



Missouri Court of Appeals  
Southern District

Division Two

LOUIS EDWARD MALLOW,	)	
	)	
Movant-Appellant,	)	
	)	
vs.	)	No. SD32158
	)	
STATE OF MISSOURI,	)	<b>Filed: Nov. 18, 2013</b>
	)	
Respondent-Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF PHELPS COUNTY

Honorable Mary W. Sheffield, Circuit Judge

**AFFIRMED**

In 2006, a jury found Louis Edward Mallow ("Movant") guilty of one count of child molestation and not guilty of statutory sodomy and a second count of child molestation. *See* sections 566.067 and 566.062.<sup>1</sup> We affirmed Movant's conviction and resulting 14-year prison sentence on direct appeal in an unpublished decision.

Movant now appeals the denial, after an evidentiary hearing, of his amended Rule 29.15 motion for post-conviction relief. In two points, Movant contends he was denied a fair trial because both his trial and appellate counsel were ineffective for failing to raise as error "that the verdict directors for the two child molestation counts were unconstitutionally vague, did not require unanimity and subjected [Movant] to double

<sup>1</sup> Unless otherwise indicated, all statutory references are to RSMo 2000. All rule references are to Missouri Court Rules (2013).

jeopardy in that the directors did not adequately identify which of the alleged incidents . . . was being considered in each count."<sup>2</sup> Finding that the alleged instructional error did not deprive Movant of a fair trial, we affirm.

### **Facts and Procedural Background<sup>3</sup>**

Count 1 of the State's information charged Movant with child molestation, occurring "between February 1, 2003 and July 17, 2004," when Movant "subjected [C.K.] [("Victim")], who was less than fourteen years old, to sexual contact."<sup>4</sup> The Count 2 charge was identical to that of Count 1, except for its final phrase, which added that the offense occurred "at a time different than that alleged in Count 1." Neither count specified the sexual contact at issue or alleged where it took place. Count 3 charged statutory sodomy and alleged the same time period set forth in counts 1 and 2.

Victim was born in 1992, and her mother testified that Victim had a particular syndrome which caused her to be "three or four years behind" her peers. Victim moved back to live with her mother "permanently" on June 1, 2003. Movant was their neighbor, and Victim played with Movant's children. Victim spent the night at Movant's house "probably no more than two . . . or three times." On July 19, 2004, a child abuse investigator was assigned to investigate a "hot line" report that claimed Movant had sexually abused Victim.

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<sup>2</sup> Movant's second point, regarding appellate counsel, actually references "verdict directors for the two child endangerment counts[.]" We presume that he intended to reference the verdict directors for the two child molestation counts as no child endangerment counts were presented to the jury.

<sup>3</sup> We present the relevant facts as "viewed in the light most favorable to the verdict and judgment[.]" *Ervin v. State*, 80 S.W.3d 817, 820 n.1 (Mo. banc 2002), and we present only those necessary to provide some context for the issues raised on appeal.

<sup>4</sup> In 2002, section 566.010(3) was amended to define "[s]exual contact" as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person[.]"

Victim was subsequently interviewed at a child advocacy center in July and November 2004, and the video recordings of those interviews were admitted into evidence at trial.<sup>5</sup> In the July 2004 interview, Victim said that Movant made her "do the dance thing that [her] mom won't let [her] do[.]" "called 'Coyote Ugly.'" She also said that Movant had touched her "pee-pee" "[o]n [her] skin" "about eleven times." She said Movant had touched her on her "pee-pee" in his house in the living room and in the bathroom. She said that Movant also had her take her pants off and "sit on his private part" while he was sitting in the bathtub wearing "boxers[.]"

In the November 2004 interview, Victim said that Movant had touched her "[o]n [her] chest and on [her] girl part" "with his hands" "in the bathtub," but she said they both had clothes on. Victim also said that Movant made her sit on his legs, and his "boy part" touched her "[o]n [her] girl part." She said he tried to touch her "on the skin" "[b]etween [her] legs." She also said that Movant made her do a dance that she called "Coyote Ugly," and he "made [her] sleep on his bed with him."

At trial, Victim testified that Movant "touched [her] with his hands on [her] private parts" "[o]ver [her] clothes" on one occasion. She could not remember if she got into the bathtub with him, and she did not remember stating in an interview "that [Movant] touched [her] private parts eleven times[.]" On cross-examination, she agreed that "the first time that [Movant] touched [her] with his hand . . . was in the bathtub[.]" She testified that Movant "tried to make [her] do the dance" from the movie "Coyote Ugly[.]" but she did not do it, and she also testified that she successfully resisted

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<sup>5</sup> Transcripts of these recordings were admitted into evidence at the motion hearing as Exhibits 9 and 13. We draw upon the transcripts for our recitation of the facts surrounding the interviews.

Movant's efforts to get her to sleep with him in bed. Victim agreed that, "[Movant] wanted [her] to touch his private part . . . [b]ut [she] never did."

Phelps County Sheriff's Detective D. Andrew Davis recalled that after Movant was arrested, Movant said that Victim must have been mistaken or confused. But Movant also stated that "he would accept it and he'd have to pay the penalty or pay the price."

The verdict directing instructions for the child molestation counts were instructions 5 and 6 (collectively, "the molestation verdict directors"). Instruction No. 5 stated:

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

First, that between February 1, 2003 and July 17, 2004, in the County of Phelps, State of Missouri, [Movant] touched the genitals of [Victim], and

Second, that he did so for the purpose of arousing or gratifying his own sexual desire, and

Third, that [Victim] was then less than fourteen years old, then you will find [Movant] guilty under Count One 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 [Movant] not guilty of that offense.

Instruction No. 6 stated:

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

First, that between February 1, 2003 and July 17, 2004, in the County of Phelps, State of Missouri, [Movant] touched the genitals of [Victim], and

Second, that he did so for the purpose of arousing or gratifying his own sexual desire, and

Third, that [Victim] was then less than fourteen years old, and

Fourth, that the incident complained of in Count Two occurred at a different time than the incident complained of in Count One,

then you will find [Movant] guilty under Count Two 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 [Movant] not guilty of that offense.

Instruction No. 8 stated, *inter alia*, that Movant was "charged with a separate offense in each of the three counts submitted to you. Each count must be considered separately."

During the instructions conference, trial counsel stated that Movant had no objection to instructions "1 through 10[.]" Trial counsel indicated that he initially had some question about whether "sexual contact" was included in Instruction No. 5, but he said that he was deferring to the prosecutor's reliance on "one of the notes on use" for that instruction in deciding not to raise an objection to it.

In his initial closing argument, the prosecutor said,

Instruction No. 5, Instruction 6 deal with the allegations of child molestation. They are practically the same instruction except Instruction No. 6 says, if you find and believe from the evidence that the incident complained of in Count II occurred at a different time than the incident complained of in Count I, that's the differentiating statement in that instruction. If you find that twice [Movant] touched the genitals of [Victim] then you can find him guilty of both of those offenses.

In rebuttal argument, the prosecutor stated: "Where did it happen, how many times, living room [sic]. She told you that, happened in the living room, happened in the bathroom. That's at least two right there. Happened in the bedroom, that's three."

Trial counsel argued in his closing that there was no physical, eye-witness, or medical evidence to corroborate Victim's statements and that her testimony and recorded statements were inconsistent.<sup>6</sup> He also argued that Victim had agreed during cross-examination "that the only contact was hand to hand" and that during one of the recorded interviews she asked the interviewer, "[I]s this a lie[?]" Trial counsel also argued that Victim's mother did not report what Victim told her to the authorities; Detective Davis was inconsistent in his testimony; Movant's statements were not recorded; and Movant did not confess to the crimes.

Movant's motion for new trial did not allege that the molestation verdict directors were erroneous. His contention on appeal was "that the evidence was insufficient to prove" the offense "because [Victim]'s testimony on this issue [of molestation] was so contradictory and self-destructive so as to preclude reliance thereon and rob her testimony of all probative force."

After we issued our mandate affirming Movant's convictions, Movant timely filed a *pro se* motion ("the original motion") to set aside his conviction and sentence. The original motion set forth ten grounds, including that the molestation verdict directors "were unconstitutionally vague so that they subjected [Movant] to double jeopardy and resulted in Movant being convicted without now being able to determine which of the two sexual touching incidents testified about by [Victim] was the crime that the jury found Movant guilty of committing and which of the two sexual touching incidents the jury acquitted [Movant] of committing." Appellate counsel's timely-filed, amended post-

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<sup>6</sup> This was similar to trial counsel's opening statement, in which he also pointed out the same problems with the evidence, and he told the jury to listen closely to Victim's recorded statements and trial testimony "because everything relies on her story."

conviction motion incorporated this particular claim by attaching it to the amended motion.

At the motion hearing, appellate counsel testified that he did not recall noting anything wrong with instructions 5 and 6. He testified that if he "saw an issue . . . at least [he] would have made note of it." His only reason for not raising an objection to an instruction would have been "if [he] didn't think it had any merit." Appellate counsel had no doubt that in handling Movant's case he would have looked both at errors raised in the motion for new trial and for any unpreserved errors.

Trial counsel also testified at the evidentiary hearing, but he was not asked any questions about instructions 5 and 6. He did testify that the errors he identified were included in the motion for new trial.

In its order denying post-conviction relief, the motion court found, *inter alia*, that as to the claims contained in Movant's *pro se* motion, the [motion c]ourt has examined and considered each of them. [Appellate counsel] indicated that he considered the issues raised in Movant's motion for new trial and made a conscious decision to not include them in his appeal. This was a sound strategic decision and appellate counsel was not ineffective.

This appeal timely followed.

### **Applicable Principles of Review and Governing Law**

Our review of the motion court's ruling on a Rule 29.15 motion is "limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous." Rule 29.15(k). "We should not reverse if the motion court reached the right result, even if it was for the wrong reason." *Branson v. State*, 145 S.W.3d 57, 58 (Mo. App. S.D. 2004).

"Whether an individual's right to be free from double jeopardy has been violated is a question of law, which this Court reviews *de novo*." ***State v. Walker***, 352 S.W.3d 385, 387 (Mo. App. E.D. 2011). Likewise, we review *de novo* whether the jury was properly instructed. ***State v. Germany***, 323 S.W.3d 472, 477 (Mo. App. E.D. 2010).

To be entitled to post-conviction relief for ineffective assistance of counsel, a movant must show by a preponderance of the evidence that his or her trial counsel failed to meet the *Strickland* test in order to prove his or her claims of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, a movant must demonstrate that: (1) his or her counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would in a similar situation, and (2) he or she was prejudiced by that failure.

***Johnson v. State***, 388 S.W.3d 159, 163 (Mo. banc 2012).

"Prejudice, in the *Strickland* context, is defined as 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [*Strickland*, 466 U.S.] at 694 . . . . A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." ***Deck v. State***, 381 S.W.3d 339, 343 (Mo. banc 2012). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." ***Strickland***, 466 U.S. at 697; *see also State v. Starks*, 856 S.W.2d 334, 336 (Mo. banc 1993).

"The standard of review for a claim of ineffective assistance of appellate counsel is essentially the same as that employed with trial counsel; movant is expected to show

both a breach of duty and resulting prejudice." *Helmig v. State*, 42 S.W.3d 658, 682 (Mo. App. E.D. 2001).

To prevail on a claim of ineffective assistance of appellate counsel, [a movant] must show that his appellate counsel failed to raise a claim of error that a competent and effective lawyer would have recognized and asserted. *Tisius v. State*, 183 S.W.3d 207, 215 (Mo. banc 2006). He must also have shown that "the claimed error [was] sufficiently serious to create a reasonable probability that, if it was raised, the outcome of the appeal would have been different." *Id.* (citing *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)). Where an alleged error that was not raised was not preserved, the right to relief due to ineffective assistance of appellate counsel tracks the plain error rule and requires that the error not raised be so substantial as to amount to a manifest injustice or a miscarriage of justice.

*Anderson v. State*, 196 S.W.3d 28, 36 (Mo. banc 2006).

### Analysis

Because both of Movant's points turn upon whether he proved that he was prejudiced by trial counsel's failure to object to the molestation verdict directors, we address them together. Movant alleges trial counsel was ineffective because he

failed to properly raise as an issue at trial that the verdict directors for the two child molestation counts were unconstitutionally vague, did not require unanimity and subjected [Movant] to double jeopardy in that the directors did not adequately identify which of the alleged incidents he [sic] was being considered in each count.

Movant argues that although he was charged with two separate counts of child molestation, "neither the charges nor the instructions attempted to identify which incident was being charged in each count." Movant claims that this failure violated his right to be free from double jeopardy, citing *State v. Mitchell*, 704 S.W.2d 280, 281 and 286 (Mo. App. S.D. 1986) (where the defendant alleged that two verdict directors subjected him to the "possibility of double jeopardy" as they "were 'identical in language'" and we found the instructions erroneous for "failing to specify . . . the incident to which each was meant

to refer"). He also asserts that the error violated his right to a unanimous verdict, citing *State v. Celis-Garcia*, 344 S.W.3d 150, 158 (Mo. banc 2011) (a multiple acts case in which the convictions were reversed when it was "impossible to determine whether the jury unanimously agreed on any one of these separate incidents" such that "the verdict directors violated [the defendant's] constitutional right to a unanimous jury verdict").

We address each argument in turn.

#### *Double-Jeopardy Claim*

Apart from stating that our *Mitchell* decision "appear[ed] to be founded on double jeopardy concerns[,]" Movant fails to develop an argument demonstrating how his right to be free from double-jeopardy was violated by what occurred in his case. As a result, we consider this portion of his point to be abandoned. See *State v. Parker*, 890 S.W.2d 312, 319 (Mo. App. S.D. 1994) (movant abandoned allegations by failing "to pursue and develop" them "in the argument portion of his brief").<sup>7</sup>

#### *Unanimous Verdict Issue*

In regard to Movant's unanimity argument, "[a] multiple acts case arises when there is evidence of multiple, distinct criminal acts, each of which could serve as the basis for a criminal charge, but the defendant is charged with those acts in a single count."

*Celis-Garcia*, 344 S.W.3d at 155-56.

[A] defendant's right to a unanimous verdict would be protected in a multiple acts case by either the state (1) electing the particular criminal act on which it will rely to support the charge or (2) the verdict director specifically describing the separate criminal acts presented to the jury and the jury being instructed that it must agree unanimously that at least one of those acts occurred.

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<sup>7</sup> Further, to the extent that Movant's claim that trial counsel failed to argue that the verdict directors were "unconstitutionally vague" is intended to present something beyond his unanimity challenge, it is also deemed abandoned as no such argument is developed in Movant's brief.

*Id.* at 157.

The State maintains "*Celis-Garcia* does not apply to the present case as it was decided . . . three years after the mandate in [Movant's] direct appeal." Movant's reply brief points us to *Barmettler v. State*, 399 S.W.3d 523, 529 (Mo. App. E.D. 2013), in which the eastern district of our court was "not persuaded that the reasoning of *Celis-Garcia* presents a substantive change in the law that insulates both trial counsel and appellate counsel from not advancing the argument of a potential non-unanimous jury verdict either at trial or on appeal." It noted that "*Celis-Garcia* did not establish the right of criminal defendants to a unanimous jury verdict, and was not the first judicial decision to recognize that imprecisely drafted verdict directors could violate this constitutional right." *Id.* citing *State v. Pope*, 733 S.W.2d 811, 813 (Mo. App. W.D. 1987). Further, *Barmettler* also observed that Note on Use 6 for MAI-CR3d 304.02 warned of "the risks associated with non-specific verdict directors submitted in multiple acts cases."<sup>8</sup> *Id.* We agree that

absent a compelling strategic reason, reasonable and effective trial counsel would have acted upon the cautionary language of Note on Use 6 and objected to, or requested modification of, the verdict directors to ensure against the risk of a non-unanimous jury verdict. We similarly find that reasonable appellate counsel would have considered the deficient verdict directors a basis for appeal.

*Id.*<sup>9</sup>

The State claims that even if *Celis-Garcia* is applicable, the molestation verdict directors were not erroneous because they "were sufficiently specific and they did not

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<sup>8</sup> The relevant Note on Use would have been No. 5 for the version of MAI in effect at the time of Movant's trial.

<sup>9</sup> The State also contends that Movant "abandoned his claim that trial counsel was ineffective for failing to object to [the molestation verdict directors] as he failed to present any evidence at the evidentiary hearing concerning this issue." The State's brief does not cite any authority backing its assertion, and the assistance provided by any such testimony would be of dubious value as the matter involves a legal question subject to *de novo* review. See *Germany*, 323 S.W.3d at 477.

impinge on [Movant's] right to jury unanimity and appellate counsel testified that he raised every claim that had merit." We do not need to reach this portion of the State's argument because the State also correctly asserts that Movant failed to demonstrate that he was prejudiced by any such error.

Such prejudice existed in *Celis-Garcia* for purposes of plain error review because the defendant "relied on evidentiary inconsistencies and factual improbabilities respecting each specific allegation of [sodomy] mak[ing] it more likely that individual jurors convicted her on the basis of different acts." 344 S.W.3d at 159. The defendant in that case had pursued different defenses specifically tailored to each of the different locations in which the sexual activity was alleged to have occurred. *Id.* The Court distinguished that situation from "some statutory sodomy cases in which the defense simply argues that the victims fabricated their stories." *Id.* at 158.

*Celis-Garcia* makes clear that, to establish manifest injustice based on an insufficiently specific verdict director in a 'multiple acts' case, the defendant must have mounted an incident-specific defense, which would have given the jury a basis to distinguish among the various incidents mentioned in the evidence. *Celis-Garcia* suggests that, where the defendant instead mounts a unitary defense to all alleged actions, attacking the victim's credibility generally, manifest injustice does not exist. Consistent with this suggestion, other cases have recognized that a defendant is not prejudiced by verdict directors which fail to distinguish between different alleged acts, where the defendant presented a unitary defense to all incidents of alleged misconduct, instead of a defense which distinguished among the various acts. See *State v. Staples*, 908 S.W.2d 189, 190–91 (Mo. App. E.D.1995) (citing *State v. Cody*, 801 S.W.2d 430, 433 (Mo. App. E.D.1990)); *State v. Rudd*, 759 S.W.2d 625, 627–28 (Mo. App. S.D. 1988).

*State v. LeSieur*, 361 S.W.3d 458, 465 (Mo. App. W.D. 2012).

The type of prejudice at issue in the context of the effectiveness of post-conviction trial counsel is different from that at issue in plain-error review on direct

appeal. *Deck*, 381 S.W.3d 358 (plain-error prejudice must be outcome determinative, while post-conviction prejudice requires only a reasonable probability that the result would have been different). "The movant must show more than that the error had some conceivable effect on the outcome, but less than that the error more likely than not altered the outcome." *Barmettler*, 399 S.W.3d at 526. Despite those differing standards, the outcome they produce in the instant case is the same for both trial and appellate counsel; Movant was not prejudiced by any deficient performance by either attorney regarding the molestation verdict directors because Movant's defense did not vary according to the particular incident at issue.

Movant acknowledges that "the defense strategy was to note inconsistencies with respect to [Victim]'s account of the alleged abuse, and thus to raise doubts about the occurrence of any or all of the specific incidents." Movant argues that "there was a lot of discussion about whether [Movant] actually touched [Victim]'s hand or legs rather than her genitals in one incident[,]" but he also states that "[t]he defense in this case was based on the fact that [Victim] gave vague and inconsistent statements as to what actually occurred, and thus the State failed to prove [Movant's] guilt [for] the offenses as charged."

As earlier described, Movant also asserted in his closing argument that the detective's testimony was inconsistent, there was a lack of any corroborative evidence, Victim's mother's did not report the alleged abuse, and the statement Movant gave to the police did not amount to a confession of guilt. Each of these defenses also applied generally to all of the child molestation allegations. *Cf. State v. Rose*, \_\_\_\_ S.W.3d \_\_\_\_, 2013 WL 5433336, \*5 (Mo. App. S.D. Sept. 30, 2013) (any plain error in failing to

instruct the jury that "they all had to agree [d]efendant committed the same criminal act" was not prejudicial where "the defense argued [the v]ictim fabricated her story and that nothing happened"); *LeSieur*, 361 S.W.3d at 465. Movant fails to show a reasonable probability that the result would have been different if the jury had received instructions comporting with the type of instructions described in *Celis-Garcia*, 344 S.W.3d at 157, because Movant's defenses were unitary defenses to the incidents presented.

Movant's points are denied, and the judgment is affirmed.

DON E. BURRELL, J. - OPINION AUTHOR

JEFFREY W. BATES, P.J. - CONCURS

GARY W. LYNCH, J. - CONCURS