion for new trial likewise failed to specifically identify what in the record created a risk of a non-unanimous jury verdict. (LF Doc. 17, p.2). In effect, defense counsel claimed that the instructions were not sufficiently specific to ensure a unanimous verdict, but failed to identify what "specifics" the instructions should include to remedy the alleged problem.

Defense counsel's failure to distinctly state the matter to which he was objecting is not a mere technicality. It is axiomatic that this Court "will not, on review, convict a lower court of error on an issue which was not put before it to decide." *Johnson v. State*, 580 S.W.3d 895, 899 n.3 (Mo. banc 2019). "The purpose of requiring a specific objection to preserve an issue for appellate review is to put the trial judge on notice of the alleged error, giving an opportunity to correct it before the case is submitted to the jury." *State v. Davis*,

564 S.W.3d 649, 656 (Mo. App. W.D. 2018) (quoting 6 Am. Jur. Trials 605). Because defense counsel failed to identify what specific details the instructions should include to remedy the alleged *Celis-Garcia* issue, the trial court did not have an opportunity to consider whether the instructions should include any specific details, including the details Defendant now claims—for the first time on appeal—require reversal for a new trial.

Defendant now argues on appeal that two evidentiary details created a risk of non-unanimous jury verdicts: (1) Friend's testimony that Victim was usually asleep when Defendant sexually abused her but was sometimes merely pretending to be asleep, and (2) Victim's statements to the forensic interviewer that on one occasion, Defendant did the "things" he did every other time in the downstairs living room, whereas her other statements identified conduct that occurred in her bedroom. But defense counsel did not specifically identify these evidentiary matters in his objection at trial. He never mentioned Victim's state of wakefulness as a "detail" that should be included in the instruction. (Tr. 927-28). Defense counsel included a vague reference to "location" in a list of "more details" that could be included in the instructions, but he did not state distinctly what locations he thought should be included in the instructions or explain why the proposed instructions were insufficiently specific absent a reference to those locations. Because defense counsel's objection made no reference to the evidentiary details Defendant now contends creates a *Celis-*

Garcia problem, the trial court had no opportunity to consider Defendant's appellate arguments, and they are not preserved for review.

The Court of Appeals reached the same conclusion in *Davis*. 564 S.W.3d 649. The *Davis* defendant argued on appeal that the verdict directors, which required the jury to find that the defendant touched the victim's breasts in his bedroom, were erroneous because "there were multiple incidents that could meet these parameters" and thus permitted the jury to convict him without unanimously agreeing on the same act. *Id.* at 654-55. The appellate *Celis-Garcia* argument focused on the evidence about three times the victim reported that defendant touched or bit her breast—not on the dates the touching allegedly occurred. *Id.* at 656-58.

The defendant contended that this issue was preserved because, at the instruction conference, defense counsel objected that the "charging date," which included two consecutive days, would confuse the jury and "will allow the possibility of jurors finding [the defendant] guilty on different offenses." *Id.* at 655. The defendant's motion for new trial similarly alleged that the instructions erroneously included two days and "allowed different members of the jury to find the [d]efendant guilty under differing sets of facts, thereby violating the [d]efendant's right to a unanimous jury verdict." *Id.*

The Court of Appeals held that the issue on appeal was not preserved for review because the defendant's trial objection and motion for new trial "focused

solely on the dates of the offenses and does not mention anything about the descriptions of the acts themselves." *Id.* at 655-56. Consequently, the Court rejected the defendant's "attempts to broaden his objection on appeal" because he was "bound by the grounds specified at trial and cannot change or broaden his theory." *Id.* at 656.

Davis recognizes that a *Celis-Garcia* objection based on one evidentiary detail (such as the charging dates) does not preserve a *different Celis-Garcia* claim based on a *different* evidentiary detail (i.e., the description of the acts themselves) subsequently raised on appeal. *Id.* at 655-56.

The objection by Defendant in this case was even more deficient because here, Defendant failed to identify *any* specific evidentiary detail that allegedly created a risk of a non-unanimous verdict. Defendant's objection gave the trial court no opportunity to address Defendant's arguments on appeal (or of any other potential *Celis-Garcia*-type claims, for that matter). In this respect, Defendant's general objection is functionally the equivalent of not objecting at all, which is why courts have held that vague or general objections fail to preserve any claim for appeal.[2] *See State v. Henderson*, 551 S.W.3d 593, 601–

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[2] Concluding that a general reference to *Celis-Garcia* or juror unanimity during an instructional objection is sufficient to preserve any *Celis-Garcia*-variety claim on appeal could have the pernicious effect of discouraging specificity of objections at trial. As *Davis* holds, a specific *Celis-Garcia* objection at trial will not preserve a different *Celis-Garcia* claim on appeal. *Davis*, 564 S.W.3d at

02 (Mo. App. W.D. 2018) (where the defendant's "objections at trial and in her motion for new trial" only "vaguely touch[ed] on the failure to follow the MAI" but did not "specifically raise the claims asserted" on appeal, the appellate claims were not preserved); *State v. Hefflinger*, 101 S.W.3d 296, 301 (Mo. App. E.D. 2003) (because motion for new trial did not even generally allege that instruction was erroneous on same ground raised on appeal, the point on appeal was not preserved); *See also, generally, See State v. King*, 626 S.W.3d 828, 841 (Mo. App. E.D. 2021) (a general objection to evidence preserves nothing because it "fails to direct the trial court to the specific foundational element claimed to be deficient").

Defendant's objection at trial failed to distinctly specify the evidentiary details that predicate his *Celis-Garcia* claims on appeal. His objection therefore did not preserve his arguments in this appeal, and Defendant's claims can be reviewed only for plain error, which Defendant has not requested.

B. Standard of Review

"Rule 30.20 is the exclusive means by which an appellant can seek review of any unpreserved claim of error," "no matter if it is statutory, constitutional,

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655-56. If, however, a more general unanimity objection could preserve every possible *Celis-Garcia* claim on appeal, there would be little reason, if any, to make a specific objection at trial. Conversely, there might be significant incentive to make a general objection to keep open all avenues for *Celis-Garcia* claims in an appeal.

structural, or of some other origin." *State v. Minor*, 648 S.W.3d 721, 731 (Mo. banc 2022) (quoting *State v. Brandolese*, 601 S.W.3d 519, 530 (Mo. banc 2020)). Plain-error review is discretionary. *Id.*

If the Court exercises its discretion to review a claim for plain error, it conducts a "two-step process." *Id.* In the first step, the Court must determine whether "the claim of error facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted." *Id.* (quoting *Grado v. State*, 559 S.W.3d 888, 899-900 (Mo. banc 2018)). "All prejudicial error, however, is not plain error, and plain errors are those which are evident, obvious, and clear." *Id.*

If the Court finds plain error, it "must proceed to the second step and determine whether the claimed error resulted in manifest injustice or a miscarriage of justice." *Id.*

"Instructional error seldom rises to the level of plain error." *State v. Weyant*, 598 S.W.3d 675, 678 (Mo. App. W.D. 2020). "But even if the instructional error is evident, obvious and clear, the defendant must 'demonstrate that the trial court so misdirected or failed to instruct the jury as to cause manifest injustice or a miscarriage of justice.'" *Brandolese*, 601 S.W.3d at 531 (quoting *State v. Cooper*, 215 S.W.3d 123, 125 (Mo. banc 2007)).

If the Court finds that Defendant's claims are preserved, it should review his claims of instructional error *de novo*. *State v. Sanders*, 522 S.W.3d 212, 215

(Mo. banc 2017). "When reviewing claims of instructional error, this Court will reverse the circuit court's decision only if the instructional error misled the jury and, thereby, prejudiced the defendant." *State v. Zetina-Torres*, 482 S.W.3d 801, 810 (Mo. banc 2016). Reversal is required only when "the instructional error is so prejudicial that it deprived the defendant of a fair trial." *Id.* Prejudice exists when "an erroneous instruction may have influenced the jury adversely." *Id.*

C. The trial court did not err, plainly or otherwise, in submitting Instructions 8, 9, 11, 12 (the verdict directors for Counts 1, 2, 4, and 5). (Responds to Points I,II, IV, and V of Appellant's Brief).

1. The instructions

Counts 1 and 2 both charged that Defendant committed statutory sodomy in the first degree by "placing his mouth on [Victim's] genitals." (LF Doc. 9, p.1-2). Instruction No. 8, the verdict director for Count 1, provided:

> 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 [Victim] by placing his mouth on her genitals, separate and distinct from Count 2, and
> Second, that at the time [Victim] was a child less than twelve years old,
> Then you will find the defendant guilty under Count 1 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.

(LF Doc. 13, p.9).

Instruction No. 9 similarly directed the jury to find Defendant guilty under Count 2 if it found that he committed the same act "separate and distinct" from Count 1:

> 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 [Victim] by placing his mouth on her genitals, separate and distinct from Count 1, and
> Second, that at the time [Victim] was less than twelve years old,
> Then you will find the defendant guilty under Count 2 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.

(LF Doc. 13, p.10).

Count 4 charged that Defendant committed first-degree child molestation, in that he subjected Victim, who was his stepchild and less than 12 years old, to sexual contact by using his genitals to touch Victim's genitals. (LF Doc. 9, p.3). Instruction No. 11, which was the verdict director for Count 4, provided:

> First, that on or between December 1, 2018 and April 25, 2019, in the State of Missouri, the defendant touched [Victim's] 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 [Victim] was a child less than twelve years of age, and
> Fourth, that [Victim] 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 [Victim] 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.

(LF Doc. 13, p.12).

Count 5 charged Defendant with the separate offense of attempted rape in the first degree and alleged that Defendant undressed Victim, spread her legs, and "used his genitals to touch her genitals skin to skin," that this conduct was a substantial step toward the crime of rape in the first degree, and that it was done for the purpose of committing such rape in the first degree. (LF Doc. 9, p.3). The State further alleged that Victim was less than 12 years old and was incapable of consent due to her youth. (LF Doc. 9, p.3). Instruction No. 12, the verdict director for Count 5, provided:

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 [Victim's] genitals with his genitals, separate and distinct from Count 4, and
> Second, that 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 the offense of rape in the first degree.

(LF Doc. 13, p.13).

Thus, Counts 4 and 5 charged Defendant with two separate offenses, but both required the jury to find that Defendant "touched [Victim's] genitals with his genitals, separate and distinct" from the conduct found in the other count.

In addition to these verdict directors, the jurors were instructed that Defendant was "charged with a separate offense in each of the five counts," and "[e]ach count must be considered separately." (LF Doc. 12, p.7). And jurors were finally informed that their verdict "must be agreed to by each juror." (LF Doc. 12, p.14).

Defendant argues that these instructions violated his right to a unanimous jury verdict.

2. When a special jury instruction is necessary to protect the right to a unanimous verdict

The Missouri Constitution provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate." MO. CONST. art I, § 22(a). Rule

29.01(a) provides that the jury's "verdict shall be unanimous…." Article I, section 22(a) protects "the right to a unanimous jury verdict." *State v. Celis-Garcia*, 344 S.W.3d 150, 155 (Mo. banc 2011). A unanimous verdict requires the jurors to be "in substantial agreement as to the defendant's acts, as a preliminary step to determining guilt." *Id.*

This Court has defined a "multiple acts case" as one in which "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.* at 155-56 (emphasis added). Whether a case falls into this category is influenced by four 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*, this Court held that in a multiple-acts case, a defendant's right to a unanimous jury verdict is violated if it is not possible "to determine whether the jury unanimously agreed on any one of" the separate acts in evidence that would have supported the charged offenses. *Id.* at 158. The Court noted that a defendant's right to juror unanimity could be protected in multiple acts cases through (1) the State's election of a "particular criminal act on which it will rely to support the charge" or (2) a "verdict director

specifically describing the separate criminal acts presented to the jury," with an instruction that the jury "must agree unanimously that at least one of those acts occurred." *Id.* at 157.

The evidence in *Celis-Garcia* included "at least seven separate acts" of sodomy that occurred "at different times (some more than three days apart) and in different locations." *Id.* at 156. Nonetheless, the verdict directors "failed to differentiate between the various acts in a way that ensured the jury unanimously convicted Ms. Celis-Garcia of the same act or acts." *Id.* Under the given instructions, which required the jury to find only that the defendant or her boyfriend "placed her or his hand on [the victim's] genitals," the jurors could have convicted the defendant if they found that she committed that conduct "during an incident in her bedroom, *or* on the enclosed porch, *or* in the shed, *or* in the bathroom" based on the victims' testimony of separate, distinct incidents occurring in each of those locations. *Id.*

In reaching this holding, the Court declined to consider a hypothetical case presented by the State involving "repeated, identical sexual acts committed at the same location," in which the victim was "unable to distinguish sufficiently among the acts." *Id.* at 157, n.8. In *State v. Watson*, 407 S.W.3d 180 (Mo. App. E.D. 2013), the Court of Appeals cited that footnote and held that *Celis-Garcia* did not control a case in which repeated, identical acts of statutory rape occurred in the same location. *Id.* at 185.

In the wake of *Celis-Garcia*, the Court of Appeals has repeatedly held that, in cases where a child victim discloses "repeated, identical sexual acts committed at the same location during a particular time span," and where the child is not able to give specific dates, it is not necessary to identify a particular incident in the verdict director. *See, e.g.*, *State v. Walker*, 549 S.W.3d 7, 12 (Mo. App. W.D. 2018) (holding that "the factual restrictions contained in [the] verdict director" precluded any "further basis upon which the jurors could possibly distinguish one act of statutory rape from another" and holding that "[b]ecause the jurors had no evidentiary basis upon which to differentiate between…repeated acts, [the defendant]'s right to a unanimous verdict was not at risk of being violated"); *State v. Armstrong*, 560 S.W.3d 563, 572-73 (Mo. App. E.D. 2018) (where "evidence presented was of repeated, identical acts of statutory sodomy, attempted statutory sodomy, and child molestation that occurred in an identical manner and in the same location," the "defendant's right to a unanimous jury verdict was not violated" by verdict directors that did not identify specific acts because "the jurors had no evidentiary basis upon which to differentiate between the repeated acts"); *State v. Jones*, 619 S.W.3d 138, 147 (Mo. App. E.D. 2021) ("Evidence of an appellant's conduct in committing the same offense against a child victim in a repeated, indistinguishable manner renders it impossible for the jury to differentiate between the repeated acts falling within each verdict director, such that there

is no violation of a defendant's right to unanimity."). *Hogan v. State*, 631 S.W.3d 564, 573 (Mo. App. W.D. 2021) (Cases decided since *Celis-Garcia* with fact scenarios involving "repeated, identical sexual acts committed at the same location and during a short time span" "have found that where the jurors have no evidentiary basis to differentiate between repeated acts, the defendants' right to a unanimous verdict was not at risk of being violated by verdict directors that did not hone [sic] in on a particular act"); *State v. Alvarez*, 628 S.W.3d 400, 410 (Mo. App. W.D. 2021) ("The fact that different acts of hand-to-genital child molestation could theoretically have been relied on by the jurors in finding Alvarez guilty cannot demonstrate a violation of the right to a unanimous verdict when the record contains no evidentiary basis for the jurors to distinguish between those acts." (internal quotations omitted)).

These cases are consistent with this Court's reasoning in *Celis-Garcia*. Indeed, *Celis-Garcia*'s definition of a "multiple acts case" contemplates "distinct" criminal acts that could all support the charge. *Celis-Garcia*, 344 at 155-56. If multiple acts are not "distinct" from one another based on the evidence presented at trial, the jury has no way to distinguish those acts.[3] In

[3] On that note, if there were no evidentiary distinctions between repeated, identical acts, then it would not be possible for the State to "elect" one act to proceed on or to specifically describe the separate criminal acts in an instruction, as contemplated by *Celis-Garcia*. *Id.*

such cases, then, there is no unanimity issue because the jury's verdict shows "substantial agreement as to the defendant's acts": either the jury believed he engaged in the undifferentiated, repeated conduct, or he did not. This Court should affirm the Court of Appeals' consistent case law holding that "repeated, identical sexual acts committed at the same location during a particular time span" do not require the State to identify a particular act in the verdict director because there is no risk of a non-unanimous verdict in such cases.

The cases discussed above mark opposite ends of a spectrum for multiple acts cases. On one end of the spectrum, *Celis-Garcia* is the textbook case where each victim specifically described several separate, distinct incidents where the charged conduct against the victim occurred but the State charged only a single count. On the other end of the spectrum are cases like *Armstrong*, *Alvarez*, and *Hogan*, where the only evidence was of repeated, identical sexual acts that were not differentiated in the evidence, and thus did not present a unanimity concern and did not require a particularized unanimity instruction.

The evidence in this case does not fall neatly on either end of this spectrum: Victim did not specifically describe any distinct incidents in which the charged acts occurred, which materially distinguishes this case from *Celis-Garcia*. But Defendant contends that there is some variation in the way Victim described the repeated incidents that occurred in her bedroom, and that she referred to acts that occurred in one other location. The first question for this

Court, then, is whether this evidence required a special unanimity instruction to ensure that the jury was in "substantial agreement" regarding Defendant's acts.

3. Evidence of the charged conduct

The evidence at trial showed that Defendant subjected Victim to both types of charged conduct (mouth-to-genital and genital-to-genital contact) more than once. After disclosing to Friend that Defendant came into her room when she was sleeping and did "things" that she did not like, Victim told Mother that Defendant would sometimes come into her room at night and would touch her "bladder" with his "bladder" and with his mouth. (Tr. 479-80, 579). Victim described Defendant coming into her room in the middle of the night and waking her up. (Tr. 480).

At the hospital the following day, Victim told a social worker that Defendant would come into her room at night "when she is asleep" and put his "front private" in her vagina, which hurt. (Tr. 619). Victim also said that Defendant "put his mouth on her front private which was gross." (Tr. 620). Victim said she would "pretend to be asleep and roll over to stop it from happening," but it did not work. (Tr. 620). Victim said "it happened approximately five or six times since the New Year's Eve party." (Tr. 620).

Mother took Victim from the hospital to the Children's Advocacy Center for a forensic interview. (Tr. 500). In her interview that day, Victim said that

Defendant touched her "bladder," or vagina, with his "bladder," or penis, more than one time. (Ex. 13, 32:39-32:46, 33:11-33:20, 33:50-33:54, 35:09-35:55). She said that she was in her bed when Defendant's penis touched her vagina with her clothes off, and Defendant would remove her underwear but leave his own clothes on. (Ex. 13, 33:25-33:48, 34:00-34:09, 37:50-38:54). Victim described that her legs were over Defendant's head or around him when this happened, while Defendant was next to the bed with his knees on the floor and his hands on her legs. (Ex. 13, 40:08-41:32). Victim said that it hurt when Defendant touched her vagina with his penis. (Ex. 13, 39:04-39:45).

Victim returned the following day for a second interview. (Tr. 745). Victim repeated that she was in her bed when Defendant touched her vagina with his penis, and she described how her body was positioned on the bed. (Ex. 18, 34:18-35:10, 1:02:18-1:03:24). She said that when Defendant touched her vagina with his penis, Mother would be in bed. (Ex. 18, 1:13:57-1:14:05).

Victim said that this has happened in one other place, in her downstairs living room. (Ex. 18, 1:14:15-1:14:33). Victim said she was having a sleepover with someone, and Defendant came down and did the "things he does every other time." (Ex. 18, 1:14:36-1:14:50). When asked to describe those things, Victim said she did not want to talk about it, but she initially indicated that "those things" included the things she was talking about with her vagina and his penis. (Ex. 18, 1:14:51-1:15:27). Victim began to describe how she and

Defendant were positioned, but she then said that she did not remember what happened and did not know what Defendant did. (Ex. 18, 1:21:52-1:22:14). When the interviewer prompted Victim with her earlier statement that Defendant did the same thing that he did the other times, Victim said she did not remember, and did not want to talk about it. (Ex. 18, 1:22:14-1:22:44). Victim later clarified that some part of Defendant's body touched her body, but she did not know which part of the body it was. (Ex. 18, 1:23:40-1:24:10).

Victim also reported that Defendant touched her vagina with his mouth more than one time, which she said felt weird. (Ex. 18, 29:10-30:07, 1:28:05-1:28:11).

This evidence established that Defendant subjected Victim to both mouth-to-genital and genital-to-genital contact on multiple occasions. Defendant argues from this record that there was evidence of "at least three distinct acts" of the charged conduct. (App Br. 38).

4. The evidence presented no meaningful or significant basis to distinguish between acts that occurred in Victim's bedroom.

Defendant argues that the first "distinct act" of mouth-to-genital and genital-to-genital contact "is when H.D. was asleep," and the second is when she was "awake." (App. Br. 38). He attempts to draw this distinction based exclusively from the testimony of Friend, but Friend's description of Victim's

disclosure did not identify any material basis to distinguish between different acts involving the charged conduct in this case.

Friend testified that Victim told her that Defendant "would come into her room while she was sleeping and then do things to her that she didn't like." (Tr. 579). By "things" she did not like, Maggie understood that Victim was talking about "sex" or "sex acts," but Victim "never said the actual word for it." (Tr. 579-80). Maggie further testified that Victim said "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). On cross-examination, Maggie testified that Victim told her that "sometimes she's awake" during these events, "but most of the time she doesn't wake up." (Tr. 585). Following additional questions by defense counsel, Maggie agreed that Defendant had told her that "sometimes" she was asleep when it was happening. (Tr. 586).

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. (Tr. 579). But even 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. (Tr. 480, 619, 620).

Contrasting Maggie's statements to the evidence in *Celis-Garcia* underscores the dissimilarity between these cases. *Celis-Garcia* involved two child victims who, together, gave detailed descriptions of "at least seven separate acts" of the charged conduct. *Id.* at 156. For each act, the victims related the location in which it occurred, the persons present, the type of conduct the defendant committed, and often other details, including whether articles of clothing were removed, whether they were restrained, and whether someone else witnessed the touching. *Id.* at 153. In other words, the victims specifically recalled and described multiple, *distinct* incidents in which the charged conduct occurred, which created the multiple acts issue identified by this Court. *Id.* at 155-56.

Here, conversely, there is no evidence of any distinct incidents that occurred in Victim's bedroom. The evidence showed only that Defendant touched Victim's genitals with his genitals and his mouth in Victim's bedroom on five or six occasions.[4] Maggie's testimony that Victim was "sometimes" awake or asleep, by itself, does not create sufficiently "distinct" acts of the charged conduct that the court can be said to have erred, much less plainly erred, for failing to include a specific unanimity instruction.

State v. Jones, considered a similar situation. 619 S.W.3d at 149. There, one of the many charges against the defendant alleged that he committed first-degree statutory sodomy by touching one victim's genitals with his hands during a specific time period. *Id.* The victim testified that, during that time, acts of sexual misconduct "sometimes" happened in the back room, "sometimes" in the front room, "sometimes" while her sister was present, "sometimes" while the victim was sitting up, and "sometimes" while she was lying down. *Id.* The Court of Appeals distinguished this case from *Celis-Garcia* and held that no unanimity violation occurred because the victim "was unable to differentiate a single episode of Appellant's multiple incidents of touching

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[4] The prosecutor argued in closing that the "separate and distinct" language in the verdict directors for Counts 1, 2, 4, and 5 was there only because "these acts happened multiple times and they're all pretty much the same way each time. One time she talked about it taking place in the basement, but for the most part the acts are the same way." (Tr. 944, 946).

her genitals in the same apartment and within a short period of time." *Id.* *See also*, *State v. Adams*, 571 S.W.3d 140, 152 (Mo. App. W.D. 2018) (victim's vague statement that she and defendant were "'sometimes' playing crafts" when defendant touched her supported the victim's statement that the defendant touched her more than once but did not sufficiently describe a distinctly separate incident from the only one the victim had specifically described to present a unanimity issue).

Jones and *Adams* demonstrate that minor, evidentiary variations in the way repeated sexual acts occurred do not create a unanimity issue if they do not differentiate specific episodes of the charged conduct. Defendant argues, however, that any factor that might be used to distinguish acts of sexual abuse would be sufficient to give the jury the "right" to distinguish between incidents, regardless of what that factor is. (App. Br. 46). This argument is unsupported by any case law and has two logical flaws.

First, the purportedly distinguishing detail must be something that necessarily separates different instances based on the evidence in the record. For instance, if a victim were to testify that she was sometimes on her back and sometimes on her stomach when criminal acts occurred, that, without more, is not a distinguishing detail because the victim could be on her back *and* on her stomach at different times during the *same* incident. Thus, back versus stomach would not provide the jury a basis to distinguish between

multiple incidents. *See Adams*, 571 S.W.3d at 152. Conversely, the jury might be able to distinguish between different incidents if a victim were to testify that the charged conduct sometimes happened in the house and it sometimes happened outside: the conduct could not have occurred both in the house and outside during the same incident. Consequently, inside versus outside would be a detail that could permit the jury to distinguish between different incidents.

Second, Defendant's suggestion that any evidentiary detail, no matter how minute or murky, is sufficient to require a special unanimity instruction, overlooks this Court's definition of a "multiple acts case." The Court did not merely require evidence of multiple acts that would each support the charged conduct; the requirement is for multiple, "*distinct*" acts. *Celis-Garcia*, 344 S.W.3d at 155-56 (emphasis added). Distinctiveness is, then, the linchpin of this inquiry.

Minor variations in otherwise repeated, undifferentiated acts do not present an impediment to the jurors being in "substantial agreement" as to the defendant's acts. *See Celis-Garcia*, 344 S.W.3d at 155. For example, if a victim were to say that she was sometimes wearing pants and sometimes wearing shorts when the criminal acts occurred, this minor variation in evidence about otherwise undifferentiated acts would not confuse the jurors: that detail simply has no bearing on the question the jurors must decide, which is whether

Defendant committed the charged act. The more "concrete" or "vivid" the distinguishing factor is, to use Defendant's words, the more distinct the multiple acts become, and the more likely the jury may not "substantially agree" as to Defendant's conduct. (App. Br. 46). Suppose, for example, that instead of saying that she "sometimes" wore shorts or pants when the charged acts occurred, the victim had testified that one time she was wearing her favorite pink leggings, and another time she was wearing the shorts from her soccer uniform. Now, instead of a mere variation in an otherwise identical group of incidents, the testimony suggests at least two separate, distinct incidents based on what the victim was wearing.

No such vivid or concrete distinguishing details are present in this case regarding the acts Victim disclosed in her bedroom. Friend's ambiguous testimony about Victim's state of wakefulness when Defendant would do "things" she did not like is not a detail that actually distinguishes between different incidents of the charged conduct in this case.

In sum, the evidence regarding acts that occurred in Victim's bedroom showed only repeated, undifferentiated conduct, and thus it was not necessary to identify a particular incident in the verdict directors. *See State v. Armstrong*, 560 S.W.3d at 572-73.

5. Victim's vague reference to "things" that happened in the downstairs living room was not sufficient to undermine the unanimity of the jury's verdict.

Defendant argues that the third distinct act of mouth-to-genital and genital-to-genital contact took place in the downstairs living room, which he argues is distinctive because the evidence showed that all of the other acts Victim reported took place in her bedroom. (App. Br. 39). The evidentiary basis for this argument is Victim's second forensic interview, during which she stated that one time Defendant came downstairs while she was having a sleepover and did the "things he does every other time." (Ex. 18, 1:14:36-1:14:50).

Victim, however, did not describe the "things" Defendant did when he came downstairs. Victim initially indicated that those "things" included the things she was talking about with her bladder and his bladder, but shortly thereafter, Victim stated that she did not remember what happened, did not know what Defendant did, and did not know which part of Defendant's body touched her body. (Ex. 18, 1:14:51-1:15:27, 1:21:52-1:22:44, 1:23:40-1:24:10).

Defendant argues that the jury could have "easily" believed that Defendant committed both types of charged conduct in the downstairs living room based on these statements. (App. Br. 39). The jury is, of course, free to

believe or disbelieve any or all of the evidence presented to it.[5] *See*, e.g., *Celis-Garcia*, 344 S.W.3d at 159. But Victim's statements about the incident in the downstairs living room are both vague and fleeting. She never specifically described the conduct that occurred in that location. After initially indicating that the incident involved her "bladder" and Defendant's "bladder," Victim backtracked, stating that her pajamas stayed on and that she did not know what Defendant did or what part of his body touched her body. Victim did not mention any acts occurring in the downstairs living room in any of her other disclosures, which made up the vast majority of the evidence at trial.

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[5] Defendant relies on *State v. Pierce*, 433 S.W.3d 424, 432 (Mo. banc 2014), for the principle that the jury is "entitle to believe or disbelieve all or any part of the evidence before it." (App. Br. 42). *Pierce* and its companion case, *State v. Jackson*, 433 S.W.3d 390 (Mo. banc 2014), hold that the trial court cannot refuse to give a requested lesser-included offense instruction when the lesser offense is "nested" (composed of a "subset of the elements of the charged offense") because "there is always a basis in the evidence to acquit the defendant of the charged offense because the jury is free to disbelieve all or any part of the evidence" concerning the differential element between those offenses. *Id.* at 430. *Jackson* and *Pierce* thus announce a specific rule for a specific category of cases: those involving nested lesser-included offenses. *See State v. Blurton*, 484 S.W.3d 758, 783 (Mo. banc 2016) (Fischer, J., concurring) (emphasizing that *Jackson* "specifically dealt with 'nested' lesser-included offenses"). Here, there was no request for any lesser-included offense instructions, nor is there a plain-error argument that such an instruction should have been given. *Jackson* and *Pierce* thus have little application to this case aside from the ubiquitous principle that the jury is free to believe or disbelieve all, part, or none of the testimony presented at trial. *See State v. Williams*, 313 S.W.3d 656, 660 (Mo. banc 2010); *Celis-Garcia*, 344 S.W.3d at 159.

Thus, while it may have been theoretically *possible* for jurors to infer that Defendant committed both types of charged conduct in the downstairs living room based on this evidence, it is exceedingly unlikely that the jurors would have dismissed the consistent evidence that the charged acts occurred repeatedly in the bedroom and instead premised their verdicts on Victim's brief reference to the "things" that happened one time in the downstairs living room. Indeed, to believe that the charged acts happened in the downstairs living room based on Victim's vague statement that Defendant did the same things he did "every other time," the jurors were necessarily required to believe that Defendant committed the charged conduct during the "other time[s]" Victim described—i.e. her disclosure of acts occurring in the bedroom.

Given the totality of the evidence in this case, Victim's vague, fleeting reference to an incident in the downstairs living room that involved the same conduct that she had already disclosed was unlikely to prevent the jury from being in "substantial agreement" as to Defendant's acts.

> *6. To the extent Victim's brief reference to the "things" that happened in the downstairs living room identifies a separate, distinct act that would support the charges in Counts 1, 2, 4, and 5, the jury instructions for those counts adequately informed the jury that they must unanimously find that Defendant committed the charged conduct on two "separate and distinct" occasions and were not plainly erroneous.*

Even if Victim's statements about the "things" that Defendant did one time in the downstairs living room sufficiently identified a separate, distinct

act that a special unanimity instruction was required, the instructions given for Counts 1, 2, 4, and 5 sufficiently ensured juror unanimity by requiring that the jurors unanimously find Defendant guilty of "separate and distinct" acts of the charged conduct to support their verdicts for each count.

Instructions 8 and 9, which were the verdict directors for the first-degree statutory sodomy charges in Counts 1 and 2, are identical except for the language that was "added" to require that the jury find that Defendant "plac[ed] his mouth on [Victim's] genitals, *separate and distinct*" from the other count. (LF Doc. 12, p.9-10; Tr. 928). Instructions 11 and 12, the verdict directors for the first-degree child molestation charge in Count 4 and the first-degree attempted rape charge in Count 5, likewise required the jurors to base their verdicts on "separate and distinct" acts of genital-to-genital contact. Thus, these instructions required the jurors to find two "separate and distinct" acts of mouth-to-genital contact and two "separate and distinct" acts of genital-to-genital contact to find Defendant guilty of these counts.

In *Celis-Garcia*, this Court framed the idea of a multiple-acts case in terms of having multiple criminal acts that are encompassed in a "single count." *Celis-Garcia*, 344 S.W.3d at 155-56. And cases like *Armstrong* that involve only repeated, identical sexual acts that are otherwise undifferentiated in the evidence tend to charge those acts in a single count. *See, e.g.*, *Armstrong*, 560 S.W.3d 563, 572-73; *Alvarez*, 628 S.W.3d at 408; *Jones*, 619 S.W.3d 138

(Mo. App. E.D. 2021). Here, however, the prosecutor charged two counts based on evidence that the conduct (mouth-to-genital and genital-to-genital contact) occurred five to six times during the charging period. There was nothing improper about the prosecutor's decision to pursue multiple charges based on what was largely undifferentiated testimony about repeated criminal acts.

The holding in *Celis-Garcia* is designed to ensure that the jurors agree on the same act or acts when finding a defendant guilty of the charged criminal conduct. It is not, however, intended to limit a defendant's liability for multiple acts that the jurors unanimously agreed he committed. The procedural history of *Celis-Garcia* perfectly illustrates this proposition. After this Court determined that the two identical verdict directors given in the first trial violated the defendant's right to unanimous jury verdict, the case was retried. *See State v. Celis-Garcia*, 420 S.W.3d 723 (Mo. App. W.D. 2014). Upon remand, the defendant was charged and convicted of 17 different crimes based on her actions toward the same victims, all of which were affirmed on appeal. *See id.*

Thus, where the State adduces evidence that a defendant committed a criminal act multiple times, it is not improper for the State to seek multiple convictions for those acts. *See generally State v. Haynes*, 564 S.W.3d 780, 786 (Mo. App. E.D. 2018) ("When the State has probable cause to believe that a crime has been committed, the decision whether to prosecute and what charges to file generally rests entirely within the prosecutor's discretion."). This

principle is no less true when the defendant has committed the same act so many times, or over such a prolonged period, that a child victim cannot differentiate between those acts—provided, of course, that the defendant's rights to juror unanimity and to be free from double jeopardy are adequately protected.

Here, Victim told the social worker that Defendant touched her genitals with his mouth and his genitals five or six times in her bedroom. The State chose to charge those acts in two counts of first-degree statutory sodomy (for mouth-to-genital contact), one count of first-degree child molestation, and one count of attempted first-degree rape (for genital to genital contact).[6] The jury instructions for these counts expressly told the jurors that they must base their verdicts for each count on different acts of mouth-to-genital and genital-to-genital contact. It was proper for the State to charge Defendant with two offenses for each type of criminal act he committed—indeed, because the evidence indicated that he committed these acts on five or six occasions across several months, the State could have properly charged Defendant with five or

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[6] Notably, charging both first-degree child molestation and attempted first-degree rape would not create a double jeopardy issue even if both charges were based on the *same act* of genital-to-genital contact because they are different offenses and neither offense is included in the other. *See generally* § 556.041, RSMo 2016, § 556.046, RSMo 2016.

six offenses based on this evidence, so long as it made sure that the jury based each verdict on a different incident.

The next question for this Court is whether the instructions given adequately ensured that the jurors were in substantial agreement as to Defendant's acts in rendering their verdicts. This Court should answer that question in the affirmative.

As the State argues above, there was no meaningful basis to distinguish between any of the acts that occurred in the bedroom, and the only other possible basis to distinguish between different acts of the charged conduct comes from Victim's brief remark about the "things" Defendant did in the downstairs living room. To the extent that this evidence created two distinguishable acts of the charged conduct (the identical incidents in the bedroom vs. the single incident that occurred in the downstairs living room), the instructions sufficiently secured Defendant's right to a unanimous verdict.

The instructions for Counts 1 and 2 required the jurors to find that Defendant touched Victim's genitals with his mouth on an occasion that was "separate and distinct" from the occasion they found to support the other count. (LF Doc. 12, p.9-10). The instructions for Counts 4 and 5 likewise required the jurors to find two "separate and distinct" acts of genital-to-genital conduct. (LF Doc. 12, p.12-13). The jurors were further instructed that "[e]ach count must

be considered separately." (LF Doc. 12, p.7). Instruction 13 then informed the jurors that their verdict, "must be agreed to by each juror." (LF Doc. 12, p.13).

Together, these instructions unambiguously informed the jurors that, in considering each verdict, they were required to unanimously find that Defendant committed the charged conduct on two "separate and distinct" occasions. Thus, under these instructions, the jurors could convict Defendant of counts 1, 2, 4, and 5 if they unanimously believed that Defendant committed mouth-to-genital and genital-to-genital contact on at least two occasions in the bedroom. Or, they could convict him on all of those counts if they believed that Defendant committed at least one act of mouth-to-genital and genital-to genital contact in the bedroom and also committed the same acts in the downstairs living room. In either event, Defendant's right to a unanimous verdict was adequately protected because the instructions required the jury to unanimously find that Defendant committed a "separate and distinct" act of mouth-to-genital and genital-to-genital contact.

This case is similar in this respect to *State v. Watson,* 407 S.W.3d 180, where the evidence included testimony that defendant committed statutory rape "three to four times per month, repeatedly" in two locations. *Watson*, 407 S.W.3d at 185. The victim did not "distinguish between each specific act in her testimony" but instead described a "routine" that was "similar with each criminal act." *Id.* On that record, the Court of Appeals rejected an argument

that *Celis-Garcia* "requires use of one of its two verdict directors" as "unfounded." *Id.* The Court of Appeals instead upheld the special instruction given by the trial court, which "plainly told the jury that they must unanimously agree on one act, and that they must agree to the same act," which it found consistent with authority relied on in *Celis-Garcia* holding that "an instruction specifically telling the jury they must unanimously agree to one act, even without further specificity regarding acts in evidence, will uphold the defendant's rights in a case where multiple identical acts are alleged." *Id.* (citing 23A C.J.S. *Criminal Law* § 1647 (Cum.Supp.2013)).

The instructions given in this case were perhaps not as artfully worded as the special instruction given in *Watson*, but the effect was the same. *Cf Id.* at 183, and LF Doc. 12, p.9-10, 12-13. The jurors were instructed to agree on a "separate and distinct" act to support their verdict for each count, and they were informed that each verdict must be unanimous. The trial court thus did not err in giving Instructions 8, 9, 11, and 12.

If, however, the Court finds that these instructions were erroneous because they did not expressly elect a "particular criminal act" or otherwise "specifically describe[e] the separate criminal acts" and require the jury to unanimously agree on one of them, as contemplated by *Celis-Garcia*, the Court should hold that any such error was not evident, obvious, and clear on the face of this record. *See Celis-Garcia*, 344 S.W.3d at 157.

Even if this Court finds that there might be some basis to distinguish between different acts of the charged conduct in this case, it is clear from the record that the trial court was never alerted to any such distinctions. In this appeal, Defendant, for the first time, purports to isolate three "distinct" acts of mouth-to-genital and genital-to-genital contact. But this argument was not made to the trial court. Even while objecting to the jury instructions based on *Celis-Garcia*, Defendant failed to inform the trial court what distinct acts created the alleged unanimity issue in the case. The trial court thus had no opportunity to consider the specific argument raised on appeal and no guidance as to which evidentiary details it could include in the instructions to alleviate any unanimity issues.

Moreover, as discussed above, this case is not factually similar to *Celis-Garcia*, where there were seven clear, distinct criminal acts in evidence, any of which would have supported the offenses charged in the two identical verdict directors. Instead, Victim here identified five or six incidents of the charged conduct that occurred in her bedroom that were not meaningfully different and made a brief, ambiguous allusion to conduct that occurred once in the downstairs living room. On this record, the court cannot be said to have evidently, obviously, and clearly erred in failing to require the State to identify a particular criminal act in each verdict director. It is not even clear how the court could distinguish between different acts on the record and arguments

made before the court. On this record, the trial court's decision to instruct the jury to find "separate and distinct" acts to support its verdicts in these counts is both logical and not plainly erroneous.

D. The trial court did not plainly err in giving Instruction 10, the verdict director for Count 3. (Responds to Point III of Appellant's Brief).

Count 3 charged that Defendant committed incest when he "engaged in deviate sexual intercourse by using his mouth on [Victim's] genitals," whom Defendant knew to be his stepchild. (LF Doc. 9, p.2). The verdict director for this count required the jury to find:

> First, that on or between December 1, 2018 and April 25, 2019, in the State of Missouri, the defendant engaged in deviate sexual intercourse with [Victim] by placing his mouth on her genitals, and
> Second, that [Victim] 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 [Victim] was his stepchild at the time referred to in paragraph First[.]

(LF Doc. 13, p.11).

Count 3 concerns the same type of conduct as Counts I and II: mouth-to-genital contact. But unlike the instructions for those counts, Instruction 10 does not contain language requiring the jury to find a "separate and distinct" act of mouth-to-genital contact to find Defendant guilty of incest under Count 3. If this Court finds that Victim's statements about "things" that occurred in the downstairs living room identified a separate, distinct incident of mouth-to-

genital contact from the otherwise undifferentiated acts that occurred in Victim's bedroom, then Instruction 10's failure to require the jurors to unanimously agree on a distinct act would arguably constitute error.

But any error in this instruction was not evident, obvious, and clear for the same reasons discussed above. The evidence in this case primarily consisted of Victim's description of a general pattern of conduct consisting of mouth-to-genital and genital-to-genital contact that occurred five or six times in Victim's bedroom. No specific, distinct incidents were identified at trial with the possible exception of Victim's brief and indefinite comments about "things" that occurred in the downstairs living room. It was thus not obvious from the record that there were separate, distinct acts of mouth-to-genital contact in evidence. Even when defense counsel purportedly objected on unanimity grounds at the instructions conference, he failed to identify any of the evidentiary details Defendant now claims on appeal created a multiple acts issue. The trial court did not evidently, obviously, and clearly err in giving Instruction 10 based on this record.

E. Defendant has not shown either prejudice or manifest injustice as a result of the verdict directors in this case. (Responds to all five points in Appellant's Brief).

In any event, Defendant has not established either prejudice or manifest injustice. There is no indication in the record that the verdict directors misled the jury or deprived Defendant of a fair trial. *Zetina*-Torres, 482 S.W.3d at 810.

The need for a specific unanimity instruction in multiple acts cases arises from the possibility that the jurors might rely on different acts to support a verdict for a single count. *See Celis-Garcia*, 344 S.W.3d 150. Thus, in order to determine if the instructions so misled the jury that it adversely affected the jury and prejudiced the defendant, the question should be whether there is any reasonable probability that jurors would have relied on separate, distinct acts when reaching their verdict for a count.

There is no reasonable probability in this case that the jurors would have relied on different acts to reach a verdict on any one of the five counts. As discussed above, there were no material details distinguishing any of the acts that occurred in Victim's bedroom. And even if this Court believes that Victim's vague reference to the "things" that happened in the downstairs living room is sufficient to identify a separate, distinct act from those that occurred in the bedroom, there is no reasonable probability that any jurors would have disbelieved that the acts occurred in the bedroom and instead believed that those same acts occurred in the downstairs living room.

First, as argued above, the only reference to something occurring in the downstairs living room was brief and very vague. Specifically, Victim said that Defendant came downstairs while Victim was having a sleepover and did the "things he does every other time." (Ex. 18, 1:14:36-1:14:50). Victim never described what those things were, however. She initially indicated that the

"things" included the things she was talking about with her bladder and his bladder, but shortly thereafter, Victim stated that she did not remember what happened, did not know what Defendant did, and did not know which part of Defendant's body touched her body. (Ex. 18, 1:14:51-1:15:27, 1:21:52-1:22:44, 1:23:40-1:24:10).

Jurors in this case were presented with clear, consistent evidence that Defendant touched Victim's genitals with his mouth and his genitals on multiple occasions in Victim's bedroom. The focus of all the witness testimony presented by the State, including Friend's testimony, Mother's testimony, the social worker's testimony, and the forensic interviewer's testimony, was on Victim's statements about acts that occurred in the bedroom. On the other hand, the only evidence presented of anything happening in the downstairs living room came from a brief segment in Victim's second forensic interview. In addition to being brief, Victim's reference to acts in that location was equivocal and ambiguous. Where the trial focused almost exclusively on the clear, consistent evidence of conduct that occurred in Victim's bedroom, there is no reasonable probability that the jurors would have relied on the latter incident to support their verdicts for any of the charged counts. *See State v. Ralston*, 400 S.W.3d 511, 523 (Mo. App. S.D. 2013) (finding no manifest injustice in erroneous verdict directors because the mention of a distinct act was limited to "nine transcript lines" during the 2-day trial, while the

remainder of the trial "focused almost exclusively" on an otherwise undifferentiated pattern of criminal conduct); *Barmettler v. State*, 399 S.W.3d 523, 530 (Mo. App. E.D. 2013) (the defendant was not prejudiced by counsel's failure to object to instructions on unanimity grounds because, although the victim made a "passing reference" to other incidents of abuse, the record showed that the trial "focused almost exclusively" on two specific alleged incidences of abuse, and thus there was no "reasonable risk" that jurors might have been "confused or misled by the verdict directors").

Second, there is not even a remote possibility that some jurors would have believed that the charged conduct occurred in the downstairs living room without *also* believing that it occurred in the bedroom as Victim otherwise disclosed. Victim told the interviewer that, on one occasion, Defendant 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. As a result, to have found Defendant guilty, the jurors must have unanimously agreed that Defendant committed the charged conduct in the bedroom, and, as discussed above, those acts were sufficient to support Defendant's convictions for all five counts for which he was convicted.

Third, Defendant primarily relied on a general, or unitary, defense of denying outright any improper or sexual conduct toward Victim. In finding that a manifest injustice occurred in *Celis-Garcia*, this Court noted that the defendant had "sought to exploit factual inconsistencies and raise doubts about the plausibility of the specific incidents" alleged by the victims, which the Court contrasted from cases "in which the defense simply argues that the victims fabricated their stories." *Celis-Garcia*, 344 S.W.3d at 158. In this case, the defense primarily argued that Victim fabricated her allegations against Defendant because she was mad at him and believed that he treated his natural daughter better than he treated Victim.[7] While this Court's opinion in *Hoeber v. State*, 488 S.W.3d 648 (Mo. banc 2016), made it clear that a unitary

[7] Indeed, Victim even testified to that effect when she recanted at trial. (TR. 451-52).

defense does not preclude a finding that Defendant was prejudiced, *Celis-Garcia* and numerous post-*Hoeber* opinions from the Court of Appeals indicate that the nature of the defense presented at trial is a relevant factor to consider in assessing prejudice in multiple-acts cases. *See See State v. Escobar*, 523 S.W.3d 545, 551 (Mo. App. W.D. 2017); *State v. Gilbert*, 531 S.W.3d 94 (Mo. App. W.D. 2017); *State v. Demark*, 581 S.W.3d 69, 76–77(Mo. App. W.D. 2019).

This factor is all the more important in a case like this one, where there is little evidence from which the jurors could even identify distinct incidents of the charged conduct in the first place. Indeed, even when defense counsel made his *Celis-Garcia* objection, he failed to identify any specific acts or evidentiary details that could be used to distinguish between different incidents. The fact that Defendant then generally argued that Victim fabricated her allegations against him further supports the conclusion that there is no reasonable probability that the jurors were not unanimous on each count for which Defendant was convicted.

F. Summation

This case is not factually similar to *Celis-Garcia*: the great majority of the evidence in this case consisted of Victim's disclosures of five or six undifferentiated incidents in which Defendant committed the charged conduct in her bedroom, while there was only a brief, ambiguous reference to "things" Defendant did once in a different location. None of the alleged distinctions

Defendant now attempts to draw from the evidence were presented to the trial court, nor were they manifestly apparent on the face of this record. The trial court should not be convicted of plain error in failing to sua sponte identify those evidentiary details and include them in the verdict directors. In light of this record, the trial court did not plainly err in giving verdict directors for each of the counts. And, on this record, there was no prejudice or manifest injustice because there was no reasonable probability that the jurors would rely on different acts of the charged conduct to support their verdicts for each count. As a result, the trial court's judgment should be affirmed.

CONCLUSION

Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 13,739 words, excluding the cover, certification, and appendix, if any, as determined by Microsoft Word 2016 software, and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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