

## **Summary of SC95079, *Edward L. Hoeber v. State of Missouri***

Appeal from the Buchanan County circuit court, Judge Daniel F. Kellogg  
Argued and submitted December 10, 2015; opinion issued May 3, 2016

**Attorneys:** Hoeber was represented by Laura G. Martin of the public defender's office in Kansas City, (816) 889-7699; and the state was represented by Evan J. Buccheim of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A man convicted of two counts of first-degree statutory sodomy appeals the circuit court's denial of post-conviction relief. In a 5-2 decision written by Chief Justice Patricia Breckenridge, the Supreme Court of Missouri reverses the judgment and remands (sends back) the case. Conflicting evidence was presented at trial of multiple acts of touching occurring in multiple rooms, but the verdict-directing jury instructions failed to specify any particular act or location. As such, the verdict directors allowed each juror to determine which incident led to the man's guilt, creating a real risk that the jurors did not agree unanimously on the specific acts of statutory sodomy for which they found him guilty. Trial counsel testified his failure to object to these insufficiently specific verdict directors was not due to trial strategy, and no reasonable trial strategy exists for not objecting to them. As such, counsel's performance fell outside the wide range of professional, competent assistance.

Judge Zel M. Fischer dissents. He points out that, while the majority opinion correctly presumes the circuit court found that the failure to object to the verdict directors was a reasonable trial strategy, he disagrees with the majority's holding that this finding was clearly erroneous. He would find the man has not overcome the presumption that his trial counsel acted reasonably. It was reasonable trial strategy for counsel to want to focus the jury's attention on the weaker and conflicting evidence presented by the daughter rather than the clear evidence of the man's confession. As such, it was reasonable for counsel not to object to the verdict directors. Insisting on act-specific verdict directors would have focused the jury's attention on the confession. Given the analysis and result of the principal opinion, there is a risk the state will be incentivized to charge the man with more counts to match the evidence, putting him at risk of more time in prison.

**Facts:** Edward Hoeber lived in a one-bedroom apartment in St. Joseph for part of 2007 with his former girlfriend and her daughter, who was approximately 4 years old at the time. Because of health problems, the mother was unable to care for her daughter that July, and Hoeber prepared the daughter's meals, bathed and dressed her, and helped her use the bathroom. During this time, the daughter was diagnosed with a vaginal infection, and Hoeber applied the topical medication. By September 2007, Hoeber no longer was living with the family, and the daughter was placed in foster care, and the daughter told her foster mother – and subsequently a child therapist – that Hoeber had touched her “private area.” After returning to live with her mother in January 2008, she reported the touching to her mother, who called police. During an ensuing investigation, Hoeber admitted to a detective that he had touched the daughter in the bathroom on two separate

occasions. The detective transcribed Hoeber's admission into a written statement that Hoeber signed. In 2009, Hoeber was tried by a jury for two counts of first-degree statutory sodomy.

During the trial, there was conflicting evidence about where in the apartment the touching had occurred. The daughter – who was approximately 6 years old at the time – testified that Hoeber had touched her private area and buttocks with his hand more than one time. She first stated the touching occurred in the kitchen and later testified it occurred in the bedroom, the bathroom or the living room. The mother testified that her daughter had told her the touching occurred more than one time in the kitchen and bedroom. The therapist testified that the daughter had told her that Hoeber touched her, then said he did not, then on later occasions said Hoeber had touched her private area with his hand while she was in the bedroom, kitchen, bathroom and living room. The detective also read Hoeber's statement into evidence. At the close of evidence, the trial court instructed the jury; Hoeber's trial counsel did not object to either verdict-directing instruction. The jury found Hoeber guilty, and the trial court sentenced him, as a prior offender, to two consecutive prison terms of 40 years each. Hoeber's convictions were affirmed on direct appeal. He subsequently sought post-conviction relief, claiming his counsel was ineffective for not objecting to the verdict-directing instructions, which he claimed violated his constitutional right to a unanimous jury verdict. During a May 2013 evidentiary hearing, Hoeber's trial counsel testified he did not consider objecting to the verdict directors and had no trial strategy for not doing so. The circuit court ultimately denied Hoeber relief. Hoeber appeals.

## **REVERSED AND REMANDED.**

**Court en banc holds:** Because trial counsel provided ineffective assistance when he failed to object to the verdict directors, the circuit court clearly erred in overruling Hoeber's motion for post-conviction relief.

(1) The verdict directors failed to ensure unanimous jury verdicts by failing to specify a particular incident or act of hand-to-genital contact despite evidence of multiple acts of hand-to-genital contact being introduced at trial. Article I, section 22(a) of the state constitution protects a defendant's right to a unanimous jury verdict. This Court's 2011 decision in *State v. Celis-Garcia* addressed the right to a unanimous jury verdict in the context of a case involving multiple acts – the defendant was charged with two counts of statutory sodomy, and two victims testified about multiple incidents of abuse occurring in different locations. The decision explained that, for a jury verdict to be unanimous, the jurors must be in substantial agreement as to the defendant's acts as a preliminary step to determining guilt. In holding the verdict directors violated the defendant's constitutional right to a unanimous jury verdict, this Court explained that because there was evidence of multiple, separate incidents of sodomy – any of which could have supported the charged offenses – and because the verdict directors did not specify a location or otherwise identify the incident of statutory sodomy the defendant allegedly had committed, it was impossible to determine whether the jury unanimously agreed on any one of the separate incidents. Hoeber's case is similar. Evidence was presented of multiple acts – each of which would constitute statutory sodomy – and despite conflicting testimony about the room(s) in which the acts occurred, neither verdict director specified a particular room or incident. As such, the verdict directors allowed each individual juror to determine which incident he or she would consider in finding Hoeber guilty on each count of statutory sodomy, creating a

real risk that the jurors did not agree unanimously on the specific acts of statutory sodomy for which they found Hoeber guilty and failing to ensure a unanimous jury verdict.

(2) Hoeber has established that, by failing to object to the insufficiently specific verdict directors, trial counsel's performance was deficient, and Hoeber was prejudiced as a result. The circuit court distinguished *Celis-Garcia* in reasoning that, unlike the prior case, in Hoeber's case there was no evidence of multiple uncharged bad acts. The state also notes Hoeber used a general defense at trial. But at no point in *Celis-Garcia* did this Court conclude that a defendant asserting a general defense never could be prejudiced by non-specific verdict directors. To the extent the 2012 appeals court decision in *State v. LeSieur* and its progeny suggest that a defendant's failure to mount an incident-specific defense precludes a finding that non-specific verdict directors resulted in manifest injustice, they no longer should be followed. In Hoeber's case, there was evidence of multiple, separate incidents of statutory sodomy – any of which would have supported the charged offenses – and neither verdict director specified a particular act or incident, there was no requirement that the jurors agree on the same act to find Hoeber guilty of either count, creating a real risk that the jury verdicts were not unanimous and undermining this Court's confidence in the reliability of the verdicts. Despite this substantial threat to the unanimity of the jury verdicts, Hoeber's trial counsel failed to object to the insufficiently specific verdict directors, prejudicing Hoeber. Although *Celis-Garcia* had not been decided at the time of Hoeber's trial, that opinion did not constitute a substantive change in the law. At the time of the trial, it was well-established law in Missouri that the verdict must be definite and certain as to the crime of which the accused is found guilty. *Celis-Garcia* merely reiterated this principle in the context of a multiple acts statutory sodomy case. Further, the presumption that counsel's failure to object was sound trial strategy is overcome by trial counsel's testimony that he did not fail to object to the verdict directors on the basis of trial strategy. No reasonable trial strategy existed for counsel's failure to object to the insufficiently specific verdict directors, which made it easier for the jury to convict Hoeber of two counts of statutory sodomy. In the absence of reasonable trial strategy, counsel's failure to object to the verdict directors did not conform to the degree of skill, care and diligence of a reasonably competent attorney. Counsel's performance fell outside the wide range of professional, competent assistance.

**Dissenting opinion by Judge Fischer:** The author points out that, while the majority opinion correctly presumes the circuit court found that the failure to object to the verdict directors was a reasonable trial strategy, he disagrees with the majority's holding that this finding was clearly erroneous. This case is not the rare case in which a reviewing court should find the presumption of reasonableness of trial strategy has been overcome. Any importance placed on unanimous verdicts in general is not dispositive of whether counsel provided reasonably effective assistance under the particular circumstances of the case. In this case, there were two categories of evidence against Hoeber – his confession to police and the daughter's various statements to a child therapist, to her mother, to police and in her trial testimony. Not surprisingly, the statements of the daughter – who was 4 years old at the time of the out-of-court statements and 6 years old at the time of trial – were contradictory as to the room in which the inappropriate touching took place, failed to provide a logical timeframe as to when the touching took place, failed to establish the number of occasions on which the touching took place and were contradictory as to whether Hoeber even touched her. In contrast, the confession was quite clear in detail, establishing two incidents of touching, both in the bathroom. Given the dichotomy of evidence, Hoeber's counsel

used a reasonable trial strategy, focusing primarily on the weaker evidence of the daughter's statements, which could be picked apart on credibility concerns and were the best grounds for reasonable doubt. It was reasonable and consistent with this overall trial strategy not to insist that the verdict directors specify a room in which the touching took place. Had counsel insisted on room-specific verdict directors, the state either could have specified one room for each verdict director or used eight different verdict directors, four for each count, with a different verdict director for each possible room. Under either scenario, the state would have shifted the jury's focus to Hoeber's confession – exactly what reasonable counsel would not have wanted under the circumstances. The better way for counsel to provide effective assistance in this case was *not* to insist on specific verdict directors. On remand in *Celis-Garcia*, the state added charges, and the defendant was convicted of 15 new counts and was sentenced to more time in prison, including three consecutive life sentences. Under the principal opinion's analysis and result here, the state is incentivized to amend charges on remand to include all versions of facts in the record, which defense counsel undoubtedly knew was not in his client's best interest. The author would find that Hoeber has not overcome the presumption that his trial counsel acted reasonably and would not subject him to the risk of additional charges.