

SC 90980

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

MAURA L. CELIS-GARCIA,

Appellant.

Appeal from the Judgment and Sentence of
the Circuit Court of Clay County, Missouri,
7th Judicial Circuit, Division 4
The Honorable Larry D. Harman, Judge

APPELLANT'S SUBSTITUTE BRIEF and APPENDIX

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JURISDICTIONAL STATEMENT

On November 8, 2007, a Clay County jury found appellant, Maura L. Celis-Garcia, guilty of two counts of the felony of statutory sodomy in the first degree, Section 566.062.2.¹ On December 19, 2007, Judge Harman sentenced Ms. Celis-Garcia to concurrent terms of twenty-five years imprisonment.

Ms. Celis-Garcia timely filed a Notice of Appeal on December 27, 2007. On April 20, 2010, the Court of Appeals, Western District, affirmed the convictions, with Judge Ahuja dissenting. On May 5, 2010, Ms. Celis-Garcia timely filed a motion for rehearing, or in the alternative, application for transfer, which was denied on June 1, 2010. On June 16, 2010, Ms. Celis-Garcia timely filed an application for transfer to this Court. On August 31, 2010, this Court sustained the application for transfer. Jurisdiction therefore lies in the Supreme Court of Missouri.

¹ All references are to RSMo 2000, unless otherwise noted.

STATEMENT OF FACTS

Appellant, Maura L. Celis-Garcia, was charged along with her boyfriend, Jose Flores, with two counts of the felony of statutory sodomy in the first degree, Section 566.062.2 (L.F. 8-10).² The State alleged that Ms. Celis-Garcia and Mr. Flores had deviate sexual intercourse with C.J. and K.J., who were under the age of twelve (L.F. 8-10).

The case first went to trial on September 10, 2007 (L.F.4). After deliberating for seven hours, the jury announced that they were deadlocked (L.F.5). A mistrial was declared (L.F.5).

At a second trial, the following evidence was adduced: From January 2005 to March 31, 2006, Ms. Celis-Garcia lived with her mother and two daughters, five-year-old C.J. and seven-year-old K.J., at 325 N. Benton in Marshall, Missouri (Tr. 468). Ms. Celis-Garcia's boyfriend, Jose Flores, was often at the house, although he did not sleep there (St.Ex.23, p. 10). On April 4, 2006, C.J. and K.J. were removed from Ms. Celis-Garcia's custody based on an allegation of physical abuse (Tr. 351).

On April 12, 2006, the girls were placed with foster parents Patricia and Joe Ratliff (Tr. 275). Within several days, the girls started calling the Ratliffs "mom" and "dad" and asked to change their last name to Ratliff (Tr.282-83,321). The Ratliffs gave the girls new things and did things with them the girls had not done before (Tr. 287, 321-

² The Record on Appeal consists of a transcript (Tr.) and legal file (L.F.) and several exhibits.

22). They went to the movies and had campouts (Tr. 324). For Easter, the girls received new dresses, bonnets, Easter baskets, and bicycles (Tr. 321). The girls were very excited about an upcoming trip to Springfield to visit Bass Pro Shop (Tr. 288).

C.J. and K.J. were very nervous and anxious to please their foster parents (Tr. 281-82). Each night, they insisted on double-checking that every door and window was locked (Tr. 309). The girls insisted that when they drove to Springfield, they not pass through Marshall, where their mother and other relatives lived (Tr. 289). The girls had frequent meetings with several DFS caseworkers (Tr. 371-72, 389, 391, 570, 575).

On June 1, 2006, the girls had a supervised meeting with their mother (Tr.283-84). Leading up to the meeting, the girls expressed fear of being left alone with their mother (Tr. 285). After the visit, K.J. shook uncontrollably when she learned that Mr. Flores was waiting outside to drive Ms. Celis-Garcia home (Tr. 402, 581). The girls refused to leave the building for an hour, until they were sure he was gone (Tr. 336-37, 581).

Statements to Patricia Ratliff

On June 16, 2006, C.J. told her foster mother that she and K.J. had lied to her about their mother and Mr. Flores (Tr. 291). Earlier, they had discussed some physical abuse but had never mentioned any sexual abuse (Tr. 292). Now, C.J. disclosed that her mother and Mr. Flores wore gloves with lotion on them and touched her on her breasts, vagina and bottom (Tr. 294, 296).

K.J. was very nervous and initially denied C.J.'s allegations, insisting that C.J. was lying (Tr. 298). But then she agreed with C.J. (Tr. 298). K.J. stated that her mother and

Mr. Flores threatened to kill her if she said anything (Tr. 299). K.J. said she had been handcuffed and chained to the wall by hooks, locked in the “cold room,” and hit with shoes and belts (Tr. 300). She said that her mother and Mr. Flores threatened to send the girls’ grandmother away or hurt her (Tr. 300). K.J. described one incident when the girls were taking a bath together (Tr. 300). Her mother and Mr. Flores took her out; they kissed and touched her until her grandmother stopped them (Tr. 300). K.J. was touched on her chest, vagina and bottom (Tr. 301). They used their hands on her front and back and it hurt when “they put it in” (Tr. 311). Mr. Flores kissed the girls on their “privates, front and back” (Tr. 311). The girls stated that the abuse occurred in Ms. Celis-Garcia’s bedroom, the bathroom, the “cold room” and a cellar (Tr. 325). They also stated that when their mother gave them medicine, she turned into a witch, dressed in black, and hit them with a broom (Tr. 340). After telling their foster mother about the alleged abuse, C.J. and K.J. also told her that they had violent nightmares involving Mr. Flores (Tr. 306-307).

Statement to Maria Mittelhauser

Maria Mittelhauser was an interviewer for ChildSafe, a child advocacy center that conducts forensic interviews of children in cases of suspected abuse (Tr. 442). On June 19, 2006, Ms. Mittelhauser interviewed K.J. and C.J. on videotape (Tr. 452; St.Ex.25). Each interview was played for the jury (Tr. 461). Ms. Mittelhauser testified that at no time during the interviews did the girls give her any information or answers that caused her to believe they were not being truthful (Tr. 452). Defense counsel did not object to this testimony.

In the interview, K.J. reported that her mother and Mr. Flores hit them and touched her in her private places (St.Ex.25). Mr. Flores would handcuff the girls with their hands behind their backs (St.Ex.25). One time, Ms. Celis-Garcia touched K.J.'s chest and vagina in her mother's bedroom (St.Ex.25). Another time, when C.J. was in the tub and K.J. standing in the shower, her mother and Mr. Flores shut off the water and touched the girls until the girls yelled for their grandmother, who stopped the activity (St.Ex.25).

C.J. told Ms. Mittelhauser that Mr. Flores had touched her chest and vaginal area in Ms. Celis-Garcia's bedroom (St.Ex.25). She described an incident where her mother and Mr. Flores came into the bathroom and touched K.J. (St.Ex.25). Another time, they snuck into the bedroom while the girls slept with their grandmother and took the girls to Ms. Celis-Garcia's bedroom (St.Ex.25). They cuffed the girls and hung the cuffs on hooks on the wall; while K.J.'s feet could just reach the floor, C.J.'s could not (St.Ex.25). Meanwhile, their mother and Mr. Flores were in bed touching each other (St.Ex.25). The girls were also hung from hooks in the "cold room," an enclosed porch (St.Ex.25). Other times, their mother and Mr. Flores would take the girls into the bedroom, take the girls' clothes off, and touch them "everywhere" (St.Ex.25).

Statements to Ellen Walls and Stephanie Diercker

Ellen Walls, a licensed clinical social worker, had seen the girls three or four times before they disclosed their allegations of sexual abuse to their foster mother (Tr. 384, 389, 391). Stephanie Diercker, a children's service worker for DFS, met the girls in late April or early May, 2006 and met with them at least twice a month after that (Tr. 574).

She would ask the girls about how things were going, how they were adjusting to the foster family, school, etc. (Tr. 575).

On June 20th, C.J. told Ms. Walls that she bled from “her hiney in the front” after being hurt by her mother and Mr. Flores (Tr. 392-93). She was afraid that they would find out she had told (Tr. 393). K.J. said her mother and Mr. Flores put grey things on her wrists, chained her to the wall and touched her (Tr. 393-94). She described an incident in which the girls were taking a shower, the defendants touched them, and the girls screamed, alerting the grandmother, who made them stop (Tr. 394).³

On June 21st, both Ms. Walls and Ms. Diercker met with the girls (Tr. 394, 583). C.J. said that when she bled from her hiney, her grandmother put lotion on it to make the bleeding stop (Tr. 394, 584). The girls were often separated when the abuse occurred, and K.J. would be with Mr. Flores (Tr. 395).⁴ C.J. related that it hurt when Mr. Flores touched “her hiney in front” (Tr. 395). K.J. told Ms. Walls about once, when she was on her stomach naked, her mother and Mr. Flores touched her hiney (Tr. 395). K.J. talked about being handcuffed, and showed small scars on her wrist (Tr. 586).⁵ She stated that

³ C.J. also disclosed that her grandmother had a videotape of one event and had seen her grandmother watch it (Tr. 404, 417). The girls did not want to eat food that the defendants made because it made their grandmother dizzy and want to kiss them (Tr. 416-17).

⁴ K.J. stated the opposite, that Mr. Flores was always with C.J. (Tr. 608).

⁵ No photographs of any scars were placed into evidence.

she would get out of the handcuffs and waken her grandmother, who would take them to another relative's house (Tr. 587-88).

C.J. privately told Ms. Diercker that she was touched in her "lower private area" with something that looked like a hand but was not (Tr. 590). It touched her private, front and back (Tr. 590). It was soft at first but then got hard (Tr. 591). C.J. repeated this story on June 23rd, but stated that she was lying on her stomach, and that the object, perhaps a hand, was hard and then soft (Tr. 403-404).

Over objection, Ms. Walls testified that the girls' "behaviors are consistent with experiencing a very traumatic event" and that neither their behavior nor their disclosures were inconsistent with children who have been sexually abused (Tr. 408). Ms. Walls testified that the girls never gave her reason to doubt the truthfulness of their statements (Tr. 413).

The Police Investigation

The police determined that at the time of the alleged abuse, K.J. was eight years old and C.J. was six (Tr. 474). They searched 325 N. Benton and a shed on property adjoining the house (Tr. 475). Because Ms. Celis-Garcia had moved out of 325 N. Benton several months earlier, they also searched her current residence, with her consent (Tr. 475, 486). At 325 N. Benton, the police found several hooks in the bedroom and closet, but K.J. denied that any of them were the hooks in question (Tr. 480-81, 511). A hook remaining in the wall would not have been sturdy enough to support a child's weight (Tr. 481, 499). There were small holes in the bedroom wall at an adult's eye level

where hooks could have been removed (Tr. 481-82). The police seized videotapes, but all depicted normal family get-togethers (Tr. 489-90). When the police met with the girls on June 23, 2006, they did not note any injury to the girls' wrists (Tr. 515). If the girls' hands were cuffed behind their backs and they were hung by the cuffs, their shoulders would have popped, but not if they were cuffed in the front (Tr. 513-14).

A pediatric nurse practitioner conducted a SAFE examination on June 26, 2006 (Tr. 517). K.J. had no abnormalities to her genital area, but a portion of C.J.'s hymenal tissue was missing (Tr. 534, 538). The damage to C.J.'s hymen showed an injury consistent with penetration by an erect penis (Tr. 557).

Videotaped Deposition Testimony of C.J. and K.J.

The court allowed the State to present the girls' videotaped deposition testimony in lieu of live testimony in court (Tr. 616-17).

K.J.'s testimony

In her deposition, K.J. detailed three incidents of abuse. Two of them happened on the same day, and one happened three or four days later (St.Ex.23, p. 51). The first time was during summer school (St.Ex.23, p. 17). It took place on the back porch of the house (St.Ex.23, p. 17, 21). Mr. Flores took K.J.'s clothes off, except her panties (St.Ex.23, p. 19-20). Both her mother and Mr. Flores touched her "private places" under her clothing (St.Ex.23, p. 18-20).

The second incident took place three or four days later, in Ms. Celis-Garcia's bedroom (St.Ex.23, p. 22-23). K.J.'s mother and Mr. Flores undressed her and put her

hands and feet in handcuffs while C.J. was outside playing (St.Ex.23, p. 22, 25-28).⁶ The cuffs were hooked to the wall (St.Ex.23, p. 26). They then touched her three private spots with their hands (St.Ex.23, p. 29). They told her they would kill her if she told anyone (St.Ex.23, p. 30).

Another time, both girls were in the bathroom, taking a shower (St.Ex.23, p.27, 31). Either Ms. Celis-Garcia or Mr. Flores took K.J. to the back porch (St.Ex.23, p. 27, 33). Then they brought C.J. there (St.Ex.23, p. 34). They touched K.J. in her private places with their hands, and she saw them touch C.J. (St.Ex.23, p. 35). K.J. remembered four or five times when she was handcuffed (St.Ex.23, p. 39).

C.J.'s Testimony

In her videotaped deposition, C.J. first stated that she was never touched on her “boobs” or “butt” (St.Ex.22, p. 12-13), but then testified that she was touched on her “boobs,” “butt,” and “front privacy” (St.Ex.22, p. 21-22, 24). She relayed that once, in her mother’s bedroom, her mother took off C.J.’s clothes except her panties and both her mother and Mr. Flores touched her in the front (St.Ex.22, p. 14-16). Another day, they touched her in the front and on her “butt” (St.Ex.22, p.17). K.J. was not present either of these times (St.Ex.22, p. 14, 18).

More than once, C.J. saw her mother and Mr. Flores, in the bedroom, touch K.J.’s front and Mr. Flores touch her “butt” (St.Ex.22, p.18-19). She saw them touch K.J. on

⁶ K.J. also stated that C.J. was there too and also was handcuffed, etc. (St.Ex.23, p. 27, 29).

the back porch three times (St.Ex.22, p.19-20). K.J. was naked, and they touched her front and back (St.Ex.22, p. 20). More than once, in the bedroom, her mother and Mr. Flores would handcuff her and K.J. and then touch them in the front and the back (St.Ex. 22, p. 21-22). She remembers being handcuffed and placed on a hook in the bedroom closet (St.Ex.22, p. 22-23).

More than once, her mother brought her to the shed and touched her “boobs” and “front privacies” (St.Ex.22, p. 23-25). Four times, she saw her mother and Mr. Flores touch K.J. in the shed (St.Ex.22, p.25-26).⁷ C.J. knew there were other times that her mother and Mr. Flores touched her, but she could not remember details (St.Ex.22, p. 26). They always touched her with their hands (St.Ex.22, p. 26).

The Defense

Maria Garcia, Ms. Celis-Garcia’s mother, testified for the defense (Tr. 625-44).⁸ Maria testified that she had lived with her daughter and two granddaughters at 325 N. Benton (Tr. 625-26). Mr. Flores visited often but did not sleep there (Tr. 626). The girls slept in a bed with Maria (Tr. 626). Ms. Celis-Garcia would work Monday through Friday from 5:00 a.m. to 5:00 p.m. (Tr. 627). Maria would get the girls ready for school and bathe them (Tr. 628).

⁷ K.J. denied being touched in the shed (St.Ex.23, p. 40).

⁸ Because Ms. Garcia’s name is so similar to Ms. Celis-Garcia’s, Ms. Garcia will be referred by her first name, Maria.

Maria never saw any inappropriate behavior by her daughter or Mr. Flores (Tr. 629). She never interrupted any abuse in the bathroom, never had a video camera or a videotape of any abuse, and never saw the girls in handcuffs (Tr. 629). Maria testified that the girls had a reputation for lying (Tr. 631).

In closing argument, the prosecutor stressed how experienced Ms. Walls and Ms. Mittelhauser were (Tr. 660). It then reiterated their testimony, vouching for the truthfulness of the girls, in urging the jurors to believe the girls' account of abuse:

They were interviewed by a professional interviewer, Ms. Mittelhauser. I asked her, did it appear to you anything, that they were coached or not being truthful? No. Ellen Walls, any indications that they were being less than truthful or that they were making things up? No.

(Tr. 692-93).

The verdict directors instructed the jurors to consider whether Ms. Celis-Garcia placed her hand on the girls' genitals or alternatively, whether she acted in concert with Mr. Flores when he did so (L.F. 157-58). The verdict directors did not specify the date or place of any specific act of alleged sodomy the jury was to consider. Defense counsel did not object to the verdict directors.

The jury found Ms. Celis-Garcia guilty of two counts of statutory sodomy in the first degree (L.F. 173-76). On December 19, 2007, the court overruled the motion for new trial and sentenced Ms. Celis-Garcia to concurrent terms of twenty-five years imprisonment (Tr.727, 742; L.F.202). The Notice of Appeal was timely filed (L.F. 207-208).

On April 20, 2010, the Court of Appeals, Western District, affirmed the convictions, with Judge Ahuja dissenting. On May 5, 2010, Ms. Celis-Garcia timely filed a motion for rehearing, or in the alternative, application for transfer, which was denied on June 1, 2010. On June 16, 2010, she timely filed an application for transfer, which was sustained on August 31, 2010.

POINT I

The trial court plainly erred and abused its discretion in submitting Instructions 6 and 7 to the jury, in accepting the guilty verdicts, and in sentencing Ms. Celis-Garcia, because the verdict directors failed to specify a particular incident and thereby violated Ms. Celis-Garcia’s rights to due process, a fair trial, a unanimous verdict, and freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19, and 22(a) of the Missouri Constitution, in that the State presented evidence of multiple acts of alleged hand to genital sodomy, yet the verdict directors did not specify any one of these incidents, thereby making it unclear as to which incident Ms. Celis-Garcia was found guilty and allowing the possibility that the jurors failed to find the same incident of sodomy unanimously; for instance, that some jurors found that Ms. Celis-Garcia committed sodomy in the shed, but rejected the allegation of sodomy in the enclosed back porch, while other jurors found that she committed sodomy in the bedroom but not in either the shed or the porch.

State v. Goucher, 111 S.W.3d 915 (Mo. App. S.D. 2003);

State v. Mitchell, 704 S.W.2d 280 (Mo. App. S.D. 1986);

State v. Oswald, 306 S.W.2d 559 (Mo. 1957);

State v. Voyles, 160 P.3d 794 (Kan. 2007);

U.S. Const., Amends. V, VI, and XIV;

Mo. Const., Art. I, Secs. 10, 18(a), 19, and 22(a);

Rules 28.02, 29.01, and 30.20; and

MAI-CR3d 304.02.

POINT II

The trial court erred and abused its discretion in overruling Ms. Celis-Garcia's objection to Ellen Walls' testimony that the girls' behavior was consistent with having experienced a very traumatic event and that neither the girls' behavior nor their statements were inconsistent with those of children who have been sexually abused; and plainly erred and abused its discretion in allowing Ms. Walls and Maria Mittelhauser to testify that the girls did not give any answers to cause them to believe the girls were not being truthful, because the testimony violated Ms. Celis-Garcia's rights to due process, a fair trial, and the presumption of innocence, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the testimony improperly vouched for the girls' credibility and invaded the exclusive province of the jury to determine credibility in a case where the State's case hinged upon the credibility of the girls, and a prior jury had so much doubt about the girls' credibility that it was unable to return unanimous verdicts.

State v. Chism, 252 S.W.3d 178 (Mo. App. W.D. 2008);

State v. Churchill, 98 S.W.3d 536 (Mo. banc 2003);

State v. Link, 25 S.W.3d 136 (Mo. banc 2000);

State v. Williams, 858 S.W.2d 796 (Mo. App. E.D. 1993);

U.S. Const., Amends. V, VI, and XIV;

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

Rule 30.20.

ARGUMENT I

The trial court plainly erred and abused its discretion in submitting Instructions 6 and 7 to the jury, in accepting the guilty verdicts, and in sentencing Ms. Celis-Garcia, because the verdict directors failed to specify a particular incident and thereby violated Ms. Celis-Garcia's rights to due process, a fair trial, a unanimous verdict, and freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19, and 22(a) of the Missouri Constitution, in that the State presented evidence of multiple acts of alleged hand to genital sodomy, yet the verdict directors did not specify any one of these incidents, thereby making it unclear as to which incident Ms. Celis-Garcia was found guilty and allowing the possibility that the jurors failed to find the same incident of sodomy unanimously; for instance, that some jurors found that Ms. Celis-Garcia committed sodomy in the shed, but rejected the allegation of sodomy in the enclosed back porch, while other jurors found that she committed sodomy in the bedroom but not in either the shed or the porch.

Appellant, Maura Celis-Garcia, was charged with her boyfriend, Jose Flores, with committing two counts of statutory sodomy, one for each of Ms. Celis-Garcia's two daughters, C.J. and K.J., ages five and seven, respectively (L.F. 8-9). At trial, the State presented evidence of multiple acts of sexual abuse over the course of fifteen months. The acts were alleged to have occurred in a bedroom, a bathroom, an enclosed porch, and

a shed (St.Ex.22, 23). The jury was instructed to find Ms. Celis-Garcia guilty if it found that she placed her hand on the girls' genitals, or assisted Mr. Flores in doing so, during that fifteen-month period (L.F. 104-105). Although the jury heard evidence of multiple acts in various places, it was not told which incident to consider as the actual charged crime. The jury received the following verdict director:

INSTRUCTION NO. 6⁹

As to Count I regarding the defendant Maura L. Celis-Garcia, if you find and believe from the evidence beyond a reasonable doubt:

First, that between the dates of January 01, 2005 and March 31, 2006, in the County of Saline, State of Missouri, the defendant or Jose F. Flores placed her or his hand on [C.J.'s] genitals, and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that at that time [C.J.] was less than twelve years old, then you are instructed that the offense of statutory sodomy in the first degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Fourth, that with the purpose of promoting or furthering the commission of that statutory sodomy in the first degree, the defendant Maura L. Celis-Garcia acted together with or aided Jose F. Flores in committing that offense,

⁹ Instruction No. 7 is identical but for its reference to K.J. instead of C.J. (L.F. 158).

then you will find the defendant Maura L. Celis-Garcia guilty under Count I of statutory sodomy in the first degree.

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

(L.F. 157).

On appeal, Ms. Celis-Garcia argued that this was a problem because the State had presented evidence that she had placed her hand on the girls' genitals at different times and places. Without some differentiation in the verdict directions, the jury did not know which two specific incidents it was to consider. As a result, some jurors may have convicted Ms. Celis-Garcia because they believed that she placed her hand on C.J.'s genitals in the shed, but disbelieved the evidence that she did so in the bedroom or enclosed back porch; whereas other jurors may have disbelieved that she committed sodomy in the shed but believed that she did so in the bedroom, and so on. There is no assurance that all twelve jurors agreed that Ms. Celis-Garcia committed the same act of hand to genitals sodomy as to C.J. or K.J..

The Court of Appeals¹⁰ rejected the argument, holding that there was no unanimity problem, because each juror found that Ms. Celis-Garcia committed an act of hand to genital contact with each victim. Slip op. at 4-5. It stressed that first degree statutory sodomy occurs when a person has deviate sexual intercourse with someone younger than

¹⁰ The Honorable Lisa Hardwick and the Honorable James Smart.

fourteen, and that deviate sexual intercourse was “any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person ... done for the purpose of arousing or gratifying the sexual desire of any person.” *Id.* at 4, citing Section 566.010(1), RSMo.

Thus, as one element of the charge of first-degree statutory sodomy, the jury is required to determine whether the defendant was involved in a specific physical act constituting deviate sexual intercourse. Instructions Nos. 6 and 7 directed the jury to consider whether Celis-Garcia engaged in deviate sexual intercourse by placing her hand on the children’s genitals.

Slip op. at 4. The majority opinion held that the verdict director was proper, because it identified the specific act, *i.e.*, hand to genital contact, that constituted the criminal offense. *Id.* The jurors did not need to unanimously decide that any specific incident occurred – bedroom, bathroom, porch, or shed – because they must have unanimously found that hand to genital contact occurred. *Id.* at 4-5.

The Honorable Alok Ahuja dissented, noting that he would have granted plain error relief and reversed the convictions. Slip op., dissent, at 1. “Given the verdict directors, it is impossible to know whether the jury unanimously found beyond a reasonable doubt that any of these specific incidents of sexual contact had occurred, and if so, which one (or ones).” *Id.* at 2. The “specific physical act” which the jurors were to find unanimously referred “to a specific event which occurred at a specific point in time (even if [the] child victims could not precisely identify that time).” *Id.* at 4. It was not

enough that the jurors agreed that Ms. Celis-Garcia “engaged in actions of a particular nature or type.” *Id.* at 5. Judge Ahuja analogized to a burglary case:

Consider a defendant charged with a single count of burglary, but implicated in the burglaries of multiple homes over the same fifteen-month time span submitted here. Even if evidence of the multiple burglaries was admitted at trial, I assume this Court would reverse a conviction if the jury was instructed in a single verdict director that it was required to find only that the defendant, during this fifteen-month span, unlawfully entered the (unspecified) property of another with the intent of committing a crime therein.

Id. at 5. Such a generic submission would violate the defendant’s right to a unanimous verdict, “even though the hypothesized instruction describes a single *type* of conduct which the defendant allegedly committed (*i.e.*, unlawful entry into the premises of another with the intent of committing a crime inside).” *Id.* at 5.

Preservation and Standard of Review

Defense counsel failed to object to the verdict directors (Tr. 648-52). Ms. Celis-Garcia therefore requests review for plain error. Rule 30.20. For instructional error to warrant reversal under plain error review, “the trial court must have so misdirected or failed to instruct the jury as to cause manifest injustice or miscarriage of justice.” *State v. Cline*, 808 S.W.2d 822, 824 (Mo. banc 1991). Manifest injustice occurs when the instructional error appears to have affected the jury’s verdict. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo. App. W.D. 2000).

The Verdicts Lacked Any Assurance of Unanimity

The requirement of unanimity is guaranteed under Article I, Section 22(a) of the Missouri Constitution. *State v. Goucher*, 111 S.W.3d 915, 917, 920 (Mo. App. S.D. 2003). A criminal defendant has a “fundamental right [to] a trial by twelve people that unanimously concur in the guilt of the defendant before he or she can be legally convicted.” *Id.* at 917, citing *State v. Hadley*, 815 S.W.2d 422, 425 (Mo. banc 1991); *State v. Schumacher*, 85 S.W.3d 759, 761 (Mo. App. W.D. 2002) (jury’s verdict must be “unanimous, in writing, signed by the foreperson, and returned in open court”); Rule 29.01(a) (“The verdict shall be unanimous and be in writing.”).

“The unanimity rule ... requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged.” *United States v. Gipson*, 553 F.2d 453, 457-58 (5th Cir. 1977); *State v. Gardner*, 231 S.W. 1057, 1058 (Mo. App. 1921) (a verdict must be clear and unambiguous, and must show that all twelve of the jurors agreed on finding the same thing); see also *State v. Marks*, 721 S.W.2d 51, 54 (Mo. App. W.D. 1986)(instructing in disjunctive is error where “submission was as to the very act which was the gravamen of the offense” because jury “must agree on “just what the defendant did”).

This Court has recognized that when the State presents evidence of multiple acts by the defendant, the verdict director must specify the one incident that is charged. MAI-CR3d 304.02 sets forth general rules for instructing on the principal offense. Note on Use 5 warns trial courts of the need to instruct jurors specifically about the incident they

are to consider. It stresses the importance of including the place of the offense in the verdict director when evidence of multiple acts is presented to the jury:

The place of the offense may become of “decisive importance” under certain circumstances, such as ... (c) where the defendant may have committed several separate offenses against the same victim at the same general location within a short space of time. In such a situation, upon request of the defendant or on the Court’s own motion, the place should be more definitely identified, such as “the front bedroom on the second floor,” “the southeast corner of the basement,” etc.

If the jurors need not find that a specific incident occurred, but just that a *type* of conduct occurred, there would be no need for the verdict director to specify a time or place of the incident. Note on Use 5 to MAI-CR3d 304.02 would make no sense.

This Court again recognized the need for specificity in verdict directors, when it reversed and remanded for a new trial in *State v. Oswald*, 306 S.W.2d 559, 563 (Mo. 1957). There, the State alleged several acts within the same count. *Id.* The verdict director told the jury to find the defendant guilty if it found that he put his penis in the victim’s mouth and rectum or if he did either of those acts. *Id.* This Court held that there was no assurance that the jurors were unanimous that the same act occurred:

The State refers us to no case holding a general verdict proper upon the trial of an indictment or information charging an appellant with the commission of two offenses in one count. An accused is entitled to the concurrence of twelve jurors upon one definite charge of crime. Under the charge and the

verdict some of the jurors may have agreed appellant was guilty of an offense committed with the mouth of the [victim], while others may have reached the same result with respect to an offense committed with the rectum. It cannot be determined that there was a concurrence of twelve jurors upon one definite charge of crime.

Id.; see also *State v. Pope*, 733 S.W.2d 811, 812-13 (Mo. App. W.D. 1987) (reversing because verdict directors did not state specific act charged).

A similar situation arose in *State v. D.W.N.*, 290 S.W.3d 814, 827 (Mo. App. W.D. 2009)(en banc), where the jury was instructed to find the defendant guilty if it found that he touched the victim's genitals or breast.

Prior cases have held that the disjunctive submission of an element of an offense in a single instruction runs afoul of a defendant's constitutional right to a unanimous concurrence in the verdict. This is because an instruction that submits a proof element in the disjunctive creates a situation where some of the jurors may have agreed that he was guilty of the offense because he committed one act while the other jurors believed that he was guilty because he committed another act.

Id. at 828. The instruction violated the defendant's right to a unanimous verdict. *Id.*

Although not a sex case, *State v. Mitchell*, 704 S.W.2d 280 (Mo. App. S.D. 1986) is also instructive. The defendant was charged with two counts of exhibiting a lethal weapon in an angry or threatening manner, one count for an incident at a house, and the other for an incident at a café. *Id.* at 282-83. The verdict directors, however, were

identical, so there was no way for the jury to know which count referred to the house and which to the café. *Id.* at 283. Even though both verdict directors set forth the specific type of unlawful use of a weapon, the instructions were erroneous because “it was impossible for the jury to know which incident was the subject of” which verdict director. *Id.* at 284. The Court of Appeals reversed for a new trial. *Id.* at 287.

In the current case, the verdict directors set forth the type of sodomy alleged, *i.e.*, hand to genital contact. But it was impossible for the jurors to know which incident described at trial was the subject of the verdict director. Thus, as in *Mitchell*, the appellate court should have reversed and remanded for a new trial.

Other Missouri cases have criticized the use of disjunctive verdict directors, or verdict directors that fail to instruct the jury as to which of the acts presented in evidence the jury should consider as the charged act. See *State v. Pope*, 733 S.W.2d 811, 813 (Mo. App. W.D. 1987) (“instruction which allows [the jury] to convict of [the charged act] or another which is not charged cannot stand”); *State v. Mackey*, 822 S.W.2d 933, 936 (Mo. App. E.D. 1991)(“To overcome the problem of the jury returning a non-unanimous verdict, disjunctive submissions of acts, especially those which constitute the gravamen of the offense, should be curtailed”); *State v. Rudd*, 759 S.W.2d 625, 629 (Mo. App. S.D. 1988)(“There is no doubt that when multiple offenses are submitted, they should be differentiated”); but see *State v. Smith*, 32 S.W.3d 134, 135 (Mo. App. E.D. 2000)(although appellate court has “no hesitation in saying that the prosecution should have made it clear that the two instructions applied to different incidents,” the identical verdict directors were “legally correct”).

Here, the verdict directors gave the jurors a roving commission to determine, each for him or herself, which specific incident to consider. In essence, the verdict directors told the jurors to find Ms. Celis-Garcia guilty if they found that she, or she acting with Mr. Flores, placed her hand on the girls' genitals in the shed or in the bedroom or on the porch or in the bathroom. An instruction results in a "roving commission" when "it assumes a disputed fact or posits an abstract legal question that allows the jury to roam freely through the evidence and choose any facts [that] suited its fancy or its perception of logic to impose liability." *State v. Scott*, 278 S.W.3d 208, 214 (Mo. App. W.D. 2009) (quoting *Newell Rubbermaid, Inc. v. Efficient Solutions, Inc.*, 252 S.W.3d 164, 174 (Mo. App. E.D. 2007)). "To avoid a roving commission, the court must instruct the jurors regarding the specific conduct that renders the defendant liable." *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583, 594 (Mo. App. W.D. 2008).

It is true that certain procedural rules are relaxed in sex cases, especially those involving children. Understandably, a child might not be able to relate the precise date that abuse occurred, so a wide time frame is permissible. *State v. Johnson*, 62 S.W.3d 61, 67 (Mo. App. W.D. 2001). But, as Judge Ahuja noted, "the understandable vagaries in the testimony of young children concerning such heinous acts makes it *more* important - not less - that the jury be given as specific direction to guide its deliberations as the victims' accounts will permit." Slip op., dissent, at 12 (emphasis in original). If the evidence shows several distinct incidents of abuse within that time period, the verdict director should refer the jury to the specific incident it has charged. The verdict is not

unanimous if four jurors find that the defendant is guilty of one incident, four others find he is guilty of another, and four more find him guilty of yet another.

Missouri Should Follow the Practice of Other States

Many other courts have recognized that the defendant's right to a unanimous verdict is violated when the State charges the defendant with one count but presents evidence of multiple incidents, without instructing the jury which incident it is to consider as the charged crime. These states have adopted a standard for "multiple acts" cases. The trial court must either require the State to elect the one incident that makes up the charged crime, or instruct the jurors that they must be unanimous as to that specific act in order to convict.¹¹

The Supreme Court of Kansas considered a scenario very similar to the facts at issue in this case. In *State v. Voyles*, 160 P.3d 794, 797-98 (Kan. 2007), the defendant was charged with sexually abusing two girls in five locations, on twenty occasions. He was convicted of eight counts: two counts of aggravated indecent solicitation of a child

¹¹ Missouri juries are instructed that, "[y]our verdict, whether guilty or not guilty, must be agreed to by each juror. Although the verdict must be unanimous, the verdict should be signed by your foreperson alone." But they are not instructed that they must "unanimously agree upon the commission of the same specific act or acts constituting the crime within the period alleged." See *State v. Muhm*, 775 N.W.2d 508, 520, fn. 8 (S.Dak. 2009), citing a California jury instruction.

and two counts of aggravated criminal sodomy for each girl. *Id.* On appeal, Voyles alleged that he was denied his right to a unanimous jury verdict because the jury was not told to unanimously agree upon the specific act which constituted each count. *Id.* at 798.

The Kansas Supreme Court determined that this was a “multiple acts” case, one in which several acts were introduced in evidence and any one of them could have constituted the crime charged. *Id.* at 799. The court stressed that, “[i]n a multiple acts case we require that either the State *must* inform the jury which act to rely on in its deliberations or the court *must* instruct the jury to agree on a specific criminal act.” *Id.* at 800 (emphasis in original). The court reversed, despite Voyles’ failure to object at trial. *Id.* at 805.

Another similar case is *State v. Kitchen*, 756 P.2d 105 (Wash. 1988). The defendant was charged with one count of second degree statutory rape within a fourteen month period, but at trial, the victim testified to several incidents that could have constituted the charged crime. *Id.* at 107.¹² The Washington Supreme Court held that, “[w]hen the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations” or the court must “instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt.” *Id.* at 108-109. Because the State conceded the error, the only issue was whether the error was harmless. *Id.* The

¹²This case was a consolidation of three appeals, but for the sake of simplicity, only the facts and holding regarding appellant Kitchen is discussed here.

Supreme Court reversed, since the jury heard conflicting testimony as to each act, and “a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred.” *Id.* at 109-10.

The same principles were noted in *People v. Keindl*, 502 N.E.2d 577, 580 (N.Y. 1986). “[W]here one count alleges the commission of a particular offense occurring repeatedly during a designated period of time, that count encompasses more than one offense and is duplicitous.” *Id.* The appellate court stressed the danger:

If two or more offenses are alleged in one count, individual jurors might vote to convict a defendant of that count on the basis of different offenses; the defendant would thus stand convicted under that count even though the jury may never have reached a unanimous verdict as to any one of the offenses.

Id. at 580. Because there was “such a multiplicity of acts encompassed in single counts,” it was “virtually impossible to determine the particular act of sodomy or sexual abuse as to which the jury reached a unanimous verdict.” *Id.* at 582. The resulting prejudice was manifest. *Id.*; see also *Woertman v. People*, 804 P.2d 188, 192 (Colo. 1991); *State v. Gardner*, 889 N.E.2d 995, 1005 (Ohio 2008); *State v. Brown*, 762 S.W.2d 135 (Tenn. 1988); *State v. Arceo*, 928 P.2d 843, 875 (Hawaii 1996); *State v. Muhm*, 775 N.W.2d 508, 518 (S. Dak. 2009).

The Verdict Directors Create a Future Threat of Double Jeopardy

By their ambiguity, the verdict directors also created a risk that Ms. Celis-Garcia could be subject to double jeopardy. The Fifth Amendment to the United States

Constitution prohibits placing a person twice in jeopardy of life or limb for the same offense. This protection applies to state prosecutions through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 793-94 (1969). The right to be free from double jeopardy is also guaranteed by Missouri common law. *State v. Richardson*, 460 S.W.2d 537, 538 (Mo. banc 1970). The protection against double jeopardy applies to both successive punishments and successive prosecutions for the same criminal offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

Verdict directors 6 and 7 threaten Ms. Celis-Garcia's right to be free from double jeopardy, because there is no way of knowing exactly what act of sodomy the jury used for its verdicts of guilt. As a result, the State later could charge Ms. Celis-Garcia with another act of hand to genitals sodomy during the charged time period. Ms. Celis-Garcia could be convicted and found guilty twice for the same act.

The Verdict Directors Caused Manifest Injustice

Ms. Celis-Garcia has suffered manifest injustice by the verdict directors. "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." *Carter v. Kentucky*, 405 U.S. 288, 302 (1981). Under Note on 5 to MAI-CR3d 304.02, the trial court, upon the request of the defendant, but also *on its own motion*, should have included the place of the specific act charged to definitely identify the act charged. Failure to follow the Note on Use was error. Rule 28.02(f). Any deviation from the approved instructions is presumed prejudicial unless it

is clearly established by the State that the error did not result in prejudice. *State v. Westfall*, 75 S.W.3d 278, 284 (Mo. banc 2002).

This case is distinguishable from those where plain error relief was denied. In other cases, there was no manifest injustice because the jurors logically would have known which incident to consider as to which count. *Smith*, 32 S.W.3d at 135-36. In others, the prosecutor cleared up the confusion by his closing argument. *State v. Marley*, 257 S.W.3d 198, 201 (Mo. App. W.D. 2008); *State v. Jennings*, 761 S.W.2d 642, 644 (Mo. App. W.D. 1988). Those factors, lessening the effect of the error, are not present here.

In other cases, the acts alleged against the defendant were committed close together in time. In those cases, the jury is typically given an all-or-nothing choice – the defendant is either guilty of all, or guilty of none. *D.W.N.*, 290 S.W.3d at 827; *State v. Staples*, 908 S.W.2d 189, 190-91 (Mo. App. E.D. 1995). Here, the acts were alleged to have occurred over the course of fifteen months. And, while Ms. Celis-Garcia asserted her innocence on all the counts, arguing generally that the girls fabricated their stories, she also advanced different defenses for different incidents. For example, the defense challenged the likelihood of Ms. Celis-Garcia or Mr. Flores hanging the girls on hooks and abusing them on a porch surrounded by windows (St.Ex.22, p. 20; Tr. 680-81). It attacked the credibility of the abuse in the bedroom and in the bathroom, both located right next to the grandmother's bedroom (Tr. 674; St.Ex.23, 64-66). It questioned why the defendants would take the girls to a shed on a neighbor's property to commit such abuse (Tr. 681).

In his dissent, Judge Ahuja summarized the specific inconsistencies that Ms. Celis-Garcia pointed out as to each event:

In this case, although the defense argued generally that the children had fabricated their accounts of sexual abuse because of their desire to remain in their foster placement, Celis-Garcia also sought to exploit specific inconsistencies or doubts concerning the individual incidents or categories of incidents the children had described. For example, the children alleged that various incidents (for example, one that began in the bathroom) ended when their grandmother responded to their calls for help; at other times one or both children had claimed that their grandmother was aware of the abuse, and had even made and watched videotapes of it. Their grandmother denied any knowledge of alleged abuse, or that she had prevented or terminated any abusive incident. As to claims of being handcuffed in Celis-Garcia's bedroom or the closet of that bedroom, the defense noted that K.J. had physically demonstrated inconsistent methods by which the children were handcuffed, and had claimed in one interview to having been handcuffed behind her back, which other witnesses had testified was inconsistent with the handcuffs being attached to hooks on the wall. The prosecution's evidence was inconsistent as to whether the girls showed wounds or scarring on their wrists consistent with handcuff use, which was particularly significant since C.J. had described being restrained by handcuffs with her feet off the ground. The girls' deposition testimony was also inconsistent as

to whether handcuffs had been used anywhere other than in the bedroom or bedroom closet. One or both children testified to an incident in which they escaped from the handcuffs, ran to their grandmother, and then retreated to an aunt's house; yet no corroboration of such an incident beyond the girls' accounts was offered. K.J. and C.J. disagreed, at least in some of their statements, as to which adult would take which child when certain incidents of abuse allegedly occurred. The girls' descriptions of the bathroom incident were also inconsistent as to whether they were bathing or showering, and as to whether the girls were bathing together, and both naked, or instead whether one was partially clothed and preparing to enter the bath as the other finished. The defense also emphasized the proximity between the grandmother's bedroom and where certain acts of abuse allegedly occurred, arguing that it was implausible that these acts could have occurred without the grandmother's knowledge. Further, although C.J. described abuse which had occurred in a shed separated from the girls' home, K.J. denied that any abuse had occurred there.

Slip op., Dissent at p. 8-9.

At Ms. Celis-Garcia's first trial, the jurors deliberated for seven hours before announcing that they were deadlocked (L.F.5). This is a case where the faulty verdict directors likely made a difference in the outcome of the trial. Some members of the jury could have disbelieved the bathroom incident, but believed the bedroom incident, or the incident in the shed but not the porch, and so on. The jurors were free to believe that any

of the acts occurred, and other acts did not, but all twelve had to agree on one same act of hand to genitals touching. Manifest injustice has occurred, because there simply is too strong a possibility that the jury at this trial could not unanimously agree on any single act of hand to genitals touching. Without a unanimous verdict, the convictions cannot stand. Ms. Celis-Garcia has been denied her rights to due process, a fair trial, a unanimous verdict, and freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), 19, and 22(a) of the Missouri Constitution.

This Court must reverse.

ARGUMENT II

The trial court erred and abused its discretion in overruling Ms. Celis-Garcia's objection to Ellen Walls' testimony that the girls' behavior was consistent with having experienced a very traumatic event and that neither the girls' behavior nor their statements were inconsistent with those of children who have been sexually abused; and plainly erred and abused its discretion in allowing Ms. Walls and Maria Mittelhauser to testify that the girls did not give any answers to cause them to believe the girls were not being truthful, because the testimony violated Ms. Celis-Garcia's rights to due process, a fair trial, and the presumption of innocence, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the testimony improperly vouched for the girls' credibility and invaded the exclusive province of the jury to determine credibility in a case where the State's case hinged upon the credibility of the girls, and a prior jury had so much doubt about the girls' credibility that it was unable to return unanimous verdicts.

The key issue at trial was whether C.J. and K.J. were truthful when they stated that Ms. Celis-Garcia and her boyfriend Jose Flores had sexually abused them. The girls were removed from Ms. Celis-Garcia's custody based on an allegation of physical abuse (Tr. 351). The girls were placed in a foster home where they received new clothing and bicycles, things their mother had been unable to provide, and they had fun doing things they had never done with their mother (Tr. 287, 321-24). The girls waited ten weeks

after leaving their mother's custody to report the alleged abuse, even though they had met with multiple DFS caseworkers/counselors during that time (Tr. 290, 354, 389, 391, 574). The first jurors to hear the case deliberated for seven hours before announcing that they could not reach a unanimous verdict (L.F. 4-5).

The State presented opinion testimony from two expert witnesses, Ellen Walls and Maria Mittelhauser, and then stressed this testimony in closing argument. Ms. Walls, a clinical social worker since 1985, met with the girls for three or four counseling sessions before they made their allegations (Tr. 384, 392-93). She relayed to the jury what the girls told her in three meetings about the alleged sexual abuse (Tr. 392-95, 403-405). Over defense counsel's repeated objections, Ms. Walls vouched that, "Their behaviors are consistent with experiencing a very traumatic event" and that neither their behavior nor their allegations were inconsistent with children who have been sexually abused (Tr. 408). Ms. Walls testified that the girls never gave her reason to doubt the truthfulness of their statements (Tr. 413). Defense counsel did not object (Tr. 413).

Maria Mittelhauser, a forensic interviewer for ChildSafe, had never met the girls before (Tr. 445). The entire scope of her interaction with them was when she conducted a videotaped interview of each girl individually (Tr. 452). Those videotapes were played for the jury (Tr. 452, 461; St.Ex.25). Ms. Mittelhauser testified that at no time during the interviews did the girls give her any information or answers that caused her to believe they were not being truthful (Tr. 452). Defense counsel did not object.

In closing argument, the prosecutor stressed the lengthy experience these experts had (Tr. 660). It then reiterated the women's testimony, vouching for the truthfulness of the girls, in urging the jurors to believe the girls' account of abuse:

They were interviewed by a professional interviewer, Ms. Mittelhauser. I asked her, did it appear to you anything, that they were coached or not being truthful? No. Ellen Walls, any indications that they were being less than truthful or that they were making things up? No.

(Tr. 692-93).

The Court of Appeals held that Ms. Walls' initial testimony was permissible because she "only gave a general explanation that the children's conduct and statements were indicative of sexual abuse." Slip op. at 18. It noted the State's concession that Ms. Walls' later testimony, the testimony of Ms. Mittelhauser, and the State's argument about that testimony was "objectionable." Slip op. at 20. But it held that defense counsel's failure to object to this testimony must have been a tactical choice, because defense counsel initially objected repeatedly yet did not object to the later testimony or argument. Slip op. at 21-22. Thus, the court held, there was no plain error. Slip op. at 21. The court also held that even under plain error review, there was no manifest injustice, because there was evidence to corroborate the girls' testimony. Slip op. at 22-23.

In a footnote in his dissent, Judge Ahuja noted his "serious reservations" with the majority's conclusion that Ms. Celis-Garcia waived plain error review. Slip op., dissent at 12, fn.10. He stressed that to find waiver, "counsel [must have] affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or

negligence.” *Id.*, citing *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009). Waiver cannot be found unless defense counsel expressly stated that he or she had no objection to particular evidence, or made and then withdrew an objection, or where the defendant “affirmatively invited and/or relied upon the evidence he later challenges.” Slip op., dissent at 12, fn.10. Judge Ahuja believed that this was not such a case. *Id.*

Preservation and Standard of Review

Ms. Celis-Garcia acknowledges that although defense counsel objected to the initial testimony of Ms. Walls and included the issue in the motion for new trial (Tr. 408; L.F. 192-93), he did not object to her later testimony nor that of Ms. Mittelhauser, nor include that in the motion for new trial. Thus, the issue is preserved as to Ms. Walls’ initial testimony, but not to her later testimony or that of Ms. Mittelhauser.

The Court should review this issue, as to Ms. Walls’ initial testimony, for an abuse of discretion. *Johnson v. State*, 58 S.W.3d 496, 499 (Mo. banc 2001). The trial court abuses its discretion when the ruling is clearly against the logic of the circumstances or when it is arbitrary and unreasonable. *State v. Davis*, 32 S.W.3d 603, 608 (Mo. App. E.D. 2000). Courts have no discretion to allow testimony that explicitly or implicitly vouches for a victim’s credibility and therefore usurps the decision-making function of the jury. *State v. Collins*, 163 S.W.3d 614, 621 (Mo. App. S.D. 2005).

For the other testimony, Ms. Celis-Garcia requests review for plain error under Rule 30.20. Plain error review involves two steps. *State v. Beggs*, 186 S.W.3d 306, 312 (Mo. App. W.D. 2005). First, this Court determines whether the trial court “committed

an evident, obvious and clear error, which affected the substantial rights of the appellant.” *Id.* at 311. Next, the Court determines whether the error created so much prejudice to the defendant as to result in a manifest injustice or a miscarriage of justice. *Id.* at 312.

Experts Cannot Vouch for the Credibility of Other Witnesses

Generally, expert testimony is inadmissible if it relates to the credibility of witnesses. *State v. Middleton*, 998 S.W.2d 520, 527 (Mo. banc 1999). Expert testimony commenting directly on a particular witness’ credibility “invests ‘scientific cachet’ on the central issue of credibility and should not be admitted.” *State v. Williams*, 858 S.W.2d 796, 800 (Mo. App. E.D. 1993). It “presents the danger that jurors may be over-awed by the evidence, or may defer too quickly to the expert’s opinion” without making an independent determination of the victim’s credibility. *Id.* at 800-801.

In child sex abuse cases, expert testimony can fall into two categories: general and particularized. *State v. Churchill*, 98 S.W.3d 536, 539 (Mo. banc 2003). General testimony describes behaviors and characteristics generally seen with children who have been sexually abused. *Id.* Particularized testimony, on the other hand, is testimony relating to a specific victim’s credibility on whether he or she has been abused. *Id.* Particularized testimony explicitly or implicitly vouches for a victim’s credibility and therefore usurps the decision-making function of the jury. *Id.*; *State v. Collins*, 163 S.W.3d 614, 621 (Mo. App. S.D. 2005). “Missouri strictly prohibits expert evidence on witness credibility.” *Williams*, 858 S.W.2d at 800.

In *State v. Chism*, 252 S.W.3d 178, 183-84 (Mo. App. W.D. 2008), the Court of Appeals agreed that the State elicited testimony that improperly vouched for the credibility of the claimed victim. The State asked the victim's treating physician if he had any reason to believe that in fact the victim had not been raped. *Id.* at 183. Over objection, the doctor replied, "By my evaluation at the time, my indications were that, was to believe her history." *Id.* The Court of Appeals held that the testimony "does vouch for the victim's credibility because the doctor testified that he believed that she was sexually assaulted.... [T]he doctor should have only testified to the physical injuries that were consistent with rape and not whether he believed the history that the victim provided him." *Id.* at 183-84.

Here, the trial court abused its discretion by overruling defense counsel's objection and allowing Ms. Walls to vouch that the girls' behavior was consistent with experiencing a very traumatic event; that neither their behavior nor their disclosures were inconsistent with children who have been sexually abused; and that the girls never gave her reason to doubt the truthfulness of their statements (Tr. 408, 413). This testimony improperly vouched for the girls' credibility and invaded the province of the jury by eliciting particularized testimony about the girls' credibility.

The trial court evidently, obviously and clearly erred, by failing to intervene *sua sponte* when the State elicited from Ms. Mittelhauser that at no time during the interviews did the girls give her any reason to believe they were not being truthful (Tr.452). Expert testimony "should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions

from the facts proved.” *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984). Ms. Mittelhauser’s only interaction with C.J. and K.J. was through her videotaped interview of them (Tr. 445). The jury viewed these interviews (Tr. 461). Thus, the jury observed exactly what Ms. Mittelhauser observed. Jurors themselves are capable of interpreting demeanor; in fact, that is their very duty, in assessing the credibility of witnesses as they testify. The jurors should have been allowed to draw their own conclusions from the girls’ videotaped statement to Ms. Mittelhauser and from their videotaped deposition testimony.

In *State v. Link*, 25 S.W.3d 136, 143 (Mo. banc 2000), this Court acknowledged the general rule that expert testimony is inadmissible if it relates to the credibility of witnesses, because it invades the province of the jury. *Id.* It stressed that a witness may testify to “specific facts that discredit the testimony of another witness, as long as the witness does not comment directly on the truthfulness of another witness.” *Id.* Thus, it was permissible for the State’s witness – a police officer – to testify explaining the general concept of false sightings and to discredit another witness’ account of a sighting. *Id.* But he could not go “one step further and say that the police classified the information ... as a false sighting.” *Id.*

The introduction of Ms. Walls’ and Ms. Mittelhauser’s “expert” opinions that the girls were not being untruthful, *i.e.*, that they were truthful, was a “superfluous attempt to put the gloss of expertise, like a bit of frosting, upon inferences which lay persons were equally capable of drawing from the evidence.” *Davis*, 32 S.W.3d at 608-609 (upholding refusal to allow expert testimony on suspect’s thought processes when interrogated, since

it was “specific credibility testimony that encroaches upon the jury’s duty to determine the reliability of defendant’s statement”).

The testimony of these expert witnesses strongly resembles the type of impermissible testimony condemned by this Court in *State v. Churchill*, 98 S.W.3d 536 (Mo. banc 2003). The Court reversed the defendant’s conviction based on the admission of testimony by an expert witness for the State that changes in the alleged victim’s demeanor when discussing the incident indicated that the event she described “was real” and “had occurred to her.” *Id.* at 538. The testimony “infringed upon the decision-making function of the jury and prejudiced [the defendant] by bolstering [the alleged victim’s] testimony with the credibility of a professional.” *Id.* at 539. Even though the testimony was brief, the defendant suffered “severe” prejudice, because there was no physical evidence of abuse, and the State’s only other evidence was the child’s inconsistent accounts and her subsequent behavior, both of which were matters directly bolstered by the expert witness’ improper testimony. *Id.* at 539, fn. 7, 8.

Defense Counsel Did Not Waive Plain Error Review

The Court of Appeals held that the testimony by Ms. Walls and Ms. Mittelhauser that the girls were not untruthful did not amount to plain error. Slip op. at 21-22. It reasoned that defense counsel’s failure to object must have been a tactical choice, because defense counsel objected repeatedly to Ms. Walls’ testimony that the girls’ behavior was consistent with sexual abuse, yet did not object to the later testimony or argument that the girls were not untruthful. Slip op. at 21-22.

But this could not have been trial strategy. There was no reason defense counsel would have wanted this testimony to come in at all. Counsel had objected three times to Ms. Wall's testimony that vouched for the girls' credibility and was overruled each time (Tr. 407-408). Defense counsel wanted the later testimony excluded too, but at that point, after the court already repeatedly overruled counsel's objections on similar grounds, it was obvious that further objections would be futile. Counsel's only remaining option was to attack the basis for the expert's opinion that the girls were being truthful.

Furthermore, as Judge Ahuja noted in his dissent, to find waiver, "counsel [must have] affirmatively acted in a manner precluding a finding that the failure to object was a product of inadvertence or negligence." Slip op., dissent, at 12, fn.10., citing *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009). Waiver cannot be found unless defense counsel expressly stated that he or she had no objection to particular evidence, or made and then withdrew an objection, or where the defendant "affirmatively invited and/or relied upon the evidence he later challenges." Slip op., dissent at 12, fn.10. Here, the record fails to demonstrate that counsel's failure to object was anything other than inadvertence or negligence.

A New Trial is Warranted

The State's case rested upon the credibility of the girls' accounts and their behavior, which were matters directly bolstered by the improper testimony of Ms. Walls and Ms. Mittelhauser. As in *Churchill*, the prejudice was "severe." *Id.* at 539, fn.7. The testimony of these two experts "invest[ed] 'scientific cachet' on the central issue of

credibility” and presented the danger that the testimony over-awed the jurors, or that the jurors deferred too quickly to the experts’ opinions without making an independent determination of the girls’ credibility. *Williams*, 858 S.W.2d at 800-801.

Additionally, the State elicited the testimony repeatedly and intentionally (Tr. 408, 413, 452). In closing argument, the prosecutor stressed the experts’ lengthy experience and then reiterated their testimony vouching for the girls’ credibility:

They were interviewed by a professional interviewer, Ms. Mittelhauser. I asked her, did it appear to you anything, that they were coached or not being truthful? No. Ellen Walls, any indications that they were being less than truthful or that they were making things up? No.

(Tr. 692-93).

The Court of Appeals held that there was no manifest injustice from the testimony and argument because there was corroborating evidence of Ms. Celis-Garcia’s guilt. Slip op. at 22. But although there was some corroborating physical evidence, there also was a lack of physical evidence where one would expect physical evidence. While the girls’ stories meshed in places, there were also many inconsistencies. See *supra*, p. 36-37 (Judge Ahuja’s summary of inconsistencies). There were also some unbelievable accounts, such as the girls’ statement that when their mother gave them medicine, she turned into a witch, dressed in black, and hit them with a broom (Tr. 340). Finally, the girls’ grandmother, who lived in the house, slept with the girls, and gave them all their baths, flatly refuted that there was any abuse (Tr. 626, 629).

This was a case in which the outcome could turn on the repeated comments by two experienced experts bolstering the testimony of the State’s key witnesses. The first time this case went to trial, the jurors deliberated seven hours before announcing that they could not reach a unanimous verdict (L.F. 4-5). To get an edge, the State purposefully elicited that these two very experienced “experts” saw no reason to doubt the girls’ truthfulness and then stressed that testimony in closing argument. Their testimony “amounted to an impressively qualified stamp of truthfulness on [the girls’] story, and a miscarriage of justice will result from the refusal to reverse for plain error.” *Williams*, 858 S.W.2d at 801. By allowing the State to present this testimony, the trial court violated Ms. Celis-Garcia’s rights to due process, a fair trial, and the presumption of innocence, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court must reverse to allow a jury – the twelve jurors alone – to make the credibility assessments required for conviction or acquittal.

CONCLUSION

For the reasons set forth above, Maura L. Celis-Garcia respectfully requests that this Court reverse her convictions, vacate her sentences, and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were mailed, postage prepaid, to: Evan Buchheim, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; on the 17th day of September, 2010.

Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 11,757 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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