

**SC 90980**

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**IN THE  
MISSOURI SUPREME COURT**

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**MAURA L. CELIS-GARCIA,**

**Appellant.**

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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

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**APPELLANT'S SUBSTITUTE REPLY BRIEF**

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## **JURISDICTIONAL STATEMENT**

Ms. Celis-Garcia incorporates the Jurisdictional Statement from page 6 of her Substitute Brief.

## **STATEMENT OF FACTS**

Ms. Celis-Garcia incorporates the Statement of Facts from pages 7-17 of her Substitute Brief.

## ARGUMENT I

The State is incorrect on three major points. First, the State incorrectly argues that plain error review is waived. The Court should review this issue for plain error, because the trial court had a *sua sponte* duty to instruct the jury on the correct law, as to a substantial right, to insure that Ms. Celis-Garcia received a fair trial, and Notes on Use 4 and 5 to MAI-CR3d 304.02 indicated that the court should have modified the verdict directors. Second, the State ignores the vast wealth of caselaw that holds that, in multiple acts cases, the jury must be unanimous as to the specific incident which forms the basis for conviction. Many courts have achieved a good balance between enabling the prosecution of child sex cases and protecting the defendant's right to juror unanimity and due process by either requiring the State to inform the jury which incident is the one charged crime, or instructing the jury that it must be unanimous as to one specific incident. Third, the State incorrectly insists that the multiple incidents that the jury heard about in this case could not have been differentiated and that the jury would have either believed all of the incidents or believed none of them, with no individual defenses to any of the specific incidents.

### The Court Should Conduct Plain Error Review

The State argues that the Court should not conduct even plain error review, because Ms. Celis-Garcia did not object at trial and submitted nearly identical verdict

directors for lesser-included offenses<sup>1</sup> (Resp. Br. 19-23). But Missouri courts have repeatedly held that a defendant does not waive plain error review of instructional error even by affirmatively stating “no objection” or by offering the faulty instruction himself. In *State v. Wurtzberger*, 40 S.W.3d 893, 897 (Mo. banc 2001), the defendant expressly stated he had no objection to an instruction which, on appeal, he challenged as erroneous. *Id.* at 897. The State argued that because the defendant failed to object, he violated Rule 28.03 and therefore waived all appellate review, even review for plain error under Rule 30.20. *Id.* This Court disagreed:

Although the state is correct that appellant waived appellate review when counsel failed to raise a specific objection to the disputed attempt instruction, it misconstrues the extent of the waiver. Unpreserved claims of plain error may still be reviewed under Rule 30.20 if manifest injustice would otherwise occur.

*Id.* at 898. The Court rejected the notion that Rule 28.03 “trumps” Rule 30.20 and proceeded to conduct plain error review. *Id.*.

Multiple cases are in accord. See *State v. Derenzy*, 89 S.W.3d 472, 475 (Mo. banc 2002) (reversed due to trial court’s failure to properly instruct the jury, even though defendant’s proposed instruction was faulty); *State v. Westfall*, 75 S.W.3d 278, 281, fn. 9 (Mo. banc 2002)(once defendant injected issue of self-defense, “trial court was required to instruct on self-defense, even in the absence of a request for such an instruction, and

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<sup>1</sup>The court rejected these proposed instructions, and hence they were not submitted to the jury (Tr. 647-48).

even if such an instruction was offered but not in proper form”); see also *State v. Goodine*, 196 S.W.3d 607, 617 (Mo. App. S.D. 2006); *Johnson v. State*, 189 S.W.3d 640, 647, fn. 4 (Mo. App. W.D. 2006) (even if defense counsel had stated “no objection” to a faulty instruction, or offered the faulty instruction himself, he would not have waived plain error review under Rule 30.20); *State v. Beck*, 167 S.W.3d 767, 777 (Mo. App. W.D. 2005) (defendant does not waive plain error review despite violation of Rule 28.03 regarding improper instruction offered by defendant himself); *State v. Reynolds*, 72 S.W.3d 301, 305 (Mo. App. S.D. 2002).

The State argues that trial judges “are not expected to assist counsel in trying cases” and so the trial court here had no duty to correct the verdict directors (Resp. Br. at 20-21). But while trial judges may not be expected to jump in to suggest strikes for cause, for example, or to correct the State’s closing arguments, they are required to instruct jurors properly. Plain error review is not waived on instructional issues – even when the defendant himself submitted the instruction challenged on appeal – because “the trial court has a *sua sponte* duty to instruct the jury on the correct law, as to a substantial right, to insure that the defendant receives a fair trial.” *Johnson*, 189 S.W.3d at 647, fn. 4, citing *Westfall*, 75 S.W.3d at 281.<sup>2</sup> “It is the court’s duty and not counsel’s duty to instruct the jury on the law.” *State v. Fox*, 916 S.W.2d 356, 361 (Mo. App. E.D.

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<sup>2</sup> A different standard applies regarding plain error review of issues regarding the admission of evidence, where plain error review can be waived when defense counsel states “no objection.” See, e.g., *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009).

1996). Section 546.070(4) mandates that, “[i]n every trial for a criminal offense the court shall instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving the verdict...” Rule 28.02(a) provides that it is the trial court’s duty to instruct the jury in writing “upon all questions of law arising in the case that are necessary for their information in giving the verdict.”

The court’s duty was obvious here, because it was mandated by the Notes on Use to MAI-CR3d 304.02. The Notes on Use recognize that the time, date and place of the charged crime may be of crucial importance, as when the State presents evidence of multiple acts. Regarding the time of the offense, Notes on Use 4 to MAI-CR3d 304.02 acknowledges that sexual abuse cases involving children may allow more leeway, but that, “[i]f it is impossible to fix the occasion of the offense by time or date, the instruction should be modified by the Court to identify the occurrence by some other reference” (emphasis added). Note on Use 5 recognizes that the place of the offense is of “decisive importance” when the defendant may have committed multiple acts “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.” (emphasis added). The use of the word “should” in both of these sections indicates an obligation on the part of the court to ensure that the jury in multiple acts cases knows specifically what act it is to consider as the charged crime.

The State suggests that counsel failed to object as a matter of trial strategy, and hence the claim cannot be considered (Resp. Br. 21-22). But what trial strategy is

achieved by allowing the jurors a roving commission to decide which one, of the multiple incidents in evidence, is the charged incident? Having each juror pick and choose whichever incident he or she likes did not help the defense. It made the playing field broader, not narrower, and made it easier for the State to meet its burden of proof. Permitting the State's shotgun approach of hitting the jury with multiple acts and hoping each juror can find one that sticks, with no assurance of juror unanimity as to any one act, could not possibly be considered a reasonable trial strategy.

The Incidents Could Have been Differentiated, in Compliance with the Notes on Use

The State does not deny that the jury could not have known which incident was the charged act as to either K.J. or C.J. It argues that the jury need not have agreed as to a specific incident, as long as each juror found that some act of hand to genital contact occurred (Resp. Br. 24). Under the State's theory, the conviction would be unanimous even if three jurors concluded that the bedroom incident occurred but rejected the bathroom incident, another three believed that abuse occurred only in the shed, and so on.

The State's approach has been roundly rejected. In multiple acts cases, the jury must agree on the "specific occurrence giving rise to the offense." *State v. Severson*, 215 P.3d 414, 431 (Idaho 2009). Where the evidence shows multiple acts, the trial court must give "a specific unanimity instruction ... to ensure that each juror convicted the defendant on the basis of the *same incident of culpable conduct*." *State v. Jones*, 29 P.3d 351, 359 (Hawaii 2001)(emphasis in original). Where some jurors rely on one incident and some rely on another, there is "a lack of unanimity on all of the elements necessary

for a valid conviction.” *State v. Coleman*, 150 P.3d 1126, 1127 (Wash. 2007). The right to a unanimous verdict “requires the trial court to take precautions to ensure that the jury deliberates over the particular charged offense, instead of assembling a ‘patchwork verdict’ based on the different offenses in evidence.” *Tidwell v. State*, 922 S.W.2d 497, 501 (Tenn. 1996)(State’s approach was impermissible; it was “akin to a ‘grab-bag’ theory of justice” where the State could present proof of as many offenses as it chose, and the jurors “may, in effect, reach into the brimming bag of offenses and pull out one for each count”); *State v. Hodge*, 989 S.W.2d 717, 720 (Tenn. Crim. App. 1998) (jury must be unanimous not only as to which offense constitutes the crime for which a defendant is convicted, but also “as to the specific act which constituted the offense”). “Without a requirement that the jurors agree on the same incident, ... the right to a unanimous jury verdict would be meaningless.” *Williams v. United States*, 981 A.2d 1224, 1228 (D.C. 2009)(citations omitted). “Allowing the jury to convict [the defendant] without ensuring unanimity that the same incident constituted the charged crime compromised the validity of the verdict.” *Saldana v. State*, 980 So.2d 1220, 1222 (Fla. App. 2008) (where defendant charged with one weapons offense but state presented evidence of two incidents).

As in Missouri, California requires juror unanimity for criminal convictions. *People v. Russo*, 25 P.3d 641, 645 (Cal. 2001). To satisfy the unanimity requirement, the jury must unanimously agree that the defendant is guilty of a “specific” crime. *Id.* California requires that when the jury has heard evidence of more than one discrete crime, either the State must choose which of those crimes is the charged crime, or the

court must instruct the jurors that they must agree on the same specific crime. *Id.* The unanimity requirement as to the criminal act “is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.” *Id.* The California Supreme Court gave the example of another case where the jury had heard evidence of two discrete bribes, but the jury convicted the defendant of only one count. *Id.*, citing *People v. Diedrich*, 643 P.2d 971 (Cal. 1982). In that case, reversal was warranted, because “some of the jurors may have believed the defendant guilty of one of the acts of bribery while other jurors believed him guilty of the other, resulting in no unanimous verdict that he was guilty of any specific bribe.” *Russo*, 25 P.3d at 645, citing *Diedrich*, 643 P.2d at 980-81. The California Supreme court stressed:

The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.

*Russo*, 25 P.3d at 645.

In *Severson*, 215 P.3d 431-32, the Idaho Supreme Court cited with approval the appellate court’s holding in *State v. Miller*, 16 P.3d 937 (Idaho App. 2000), a multiple acts case very similar to Ms. Celis-Garcia’s. Miller was charged with one count of hand to genital contact with an eight-year-old, but the State presented evidence of six acts. *Miller*, 16 P.3d at 943. The Idaho Supreme Court stressed that, whether requested by defense counsel or not, the trial court had a duty to instruct the jurors that it must be

unanimous as to the same specific act. *Severson*, 215 P.3d at 431-32, citing *Miller*, 16 P.3d at 944. The unanimity instruction was necessary because each instance of hand to genital contact was “a separate incident – a distinct union of *mens rea* and *actus reus* separated by a discrete period of time and circumstance from any other such similar incident.” *Severson*, 215 P.3d at 431, citing *Miller*, 16 P.3d at 944. The defendant was entitled “to have the jury instructed that it must agree on a single incident in order to find him guilty.” *Severson*, 215 P.3d at 432, citing *Miller*, 16 P.3d at 944.

The State argues that the requirement of jury unanimity as to one specific act should be suspended because it may be difficult in some child sex abuse cases for the complaining witnesses to allege details to differentiate incidents (Resp. Br. 25-26). But it is not too much to ask the State to elect one act as the charged act:

We appreciate the difficulties involved in prosecuting cases of sexual abuse committed against small children. In such cases, the rules of evidence and the rules of procedure have been relaxed to some extent to accommodate very young witnesses. Nevertheless, the constitutional protections guaranteed a criminal defendant, who is presumed by law to be innocent until proven guilty, cannot be suspended altogether because of the victim’s age or relative inability to testify. In cases such as this one, the state must either limit the testimony of prosecuting witnesses to a single event, or prepare the case so that an election can be made before the matter is submitted to the jury to decide.

*Tidwell v. State*, 922 S.W.2d 497, 501-502 (Tenn. 1996). Recognizing the difficulties inherent in prosecuting child sex cases while still protecting the defendant’s rights to a

fair trial, courts have achieved a balance by either requiring the State to elect the one act that is the charged crime, or by instructing the jurors that they must be unanimous as to the same specific act or find that all the acts occurred. *State v. Muhm*, 775 N.W.2d 508, 518 (S. Dak. 2009); see also *State v. Voyles*, 160 P.3d 794, 800 (Kan. 2007); *Quintano v. People*, 105 P.3d 585, 593-94 (Colo. 2005); *State v. Johnson*, 53 S.W.3d 628, 630-31 (Tenn. 2001); *State v. Coleman*, 150 P.3d 1126, 1127 (Wash. 2007); *State v. Kitchen*, 756 P.2d 105, 108-109 (Wash. 1988); *State v. Gardner*, 889 N.E.2d 995, 1005 (Ohio 2008); *State v. Arceo*, 928 P.2d 843, 875 (Hawaii 1996).

While there may be cases where the child witness has difficulty differentiating events, this is not such a case. In her videotaped trial testimony, K.J. testified that there were three main incidents: one during summer school on the porch (St. Ex. 23, at p. 17-21), one in the bedroom (St. Ex. 23, at p. 22-25), and a later one from the bathroom to the porch (St. Ex. 23, at p. 32-33). As to the count involving K.J., the State could have chosen one of those incidents and followed MAI-CR3d 304.02, Notes on Use 4 and/or 5, to specify the time and location and show the jury which incident it was to consider. Similarly, C.J. recalled specific incidents in different locations, some with more detail than others (St. Ex. 22). While she testified that she was touched in the bedroom multiple times, C.J. described certain times in detail (St. Ex. 22, at p. 14-16, 22-23). The State could have selected one of the detailed incidents that was supported by the best evidence and specified that location in the verdict director. *State v. Davis*, 318 S.W.3d 618, 641 (Mo. banc 2009)(permissible for trial court to include references to evidence in verdict directors to aid jurors' understanding).

It is true that the girls described certain specific incidents and then, for some, said that the act occurred more than once. For instance, C.J. described an incident in the bedroom where she handcuffed, put on a hook, and then touched (St. Ex. 22, at p. 22-23). Although she stated this happened more than once, she did not describe any other time in detail (St. Ex. 22). If the jury had been told to consider the charged incident as the incident in the bedroom with the handcuffs, the jury would have known it should consider that incident, described in detail. Since only one of these incidents was described in detail, and the others were only referred to as “it happened more than once,” the jury logically would know to consider, as the charged crime, that one incident described in detail.

The State’s argument appears to be that it would be hard to differentiate the incidents, so the prosecution does not even need to try. But why shouldn’t the State be required to sift through its evidence and determine which of the multiple acts is the charged act? The State could have picked the incident it believed was supported by the strongest evidence, complied with the Notes on Use, and narrowed the jury’s focus to the one charged incident.

The State asserts that “no one disputes that the jury unanimously agreed that each element of the offense was satisfied” (Resp. Br. 24). This statement is not true. Ms. Celis-Garcia does not agree. She also disagrees with the State’s contention that “the record contains uncontested evidence to show that Defendant committed deviate sexual intercourse with each victim” (Resp. Br. 36). For the jurors to agree unanimously that each element of the offense was satisfied, they would need to be in agreement of what the

specific offense was. Was it the offense in the shed, or the bathroom, or the bedroom, or on the porch? The State cannot take one element from one incident, another element from another incident, and put them together to reach a patchwork verdict. *Tidwell*, 922 S.W.2d at 501. Due process requires that the State prove, beyond a reasonable doubt, that the defendant committed all elements of the specific crime charged. *In re Winship*, 397 U.S. 357, 362 (1970); U.S. Const., Amends V, VI and XIV; *State v. Cooper*, 215 S.W.3d 123, 126 (Mo. banc 2007) (due process is violated by instruction that “relieves the State of its burden of proving each and every element of the crime and allows the State to obtain a conviction without the jury deliberating on and determining any contested elements of that crime”). Patchwork verdicts violate due process and the defendant’s right to a unanimous verdict. They also violate the defendant’s right to procedural due process, by arbitrarily denying a protected liberty interest, the right to a unanimous verdict as guaranteed by the Missouri constitution. U.S. Const., Amends V, VI and XIV; *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)(due process protections must be invoked to ensure that the state-created right is not arbitrarily denied or abrogated).

#### Ms. Celis-Garcia Suffered Manifest Injustice

The State insists that Ms. Celis-Garcia suffered no harm, because “nothing in the record suggests that there was any dispute regarding whether one particular act of deviate sexual intercourse occurred and another did not” (Resp. Br. 36). But the State’s argument ignores the evidence and arguments at trial. While the defense argued that

none of these incidents occurred, it also presented specific defenses to specific incidents. The defense presented testimony by Ms. Celis-Garcia's mother that she never saw the girls being abused in the bathroom nor saved them from that abuse, as the girls alleged (Tr. 629). It stressed that the girls gave conflicting accounts of how the bathroom incident occurred (Tr. 673). Regarding the bedroom incident, the defense noted that K.J. had demonstrated inconsistent methods by which the girls were handcuffed (St. Ex. 22; Tr. 513), and the evidence was inconsistent as to whether the girls had any injuries despite allegedly being hung from hooks while wearing metal handcuffs (Tr. 515). It challenged whether the hooks could have been repeatedly inserted and removed from the wall as the girls alleged (Tr. 496-97, 671), and if the holes in the bedroom wall were at the right height for the girls to have been hung as they described, or instead were at the height where pictures would have hung (Tr. 498). As to the alleged incident in the shed, the defense challenged the likelihood of the defendants taking the girls into a shed across a road on another piece of property (Tr. 681). The jurors also could have disbelieved the shed incident, because while C.J. alleged the girls were abused in the shed, K.J. denied it (St. Ex. 22, p. 25-26; St. Ex. 23, p.40). The defense challenged the likelihood of the defendants abusing the girls on a porch surrounded by windows (St. Ex. 22, p.20; Tr. 680-81). It questioned whether abuse could have occurred in the bedroom or bathroom, located so close to the grandmother's room (Tr. 674; St. Ex. 23, p.64-66).

The jurors were free to believe that any of the acts occurred, and other acts did not, but all twelve had to agree on at least one, same act of hand to genitals touching.

Unfortunately, there simply is no way of knowing that all twelve jurors agreed beyond a

reasonable doubt that Ms. Celis-Garcia was guilty of the same, specific incident as to each count. This inability to believe, with any level of comfort, that the verdicts were proper makes Ms. Celis-Garcia's case akin to others where the Court has found manifest injustice based on instructional error. In *State v. Cooper*, 215 S.W.3d 123, 126 (Mo. banc 2007), this Court granted plain error relief, because an instruction omitted an element whose existence was contested at trial. Given the evidence presented at trial, the jurors could have found the element proven, but also very well might not have, causing this Court to conclude that, "[t]here is simply no way to know." *Id.* Manifest injustice resulted, warranting reversal. See also *State v. Derenzy*, 89 S.W.3d 472, 475 (Mo. banc 2002) (because appellant "could reasonably have been acquitted on the greater delivery offense, yet convicted of the lesser included possession offense," manifest injustice resulted from trial court's failure to instruct on the lesser offense).

Unlike other Missouri cases where plain error relief was denied, here there was nothing to show that the jurors all considered the same incident as the charged act for each count.<sup>3</sup> Unlike other cases where the jury would have to believe that all of the acts

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<sup>3</sup> In contrast, the record in *State v. Smith*, 32 S.W.3d 134, 136 (Mo. App. E.D. 2000), showed that the jury considered one, specific act as to each count, because the State presented evidence of two acts, two verdict directors were submitted to the jury regarding the two acts, and the jury acquitted on one count.

occurred, or that none occurred,<sup>4</sup> here separate and distinct defenses were presented for the different incidents. Here, unlike other cases, the acts did not take place at the same time<sup>5</sup>, but rather over many months (L.F. 157-58). Here, unlike other cases where plain error relief was denied, there was no clarification by the State in closing argument as to what incident the jury was to consider as the charged act.<sup>6</sup>

At the first trial, the jurors deliberated for seven hours before advising the court that they could not return a unanimous verdict (L.F. 4-5). There is too great a danger that this jury convicted Ms. Celis-Garcia only by amalgamating the different incidents, or creating “patchwork” verdicts, instead of unanimous verdicts. Manifest injustice will result if the convictions are not overturned.

The Court must reverse.

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<sup>4</sup> See, e.g., *State v. Burch*, 740 S.W.2d 293, 296 (Mo. App. E.D. 1987) (same defense for all acts).

<sup>5</sup> See, e.g., *State v. D.W.N.*, 290 S.W.3d 814, 827 (Mo. App. W.D. 2009)(en banc); *State v. Staples*, 908 S.W.2d 189, 190-91 (Mo. App. E.D. 1989) (three acts presented in evidence occurred one right after the other in the same place and were submitted to the jury via three verdict directors).

<sup>6</sup> *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).

## ARGUMENT II

**The State is wrong in arguing that there was no plain error. Defense counsel would not have had a trial strategy for allowing two well-experienced State’s “experts” to testify that they had seen no reason to believe that the girls were not being truthful. Allowing the jurors to hear that damaging testimony just so defense counsel could discredit it, could not possibly be considered trial strategy, especially since counsel had repeatedly objected to similar testimony and had repeatedly been overruled. Secondly, despite its current claims, the State clearly intended for the jurors to believe that these witnesses had extensive experience in dealing with abused children and had specialized knowledge for assessing the credibility of child abuse claims. Finally, the instruction provided to the jurors that they were to assess credibility did not cure the manifest injustice to Ms. Celis-Garcia.**

The State does not attempt to argue the admissibility of testimony by social worker Ellen Walls and forensic interviewer Maria Mittelhauser that the girls never gave any reason to doubt their truthfulness (Tr. 413, 452)<sup>7</sup>. Instead, the State argues that there was no plain error (Resp. Br. 50-52). The State argues that defense counsel’s failure to

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<sup>7</sup> See *State v. Celis-Garcia*, Court of Appeals, slip op. at 20 (“The State acknowledges that this line of questioning and argument was “objectionable” because it was improper for an expert witness to render an opinion concerning a specific victim’s credibility as to whether they have been abused”).

object must have been trial strategy; that these witnesses were not factual investigators so the jurors would not have given their opinions any weight; and that the jury was instructed that it was its role to determine credibility (Resp. Br. 50-52, 56-57).

It could not have been defense counsel's trial strategy to allow not one, but two key State witnesses to vouch for and bolster the girls' truthfulness just so the defense then could attack the bases for those opinions. There is no reason defense counsel would want the jurors to hear this testimony at all, and in fact, counsel objected to similar testimony several times during Ms. Walls' testimony and was overruled each time (Tr. 407-408). Counsel knew that it would have been futile to object once again. Defense counsel wanted the testimony excluded, but at that point, after the court already overruled counsel's objections repeatedly, counsel's only option – once the damaging testimony was allowed – was to attack the basis for each expert's opinion that the girls were being truthful. There is no strategy reason defense counsel would want the jurors to hear, from two well-experienced experts, that the girls were truthful in their allegations, when the defense was trying to convince the jurors that those allegations were false. Because defense counsel must have failed to object solely due to "inadvertence or negligence," plain error review is available. *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009).

Next, the State argues that there was no plain error because the jurors would not have given much weight to the testimony of Ms. Walls and Ms. Mittelhauser, as these witnesses were not factual investigators and they were extensively cross-examined (Resp. Br. 56). But, although these two witnesses were not investigators, the State proffered them to the jury as highly experienced and qualified professionals who would be giving

their “expert” opinions. The prosecutor told both Ms. Walls and Ms. Mittelhauser that he would be asking them some questions “that call for expert opinions” (Tr. 385, 440). In detail, the prosecutor elicited Ms. Walls’ education, training and qualifications and her fifteen years of experience (Tr. 384-89). So too, he detailed Ms. Mittelhauser’s education, training and qualifications and elicited that since 1992, she had interviewed over a thousand children regarding allegations of abuse (Tr. 439-43).

The issue of whether the girls were lying was woven throughout the State’s opening and rebuttal closing arguments. The State again characterized these women as experts: “Who is the only expert child interviewer with more than one thousand child interviews? Maria Mittelhauser. Who is the only licensed clinical social worker with 15 plus years of experience you heard from? Ellen Walls.” (Tr. 660). Within the last two minutes of the State’s argument, right before the jury went to deliberate, the State reiterated the impermissible 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 they were being less than truthful or that they were making things up? No.” (Tr. 692-93)(emphasis added). The jury was led to believe that these witnesses, because of their lengthy experience interviewing or counseling children, had a special ability to gauge the girls’ truthfulness. Because the girls’ credibility was the key issue and the impermissible testimony spoke directly to that issue, manifest injustice resulted.

Missouri courts have repeatedly acknowledged that even brief vouching by an expert for a witness' credibility can cause "severe" prejudice. *State v. Churchill*, 98 S.W.3d 536, 539 (Mo. banc 2003). In *State v. Williams*, 858 S.W.2d 796, 801 (Mo. App. E.D. 1993), a doctor vouched for the credibility of the complaining witness. Even though there was physical evidence corroborating the testimony of the complaining witness, the Court of Appeals for the Eastern District found manifest injustice and reversed. *Id.* at 798, 801. It held that the testimony "supplied improper verisimilitude on the issue of whether the appellant was guilty" and "invest[ed] scientific cachet on the central issue of credibility." *Id.* at 800-801. The Eastern District found manifest injustice:

The danger was too great that the jury accepted the doctor's testimony as conclusive of appellant's guilt without making an independent determination of the victim's credibility. The doctor's statements amounted to an impressively qualified stamp of truthfulness on the victim's story, and a miscarriage of justice will result from a refusal to reverse for plain error.

*Id.* at 801; see also *Churchill*, 98 S.W.3d at 539 (testimony "infringed upon the decision-making function of the jury and prejudiced [the defendant] by bolstering [the victim's] testimony with the credibility of a professional"); *State v. Collins*, 163 S.W.3d 614, 621 (Mo. App. S.D. 2005).

Finally, the State argues that there was no plain error, because the jurors were instructed that they alone determine the believability of the witnesses (Resp. Br. 99). If the State's argument were valid, then this Court would not have reversed in *Churchill*, 98 S.W.3d at 539, nor would the Eastern District have reversed in *Williams*, 858 S.W.2d at

801. Such an instruction must have been given in those cases too. See MAI-CR3d 302.01, Note on Use 2.

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). The State knew its case had problems. To get an unfair edge, the State purposefully elicited that these two very experienced “experts” – one a “professional interviewer” – saw no reason to doubt the girls’ truthfulness, and the State then stressed that testimony repeatedly in closing argument.

This Court must reverse.

**CONCLUSION**

Ms. 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 Service**

Two true and correct copies of the attached brief and a disk containing a copy of this brief were mailed, postage prepaid this 9<sup>th</sup> day of November, 2010, to Evan Buchheim, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Rosemary E. Percival, #45292

**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 5,799 words, which does not exceed the 7,750 words allowed for an appellant's reply 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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