

No. SC90980

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In the  
**Supreme Court of Missouri**

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**MAURA L. CELIS-GARCIA,**

**Appellant.**

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**Appeal From Clay County Circuit Court  
Seventh Judicial Circuit  
The Honorable Larry D. Harman, Judge**

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**RESPONDENT'S SUBSTITUTE BRIEF**

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## **JURISDICTIONAL STATEMENT**

Appellant (Defendant) appeals from a Clay County Circuit Court judgment convicting her of two counts of first-degree statutory sodomy, for which she was sentenced to a total of twenty-five years of imprisonment. After the Missouri Court of Appeals, Western District, issued an opinion affirming Defendant's convictions, this Court ordered this appeal transferred to it. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10; Rule 83.04.

## STATEMENT OF FACTS

In 2006, Defendant and her boyfriend, Jose Flores, were indicted in Saline County Circuit Court on two counts of first-degree statutory sodomy involving Defendant's two daughters, six-year-old C.J. (Count I) and eight-year-old K.J. (Count II) that occurred between January 1 and May 31, 2006.<sup>1</sup> (L.F. 8-9). After a change of venue to Clay County, Defendant and Mr. Flores were jointly tried by consent before a jury on November 5-8, 2007, with Judge Larry D. Harman presiding.<sup>2</sup> (L.F. 1-2, 5-6; Tr. 1-2, 120). Defendant does not contest the sufficiency of the evidence to support her convictions. Viewed in the light most favorable to the verdict, the evidence presented at trial showed that:

Eight-year-old K.J. (born January 30, 2008) and six-year-old C.J. (born January 12, 2000) lived with Defendant (their mother) and grandmother in Marshall, Missouri, from January 2005 until March 31, 2006.<sup>3</sup> (Tr. 460; State's Exhibits 22 and 23). Defendant's boyfriend at the time, Jose Flores—

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<sup>1</sup> Defendant and her co-defendant, Mr. Flores, had married by the time of trial in 2007. (Tr. 634).

<sup>2</sup> Appellant and Mr. Flores's first trial ended in a hung jury. (L.F. 4-5).

<sup>3</sup> The transcript mistakenly shows K.J.'s birthdate as "2-30-98." (Tr. 474).

also known as “Paco,” lived nearby and stayed in the house with them most of the time. (Tr. 297; State’s Exhibits 22 and 23).

On April 4, 2006, K.J. and C.J. were removed from Defendant’s custody. (Tr. 350-51, 430). Within a few days, the victims were placed in a foster home in Lexington, Missouri. (Tr. 272, 275, 341, 353-54).

On June 7, 2006, the victims attended a one-hour supervised visitation with Defendant in the Lafayette County Children’s Division offices. (Tr. 576-77). Before the visitation began, the victims expressed considerable concern about their safety and asked whether anyone could enter the room and “get them.” (Tr. 400, 577-78). K.J. did not embrace her mother when they first met for the visit. (Tr. 401).

After the visit, K.J. heard that Mr. Flores had driven Defendant to the visitation and was in the building; she became visibly upset and shook uncontrollably. (Tr. 401-02, 580-81). The building was checked after the visitation had ended to assure K.J. that Defendant and Mr. Flores had left the building. (Tr. 340, 581). It took an hour to calm her down after the visit. (Tr. 402, 581). Even after K.J. and C.J. had left the building, they asked their foster mother to drive them around for an hour so they could be assured that Defendant and Mr. Flores had left town. (Tr. 336-37).

About a week later, after their foster parents told them about a trip the family was taking to Springfield, K.J. and C.J. worried whether they had to

drive through Marshall to get there. (Tr. 289). One day before taking this trip, and before the victims' second supervised visit with Defendant, K.J. and C.J. disclosed that Defendant and Mr. Flores had sexually abused them. (Tr. 290, 342-43). K.J. was present when C.J. told her foster mother that Defendant and Mr. Flores had touched the victims' "privates" and had locked them in handcuffs. (Tr. 293-94). The younger victim, C.J., used a doll to show that she had been touched on her breasts, vagina, and bottom. (Tr. 296-97). C.J. reported that Defendant and Mr. Flores had kissed her privates, both front and back. (Tr. 311).

At first, K.J. denied that it had happened, but eventually agreed with what C.J. had disclosed. (Tr. 298-300, 326). K.J. disclosed that she had been touched on her chest, vagina, and bottom. (Tr. 301). She also said that she had been handcuffed and restrained against the wall by hooks. (Tr. 300).

K.J. described an incident that occurred in the bathroom when she and her sister C.J. were taking baths. (Tr. 300). Defendant and Mr. Flores entered the bathroom and began touching and kissing them. (Tr. 300). She said that the touching stopped when the victims' grandmother came into the bathroom to stop it. (Tr. 300).

Defendant and Mr. Flores had threatened to kill the victims or to hurt their grandmother if the victims disclosed the abuse to anyone. (Tr. 300).

After making these disclosures, the victims would repeatedly check the house at night to make sure all the doors and windows were locked. (Tr. 309-10).

After these initial disclosures, the girls met with their counselor, a licensed clinical social worker. (Tr. 383-84, 389, 391-92). C.J. told the counselor that she had bled from her “hiney” and her “front” after being hurt by Defendant and Mr. Flores. (Tr. 392-95). She also described an incident, during which she was lying on her stomach, in which Mr. Flores used lotion and then touched her with something that was initially hard, but then became soft. (Tr. 403-04).

K.J. told the counselor about gray-colored “things” that had been put on her wrists and then hooked to a wall. (Tr. 393-94). She also described the bathroom incident during which Defendant and Mr. Flores touched her and C.J.’s bodies while they were naked. (Tr. 394). K.J. also reported that “they” had touched her “heiny” while K.J. was naked and lying on her stomach. (Tr. 395). Both girls expressed concern about their safety. (Tr. 411).

A member of the Lafayette County Children’s Division Office also separately interviewed C.J. and K.J. at their foster home. (Tr. 568-69, 582-84). Both C.J. and K.J. mentioned being handcuffed; the case worker could see scars on K.J.’s wrists that resulted from cuts made by the handcuffs. (Tr. 584-86). K.J. also related the bathroom incident to the case worker. (Tr. 587-88, 604). C.J. disclosed that Defendant and Mr. Flores had touched her on

her lower private area, both front and back. (Tr. 589-91). She also described the incident during which Defendant and Mr. Flores had touched her with something that looked like a hand, but was not. (Tr. 590). C.J. also said that she was touched with something that was soft at first and then got hard. (Tr. 591).

The victims were later interviewed by a forensic interviewer at Childsafe of Central Missouri. (Tr. 438-39, 445-46). A SAFE exam performed on K.J. showed no abnormalities in her genital area, a finding that is not unusual in sexual-abuse victims. (Tr. 533-36). But C.J.'s genital exam revealed that a segment of her hymen tissue was missing from the six o'clock to nine o'clock positions, which was consistent with a penetrating injury. (Tr. 538, 542-46).

The victims testified at trial through a videotaped deposition presided over by the trial judge. (State's Exhibits 22 and 23). K.J. testified that Defendant and Mr. Flores touched her in all three of her "private areas," which were her chest, vaginal area, and buttocks. (State's Exhibit 23). She described multiple times that she had been touched in both Defendant's bedroom and in the "cold room," which was a back porch area of the house that contained an air conditioning unit. (State's Exhibit 23; Tr. 483-84, 504-05). She also described being put in handcuffs and hung up by a hook in

Defendant's bedroom closet.<sup>4</sup> (State's Exhibit 23). She said that Defendant and Mr. Flores took off her clothes and touched her while she was handcuffed. (State's Exhibit 23). She also again described the bathroom incident during which Defendant and Mr. Flores touched her and C.J. while they were taking a bath. (State's Exhibit 23). K.J. said that Defendant and Mr. Flores told her that if she told anyone about the abuse, they would kill her. (State's Exhibit 23).

C.J. testified that on more than one occasion Defendant and Mr. Flores touched her in her vaginal area without her clothes while using their hands. (State's Exhibit 22). She also saw them touch her sister, K.J., when she did not have any clothes on. (State's Exhibit 22). She said that Defendant and Mr. Flores also put handcuffs on her and K.J. while they were in Defendant's bedroom closet and touched them. (State's Exhibit 22).

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<sup>4</sup> During a later search of the house, hooks were found in the master bedroom closet and master bedroom wall of the house, and holes were found in the bedroom wall at eye level. (Tr. 480-82). The victims described and identified to police the style of hook used to restrain them against the wall. (Tr. 506-07).

Neither Defendant nor Mr. Flores (Paco) testified at trial. Defendant's mother testified that she never saw Defendant do anything inappropriate to K.J. and C.J. (Tr. 625, 629).

The jury found Defendant guilty on both counts and recommended a sentence of twenty-five years for each count. (Tr. 698-700, 725; L.F. 6, 173-74, 183-84). The trial court later sentenced Defendant to twenty-five years imprisonment on each count, with the sentences to run concurrently. (Tr. 742; L.F. 7, 202-03).

## ARGUMENT

### I (verdict directors).

**The trial court did not plainly err in submitting Instruction Numbers 6 and 7, the verdict directors on the charge of first-degree statutory sodomy pertaining to each victim.**

Although Defendant did not object to the verdict directors submitted to the jury, she now asserts, for the first time on appeal, that the trial court plainly erred in giving these instructions. She suggests that the verdict directors' failure to specify a precise location where the specific act of hand-to-genital contact occurred violated her right to a unanimous jury verdict because there was no assurance that the jurors had all agreed on the same specific incident of sodomy.

But the record in this case does not support Defendant's unsupported, speculative claim that the alleged instructional error so misdirected the jury that it violated her right to a unanimous jury verdict. Because Defendant is seeking plain-error review, she had the burden of showing that it was probable that the jurors had not all agreed on the same act of sodomy for each victim, which she has failed to do. Moreover, Defendant was charged with only one count of statutory sodomy for each victim, the evidence showed that Defendant or Mr. Flores committed multiple acts of hand-to-genital

contact over the charged period, the defense at trial was that no sexual abuse had occurred and that the victims were simply lying, and Defendant submitted nearly identical verdict directors for the lesser offense of child molestation without specifying any location where the acts occurred.

**A. The record regarding the verdict directors.**

The indictment against Defendant charged two counts of first-degree statutory sodomy—one count for each victim. (L.F. 8-9). The charge for each count was identical, with the exception of the victim’s name:

The Grand Jurors of the County of Saline . . . charge that the defendants . . . committed the felony of statutory sodomy in the first degree . . . in that between the dates of January 01, 2006 and May 31, 2006 . . . defendant Maura Celis-Garcia and defendant Jose F. Flores had deviate sexual intercourse with [C.J. or K.J.], who was then less than twelve years old.

(L.F. 8-9).

During the instructions conference, defense counsel tendered four instructions (one for each defendant pertaining to both C.J. and K.J.) labeled “A,” “B,” “C,” and “D” as verdict directors for the offense of second-degree child molestation. (Tr. 647-48; L.F. 148-51). The instructions tendered by defense counsel were identical to the verdict directors submitted by the State

on the charge of first-degree statutory sodomy except for language identifying it as a lesser-included-offense instruction in the first paragraph,<sup>5</sup> a reference to second-degree child molestation in the penultimate paragraph, and a change in the third paragraph positing that the victims were less than “seventeen” years old, as opposed to being less than “twelve” years old as provided in the verdict directors submitted by the State.<sup>6</sup> (L.F. 148-51; Tr. 647-48). Because the evidence was undisputed that the victims were less than twelve years old when the offenses were committed, the trial court

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<sup>5</sup> “As to Count [1 or 2] if you do not find the defendant, [Maura Celis-Garcia or Jose F. Flores], guilty of statutory sodomy in the first degree as submitted in Instruction No. \_\_\_\_, you must consider whether [she or he] is guilty of child molestation in the second degree under this instruction.” (L.F. 148-51).

<sup>6</sup> The offense of first-degree statutory sodomy requires proof that the victim was less than fourteen years old, and provides for an enhanced penalty if the victim is less than twelve years old. Section 566.062, RSMo Cum. Supp. 2009. The offense of second-degree child molestation (a class A misdemeanor) requires proof only that the victim was less than seventeen years old. Section 566.068, RSMo 2000.

refused to submit defense counsel's tendered instructions to the jury.<sup>7</sup> (Tr. 648-51). When the court asked counsel if there was "anything else," defense counsel replied, "no, Judge." (Tr. 651-52).

The verdict directors (Instruction Numbers 6 and 7) submitted to the jury on the statutory sodomy charges were identically worded, with the exception of the count number and the victim's name:

As to Count [1 or 2] 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 1, 2005<sup>8</sup> 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. or K.J.]'s genitals, and

Second, that such conduct constituted deviate sexual intercourse, and

Third, at the time that [C.J. or K.J.] was less than twelve years old,

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<sup>7</sup> Defendant makes no claim in this appeal that the trial court erred in refusing to submit her tendered instructions.

<sup>8</sup> Although the indictment alleged the dates as being between "January 01, 2006, and May 31, 2006," Defendant has raised no claim regarding use of the 2005 date in the verdict directors.

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, then you will find the defendant Maura L. Celis-Garcia guilty under Count [1 or 2] of statutory sodomy in the first degree.

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

(L.F. 104-05). The paragraph describing the specific act the jury must find to hold Defendant guilty (Paragraph First) was worded identically in the verdict directors tendered by Defendant:

First, that . . . the defendant, Maura Celis-Garcia, placed her hand on [C.J. or K.J.]’s genitals, and . . .

(L.F. 148-49).

## **B. Standard of review.**

Defendant has waived her right to appellate review by failing to object at trial to the giving of the verdict-directing instructions for the statutory-sodomy charges. This Court is not required to give plain error review to this claim, especially since Defendant failed to comply with Rule 28.03, which provides:

Counsel shall make specific objections to the instructions or verdict forms considered erroneous. No party may assign as error the giving or failure to give instructions or verdict forms unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Counsel need not repeat objections already made on the record prior to delivery of the instructions and verdict forms. The objections must also be raised in the motion for new trial in accordance with Rule 29.11.

Rule 28.03. An appellate court should be especially reluctant to consider plain error relief on instructional issues when counsel has failed to comply with Rule 28.03. This Court may find that Defendant waived the right for plain-error review because she failed to object to these instructions at trial.

*See State v. Wurtzberger*, 40 S.W.3d 893, 898 (Mo. banc 2001); *State v. Martindale*, 945 S.W.2d 669, 673 (Mo. App. E.D. 1997). This is especially

true in this case when Defendant submitted nearly identical verdict directors, which were ultimately refused, as those submitted to the jury.

If this Court should choose to undertake plain error review, Defendant has a tremendous burden to show that she suffered manifest injustice.

“Instructional error seldom rises to the level of plain error.” *State v. Wright*, 30 S.W.3d 906, 912 (Mo. App. E.D. 2000); *State v. Holman*, 965 S.W.2d 464, 470 (Mo. App. W.D. 1998). For instructional error to be plain error, the defendant must show more than mere prejudice; she must “demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident that the instructional error affected the jury’s verdict. *State v. Baker*, 103 S.W.3d 711, 723 (Mo. banc 2003); *Wright*, 30 S.W.3d at 912; *see also State v. Doltle*, 896 S.W.2d 27, 29 (Mo. banc 1995).

**C. This Court should not consider Defendant’s plain-error claim.**

Defendant is essentially asking this Court to rule that she suffered manifest injustice when the trial court failed to alter the verdict-directing instructions when neither she nor the State had requested or invited the court to do so. Trial judges are not expected to assist counsel in trying cases and should act *sua sponte* only in “exceptional circumstances.” *State v. Buchner*, 929 S.W.2d 795, 799-800 (Mo. App. W.D. 1996). “Uninvited interference by the trial judge in trial proceedings is generally discouraged,

as it risks injecting the judge into the role of a participant and invites trial error.” *State v. Roper*, 136 S.W.3d 891, 902 (Mo. App. W.D. 2004). “In certain circumstances, a trial judge’s intervention in the proceedings may be unwelcome, as the failure to raise an objection may be a matter of trial strategy.” *Id.* See also *State v. Drewel*, 835 S.W.2d 494, 498 (Mo. App. E.D. 1992) (holding that appellate courts do not expect trial judges to assist counsel in trying cases and that *sua sponte* action should be exercised only in exceptional circumstances).

Although Defendant does not specifically identify what action the trial court should have taken, she implies that the court should have edited the verdict directors to insure that the jurors all agreed on the same incident in which hand-to-genital contact occurred. But that is a peculiar argument to make under the facts of this case considering that Defendant submitted verdict directors for the offense of child molestation that contained language identical to the State’s verdict director about which she now complains for the first time on appeal. The trial court should not be convicted of plain error for failing to change, or add to, the language in the verdict directors it did submit to the jury when that language was identical to that contained in the verdict directors Defendant sought to have submitted to the jury.

Trial strategy may have also played a part in Defendant’s choice not to object to the State’s verdict directors and in submitting nearly identical

verdict directors of her own. Although the evidence showed repeated acts of hand-to-genital contact inflicted on the victims, the State chose only to charge Defendant with one count of first-degree statutory sodomy for each victim. Since the defense at trial was that no sodomy had occurred and that the victims had lied, it would have made no sense to remind jurors of the extent of the sodomy testified to by the victims by having multiple verdict directors that identified a different location in or near the house where the sodomy occurred. Of course, now that Defendant's trial strategy of obtaining an outright acquittal has proved unavailing, she has shifted gears and seeks a new trial from this Court by raising a claim of instructional error asserted for the first time on appeal.

An appellate court should not countenance this type of sandbagging to convict a trial court of plain error for failing to do something the defendant did not ask it to do, especially when it appears that the failure to seek relief was a conscious choice based on trial strategy considerations. "A party cannot fail to request relief, gamble on the verdict, and then, if adverse, request relief for the first time on appeal." See *State v. Powell*, 286 S.W.3d 843, 852 (Mo. App. W.D. 2009) (quoting *State v. Bennett*, 201 S.W.3d 86, 88 (Mo. App. W.D. 2006)). See also *State v. D.W.N.*, 290 S.W.3d 814, 828-29 (Mo. App. W.D. 2009) (holding that a "trial court does not plainly err when it fails to *sua sponte* prohibit the introduction of objectionable evidence when the

totality of the surrounding circumstances reflect a clear indication that trial counsel strategically chose not to object to the evidence”).

This is simply not the appropriate case for this Court to consider the constitutional issue Defendant has raised regarding the proper method of instructing a jury when there is evidence of multiple acts charged in a single count. The development of a policy for instructing juries under those circumstances should only be made in a case in which a proper objection was lodged to the jury instructions and an appropriate record has been made. Too often have defendants employed all-or-nothing strategies and gambled on verdicts only to seek plain error review on claims raised for the first time on appeal when things do not go their way. This results in appellate courts considering and ruling on claims that were not properly presented to the trial court and in which a proper record has not been made. Decisions made under these circumstances create precedents that can later prove to be not only unworkable, but also undesirable. Scarce judicial resources should not be wasted in considering the claims of criminal defendants who pursue an outright acquittal at trial and when that strategy proves unsuccessful, assert claims for the first time on appeal in seeking to reverse their convictions. It is for these reasons that litigants are required to properly preserve claims for appellate review, and why appellate courts in many instances refuse to consider claims of plain error.

**D. Defendant's right to a unanimous jury verdict was not violated.**

The Missouri Constitution provides that “the right of trial by jury as heretofore enjoyed shall remain inviolate.” MO. CONST. art I, § 22(a). Rule 29.01(a) provides that the jury’s “verdict shall be unanimous . . . .” Although these provisions require a unanimous verdict, they do not precisely define what it is the jury must unanimously agree on.

Obviously, the jury must unanimously agree on each element of the offense as set out in the verdict director. In this case, no one disputes that the jury unanimously agreed that each element of the offense was satisfied. This includes the specific act forming the basis for the charge, which was that Defendant or Jose Flores placed her or his hand on the victims’ genitals. Since Defendant was charged with a only single count of statutory sodomy for each victim, the requirement for jury unanimity was satisfied.

But Defendant complains that notwithstanding the fact that she was charged with only one count for each victim, she was denied her right to a unanimous verdict because the evidence showed that more than one act of statutory sodomy occurred during the charged time period. Thus, she contends, there is no assurance that each juror considered the same incident of statutory sodomy in rendering his or her verdict. Defendant argues that

the trial court's failure to require the jurors to all agree to one specific act violated her constitutional right to a unanimous verdict.

The fallacy of Defendant's argument is exposed when the logical extension of it is considered. In this case, the evidence showed that acts of hand-to-genital contact occurred in various rooms in the house in which the victims lived. Defendant claims that to insure a unanimous verdict, the verdict director should have specified which location the jury believed an act of sodomy occurred to demonstrate that jurors had agreed on the same act. But the evidence also showed that more than one act of sodomy may have occurred at some of these locations. Defendant does not explain how the jury could have been instructed to insure that unanimity was reached with respect to a particular act of sodomy when nothing in the record exists to differentiate those occurrences.

Consider a case in which a child-victim testifies that the defendant committed ten acts of hand-to-genital contact on the same day in the victim's bedroom while the victim was lying on the bed. The child victim can provide no further details distinguishing one specific act from the other, which would not be surprising in a case involving a young child. If Defendant's argument were accepted, the defendant in that case could not be found guilty of any crime without violating his right to a unanimous verdict because it would be impossible to demonstrate that each juror agreed on the same specific act of

sodomy of the ten committed. Such a rule would work a particular hardship in prosecuting cases involving young children subjected to multiple, but identical, acts of sexual abuse.

Judge Hardwick, writing for the court below and citing to *State v. Hoban*, 738 S.W.2d 536 (Mo. App. E.D. 1987), “recognize[d] the need to balance the rights of the accused against the practical needs of our justice system in cases that involve sexual offenses against children.” *State v. Celis-Garcia*, No. WDD69199, slip op. 10 (Mo. App. W.D. Apr. 20, 2010).

Our courts allow fewer details in charging such crimes because child victims may find it difficult to precisely recall the dates of the offenses against them. Even if a specific date for the offense is not alleged, the defendant is adequately protected by the requirement that the jury must find him or her guilty beyond a reasonable doubt. The jury can weigh the inability of the victim to specify the time and date of the crime in determining whether that standard of guilt has been met.

*Id.* at 10-11.

A rule of constitutional significance should not be dependent on the specificity of a child-victim’s testimony or the ability to differentiate between specific acts of sexual abuse. The fact that one victim testifies to details that enables jurors to distinguish between specific incidents, while another does not, should not be the determining factor in deciding whether a defendant’s

right to a unanimous verdict has been preserved. It should make no difference from a constitutional standpoint that one child victim is able to provide more detailed information about the location or timing of acts of sexual abuse than another. No constitutional significance should be attached to the fact that a defendant committed one act of sexual abuse in the bedroom and committed a second identical act against the same victim in the bathroom.

Moreover, Defendant's argument places no limit on the type of detailed evidence that might be required to distinguish between acts. The fact that the victim was wearing a blue shirt or a red shirt or tennis shoes or sandals should be of no constitutional significance in determining the parameters of the right to a unanimous verdict. See *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring) ("Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.").

Because Defendant stands convicted, she advances arguments with the sole purpose to obtain a reversal and a retrial. In making these arguments, she gives no consideration to the consequences that would result if this Court should adopt her position.

If a blanket rule requiring either multiple verdict directors or the inclusion of language specifying an exact location or other differentiating

factor in a verdict director in a single-count case involving evidence of multiple acts of identical abuse was made mandatory in all cases, prosecutors would be induced to parse the evidence, identify any facts that potentially distinguish the separate acts, and charge multiple counts against the defendant. There would be no incentive for prosecutorial restraint, as was shown in this case, in charging a single count despite the fact that evidence of multiple acts, which could have also been charged, is also present.

In a case involving a single charged count in which evidence of multiple acts of sexual abuse committed in the same manner and against the same victim has been presented, a defendant's constitutional right to a unanimous jury verdict has been satisfied if all twelve jurors agree to the elements contained in a verdict director that complies with MAI-CR 3d. Consequently, Defendant's right to a unanimous jury verdict in this case was not infringed.

Defendant relies on the Notes on Use to MAI-CR 3d 304.02 in support of her constitutional claim. That note allows the defense to request that the place of the offense be identified in the verdict director:

The place of the offense may become of "decisive importance" under certain circumstances, such as (a) when evidence of alibi is introduced, . . . or (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.

MAI-CR 3d 304.02, Notes on Use 5.

This note should not be construed as defining the scope of the constitutional right to a unanimous jury verdict. If it did, it would not make the inclusion of language specifying the precise location of an offense optional at the request of the defendant or on the court's own motion. In addition, under the hypothetical discussed above, in which the offenses took place in the same location and the child victim cannot provide any further distinguishing details, it would be impossible to craft a verdict directing identifying a specific location to distinguish between offenses. It seems then that this note is most appropriately applied in situations in which the defendant has been charged with more than one count involving similar or identical offenses. That is when the ability of the jury to distinguish between offenses "becomes of 'decisive importance,'" since it is being called upon to determine if more than one offense has occurred. In a case charging a single count in which evidence of multiple, identical offenses has been presented, and in which the defendant has denied that any offenses have occurred, the

ability to distinguish between offenses is not paramount, certainly not in a constitutional sense.

Consequently, Defendant's claim is not that her constitutional right to a unanimous verdict was violated, but is simply that instructional error occurred in the drafting of the verdict directors. Since she has failed to demonstrate that this instructional error affected the jury's verdict, she is not entitled to relief.

In addition, it is difficult to convict the trial court of plain error when more than one alternative was available to specifically identify the incident of abuse. Multiple verdict directors for each count could have been submitted that each identified a separate location. See MAI-CR 3d 304.02, Notes on Use 3(c); MAI-CR 3d 304.14 and 304.16. Or the State could have elected the location in which the incident it had charged occurred and specified that location in the verdict director. The fact that there was no one way of handling the situation—if an appropriate objection had been made—militates against adopting a blanket rule, or even allowing plain-error review of Defendant's claim.

Defendant's claim in this case is much less compelling than the one the court rejected in *State v. Smith*, 32 S.W.3d 134 (Mo. App. E.D. 2000), in which the instructions on two counts of sexual misconduct were identical except for the reference to different count numbers. *Smith*, 32 S.W.3d at 135.

In Defendant's case, the verdict directors are differentiated not just by count number, but also by the victim involved. Just like Defendant in this case, the defendant in *Smith* sought plain-error review on the giving of these instructions. Although the court suggested that the instructions could have been clearer by supplying more detail as to the location of each offense, it found no plain error in giving these instructions:

But the instructions are legally correct and, if the point had been timely raised, the court would have undoubtedly complied with a request for clarification. We consider the appellant's suggestion that some jurors might have had one touching in mind when voting for guilt on Count II, while other jurors found a different touching, highly unlikely. What is much more probable is that the jurors discussed each incident separately and found guilt on the only touching all of them agreed to.

*Id.* at 136. The *Smith* court also held that the defendant's failure to object at trial was an important consideration in determining that the defendant had failed to carry her burden of proving that the trial court had committed plain error:

The parties have cited cases involving similar infirmities, but we do not consider them in detail because of the defendant's failure to comply with Rule 28.03. The defendant, having failed in this respect, does not

persuade us that there is plain error requiring us to excuse her failure to comply with the governing rule.

*Id.*

Similar claims have been rejected in other cases, including in *State v.*

*Burch*, 740 S.W.2d 293 (Mo. App. E.D. 1987), *State v. Staples*, 908 S.W.2d 189 (Mo. App. E.D. 1995), and *State v. Rudd*, 759 S.W.2d 625 (Mo. App. S.D. 1988).

In *Burch*, the jury was given an instruction similar to Instruction No. 12 (that each count should be considered separately) given in this case, along with two identical verdict-directing instructions for sodomy. *Burch*, 740 S.W.2d at 295. The court noted that the jury was given the instruction based on MAI-CR 2d 2.70, a predecessor to MAI-CR 3d 304.12, which instructed the jury that “[e]ach offense and the law applicable to it should be considered separately.” *Id.* The Court found that this adequately guarded against any danger that the jury would impose multiple punishments for a single crime. *Id.* Although *Burch* is primarily a double-jeopardy case, the *Burch* court stated that the submission of allegedly insufficiently differentiated instructions does not warrant reversal where the defendant made no complaint at trial and where the defense to the two counts was the same.

*Burch*, 740 S.W.2d at 295-296.

In *Staples*, the defendant was charged with two counts of rape. The instructions for each rape charge were identical except for the reference to the count number. *Staples*, 908 S.W.2d at 190. Although the court noted that the notes applicable to the form instructions suggested fixing the conduct by referring to time, place, or some other reference, the court must still determine whether the failure to give an instruction as provided in the applicable Notes on Use is prejudicial error. *Id.* In *Staples*, the court found that the defendant was not prejudiced because the jury was instructed to consider and return a verdict separately for each count. *Id.* Moreover, the defense in *Staples* was that the victim consented, so the defense did not vary from count to count. *Id.* at 190-91. Finally, the *Staples* court held that no prejudicial error occurred even though the defendant preserved the alleged instructional error for appellate review. *Id.* at 189.

In *Rudd*, the defendant was charged with three counts of rape. The instructions for these rape charges were identical except that each instruction referred to a different count in the information. *Rudd*, 759 S.W.2d at 628. The defendant in *Rudd* preserved his claim of instructional error for appellate review. *Id.* at 625-26. The court held that although multiple offenses should be differentiated when possible, there was no prejudicial error in that case. *Id.* at 629-30. The court stated that it must look to whether the jury was confused before it could find prejudicial error:

We agree with the general proposition that if multiple offenses are submitted against a single defendant, the different offenses submitted should be distinguished. . . . Nevertheless, the possibility that the jury might be confused by an attempt to distinguish between offenses which are indistinguishable except in relation to each other is to be considered. In the case at hand, we are convinced that the jury clearly understood that the defendant was charged with different offenses in distinct counts and that each offense was to be considered separately.

*Id.* at 630.

In each of these cases, the verdict directors were identical except for the reference to the count number, yet the appellate court rejected claims that the jury was confused by the instructions or had not agreed on the same act or incident constituting the offense. In Defendant's case, the verdict directors were clearly differentiated in that each referred to a separate victim. This level of differentiation makes Defendant's claim much less compelling than the ones rejected by the courts in the cases discussed above.

In *United States v. Sims*, 975 F.2d 1225 (6<sup>th</sup> Cir. 1992), the defendant, who was convicted on one count of possession of a firearm by a convicted felon, argued that his right to a unanimous jury verdict was violated because two guns were identified in the indictment and "no procedure was used for the jury to specify which gun, if either, they unanimously agreed [the

defendant] possessed in violation of the statute.” *Id.* at 1240. In rejecting this claim, the court noted that the “touchstone has been the presence of a *genuine* risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts.” *Id.* at 1240-41 (emphasis added). The court found no error, plain or otherwise, because the guns had been in the backseat of the same car in which the defendant was riding and there was “no chance of jury confusion or of differing outcomes with regard to these two guns.” *Id.* at 1241.

Defendant cites *State v. Mackey*, 822 S.W.2d 933 (Mo. App. E.D. 1991), in her brief, but as that case involved a disjunctive submission contained in the verdict director, it is inapposite to the claim Defendant raises here.

In *Mackey*, the defendant in a sodomy case did not object to a verdict director that alleged in the first paragraph “that defendant placed his *hand or mouth* on the genitals of” the victim. *Mackey*, 822 S.W.2d at 936 (emphasis in original). The court rejected the defendant’s plain-error claim on the grounds that: (1) the record contained sufficient evidence to find that the defendant committed both acts; and, (2) the abuse took place simultaneously on the same day and within a single time frame. *Id.*

The *Mackey* court also rejected the defendant’s claim that his case was controlled by the now fifty-year-old case of *State v. Oswald*, 306 S.W.2d 559 (Mo. 1957), another case Defendant cites in her brief. *Id.* Although the court

was aware that “the disjunctive submission of an element of an offense in a single instruction can present an issue of unanimity,” it found that while the disjunctive submission was “improper” it did not result in manifest injustice to the defendant. *Id.*

In *Oswald*, a single verdict director charged separate offenses based on two distinct acts. It told the jury to find the defendant guilty if he “inserted his genital organ into the ‘mouth and rectum’” of the victim “or ‘committed either of such aforesaid acts.’” *Oswald*, 306 S.W.2d at 53. Obviously, Defendant’s case is distinguishable.

Finally, in *State v. Pope*, 733 S.W.2d 811 (Mo. App. W.D. 1987), the defendant was charged with two counts of sodomy involving two different victims. *Id.* at 812. But the jury also heard evidence of multiple acts of sodomy committed in an alternative manner not alleged in the indictment, and, according to the court, the evidence of sodomy not alleged in the indictment was more believable than what was alleged. *Id.* at 812-13.

Here, the record contains uncontested evidence to show that Defendant committed deviate sexual intercourse with each victim. Nothing in the record suggests that there was any dispute regarding whether one particular act of deviate sexual intercourse occurred and another did not. The victims consistently recounted the same acts of deviate sexual intercourse. Finally, Defendant’s defense was not to deny that certain, specific acts of deviate

sexual intercourse had occurred. Rather, her defense was that no act of deviate sexual intercourse had occurred and that both victims were lying and had fabricated the charges. Consequently, Defendant was not prejudiced by the alleged failure of the verdict directors to specify a particular act of deviate sexual intercourse occurring in a specific location because she denied that any crime had occurred.

Defendant cites to the dissenting opinion below to support her claim that she offered “different defenses for different incidents.” App. Br. 35-37. But her attacks on the victims’ testimony related to each incident was not to further a defense that any particular offense did not occur, it was part of an overall trial strategy to show that contradictions and inconsistencies in the victims’ testimony proved that none of the acts occurred. The entire defense strategy, as evidenced by counsel’s closing argument, was that no act of sexual abuse occurred, that the victims had fabricated their stories, that the victims’ claims were incredible when compared to the evidence presented at trial, that the victims’ motivation was to avoid being taken from their foster parents and having to return to their mother, and that well-intentioned officials were duped by the victims’ stories of abuse. (Tr. 666-86).

Defendant also suggests that evidence of juror confusion over the verdict directors is evidenced by the fact that the jury hung in her first trial.

But such rank speculation about what caused the jury to hang in Defendant’s

first trial is insufficient to demonstrate that she suffered manifest injustice. It is Defendant's burden to establish that plain error occurred, and she cannot satisfy this burden by relying on speculative conclusions that the unknown reason why the jury hung in her first trial must somehow demonstrate that the jury in her second trial was not only confused over the verdict directors, but that the jurors had different incidents in mind when they voted to find Defendant guilty.

A defendant cannot establish prejudice justifying the reversal of a criminal conviction by offering nothing other than speculation. See *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. banc 2006). In *State v. Taylor*, 134 S.W.3d 21 (Mo. banc 2004), the defendant claimed the wording of certain jury instructions "could have allowed the jury to infer that the burden of proof was not beyond a reasonable doubt." *Id.* at 30. The court rejected this claim because the defendant "offer[ed] only conclusory statements and speculation that the alleged error in instruction would have influenced the jury's verdict." *Id.* In *State v. Wolfe*, 793 S.W.2d 580 (Mo. App. E.D. 1990), the defendant claimed that he was prejudiced by the prosecution's failure to disclose a test result because "disclosure 'may very well have affected' his preparation for trial." *Id.* at 588. The court held that this claim of prejudice was "well short of the reasonable likelihood of an effect on the outcome [of trial] that defendant must demonstrate to show fundamental unfairness." *Id.*

Defendant's assertion that she suffered manifest injustice based on double-jeopardy grounds is also unavailing. In *State v. Baker*, the defendant argued for the first time on appeal that he suffered manifest injustice by submission of a disjunctive verdict director for the possession of chemicals with the intent to create a controlled substance on the ground that since it was "impossible to ascertain which chemical he was found to have possessed, he will be unable to plead former jeopardy as to possession of all of the listed chemicals." 103 S.W.3d at 723. This Court flatly rejected the claim:

[T]he argument is simply not plausible. There is no reason to believe that the state could bring a later claim charging appellant again with possession of the same chemicals.

*Id.* See also *State v. Jennings*, 761 S.W.2d 642, 644 (Mo. App. W.D. 1988) (rejecting a double-jeopardy challenge on the ground that the verdict-directors did not sufficiently differentiate between counts).

The State charged Defendant for any conduct occurring between January 1, 2006 and May 31, 2006. (L.F. 8-9). Consequently, since Defendant was tried in one count for any offense occurring between those dates, the State would not be able to charge the same conduct occurring between those dates in any future prosecution. In fact, this method of charging inured to Defendant's benefit, since she could have been charged

with each specific act of statutory sodomy proved by the evidence adduced at trial.

Finally, Defendant's reliance on out-of-state cases is unconvincing because those cases are readily distinguishable from Defendant's case.

For example, in *State v. Voyles*, 160 P.3d 794 (Kan. 2007), the evidence showed that over a three-month period, the defendant forced his daughter and step-daughter to perform oral sex on him on multiple occasions. One victim (E.F.) did not specifically identify where these incidents occurred during her trial testimony, but had previously told a social worker that the incidents had occurred in their house, specifically in defendant's bedroom and on the couch in the living room. *Id.* at 798-99. The other victim (C.C.), however, testified at trial that the incidents occurred only in the house or in the defendant's pickup truck, which was different than what she had told the social worker and her mother's aunt (both of whom testified at trial) that some incidents had occurred at the victim's grandmother's house or at a café.

*Id.*

The defendant in *Voyles* was charged with eight counts—two counts of aggravated criminal sodomy and two counts of aggravated indecent solicitation for each victim. *Id.* at 799-800. In other words, despite the fact that “potentially 20 different acts or offenses were committed,” the defendant was charged only with committing an act of solicitation followed by an act of

sodomy on two separate occasions for each victim. *Id.* at 800. Relying on the fact that the defendant had not presented a “unified defense” in its “purest form” and citing “discrepancies” in the evidence “between the [victims] themselves, “between the [victims] and [their mother’s aunt], “and some inconsistencies in C.C.’s” pretrial statements and her trial testimony, coupled with the fact that multiple acts were charged for each victim, the court held that “*under these facts* there is a real possibility the jury would have returned a different verdict if the unanimity instruction had been given.” *Id.* at 804-06.

In *State v. Kitchen*, 756 P.2d 105 (Wash. 1988), the court considered two consolidated cases: one in which the defendant was charged with one count of statutory rape for several incidents occurring with one victim over several months, while another defendant was charged with three counts arising out of incidents involving a different child. *Id.* at 107. The parties agreed that error occurred because Washington’s policy applying to cases in which evidence of several acts that could form the basis of one charged count was violated. *Id.* at 108. In those situations, the prosecution must tell the jury during argument on which act to rely or the court must instruct the jury to agree on a specific criminal act. *Id.* The appellate court considered the claim under Washington’s harmless error rule, which provided that an “error is not harmless if a rational trier of fact could have a reasonable doubt as to

whether each incident established the crime beyond a reasonable doubt.” *Id.* at 109. Defendant’s claim here is raised under the plain-error rule, which puts the burden on her to demonstrate that she suffered manifest injustice.

But in a later Washington case, *State v. Allen*, 787 P.2d 566 (Wash. App. 1990), the court held that in a case involving a single count pertaining to one victim, when the defense generally denies that any improper touching occurred and the victim’s testimony shows that substantially the same contact occurred during each incident, it could “find no rational basis for jurors to distinguish among the acts charged” in violation of the defendant’s right to a unanimous verdict. *Id.* at 567-69.

In *People v. Keindl*, 502 N.E.2d 577 (N.Y. 1986), the defendant was charged in a 32-count indictment of sexually abusing his three step-children. *Id.* at 578.

Defendant has failed to demonstrate that she suffered manifest injustice from the trial court’s submission of the verdict directors in this case. Nothing in the record demonstrates that the jurors had different incidents in mind when they voted to find Defendant guilty of committing hand-to-genital contact on each victim. Under the circumstances of this case, the jurors’ unanimous decision to find that Defendant committed that act against each victim was sufficient to satisfy Defendant’s right to a unanimous verdict.

## II (testimony).

**The trial court did not plainly err in either allowing, or failing to intervene *sua sponte* to preclude, the testimony given by the social worker and forensic interviewer.**

Defendant complains that testimony given by the victims' counselor should have been excluded because it vouched for the victims' credibility.

She also contends that the trial court plainly erred in not intervening, *sua sponte*, to preclude certain testimony given by the forensic interviewer, even though Defendant lodged no objection to it at trial. Defendant has failed to establish that the court plainly erred in not excluding this testimony.

### **A. The record regarding the challenged testimony.**

#### **1. Ellen Walls (licensed clinical social worker).**

In May 2006, about a month after they were removed from Defendant's care, the victims began counseling sessions with Ellen Walls, a licensed clinical social worker with experience in treating children who have been sexually abused. (Tr. 383-89). Ms. Walls, who had been in private practice since 2000, saw the victims on three or four occasions before they revealed to their foster parents that they had been sexually abused by Defendant and her boyfriend, Jose Flores (Paco). (Tr. 390-91). Four days later, the victims made similar revelations to Ms. Walls during separate counseling sessions. (Tr.

391-96). During the twenty months she had seen the victims before trial began, Ms. Walls had counseling sessions with them twice a month, but on occasion she saw them weekly. (Tr. 398). Ms. Walls testified that she was “not an investigator, that’s not my job to determine the facts of that situation.” (Tr. 397). She said that her “job is to work with children based on what they’ve experienced and how they’re feeling about it and help them come to terms with their experiences and their perceptions of those experiences.” (Tr. 397).

Later during direct examination, the prosecutor asked Ms. Walls, whether the victims’ behaviors were consistent with sexual abuse:

Q. Ma’am based upon your education, training and experience, the behaviors that you have personally observed with these little girls, and the disclosures that they have made to you, are they consistent with a child that has been sexually abused?

A. Yes, their behaviors are consistent with experiencing a very traumatic event.

(Tr. 407-08). The trial court overruled Defendant’s counsel objection to this question on the ground that it invaded the province of the jury and called for speculation and conjecture. (Tr. 407-08). The prosecutor then asked Ms.

Walls whether the victims’ behaviors were inconsistent with a child who had been sexually abused:

Q. Are there any behaviors or any disclosures they [the victims] made to you, that again based on your education, training and experience, you have found to be inconsistent with a child who has been sexually abused?

[Defendant's Counsel]: Same objection.

The Court: Overruled.

A. No.

(Tr. 408).

The prosecutor finally asked Ms. Walls whether the victims had ever told her anything that caused her to doubt their truthfulness:

Q. Ma'am, during the counseling sessions that you had provided these girls over the past 20 months, had they ever provided to you any information that gave you reason to doubt the truthfulness of what they were telling you?

A. No. They've been consistent in what they have said. They have talked about the traumatic event. They have given a consistent story of what happened. They have sometimes added new pieces of information, but not anything that contradicted their original story.

(Tr. 413).

Defendant's counsel did not object to this question or answer. (Tr. 413). Instead, he immediately began an extensive cross-examination of Ms. Walls establishing that she had never seen the victims' statements or video depositions and that she had not spoken with the victims' grandmother or any neighbors, friends, or relatives of the family about the allegations. (Tr. 414-16). She also agreed that she had not conducted any investigation into the allegations of sexual abuse, nor was she privy to "everything" done in the investigation that had occurred. (Tr. 415-16). She also confirmed that she had not seen the "childsafes" interview conducted of the victims, that she had never seen such an interview, and that seeing these interviews was "not a requirement for me to do my job." (Tr. 423). She said that such interviews were part of the "investigative process and it is not my job. . . . My job is not to be an investigator." (Tr. 423).

During redirect examination, Ms. Walls reiterated that her function was not to investigate the victims' allegations of sexual abuse, but to help them cope with what they had experienced. (Tr. 432-33).

## **2. Maria Mittelhauser (forensic interviewer).**

The juvenile officer for the 18<sup>th</sup> Judicial Circuit, Maria Mittelhauser, testified that she conducted separate forensic ("Childsafe") interviews of both victims on June 19, 2006. (Tr. 445-46). During direct examination, the

prosecutor asked her whether the victims had made statements that caused Ms. Mittelhauser to believe that they were not being truthful:

Q. At anytime and during the interview process did you ever get information or answers from either [K.J.] and [C.J.] that caused you to believe they were not being truthful?

A. No.

(Tr. 452). Defendant's counsel did not object to this question. Instead, during cross-examination, Defendant's counsel got Ms. Mittelhauser to admit that she had not made any effort during her questioning of the victims, such as cross-examining them or confronting them with information obtained from other sources, to determine whether they were, in fact, giving truthful responses. (Tr. 454-55, 460).

#### **B. Standard of review.**

Although Defendant objected to two of the questions put to Ms. Walls, he did not include the claim raised in his brief in his motion for new trial. The only aspect of Ms. Walls testimony included in the motion for new trial concerned her testimony regarding the psychological phenomena of delayed reporting by victims of child-sexual abuse. (L.F. 192-93). His motion does not refer to the questions asked of Ms. Walls regarding whether the victims' behaviors were consistent with those of sexual-abuse victims. Consequently,

his claim is not preserved for appellate review and may be reviewed, if at all, only for plain error.

Plain errors may be considered in the discretion of the court when the court finds that manifest injustice or a miscarriage of justice has resulted therefrom. Rule 30.20. The plain error rule should be used sparingly and does not justify a review of every alleged trial error that has not been properly preserved for appellate review. *State v. Hibler*, 21 S.W.3d 87, 96 (Mo. App. W.D. 2000).

Plain error review is essentially a two-step process. First, the court must determine whether the claim for review “facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted.” *Id.* If this is not found, then the court should decline to exercise its discretion to review a claim of error under Rule 30.20. *Id.* Not all prejudicial or reversible error is plain error. Plain errors are those which are “evident, obvious and clear.” *Id.* If the court finds plain error, then the second step requires the court to determine whether the claimed error resulted in manifest injustice or a miscarriage of justice. *Id.* A plain error is one that “must impact so substantially upon the rights of the defendant that manifest injustice or a miscarriage of justice will result if uncorrected.” *State*

*v. Driscoll*, 711 S.W.2d 512, 515 (Mo. banc 1986).

**C. The trial court did not plainly err in allowing this testimony.**

“In cases involving the sexual abuse of a child, there are typically two types of expert testimony that give rise to a challenge: general and particularized.” *State v. Churchill*, 98 S.W.3d 536, 539 (Mo. banc 2003); see also *D.W.N.*, 290 S.W.3d at 817. “General testimony describes a ‘generalization’ of behaviors and other characteristics commonly found in those who have been the victims of sexual abuse.” *Id.* “Particularized testimony is that testimony concerning a specific victim’s credibility as to whether they have been abused.” *Id.* A trial court should not admit “particularized testimony . . . because it usurps the decision-making function of the jury.” *Id.*

“When determining the admissibility of opinion testimony, expert witnesses should not be allowed to give their opinion as to the veracity of another witness’s statement, because in so doing, they invade the province of the jury.” *Churchill*, 98 S.W.3d at 538-39 (Mo. banc 2003); see also *State v. Chism*, 252 S.W.3d 178, 182 (Mo. App. W.D. 2008) (“Expert testimony shall not usurp the jury’s province in determining the credibility of witnesses.”).

“Expert testimony that comments directly on a witness’s credibility invades the jury’s province and is inadmissible.” *Chism*, 252 S.W.3d at 182. But “[e]xpert testimony . . . that comments on how a victim’s behavior relates to

general behavior of someone who has been sexually abused is admissible.”

*Id.*

To the extent that Defendant is complaining about testimony concerning the behaviors of children who have been sexually abused, the trial court had the discretion to allow this type of testimony. Defendant made no objections in this case to the testimony concerning whether the victims had said or done anything to cause the witnesses to believe they were being untruthful, and instead chose to vigorously cross-examine the witnesses on whether they had conducted any investigation into the truthfulness of the victims’ allegations. With Defendant now apparently second-guessing this trial strategy, he contends the court plainly erred by not *sua sponte* intervening to prevent this testimony from being given at all.

Trial judges are not expected to assist counsel in trying cases and should act *sua sponte* only in “exceptional circumstances.” *State v. Buckner*, 929 S.W.2d 795, 799-800 (Mo. App. W.D. 1996). “Uninvited interference by the trial judge in trial proceedings is generally discouraged, as it risks injecting the judge into the role of a participant and invites trial error.” *State v. Roper*, 136 S.W.3d 891, 902 (Mo. App. W.D. 2004). “In certain circumstances, a trial judge’s intervention in the proceedings may be unwelcome, as the failure to raise an objection may be a matter of trial strategy.” *Id.* In this case, it is apparent that Defendant’s trial strategy was

to cross-examine the investigator on his purported ability to distinguish truthful from untruthful children.

In *D.W.N.*, the court refused to find plain error on a claim that the trial court should have *sua sponte* intervened and prevented a child-abuse investigator from testifying that he did not think the victim was lying when the record showed that trial counsel had a strategic reason for not objecting, and instead extensively cross-examined the witness on that testimony.

*D.W.N.*, 290 S.W.3d at 818-26. The court found that “to hold otherwise would put the circuit court in a no-win situation”:

If the trial court received the evidence [and allowed a witness to testify that he or she found the victim credible], the accused could ... claim receipt of the evidence was plain error, requiring reversal. If the trial court [*sua sponte*] excluded the evidence, the accused could contend on appeal that the trial court improperly interfered by barring evidence which the accused consciously chose to allow the jury to hear, thereby requiring reversal. To state the scenario is to expose its potential for mischief.

*Id.* at 825 (quoting *State v. Hamilton*, 892 S.W.2d 774, 781 (Mo. App. S.D. 1995)).

Similarly in *State v. Valentine*, the Missouri Supreme Court refused to conduct plain-error review of defendant’s claim that the trial court

improperly admitted the crime victim's identification testimony on the ground that the lineup was unduly suggestive when the record showed that "counsel chose not to object but instead to exploit the alleged deficiencies at trial." *State v. Valentine*, 584 S.W.2d 92, 96-97 (Mo. banc 1979), *overruled on other grounds by Sours v. State*, 593 S.W.2d 208, 210 (Mo. banc 1980). The court held that the defendant was barred from complaining on appeal about a "trial strategy" he chose to pursue at trial. *Id.* at 97. "If it were otherwise the accused could trap the trial court with 'error' of the accused's own making or in which he joined or acquiesced." *Id.*

Missouri courts have been reluctant to criticize a trial court when it has declined to take action on its own motion on behalf of a party during the examination of a witness. Indeed, such invitations have been rejected in all but the most unusual circumstances. *Id.* See also *State v. Drewel*, 835 S.W.2d 494,498 (Mo. App. E.D. 1992) (holding that appellate courts do not expect trial judges to assist counsel in trying cases and that *sua sponte* action should be exercised only in exceptional circumstances).

Defendant's complaint about the testimony to which he did not object should be viewed in light of the extensive cross-examination to which the witnesses were subjected. Even if the prosecutor's questions were objectionable, Defendant has not demonstrated that the trial court committed plain error under the circumstances of this case.

Defendant's reliance on *Churchill* to support his claim that he suffered manifest injustice is misplaced. In *Churchill*, the pediatrician who examined the victim in a statutory-sodomy case as part of a SAFE examination testified that the incident of sexual abuse the victim described "was real" and "had occurred to her [the victim]." *Churchill*, 98 S.W.3d at 537-38. The defendant in *Churchill* objected to the prosecutor's questions eliciting these responses. *Id.* at 538. More importantly, however, the state conceded on appeal that the doctor's testimony was improper. *Id.* at 539. The court also noted that while testimony of this type is "always inappropriate," it would "reserve judgment as to whether such testimony necessitates a new trial in all situations." *Id.* at 539 n.8. Here, the questions related to the victims' behaviors and consistency of their statements, not to the witnesses' verification that the acts of abuse reported by the victims had actually occurred. Moreover, the witnesses conceded during cross-examination that it was not their function to investigate and determine the veracity of the victims' allegations of abuse.

The court's decision in *State v. Williams*, 858 S.W.2d 796 (Mo. App. E.D. 1993), in which the court found plain error in admitting this type of testimony, is also distinguishable. In *Williams*, a physician "with expertise in the area of child sexual abuse," testified that children who have been sexually abused "don't—they essentially don't lie," that the "[i]ncidents of lying among children is very low, less than three percent," and that "the

physical findings and the behavior indicators can only support what the child says.” *Id.* at 800. The court found that the defendant suffered manifest injustice because the doctor’s testimony “amounted to an impressively qualified stamp of truthfulness on the victim’s story.” *Id.* at 801.

In *State v. Chism*, 252 S.W.3d 178 (Mo. App. W.D. 2008), a physician who treated the victim of a forcible rape testified on direct examination that he had found evidence of trauma in cases of reported sexual assaults and in cases of consensual sexual intercourse, and that he had also not found evidence of trauma in both types of cases. *Id.* at 183. The defendant’s attorney asked the doctor on cross-examination if he had any way of knowing whether the victim was raped. *Id.* On redirect examination, the prosecutor asked the doctor whether he had any reason to believe that the victim had not, in fact, been raped. *Id.* The trial court overruled defense counsel’s objection to this question. *Id.* On recross-examination, the defendant’s counsel was able to get the doctor to concede that he had had patients who had previously lied about their history, that he had no way of knowing whether the victim had lied to him about being raped, and that he had no scientific basis to support his belief that the victim was raped. *Id.* Although the court in *Chism* found that this testimony did vouch for the victim’s credibility, it held that the trial court had not plainly erred in allowing it. *Id.* at 183-84.

In *State v. Wright*, 216 S.W.3d 196 (Mo. App. S.D. 2007), the prosecutor asked a state child-abuse investigator whether she had “any reason to disbelieve this victim in this case.” *Id.* at 198. After the investigator had already answered, “No,” defense counsel belatedly objected. *Id.* In claiming that the trial court plainly erred in allowing this testimony, the defendant in *Wright* relied on the supreme court’s opinion in *State v. Churchill*. *Id.* The court of appeals distinguished *Churchill* on the ground that it involved a claim of preserved error. *Id.*

In at least one other sexual-assault case involving witness testimony vouching for the victim’s credibility, the Southern District distinguished *Churchill* on the ground that it involved preserved, not plain, error. See *State v. Artis*, 215 S.W.3d 327 (Mo. App. S.D. 2007) (finding no plain error when a physician who treated a rape victim immediately after she was attacked testified that the patient history of rape given by the victim seemed “credible” to him). In a pre-*Churchill* decision, the court of appeals found no plain error when two social workers who interviewed victims of sexual abuse testified that nothing in the victims’ statements “raised ‘red flags,’ or ‘suggested that something’ was false,’ or that the statements were ‘untrue,’ or that ‘these children were fabricating’ the allegations.” *State v. Brown*, 58 S.W.3d 649, 657 (Mo. App. S.D. 2001).

There are several reasons contained in this record demonstrating why Defendant did not suffer manifest injustice. First, the concern expressed by the court in *Churchill* regarding this testimony is that it bolsters the credibility of the victim by a “professional.” *Churchill*, 98 S.W.3d at 539. In *Williams*, the court noted that “[e]xpert testimony presents the danger that jurors may be over-awed by the evidence, or may defer too quickly to the expert’s opinion. *Williams*, 858 S.W.2d at 800. Unlike *Churchill* and *Williams*, which involved testimony by medical doctors, the witnesses in this case were a counselor, who expressly stated that it was not her job to investigate the allegations of abuse, and a forensic examiner, who conceded that she had done nothing to confront the victims with information obtained from other sources to confirm the victims’ allegations. Considering the bruising cross-examination inflicted on the witnesses by Defendant’s counsel, it is highly unlikely that the jurors were “over-awed” by their testimony or deferred to his assessment of the victim’s credibility.

Second, it appears from the record that Defendant’s trial strategy was to belittle the witnesses’ testimony through cross-examination, rather than attempting to exclude it from trial. Defendant’s counsel extracted numerous impeaching statements from the witnesses regarding the limited scope of their involvement and the fact that it was not their job to determine the veracity of the victims’ allegations.

Finally, the jurors in this case were instructed that they “alone must decide upon the believability of the witnesses.” (L.F. 99). Nothing in the record suggests that the jurors were unaware that it was up to them to determine the credibility of the victims’ testimony.

Under the circumstances of this case, Defendant has failed to demonstrate that he suffered manifest injustice from the trial court’s failure to preclude the testimony at issue.

## **CONCLUSION**

The trial court did not commit reversible error in this case.  
Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

**CHRIS KOSTER**  
Attorney General



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**ATTORNEYS FOR RESPONDENT  
STATE OF MISSOURI**

## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 11,978 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 22<sup>nd</sup> day of October, 2010, to:

Rosemary Percival  
920 Main Street, Suite 500  
Kansas City, Missouri 64105-2017



---

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ATTORNEYS FOR RESPONDENT  
STATE OF MISSOURI

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IN THE 7TH JUDICIAL CIRCUIT COURT OF CLAY COUNTY, MISSOURI

<b>Judge or Division :</b> LARRY DALE HARMAN ( 27120 ) DIV4		<b>Case Number :</b> 07CY-CR00590 <input checked="" type="checkbox"/> Change of Venue from SALINE COUNTY CIRCUIT COURT
State Of Missouri vs.		Offense Cycle No. : 87170217
Defendant: MAURAL CELIS-GARCIA(CELM0352) 735 OAK ST MARSHALL MO 65340		Prosecuting Attorney/MO Bar No: DONALD GEORGE STOFFER ( 29096 )  Defense Attorney/MO Bar No : WELDON WAYNE PERRY JR ( 26902 )
DOB : 14-May-1976 SSN : 125880352		
SEX : F		
Sentence Assessment Ordered	Appeal Bond Set Date :	Amount :
<b>Judgment</b>		

**Original Charge :** 1      31-May-2006      1109500

**Charge Description**  
Stat Sodmy-1st-Dev Sex Intr W/Prs < 14-Ser  
Phy Inj/Dspl Deadly Weap/Dng Inst/Sbj Vic Intr  
W/> Than One Per/Vic < 12 (Felony Unclassified  
RSMo : 566.062)

**Disposition :** 08-Nov-2007      Jury Verdict-Guilty

**Order Date :** 19-Dec-2007  
**Length :** 25 Years

**Sentence or SIS :** Incarceration DOC  
**Start Date :** 19-Dec-2007

**Text :** Defendant sentenced to 25 years in Missouri Department of Corrections, to be served concurrent with Count II.

**Original Charge :** 2      31-May-2006      1109500

**Charge Description**  
Stat Sodmy-1st-Dev Sex Intr W/Prs < 14-Ser  
Phy Inj/Dspl Deadly Weap/Dng Inst/Sbj Vic Intr  
W/> Than One Per/Vic < 12 (Felony Unclassified  
RSMo : 566.062)

**Disposition :** 08-Nov-2007      Jury Verdict-Guilty

**Order Date :** 19-Dec-2007

**Sentence or SIS :** Incarceration DOC

**Length :** 25 Years

**Start Date :** 19-Dec-2007

**Text :** Defendant sentenced to 25 years in Missouri Department of Corrections, to be served concurrent with Count I.

A1

The court informed the defendant of verdict/finding, asks the defendant whether (s)he has anything to say why judgment should not be pronounced, and finds that no sufficient cause to the contrary has been shown or appears to the court

Defendant has been advised of his/her rights to file a motion for post conviction relief pursuant to Rule 24.035/29.15 and the court has found **No Probable Cause** to believe that defendant has received ineffective assistance of counsel.

The Court further orders:

The clerk to deliver a certified copy of the judgment and commitment to the sheriff.

The sheriff to authorize one additional officer/guard to transport defendant to division of adult institutions.

Judgment entered in favor of the State of Missouri and against the defendant for the sum of \$68.00 for the Crime Victims Compensation fund. Judgment is **not satisfied**.

Costs taxed against defendant.

The Court further orders :

20-Dec-2007 Defendant Sentenced

The Court sentences the Defendant in Count I to Twenty-Five (25) years in the Missouri Department of Corrections, concurrent with Count II. In Count II, the Defendant is sentenced to Twenty-Five (25) years in the Missouri Department of Corrections, concurrent with Count I. LDH

So Ordered on: 07CY-CR00590 ST V MAURA L CELIS-GARCIA

12-20-07 \_\_\_\_\_  
Date Judge

I certify that the above is a true copy of the original Judgment and Sentence of the court in the above cause, as it appears on record in my office.  
(Seal of Circuit Court)

Issued on: \_\_\_\_\_ Date \_\_\_\_\_ Clerk

INSTRUCTION NO. 6

As to Count 1 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 Cynthia Jimenez's genitals, and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that at that time Cynthia Jimenez 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, then you will find the defendant Maura L. Celis-Garcia guilty under Count 1 of statutory sodomy in the first degree.

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

INSTRUCTION NO. 7

As to Count 2 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 Katie Jimenez's genitals, and

Second, that such conduct constituted deviate sexual intercourse, and

Third, that at that time Katie Jimenez 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,

then you will find the defendant Maura L. Celis-Garcia guilty under Count 2 of statutory sodomy in the first degree.

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

INSTRUCTION NO: A

As to Count 1, if you do not find the defendant, Maura Celis-Garcia, guilty of statutory sodomy in the first degree as submitted in Instruction No. \_\_\_\_\_, you must consider whether she is guilty of child molestation in the second degree under this instruction.

If you find from the evidence beyond a reasonable doubt:

First, that between the dates of January 1, 2006 and March 31, 2006 in the County of Saline, State of Missouri, the defendant, Maura Celis-Garcia, placed her hand on Cinthia Jimenez's genitals, and

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

Third, that at that time, Cinthia Jimenez, was then less than seventeen years old, then you are instructed that the offense of child molestation in the second 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 child molestation in the second degree, the defendant, Maura L. Celis-Garcia, acted together with or aided Jose F. Flores in committing that offense,

then you will find the defendant Maura L. Celis-Garcia, guilty under Count 1 of child molestation in the second 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.

INSTRUCTION: ~~GREEN~~ / REFUSED

  
LARRY D. HARMAN  
Circuit Judge

Date: NOV 7 2007

INSTRUCTION NO: B

As to Count 2, if you do not find the defendant, Maura Celis-Garcia, guilty of statutory sodomy in the first degree as submitted in Instruction No. \_\_\_\_\_, you must consider whether she is guilty of child molestation in the second degree under this instruction.

If you find from the evidence beyond a reasonable doubt:

First, that between the dates of January 1, 2006 and March 31, 2006 in the County of Saline, State of Missouri, the defendant, Maura Celis-Garcia, placed her hand on Katie Jimenez's genitals, and

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

Third, that at that time, Katie Jimenez, was then less than seventeen years old, then you are instructed that the offense of child molestation in the second 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 child molestation in the second degree, the defendant, Maura L. Celis-Garcia, acted together with or aided Jose F. Flores in committing that offense,

then you will find the defendant Maura L. Celis-Garcia, guilty under Count 2 of child molestation in the second 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.

INSTRUCTION: ~~GREEN~~ REFUSED

Larry D. Harman  
LARRY D. HARMAN  
Circuit Judge

Date: NOV 7 2007

MAI-Criminal (3<sup>rd</sup> Ed.), 320.19; 304.02 and 304.04  
Submitted by Defense

ALC

INSTRUCTION NO:   4  

As to Count 1, if you do not find the defendant, Jose F. Flores, guilty of statutory sodomy in the first degree as submitted in Instruction No. \_\_\_\_\_, you must consider whether he is guilty of child molestation in the second degree under this instruction.

If you find from the evidence beyond a reasonable doubt:

First, that between the dates of January 1, 2006 and March 31, 2006 in the County of Saline, State of Missouri, the defendant, Jose F. Flores, placed his hand on Cinthia Jimenez's genitals, and

Second, that he did so for the purpose of arousing or gratifying his own sexual desire, and Third, that at that time, Cinthia Jimenez, was then less than seventeen years old,

then you are instructed that the offense of child molestation in the second 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 child molestation in the second degree, the defendant, Jose F. Flores, acted together with or aided Maura L. Ceils-Garcia in committing the offense,

then you will find the defendant Jose F. Flores, guilty under Count 1 of child molestation in the second 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, Jose F. Flores, not guilty of that offense.

INSTRUCTION: ~~AWNEN~~ / **REFUSED**

MAI-Criminal (3<sup>rd</sup> Ed.), 320.19; 304.02 and 304.04  
Submitted by Defense

*L. St. Louis*  
LARRY D. HARMAN  
Circuit Judge

Date:   NOV 7, 2007  

A7

INSTRUCTION NO: D

As to Count 2, if you do not find the defendant, Jose F. Flores, guilty of statutory sodomy in the first degree as submitted in Instruction No. \_\_\_\_\_, you must consider whether he is guilty of child molestation in the second degree under this instruction.

If you find from the evidence beyond a reasonable doubt:

First, that between the dates of January 1, 2006 and March 31, 2006 in the County of Saline, State of Missouri, the defendant, Jose F. Flores, placed his hand on Katie Jimenez's genitals, and

Second, that he did so for the purpose of arousing or gratifying his own sexual desire, and Third, that at that time, Katie Jimenez, was then less than seventeen years old,

then you are instructed that the offense of child molestation in the second 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 child molestation in the second degree, the defendant, Jose F. Flores, acted together with or aided Mauna L. Celis-Garcia in committing that offense,

then you will find the defendant Jose F. Flores, guilty under Count 2 of child molestation in the second 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, Jose F. Flores, not guilty of that offense.

INSTRUCTION: ~~SENT~~ REFUSED

LARRY D. HARRMAN  
Circuit Judge

Date: NOV 7 2007

MAI-Criminal (3<sup>rd</sup> Ed.), 320.19; 304.02 and 304.04  
Submitted by Defense

A8

**304.02 THE PRINCIPAL OFFENSE: GENERAL RULES**

(As to Count \_\_, if) (If) you find and believe from the evidence beyond a reasonable doubt:

First, that (on) (on or about) [date], in the (City) (County) of \_\_\_\_\_, State of Missouri, the defendant [Insert name of particular defendant here and elsewhere in the instruction where others are on trial.] [Continue by submitting first essential element of the offense.], and

Second, that [Continue in this and other paragraphs to submit all other essential elements of the offense.], (and)

(Third, that [Continue in this and other paragraphs as directed in Notes on Use 10 and 11.],)

then you will find the defendant guilty (under Count \_\_) of [name of offense] (unless you find and believe that it is more probably true than not true that the defendant is not guilty by reason of Instruction No.

\_\_\_ [This would refer only to an affirmative defense as to which by statute the defendant bears the burden of persuasion.]) (unless you find and believe from the greater weight of the evidence that the defendant is not guilty by reason of a mental disease or defect excluding responsibility as submitted in Instruction No. \_\_.)

(However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.)

[The Court's instruction covering an infraction that is submitted to the jury as a lesser included offense or a lesser degree offense under Section 556.046, RSMo Supp. 2003, will be a verdict form without a

punishment range. If the infraction is not being submitted to the jury as a lesser included offense or a lesser degree offense, an infraction should not be submitted to the jury. See Notes on Use 2 to MAI-CR 3d 323.60 on Trespass in the Second Degree: Lesser Included Offense.]

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#### Notes on Use

1. This is a revision of MAI-CR 3d 304.02 (9-1-02).
2. When there is an appropriate verdict directing instruction in the MAI-CR 3d 313.00 Series through the 332.00 Series, that verdict directing instruction should be used. If no such verdict directing instruction exists, or if a verdict directing instruction needs modification, this form, with appropriate modifications, must be followed. When defendant's responsibility is based on the conduct of another person, see MAI-CR 3d 304.04. If the offense involves an attempt to commit a crime, see MAI-CR 3d 304.06 and MAI-CR 3d 304.07; if it is a hate crime, see MAI-CR 3d 304.09; if it is a conspiracy, see MAI-CR 3d 304.10.

#### 3. Introductory paragraph

(a) If only one verdict directing instruction is being submitted, the introductory paragraph will read:

If you find and believe from the evidence beyond a reasonable doubt:

(b) For each lesser graded or lesser included verdict directing instruction, the introductory paragraphs will read:

If you do not find the defendant guilty of [name of offense from immediately higher verdict director] as submitted in Instruction No. \_\_\_\_\_, you must consider whether he is guilty of [name of offense from the lesser verdict director] under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

Example: If the defendant is charged with burglary in the first degree and the Court determines that it also needs to submit burglary in the second degree, the introductory paragraphs for the burglary in the second degree instruction will be:

If you do not find the defendant guilty of burglary in the first degree as submitted in Instruction No. \_\_\_\_\_, you must consider whether he is guilty of burglary in the second degree under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

(c) For each verdict directing instruction that is an alternative to another verdict directing instruction submitting the same offense in the same degree under the same count, the introductory paragraphs will read:

If you do not find the defendant guilty of [name of offense from verdict director] under Instruction No. \_\_\_\_\_, you must consider whether he is guilty of [name of offense from verdict director] under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

Example: If the defendant is charged with official misconduct by collecting taxes when none were due and with official misconduct by discriminating against an employee, the introductory paragraphs for the second verdict directing instruction will read:

If you do not find the defendant guilty of official misconduct in the second degree as submitted in Instruction No. \_\_\_\_, you must consider whether he is guilty of official misconduct in the second degree under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

(d) If verdict directing instructions are submitted on two or more counts, the paragraph that reads:

If you find and believe from the evidence beyond a reasonable doubt:

should instead read:

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

(e) If, in a verdict directing instruction form, the words "As to Count \_\_\_\_" appear, and the case is submitted on two or more counts, those words shall be used and included in the instruction.

(f) If one or more of the above directions would not be appropriate for the introductory paragraph(s), then the user shall draft an appropriate introductory paragraph(s).

#### 4. Time

The first paragraph of the verdict directing instruction generally refers to the time of the offense. This is usually accomplished by saying that the offense occurred "on" or "on or about" a specific date. The words "on or about" as the Court has said "do not put the time at large, but indicate that it is stated with approximate certainty . . . . [T]he phrase is used in reciting the date of an occurrence to escape the necessity of being bound by an exact date and means 'approximately,' 'about,' 'without substantial variance from,' 'near.'" State v. Armstead, 283 S.W.2d 577, 582 (Mo. 1955).

It may be necessary to specify the time of the offense. The following situations should be considered:

(a) Statute of Limitations. A statute of limitations defense may be available if the offense occurred on one specific date, but not if the exact date is not specified. In such a situation, upon request of the defendant, a specific date should be established in the instruction.

(b) Alibi. Time may be of importance when the defense of alibi is relied upon. The alibi defense, and evidence in support thereof, raises an issue that would make time of decisive importance even though the crime charged may not be of such nature as to make time of the essence. State v. Graves, 588 S.W.2d 495, 497 (Mo. banc 1979). See also State v. White, 621 S.W.2d 287, 295-296 (Mo. 1981), and State v. Sager, 600 S.W.2d 541, 573-575 (Mo. App. 1980). In such a situation, upon request of the defendant, the time should be shown as "at about [*time of day or night*] on" a specific date, or "between the hours of [*time of day or night*] on" a specific date.

(c) Multiple Offenses - Same Victim, Short Period of Time.

If the defendant is charged with more than one crime involving the same victim on the same day, the time should be shown on each instruction as "at about [*time of day or night*] on" or "between the hours of [*time of day or night*] on" a specific date.

Certain offenses and circumstances may allow the state to use a less definite time period. In State v. Walker, 208 S.W.2d 233 (Mo. 1948), involving a sex crime, an instruction specifying the time as "on or about the \_\_\_\_ day of December, 1945" was approved. An instruction in a sodomy case involving a 12 year old girl that established the time as "the month of February" was upheld in State v. Siems, 535 S.W.2d 261 (Mo. App. 1976).

If 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.

**5. Place of Offense**

The place of the offense may become of "decisive importance" under certain circumstances, such as (a) when evidence of alibi is introduced, or (b) when an issue of venue arises, or (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.

## 6. Venue

The verdict directing instructions all offer alternatives in parentheses relating to the "(City) (County) of \_\_\_\_\_, State of Missouri." The word "(City)" was included for only one circuit, the City of St. Louis. In all other cases the name of the county involved should be inserted, such as "County of St. Charles" and not the "City of St. Charles" even though the offense occurred in the City of St. Charles.

Several statutes contain special circumstances for conferring venue in a particular jurisdiction. If one of these circumstances is the basis for venue in a particular prosecution, the instruction should be modified accordingly.

## 7. Numbering of Paragraphs

Most verdict directing instructions have paragraphs identified as "First," "Second," "Third," etc. However, some instructions contain only one basic paragraph, and it is not labeled "First"; in other words, there is a paragraph "First" only if there is a paragraph "Second."

If a modification to the instruction requires an additional paragraph, then numerically label all paragraphs. For example, MAI-CR 3d 319.12 does not have paragraphs "First" or "Second," but instead has a paragraph that begins "That." If MAI-CR 3d 306.06 on self-defense was given, Notes on Use 2 thereto requires that a paragraph be added to the verdict director. In this situation, "First" would be inserted in front of "That" in MAI-CR 3d 319.12 and "Second" would begin the paragraph required by Notes on Use 2 to MAI-CR 3d 306.06.

### **8. The Defendant - Multiple Defendants**

Verdict directing instructions refer to "the defendant." If there is only one defendant in the case being tried to the jury, the defendant will not be identified in the verdict director by name unless the verdict director says "[*name of defendant*]."

If two or more defendants are being tried together, the name of the particular defendant to which the instruction is directed should be inserted whenever there is a reference to "the defendant." In such situations, the words "the defendant" will remain in the instruction and the name of the particular defendant will be inserted immediately after each reference to "the defendant."

If two or more defendants are being tried together, there shall be a separate verdict directing instruction for each defendant on each charge submitted to the jury. When the defendant is being tried as an aider under Section 562.041, RSMo, special rules apply. See MAI-CR 3d 304.04.

### **9. Masculine Gender, Singular Form**

The instructions in MAI-CR 3d are written using the masculine gender and the singular form. If the instruction using the masculine gender and the singular form is inappropriate, make the necessary modifications.

### **10. Essential Elements**

Each verdict directing instruction must contain all of the essential elements of the offense. A careful reading of the appropriate statutes is necessary, as well as examination of the charge against the defendant. Consideration must be given to the evidence in the case.

In MAI-CR 3d, the verdict directing instructions make provisions for advising the jury of all essential elements. Generally, this is accomplished in the body of each instruction. However, in some situations, whether or not an issue becomes an element will depend on the circumstances of the case.

The mental element used in the instruction is normally that specified by the appropriate statute for the offense. See Section 562.021, RSMo 2000. If the statute fails to specify a mental state, Section 562.021 requires that the mental state be "knowingly," unless "the imputation of a mental state to the offense is clearly inconsistent with the purpose of the statute defining the offense or may lead to an absurd or unjust result."

The state may always elect to submit a higher mental element than that specified by the verdict director, or may elect to submit both the higher mental element and that mental element specified by the verdict director; if such election occurs, the two mental elements shall be submitted in the disjunctive, i.e., using the word "or."

#### **11. Cross-References - Separate Numbered Paragraph**

A cross-reference in a separate numbered paragraph to each special negative defense upon which a separate numbered instruction is being given shall follow the numbered paragraphs setting forth the essential elements. It should be noted, however, that some special negative defenses are not instructed upon unless requested by the defendant.

The special negative defenses upon which a separate numbered instruction may be given include:

1. 306.06 Justification:  
Use of Force in Self-Defense
2. 306.08 Justification:  
Use of Force in Defense of Third Persons
3. 306.10 Justification:  
Use of Force in Defense of Premises
4. 306.12 Justification:  
Use of Force in Defense of Property
5. 306.14 Justification:  
Use of Force by Law Enforcement Officer
6. 306.16 Justification:  
Use of Force by Private Person in Making Arrest
7. 306.18 Justification:  
Use of Force to Prevent Escape from Confinement
8. 306.20 Justification:  
Use of Force by Person Entrusted with Care and  
Supervision of Minor or Incompetent
9. 308.16 Belief in Legality of Conduct
10. 310.28 Entrapment
11. 310.52 Intoxicated or Drugged Condition:  
Involuntary

Unless a Notes on Use requires a specific cross-reference, the following method may be used (assuming in the examples below that it will be the Third paragraph):

Third, that defendant is not entitled to an acquittal  
as submitted in Instruction No. \_\_\_\_\_,

Other optional methods are, in typical cases (the list is not complete):

Third, that defendant did not act in lawful self-defense as submitted in Instruction No. \_\_\_\_,

or

Third, that defendant was not entrapped as submitted in Instruction No. \_\_\_\_.

In addition, the Notes on Use to some verdict directors require a separate numbered paragraph in the verdict directing instruction setting forth a special negative defense; there is no corresponding separate numbered instruction for these special negative defenses. For example, claim of right, see Notes on Use 4 to MAI-CR 3d 324.02.1. See also MAI-CR 3d 304.11 on Defenses.

Some special negative defenses are not covered by the material in MAI-CR 3d due to their infrequent use. If such a special negative defense exists, the user should examine the appropriate statute and draft the necessary instruction.

In many cases, such defenses will not fit into the format of the verdict directing instruction. However, where the language negating the defense can be tailored to the main verdict director, such a format will normally be preferable to the use of a separate instruction. The choice of including the defense in the verdict director or using a separate instruction shall be left to the Court.

## 12. Finding of Guilt

Following the numbered paragraphs, the instruction will give a direction to find the defendant guilty of the specific offense. The

direction could read, "then you will find the defendant guilty of assault in the first degree." This direction must be modified if an offense has two or more different punishments. For example, assault in the first degree is the general description for one type of felony assault. Assault in the first degree with serious physical injury is a class A felony; if the assault did not cause serious physical injury, it is a class B felony. If the assault in the first degree is being submitted as both a class A felony and class B felony, the clause directing the jury to find the defendant guilty of the class A felony will read, "then you will find the defendant guilty of assault in the first degree with serious physical injury." Notes on Use 6 to MAI-CR 3d 319.06. For the class B felony, the clause would read, "then you will find the defendant guilty of assault in the first degree." MAI-CR 3d 319.08.

### **13. Mental Disease or Defect**

Section 552.030, RSMo 2000, provides for the defense of "mental disease or defect excluding responsibility." To avail himself of this affirmative defense, a defendant must either plead not guilty by reason of mental disease or defect excluding responsibility or file timely written notice of the defendant's purpose to rely on such affirmative defense. In addition, at trial, there must be evidence submitted showing lack of such responsibility. If the Court determines that "substantial evidence of lack of responsibility" has been introduced pursuant to Section 552.030.6, then the following rules apply:

(a) The "finding of guilt" clause will be modified by adding this clause to all verdict directing instructions:

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unless you find and believe from the greater weight of the evidence that the defendant is not guilty by reason of a mental disease or defect excluding responsibility as submitted in Instruction No. \_\_\_\_.

Thus, for example, an instruction on assault in the first degree under MAI-CR 3d 319.08 with a defense of mental disease or defect would be modified to read:

then you will find the defendant guilty of assault in the first degree unless you find and believe from the greater weight of the evidence that the defendant is not guilty by reason of a mental disease or defect excluding responsibility as submitted in Instruction No. \_\_\_\_.

(b) Omit from all the verdict directing instructions the entire paragraph that begins, "However, unless you find and believe from the evidence . . . . "

For other matters involving the affirmative defense of mental disease or defect excluding responsibility, see MAI-CR 3d 306.02 and 306.04.

Compare MAI-CR 3d 308.03 on mental disease or defect negating culpable mental state.

**14. General Converse**

As indicated in Notes on Use 13(b) above, the general converse is omitted if the affirmative defense of mental disease or defect excluding responsibility is submitted to the jury as a part of the verdict

directing instruction. It is also omitted if any other affirmative defense is submitted.

In all other verdict directing instructions, there shall be a general converse as follows:

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

See also MAI-CR 3d 308.02 on special converses.

**15. Terms that must be defined**

MAI-CR 3d 333.00 contains terms and their definitions. These definitions are necessary to interpret legal terms for a lay jury. Also, in some instances, the definitions are available because the term has a meaning different from the meaning usually given to the word. Some verdict directing instructions contain terms that must be defined if that instruction is given to the jury. In such situations, the definition will be given in a paragraph or in paragraphs immediately following the "However, unless you find" paragraph.

To determine whether terms must be defined or may be defined, carefully examine the pattern instruction and its Notes on Use. See also MAI-CR 3d 333.00.

For example, MAI-CR 3d 319.02 requires that a definition of "serious physical injury" be given each time that instruction is used. This is indicated by the fact that parentheses do not enclose the paragraph. The definition of that term is inserted immediately after the "However, unless you find" paragraph.

As a further example, in MAI-CR 3d 319.02, the terms "sudden passion" and "adequate cause" must be defined if those terms are used in the instruction, but will not be defined if the terms are not used in the instruction. This is brought to the user's attention by the fact that the paragraph defining those terms is in parentheses and also by Notes on Use 6(a) to MAI-CR 319.02.

When drafting a verdict directing instruction for an offense not in MAI-CR 3d, the user should examine the appropriate statute to determine the terms, if any, that may require a definition. The definition of the term shall be drafted by the user and submitted to the Court for its consideration and approval. See also MAI-CR 3d 333.00.

#### **16. Punishment**

See the 305 Series when the jury is to assess and declare punishment in a bifurcated proceeding.

If the offense is a code offense but is not punishable as a class A, B, C, or D felony or a class A, B, or C misdemeanor, the appropriate language must be selected.

If the offense is a non-code offense, appropriate language shall be submitted to the jury setting forth all punishment alternatives that are available for the jury to assess. The general format used for code offenses should be used as a guide in drafting the range of punishment provisions.