No. SC95079

In the
Supreme Court of Missouri

EDWARD L. HOEBER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Buchanan County Circuit Court
Fifth Judicial Circuit
The Honorable Daniel F. Kellogg, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant (Defendant) appeals from a Buchanan County Circuit Court judgment overruling his Rule 29.15 motion for postconviction relief seeking to set aside his conviction on two counts of first-degree statutory sodomy. Defendant's postconviction motion alleged that trial counsel was ineffective for: (1) failing to object at trial to the verdict directors; and (2) failing to call a psychologist to testify during the sentencing hearing.

In the underlying criminal case, Defendant was charged as a prior offender with two counts of first-degree statutory sodomy for using his hands to touch the genitals of the four-year-old victim on two occasions during a two-month period in 2007 (July 1 to August 29).[1] (L.F. 16–17).[2] Defendant, whom the court found was a prior offender, was tried by a jury on December 7-8, 2009, with Judge Daniel F. Kellogg presiding. (L.F. 5–6; Tr. 60). The jury

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[1] Defendant was also charged in the alternative with two counts of first-degree child molestation, but those charges were later dismissed by the State before the case was submitted to the jury. (L.F. 16–17; Tr. 467).

[2] The record in this case consists of a legal file (L.F.) and trial transcript (Tr.) from Defendant's direct appeal in the underlying criminal case (Case No. WD72448). The record also contains the legal file (PCR L.F.) and evidentiary-hearing transcript (PCR Tr.) in this postconviction appeal.

found Defendant guilty of the two charged counts of first-degree statutory sodomy. (L.F. 6, 43–44; Tr. 505). After ordering a sentencing assessment report and conducting a sentencing hearing, Judge Kellogg gave Defendant consecutive sentences of 40 years on each count. (L.F. 5, 54–55; Tr. 506, 522)

Viewed in the light most favorable to the jury's verdict, the evidence at trial showed the following:

Victim was born in March 2003. (Tr. 222). Victim's mother dated Defendant while Victim was an infant. (Tr. 223, 225). Victim's mother and Defendant subsequently broke up, but Defendant eventually moved in with her and Victim when Victim was four years old. (Tr. 211, 223–24). During this time, Defendant touched Victim on more than one occasion on her "private area" and on her "butt." (Tr. 213–14).

Defendant eventually moved out of the residence in the fall of 2007. (Tr. 230). In September 2007, Victim was placed in foster care. (Tr. 262). Victim told her foster mother that Defendant had sexually abused her. (Tr. 262). Between September 2007 and January 2008, a therapist (Joyce Estes) at the Children's Advocacy Center interviewed Victim on multiple occasions. (Tr. 260, 268). During these interviews, Victim told the therapist that Defendant had touched her on the vagina. (Tr. 266–67). The therapist showed Victim a female doll, and Victim pointed to the doll's vaginal area and said that

Defendant had touched her there. (Tr. 267). Victim said that Defendant had touched her in that area of her body on more than one occasion. (Tr. 269).

Victim left foster care and returned to live with her mother around Thanksgiving 2007. (Tr. 231). Defendant was not living with them at this point. (Tr. 230). On the evening of January 2, 2008, Victim had a nightmare. (Tr. 231). She was screaming, "Stop it! Stop it!" (Tr. 231). Victim's mother woke her up and asked her what was wrong. (Tr. 231). Victim replied, "Eddie hurt me." (Tr. 231). She continued, "He touched me down there. He touched my pee-pee." (Tr. 231). Victim took off her pajamas and "touched her pee-pee area," showing her mother what Defendant had done to her. (Tr. 232). Victim's mother contacted both the therapist (Ms. Estes) and the police. (Tr. 232–33).

On January 16, 2008, Detective Trenny Wilson conducted a videotaped forensic interview with Victim at the Northwest Missouri Children's Advocacy Center.[3] (Tr. 303–04). During that interview, Victim said that

[3] Although she was a police detective, Detective Wilson testified that she had received extensive forensic training "focused solely on interviewing children" and had conducted over 900 such interviews. (Tr. 300–01). She further testified that the interviews were conducted at the children's advocacy center,

Defendant had taken her pajamas and her panties off and touched her vaginal area with his hands and rubbed it. (Tr. 308).

After interviewing Victim, Detective Wilson interviewed Defendant at the police station. (Tr. 308–09). Defendant waived his *Miranda* rights and made a statement denying that he ever sexually touched Victim. (Tr. 309–20). He concluded the statement by saying he would take a lie-detector test. (Tr. 320, 322).

On February 13, 2008, Detective Scott Coates met with Defendant to administer a polygraph test to him. (Tr. 352–53). Defendant again waived his *Miranda* rights, but before taking the test he confessed that he had inappropriately touched Victim on two occasions in the bathroom by rubbing her "clitoris" after she had gotten off the toilet; Defendant said he was "sorry" and "really needed help." (Tr. 354–58, 379–80). Defendant's oral statements were then incorporated into a written statement that Defendant read and signed. (Tr. 384–89).

Defendant testified at trial and acknowledged his prior convictions for two counts of sexual abuse, involuntary manslaughter, misdemeanor child endangerment, and living within 1,000 feet of a school. (Tr. 418–19).

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which she described as a "child-friendly environment," and that she did not wear her uniform while conducting these interviews. (Tr. 301).

Defendant denied touching Victim inappropriately during the time he was staying with Victim and her mother. (Tr. 444). He claimed that the detective who was supposed to administer the polygraph test started "yelling and cursing at" him. (Tr. 438). He further claimed that the detective told him that he was a "lying MF liar" and that Defendant was "trying…to blow up [his] machine." (Tr. 438). Defendant claimed that the detective was standing up and loudly yelling at him to tell the truth. (Tr. 439). Defendant said that this made him "feel nervous and scared" and that he told the detective that he had touched Victim because that was what the detective wanted to hear. (Tr. 440–41). He said he signed the written statement because the detective threatened Defendant that if he did not sign it, the detective would "put more stuff in it and make it stick."[4] (Tr. 441).

The Court of Appeals affirmed Defendant's conviction by a per curiam order on direct appeal. (PCR L.F. 64). *See State v. Hoeber*, 341 S.W.3d 195

[4] Detective Coates, the person Defendant said had yelled at him, testified that he never yelled or cursed at Defendant. (Tr. 377–78, 380). The investigating detective, Trenny Wilson, testified that she watched the encounter between Defendant and Detective Coates on a closed-circuit television and that the alleged mistreatment described by Defendant never occurred. (Tr. 453–56).

(Mo. App. W.D. 2011). The Court of Appeals mandate was issued on June 8, 2011. (PCR L.F. 31).

Before the notice of appeal was filed in Defendant's criminal case, Defendant prematurely filed on March 24, 2010, a pro se Rule 29.15 motion for postconviction relief. (L.F. 7; PCR L.F. 1). On April 6, 2010, the motion court prematurely issued an order appointing the Public Defender's Office to represent Defendant in this postconviction case. (PCR L.F. 1, 6). On May 13, 2010, the motion court issued an order "suspending" Defendant's postconviction motion and giving him "90 days after the date of the appellate court's mandate in which to file his amended postconviction motion." (L.F. 7). Defendant then timely filed an amended motion for postconviction relief on September 6, 2011. (L.F. 1).

Among the claims raised in the amended motion, Defendant alleged that counsel was ineffective for failing to object to the identically worded verdict directors and for failing to call an expert witness (a psychologist) to testify at sentencing. (PCR L.F. 31–33). The motion court held an evidentiary hearing during which Defendant's trial counsel and an expert witness, Dr. Bill Geis, testified. (PCR Tr. 5–99). The motion court later entered a judgment overruling Defendant's Rule 29.15 motion. (PCR L.F. 63–68).

STANDARD OF REVIEW

This appeal relates solely to the motion court's judgment overruling Defendant's postconviction motion. Appellate review of a judgment overruling a postconviction motion is limited to determining whether the motion court's findings of fact and conclusions of law are "clearly erroneous." *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *see also Barnett v. State*, 103 S.W.3d 765, 768 (Mo. banc 2003); Rule 29.15(k). Appellate review in postconviction cases is not de novo; rather, the findings of fact and conclusions of law are presumptively correct. *Wilson v. State*, 813 S.W.2d 833, 835 (Mo. banc 1991). "Findings and conclusions are clearly erroneous only if a full review of the record definitely and firmly reveals that a mistake was made." *Morrow*, 21 S.W.3d at 822.

To establish ineffective assistance of counsel, the defendant must show both (1) that his counsel's performance failed to conform to the degree of skill, care, and diligence of a reasonably competent attorney under similar circumstances; and (2) that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Barnett*; 103 S.W.3d at 768.

To prove deficient performance, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at

687. In other words, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In proving that counsel's performance did not conform to this standard, the defendant must rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.*

To prove prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

The postconviction court is not required to address both components of the inquiry if the defendant makes an insufficient showing on one. *Id.* at 697.

"The movant has the burden of proving the…claims for relief by a preponderance of the evidence." Rule 29.15(i). "Deference is given to the motion court's superior opportunity to judge the credibility of the witnesses." *State v. Twenter*, 818 S.W.2d 628, 635 (Mo. banc 1991).

ARGUMENT

I (failure to object).

The motion court did not clearly err in rejecting, after an evidentiary hearing, Defendant's postconviction claim that trial counsel was ineffective for failing to object to identically worded verdict directors for each of the two charged statutory-sodomy counts because Defendant failed to carry his burden of proving either that counsel acted incompetently or that he was prejudiced in that: (1) Defendant did not prove that counsel's failure to object was below then-existing prevailing professional norms; (2) Defendant did not rebut the presumption that a valid trial-strategy reason existed for not objecting; and (3) Defendant did not prove that if an objection to the verdict directors had been made, the jury would have either acquitted him or would have been unable to unanimously agree that Defendant committed two distinct acts of statutory sodomy.

A. The record regarding this claim.

In the amended postconviction motion, Defendant alleged that trial counsel was ineffective for failing to object to the two identically worded verdict directors submitted to the jury on the ground that each one failed to specify a particular incident of sodomy since the record contained evidence of multiple acts of hand-to-genital contact. (PCR L.F. 31–32). Defendant alleged

that because the verdict directors did not specify a particular incident, it was "unclear as to which incident the jury" found had happened. (PCR L.F. 38). It was further alleged that there was "no assurance" that the jurors unanimously agreed to the same two acts. (PCR L.F. 45).

Defendant further alleged that he was prejudiced because if counsel had objected, there was a reasonable probability of a different result at trial. (PCR L.F. 32). He specifically alleged that "[b]ecause the verdict directors did not require jurors to agree on the acts, there is a reasonable probability the jury would have acquitted [Defendant] of one or both counts had it been properly instructed." (PCR L.F. 46).

Victim, who was six years old when the trial occurred, initially testified at trial that Defendant had put his hands on her "private area" "more than one time" in the "kitchen." (Tr. 209, 214–16). She said that this touching did not happen in the bedroom, bathroom or living room. (Tr. 214–15). Victim also said that Defendant touched her when she had pajamas on. (Tr. 215). When she was asked what room she was in when that touching occurred, Victim said "in the kitchen," she then immediately said, "I don't know, maybe in the kitchen." (Tr. 215). Defendant's cross-examination of Victim did not seek specific details on each separate act of touching or attempt to differentiate the instances of touching based on the specific room in which the touching occurred. (Tr. 216–21).

Victim's therapist testified that Victim initially told her that no touching had occurred, but then Victim later told her that she touched Defendant's penis and that he had touched her "private." (Tr. 266–67). At a later date, Victim told the therapist that Defendant had touched her private area in her mother's room. (Tr. 269). At another session, Victim told the therapist that Defendant had touched her in the kitchen. (Tr. 269). In yet another session, Victim said that Defendant had touched her in the kitchen and the living room. (Tr. 270–71). In another later session, Victim said Defendant had touched her in the bathtub. (Tr. 272).

In a written statement to police, Defendant initially stated that he did not "sexually touch [Victim] in her vaginal area," and he agreed to take a polygraph test. (Tr. 320). As he prepared to take the polygraph test and was told that he would be asked if he touched Victim for his sexual gratification, Defendant admitted that he had touched Victim in the bathroom on two different occasions for a couple of minutes at a time. (Tr. 379). Defendant also said he was sorry for his actions and needed help; Defendant read the written statement aloud before signing it. (Tr. 379–80). In that statement, Defendant admitted that on two occasions he touched Victim's "clitoris" inappropriately while they were in the bathroom:

> I, Edward Hoeber, state that I dated [Victim's mother] for about one year. I lived with [Victim's mother] in 2004, this is December, to

September 2005. Then I would say I have lived with [Victim's mother] off and on since December of 2004. I came to jail in August of 2007.

During the time I lived with [Victim's mother], she would have me take care of her daughter, [Victim]. I would give her a bath and sometimes wipe her after she got done in the bathroom. [Victim] was 4. She will be 5 next month.

About a month before I got arrested,[5] we were living at [address]. Around that time, there were two times I touched [Victim] inappropriately. There were two times where [Victim] was in the bathroom and had gotten off the toilet with her pants down.

Before she would pull her pants up, I would rub her clitoris with my fingers. She would kind of laugh. I would rub her for about two minutes or so. [Victim's mother] would be sitting in the front room. I never told her anything about this. As far as I know, [Victim's mother] never knew. I only did it two times. I am sorry for what I did. I really need help.

(Tr. 389).

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[5] Defendant had told police that he stayed in an apartment with Victim and her mother between August 22-28, 2007. (Tr. 317). In his pro se postconviction motion, Defendant stated that he was put "in a police car" on August 29, 2007, and was also "locked up" on this date. (PCR L.F. 19, 24).

Except for the reference to the count number, the State submitted identical verdict directors (Instructions No. 8 and 10) for both of the charged counts of statutory sodomy:

> As to Count [I or II], if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that between July 1, 2007 and August 29, 2007, …the defendant knowingly touched the genitals of [Victim] with his hands, and
>
> Second, that such conduct constituted deviate sexual intercourse, and
>
> Third, that at the time [Victim] was a child less than twelve years old, then you will find the defendant guilty under Count [I or II] 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 not guilty of that offense.

(L.F. 37, 39). Defendant's trial counsel did not object to these verdict directors. (Tr. 465).

The jury was also instructed (Instruction No. 7) that Defendant was "charged with a separate offense in each of the two counts submitted to you" and that "each count must be considered separately." (L.F. 36). That same instruction told jurors to "return a separate verdict for each count" and that they "can return only one verdict for each count." (L.F. 36). In another

instruction (Instruction No. 12) jurors were told that their "verdict, whether guilty or not guilty, must be agreed to by each juror" and that "the verdict must be unanimous." (L.F. 41). This instruction also told them that "[w]hen you have concluded your deliberations, you will complete the applicable forms to which you unanimously agree and return them…." (L.F. 41).

During closing argument, defense counsel attacked Victim's credibility by arguing that she inconsistently testified about which room the touching occurred:

> Also, on direct examination, she was asked, did it happen in more than one room? She said, no, it happened in the kitchen once. Then she went back and she was even asked room by room, Did it happen in the bathroom, in the bedroom? She said, no, no, it didn't happen in any of those rooms.
>
> When [Victim] was speaking to [her counselor], her testimony was—and when she was speaking with [the forensic interviewer]—she said it happened in more than one room. So at one point, she said it only happened in one room. At another point, she said it happened in many rooms.

(Tr. 484). During rebuttal closing argument, the prosecutor focused in on the fact that Defendant confessed to touching Victim's vaginal area on two occasions. (Tr. 500).

Trial counsel testified at the postconviction evidentiary hearing that the defense strategy at trial was to "attack the credibility of the witnesses." (PCR Tr. 72). Counsel said he was aware that there was evidence showing that the touching had occurred in different rooms. (PCR Tr. 73, 78–79). He testified that while he reviewed the verdict directors, he did not consider objecting to them for not specifying "a particular incident or place where the incident happened." (PCR Tr. 84–86). He also said that he did not have any trial strategy reason for not objecting. (PCR Tr. 86).

The motion court rejected this claim because there was no reasonable likelihood that the jurors were misled by the verdict directors. (PCR L.F. 66–67).

B. Defendant did not prove trial counsel acted incompetently.

Under the Missouri Approved Instructions' Notes on Use in effect when Defendant's trial was held, trial counsel could have objected to the submission of two identically worded verdict directors and requested that they be modified to differentiate the incidents of touching. *See* MAI-CR 3d 304.02, Note on Use 5 (eff. 09-01-02). Two questions arise when considering whether the failure to object constituted incompetent performance. The first is whether an objection would have been expected under the law and prevailing profession norms then in effect when Defendant's trial was held.

The second is whether a reasonable trial-strategy reason might have existed for not objecting.

1. Prevailing professional norms did not require an objection.

Defendant did not prove that counsel's failure to object to identically worded verdict directors in a multiple-acts sexual-abuse case, in which the defense strategy was to generally attack the victim's credibility to win an outright acquittal, violated "prevailing professional norms" in effect when Defendant's trial was held. *See Strickland*, 466 U.S. at 688. The cases that had been decided when Defendant's case was tried did not clearly establish that an attorney would be deemed incompetent for not making such an objection.

Defendant cites *State v. Mackey*, 822 S.W.2d 933 (Mo. App. E.D. 1991), 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 *State v. Oswald*, 306 S.W.2d 559 (Mo. 1957), another case Defendant cites in his 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. Defendant's case is distinguishable since it did not involve a disjunctive verdict director.

In *State v. Pope*, 733 S.W.2d 811 (Mo. App. W.D. 1987), another case cited by Defendant, the defendant was charged with two counts of sodomy involving two different victims; the counts identified the specific acts of deviate sexual intercourse. *Id.* at 812. The two verdict directors were identical except for the name of the victim, but they only required the jury to generally find that deviate sexual intercourse occurred. *Id.* Complicating the case, 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 pertaining to the uncharged acts of sodomy was more believable than the charged acts. *Id.* at 812–13. In reversing the conviction, the court

"noted that the verdict director made it impossible to determine which of the sexual acts the jury agreed the defendant committed in finding him guilty." *State v. Celis-Garcia*, 344 S.W.3d 150, 157 (Mo. banc 2011) (citing *Pope*, 733 S.W.2d at 813).

In another case on which Defendant relies, *State v. Mitchell*, 704 S.W.2d 280 (Mo. App. S.D. 1986), the defendant was charged in two counts with the same offense—exhibiting a lethal weapon in an angry or threatening manner—involving two distinct, separate offenses occurring on the same day. *Id.* at 281. The verdict directors for each count, *which the defendant objected to*, were worded identically. *Id.* The court held that this constituted error and that the verdict directors should have specified the specific instance to which they referred. *Id.* at 286.

In *State v. Smith*, 32 S.W.3d 134 (Mo. App. E.D. 2000), 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. 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.

Similar claims about identically worded verdict directors had been rejected in other cases decided before Defendant's trial, 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 stating that each count should be considered separately, 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 did 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 295–96.

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 *State v. Celis-Garcia*, this Court specifically held that a Defendant's right to a unanimous jury verdict was violated when the verdict directors failed to separately identify specific instances of sodomy when the evidence showed that multiple acts of sodomy occurred in various locations. *Celis-Garcia* is a "multiple acts case," which "arises when there is evidence of multiple, distinct criminal acts, each of which could serve as the basis for a

criminal charge, but the defendant is charged with those acts in a single count." *Celis-Garcia*, 344 S.W.3d at 155–56.

The difficulty with using *Celis-Garcia* to support a claim of ineffectiveness in Defendant's case is that the opinion in that case was handed down two years after Defendant's trial. Counsel cannot be found incompetent for not predicting the outcome in *Celis-Garcia* before it happened. "Counsel will generally not be held ineffective for failing to anticipate a change in the law." *Zink v. State*, 278 S.W.3d 170, 190 (Mo. banc 2009) (quoting *Glass v. State*, 227 S.W.3d 463, 472 (Mo. banc 2007)).

In *Zink*, this Court held that counsel could not be deemed ineffective for not predicting whether an autopsy report would be considered testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004). *Zink*, 278 S.W.3d at 190. This Court noted that "counsel's conduct is measured by what the law is at the time of trial." *Id.* *Glass* contained a similar holding regarding counsel's failure to anticipate *Crawford*. *Glass*, 227 S.W.3d at 472. *See also Johnson v. State*, 103 S.W.3d 182, 182 (Mo. App. W.D. 2003) (holding that counsel was not ineffective for failing to challenge the constitutionality of a statute as violating *Apprendi v. New Jersey* when that case was handed down two years after the defendant's guilty plea); *State v. Meyers*, 770 S.W.2d 312, 317 (Mo. App. W.D. 1989) (rejecting an ineffectiveness claim and holding that trial

counsel could not be expected to anticipate that a statute "would be interpreted as it was by" an opinion handed down after the defendant's trial).

The holding in *Celis-Garcia* should also not be applied retroactively to find counsel acted incompetently for not objecting. In *Felton v. State*, 753 S.W.2d 34 (Mo. App. E.D. 1988), the postconviction defendant alleged counsel was ineffective for not challenging the exclusion of African-Americans from his jury in a trial that was held 10 years before *Batson v. Kentucky* was decided. *Id.* at 35. Although the defendant expressly claimed that he was not seeking retroactive application of *Batson* to his case, the Court of Appeals nevertheless rejected his claim because "his argument circuitously arrives at that result." *Id.*

Dicta in *Barmettler v. State*, 399 S.W.3d 523 (Mo. App. E.D. 2013), states that *Celis-Garcia* did not "present[ ] a substantive change in the law that automatically shields defense counsel from a claim of ineffectiveness." *Barmettler*, 399 S.W.3d at 529. Although *Celis-Gacia* did not establish the right to a unanimous jury verdict, it certainly was the first time this Court

directly ruled on how instructional issues should be handled in multiple-acts cases involving sexual-abuse claims.[6]

The Court in *Celis-Garcia* also for the first time declared that one of the notes on use to MAI-CR 3d 304.02, which permitted a defendant to request a more specific verdict director but did not require jury-unanimity on which specific act they found, was insufficient "to protect the defendant's constitutional right to a unanimous jury verdict in a multiple acts case." *Celis-Garcia*, 344 S.W.3d at 158. A note on use was added to MAI-CR 3d 304.02 only after *Celis-Garcia* was decided that specifically addressed the jury-unanimity issue in multiple acts cases. *See* MAI-CR 3d 304.02, Notes on Use 7 (eff. 07-01-13). The Court of Appeals has found *Celis-Garcia* to have had a more significant impact on the law than *Barmettler* suggests. *See State v. Watson*, 407 S.W.3d 180, 183 (Mo. App. E.D. 2013) (*Celis-Garcia* "clarified the requirement of a unanimous verdict in cases presenting evidence of multiple criminal acts related to one count"); *State v. Ralston*, 400 S.W.3d 511, 523 n.19 (Mo. App. S.D. 2013) (noting the efforts of this Court and the

[6] Respondent's counsel has been unable to find any Missouri case before *Celis-Garcia* in which the phrase "multiple acts case" has been used in addressing a claim of jury unanimity.

MAI committee "to revise MAI-CR 3d 304.02 and its Notes on Use…to address *Celis-Garcia* problems").

In light of this caselaw, Defendant has failed to carry his burden of proving that counsel either acted incompetently or violated existing professional norms by failing to object to identically worded verdict directors.

2. A trial strategy reason existed for not objecting.

Although trial counsel claimed he did not have a trial-strategy reason for not objecting to the verdict directors, this should not end the inquiry on *Strickland's* performance wrong. In other words, counsel's mere denial that he did not have a trial-strategy reason for not objecting does not, by itself, establish incompetent performance. The "defendant must overcome the presumption that, under the circumstances, the challenged action "*might* be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (emphasis added) (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The specific record in Defendant's case suggests that a reason might have existed for not requesting that the verdict directors be modified to focus the jury's attention on two distinct incidents of touching.

Defendant's defense at trial (and his position at sentencing and in this postconviction action) was that he did not commit any acts of statutory sodomy against Victim and that her claims were either fabricated or the product of confusion. Defendant also testified that he did not inappropriately

touch Victim and that his confession to having improperly touched Victim on two occasions in the bathroom was coerced by police. (Tr. 433–44).

Consequently, counsel would have had no reason to focus the jury's attention on the multiple acts identified in the record by including specific references to those acts in the verdict directors. The only apparent way to differentiate the acts allegedly committed in this case was by location, i.e., the room where the touching occurred. But Victim testified at trial that more than one act of touching occurred, but only in the kitchen and no other room. Defendant's written confession, on the other hand, stated that he committed only two acts of statutory sodomy in the bathroom. The obvious defense strategy, as evidenced by Defendant's closing argument, was to sow confusion among the jurors on the issue of reasonable doubt by demonstrating that Victim was confused and inconsistent about what, if anything, Defendant had actually done to her. (Tr. 480–89). Counsel attacked Victim's credibility by reminding the jurors of Victim's confusion when asked which room the touching occurred.

This trial strategy would not have been reinforced, and may have been undermined, by forcing the jury to focus on the specific incidents of touching by having the verdict directors modified to identify two separate incidents of touching by room that Victim described at trial, that Victim's therapist testified Victim had reported, or that Defendant had confessed to. It made no

sense to draw the jury's attention to the acts as differentiated by location when attempting to obtain an outright acquittal. Considering the evidence presented at trial, the only way to differentiate the two specific instances would have been to have alternative verdict directors charging touching on two separate occasions for each room mentioned in the case. That would have potentially involved eight alternative verdict directors (two each for the bathroom, living room, kitchen, and bedroom). Such a process only reminds the jury that Victim, who was four years old when the acts occurred and only six years old at trial, testified that multiple acts occurred. To remind the jury of this would only increase the risk of a guilty verdict, not an acquittal.

The only possible reason a defendant would seek to have the verdict directors differentiated in some manner in a multiple-acts case would be if the defense were conceding that one or more incidents occurred, but that others did not. Here, of course, the defense was that no acts of statutory sodomy occurred and that Victim had fabricated the allegations.

The statements in *Barmettler v. State*, 399 S.W.3d 523 (Mo. App. E.D. 2013), suggesting that "absent a compelling strategic reason, reasonable and effective trial counsel would have acted upon the cautionary language of [MAI-CR 3d 302.02] Note on Use 6 and objected to, or requested modification of, the verdict directors to ensure against the risk of a non-unanimous jury verdict" should not compel a different conclusion. This statement turns

Strickland's trial-strategy presumption on its head since it presumes counsel is ineffective for not objecting in such a situation unless a "compelling strategic reason" is proved otherwise. Under *Strickland*, the presumption is that a trial-strategy reason existed for not objecting and it is the defendant's burden to prove otherwise. Moreover, no reasonable defense counsel would seek to focus the jury's attention on the evidence of the different specific acts allegedly committed when the defense is that the alleged victim fabricated the allegations.

Additionally, if it was so obvious from Note on Use 6 that an objection to, and modification of, the verdict directors was needed, as *Barmettler* seems to suggest, why was MAI-CR 3d 304.02 modified to add Note on Use 7 after this Court's decision in *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. banc 2011)? These modifications, prompted by this Court's opinion in *Celis-Garcia*, warned trial courts and counsel of the need for specificity in verdict directors in multiple-acts cases to protect a Defendant's right to a unanimous verdict as outlined in *Celis-Garcia*.

Moreover, why would trial counsel seek to "ensure against the risk of a non-unanimous jury verdict" when that risk—if it did in fact exist—would more likely inure to the defendant's benefit by promoting a not guilty verdict? Confusion in a criminal case in which the State bears a high burden of proof most likely would benefit the defendant, not the prosecution. It is highly

unlikely, therefore, that if the jurors did not unanimously agree on the specific act committed that they would still return a guilty verdict, especially when other instructions informed them that each count constituted a separate offense, that they must consider each count separately, and that they must reach a unanimous verdict on each separate count.

The statements in *Barmettler* that Defendant relies on are dicta. The court resolved that case by finding that the defendant was not prejudiced. *Barmettler*, 399 S.W.3d at 530. Under *Strickland*, a postconviction court does not need to address both components of an ineffectiveness claim—incompetency and prejudice—if the defendant makes an insufficient showing on one. *Strickland*, 466 U.S. at 697. Since there was no evidentiary hearing in *Barmettler*, the court could not have properly determined that counsel's failure to object to the verdict directors was unreasonable trial strategy. A basis to object does not mean that counsel must always object. Under *Strickland*, the strong presumption is that counsel's actions and omissions constituted reasonable trial strategy. An appellate court cannot find that counsel's failure to object was unreasonable if no evidentiary hearing has been held and no evidence presented to rebut this presumption.

Finally, merely because the MAI's notes on use in effect at the time of Defendant's trial gave a defendant the option of asking that the verdict directors specifically identify the individual incidents borne out by the

evidence does not mean that it is wise trial strategy for defense counsel to invoke it. Simply because an appellate court looking at a case from its vantage point determines that specific verdict directors are preferable to avoid jury-unanimity problems does not mean that a defense attorney in the middle of trial and trying to win an acquittal would see the case the same way. *See State v. Maddix*, 935 S.W.2d 666, 671 (Mo. App. W.D. 1996) (holding that appellate courts cannot employ "hindsight" in reviewing postconviction claims). "There are countless ways to provide effective assistance in any given case," and [e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689.

The fact that Defendant's trial counsel did not recall having a reason for not objecting to the verdict directors does not overcome *Strickland's* strong presumption that a reasonable trial-strategy reason existed for that decision. *See Rios v. State*, 368 S.W.3d 301, 311 (Mo. App. W.D. 2012) (the fact that "counsel could not recall or identify his strategy in failing" to elicit testimony "does not overcome the strong presumption that counsel had a strategic reason for [his decision]") (alteration in original); *Dawson v. State*, 315 S.W.3d 726, 734 (Mo. App. W.D. 2010) (counsel's "lack of recollection alone does not overcome the presumption that her decision not to object was a reasonable trial strategy"); *Bullock v. State*, 238 S.W.3d 710, 715 (Mo. App. S.D. 2007) (counsel's failure to "verbalize a trial strategy" or to recall why a

witness was not called "does not overcome the strong presumption that counsel had a strategic reason for not calling" the witness); *Rickey v. State*, 52 S.W.3d 591, 596 (Mo. App. W.D. 2001) (counsel's "inability to remember why he took a specific course of action during trial does not establish lack of competent performance").

Defendant did not carry his burden of proving that counsel acted incompetently by not objecting to the verdict directors in this case.

C. Defendant did not prove prejudice.

Even if this Court were to find that trial counsel acted incompetently in failing to object to the verdict directors, Defendant has failed to carry his burden of proving that he was prejudiced by counsel's failure to object.

"It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. "[N]ot every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* The movant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

In *Strickland*, the Court explained what a movant must show in order to prove counsel was ineffective:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

An initial problem with Defendant's claim is that he has failed to allege any specific facts, much less present any evidence, showing a reasonable probability that the jury would have acquitted him if the verdict directors had been modified. Put another way, Defendant failed to prove that if the verdict directors had been modified, a reasonable probability existed that the jurors would not have unanimously agreed that Defendant committed two distinct acts of statutory sodomy.

Defendant alleged only that if an objection had been made, the trial court would have sustained it. But this allegation says nothing about the reliability of Defendant's trial. Rather than alleging facts, Defendant simply concludes that if an objection to the verdict directors had been made, a reasonable probability exists that the result of Defendant's trial would have been different. But to assert a cognizable claim of *Strickland* prejudice, Defendant was required to allege *facts* showing how the sustaining of his objection would have changed the result of his trial. Defendant does not even allege

any facts showing how the verdict directors should have been modified and how this modification would have changed the result of his trial. His failure to do so suggests that no such facts exist on the record of this case.

A postconviction defendant cannot prove *Strickland* prejudice with speculative conclusions. *See Williams v. State*, 168 S.W.3d at 433, 442 (Mo. banc 2005) (holding that post-conviction allegations containing "speculative conclusions" of prejudice are insufficient to warrant even an evidentiary hearing). *State v. Patterson*, 824 S.W.2d 117, 123 (Mo. App. E.D. 1992) (holding that "[c]onjecture or speculation is not sufficient to establish the required prejudice" for post-conviction relief). Defendant's failure to plead facts and his reliance on purely conclusory allegations renders the claim non-cognizable under Missouri's postconviction rules. A postconviction motion must plead specific facts, not mere conclusions, supporting the claim for relief. *See Morrow v. State*, 21 S.W.3d 819, 824 (Mo. banc 2000). "As distinguished from other civil pleadings, courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief." *Id.* at 822. The requirement to plead specific facts is also found in Rule 29.15(e). "The redundant requirement to plead facts [contained in Rule 29.15(e)] makes clear that a Rule 29.15 motion is no ordinary pleading where missing factual allegations may be inferred from

bare conclusions or implied from a prayer for relief." *White v. State*, 939 S.W.2d 887, 893 (Mo. banc 1997).

Even if Defendant's claim of prejudice is reviewable, the record shows that the motion court did not clearly err in finding that Defendant failed to carry his burden of proving prejudice.

Victim testified that multiple acts of touching occurred, but she could not definitively identify the locations where she was touched, except to say that some touching occurred in the kitchen. Victim made out-of-court statements suggesting that some touching had occurred in other rooms. Defendant, on the other hand, gave a written confession to police in which he admitted touching Victim's vaginal area on two occasions in the bathroom. Suppose the verdict directors would have been modified to identify the bathroom as the location of the two separate incidents of touching and that the touching in Count I occurred at a different time from the touching in Count II. There can be little doubt that the jury would have still unanimously found two distinct acts of statutory sodomy. In other words, there is no reasonable probability that the jury in Defendant's case would have acquitted him if the verdict directors had been modified. Nothing in the record shows that the motion court clearly erred in reaching this conclusion.

The evidence in Defendant's case and his defense strategy is distinguishable from what occurred in *Celis-Garcia*. There, the child-victims

identified "at least seven separate acts" of hand-to-genital sodomy occurring "at different times (some more than three days apart) and in different locations" within the house in which they lived with their mother (the defendant) and her boyfriend. *Celis-Garcia*, 344 S.W.3d at 156. "Despite evidence of multiple, separate incidents of statutory sodomy, the verdict directors failed to differentiate between the various acts in a way that ensured the jury unanimously convicted [the defendant] of the same act or acts." *Id.* The verdict directors (one for each victim) permitted the jury to find the defendant "guilty of first-degree statutory sodomy if they believed "that between [specified dates]…the defendant, or [her boyfriend] placed her or his hand on [the victim's] genitals." *Id.* The court found that this verdict director was erroneous because it allowed a finding of guilt when jurors may not have unanimously agreed on the same specific incident of sodomy:

> This broad language allowed each individual juror to determine which incident he or she would consider in finding [the defendant] guilty of statutory sodomy. Under the instructions, the jurors could convict [the defendant] if they found that she engaged or assisted in hand-to-genital contact with the children during an incident in her bedroom, or on the enclosed porch, or in the shed, or in the bathroom.

Id.

After the court in *Celis-Garcia* determined that the trial court had erred by failing to correctly instruct the jury, it went on to consider whether the defendant had established that plain error, i.e., manifest injustice or miscarriage of justice, had occurred. In addressing this issue, the court noted that "[u]nlike some statutory sodomy cases in which the defense simply argues that the victims fabricated their stories," the defendant in *Celis–Garcia* "sought to exploit factual inconsistencies and raise doubts about the plausibility of the *specific* incidents of statutory sodomy." *Id.* at 158 (emphasis added). The court then described the specific and distinctive evidence relied on by the defense to refute the allegations that any sodomy could have occurred in the bedroom, bathroom, porch, or shed in the manner described by the victims. *Id.* at 158-59. In finding that the trial court plainly erred in *Celis-Garcia* in submitting the challenged verdict directors, the court rested its decision on "the fact that [the defendant] relied on evidentiary inconsistencies and factual improbabilities respecting each specific allegation of hand-to-genital contact," which made "it more likely that individual jurors convicted her on the basis of different acts." *Id.* at 159.

That did not occur in Defendant's case. First, the record did not contain evidence permitting the reliance on evidentiary inconsistencies or factual improbabilities respecting "each specific" allegation of sodomy. Victim simply identified a room in which touching occurred, and Defendant identified a

different room in which he committed statutory sodomy against Victim on two occasions. Nothing in Defendant's case suggests that individual jurors convicted Defendant on the basis of different acts or that they were not unanimous on the specific acts upon which they based their verdict. What Defendant's case suggests is that the jurors found Defendant guilty of two instances of touching Victim in the bathroom just as he confessed to doing.

Defendant argues that this language in *Celis-Garcia* is dicta because it was based on a hypothetical situation not before the Court. But to support this argument Defendant cites language from *Celis-Garcia* responding to the State's argument that it would be impossible to craft verdict directors identifying specific acts in cases "involving repeated, identical sexual acts committed at the same location and during a short time span because the victim would be unable to distinguish sufficiently among the acts." *Id.* at 157 n.8. The Court did not address this argument because the "case hypothesized by the state was not the one presented here." *Id.* But this language appears in that part of the opinion addressing whether the trial court had even erred in submitting the challenged verdict directors, not the part addressing whether the defendant had proven manifest injustice. The Court's language regarding the defendant's incident-specific defense cannot be dicta since it is intricately related to whether the defendant proved manifest injustice. In other words, the type of defense employed determines whether there is a risk

that the jurors based their finding of guilt on different acts and did not unanimously agree on each act they found the defendant guilty of committing.

The Court of Appeals has faithfully applied this language in later cases in determining that while the trial court had erred in submitting verdict directors that failed to ensure a unanimous verdict, the defendant had nevertheless failed to establish manifest injustice because those cases, unlike *Celis-Garcia*, involved defenses that the victims had fabricated their stories.

In *State v. LeSieur*, 361 S.W.3d 458 (Mo. App. W.D. 2012), the court described such a strategy as a "unitary defense." *LeSieur*, 361 S.W.3d at 465. An "incident-specific defense," on the other hand, is one in which the defendant presents evidence or argument that "would have given the jury a basis to distinguish among the various incidents mentioned in the evidence." *Id.* If the defendant employs a unitary defense generally attacking a victim's credibility, courts will not necessarily find manifest injustice in a multiple-acts case from the trial court's use of a verdict director that fails to sufficiently differentiate among the various acts. But if the defendant employs an incident-specific defense in a multiple-acts case, an appellate court may find that the verdict director failed to adequately differentiate between the acts and that the jury was misdirected to the extent that it was

likely it did not unanimously agree on which specific act the defendant committed.

In *LeSieur*, and other similar cases, the Court of Appeals determined that while the trial court had erred in submitting broadly-worded verdict directors in a multiple-acts case when the record otherwise revealed "distinguishing characteristics" to differentiate the acts, it nevertheless determined that the defendant had not shown manifest injustice because he had employed a general attack on the victim's credibility, including an "emphasis on the supposed implausibility of the account she gave," *Id.* at 464–65. This demonstrated to the court that it was not likely that the jurors relied on different acts in reaching a guilty verdict. *Id.*; *see also State v. Ralston*, 400 S.W.3d 511, 521–22 (Mo. App. S.D. 2013) (finding that the trial court erred in submitting broadly worded verdict directors in a multiple-acts case without differentiation but finding no manifest injustice); *State v. Rose*, 421 S.W.3d 522 (Mo. App. S.D. 2013) (same); *State v. Payne*, 414 S.W.3d 52 (Mo. App. W.D. 2013) (same).

In *Barmettler*, the court found that the postconviction defendant suffered no prejudice from his counsel's failure to object to identically worded verdict directors in a statutory-sodomy case. *Barmettler*, 399 S.W.3d at 530. The court distinguished the record in *Barmettler* from *Celis-Garcia* because "the uncharged acts at issue in *Celis–Garcia* were well-developed at trial through

the presentation of evidence and testimony." *Id.* Moreover, it noted that the court in *Celis-Garcia* was "concern[ed] that the emphasis placed by the State on the multiple uncharged acts at trial created a risk that jurors would be misled about which incident of alleged abuse had to occur in order to convict Celis–Garcia of a particular count." *Id.* Since "there was no emphasis or focus in [*Barmettler*] by the State on the uncharged acts of sexual abuse," the court found no basis in the record to hold that there was a reasonable risk that any jurors may have been confused or misled by the verdict directors and convicted [the defendant] based upon any uncharged acts of sexual abuse." *Id.*

The record of Defendant's underlying criminal trial shows that Defendant employed a "unitary defense" in which he simply challenged the Victim's credibility as part of a defense strategy to show that Victim had fabricated the allegations. In other words, Defendant did not rely on evidentiary details relating to the separately identified incidents to show that one or more of them did not occur. There was no evidence in the record to permit such differentiation. Instead, he attacked the credibility of Victim's reports of sexual abuse during cross-examination of the various witnesses and argued to the jury that the incidents did not occur.

Ultimately, the distinction between an incident-specific defense and a unitary defense is not controlling in a case alleging ineffective assistance of

counsel for failing to object to identically worded verdict directors in a multiple-acts case. In *Celis-Garcia*, this Court found plain error on direct appeal because a risk existed in the particular record of that case that the jurors might not have unanimously agreed on the same specific act in finding the defendant guilty. But when considering the prejudice inquiry on a claim of ineffective assistance, the issue focuses on the reliability of the trial and whether a reasonable probability exists that the defendant would have been acquitted if the alleged error had not occurred. In Defendant's case that alleged error was a failure to object to the verdict directors. These two considerations are not the same. It is therefore unnecessary to resolve Defendant's attack on the Court of Appeals cases applying the unitary-defense principle in deciding plain-error challenges to verdict directors in multiple-acts cases.

The motion court did not clearly err in finding that Defendant did not carry his burden of proving that the jurors did not unanimously agree on a specific act for each count. Victim testified that two incidents of touching occurred in the kitchen, though she was later unsure about the location. Defendant signed a written confession admitting that he inappropriately touched Victim's genitals on two occasions in the bathroom. No other evidentiary details were offered that would reasonably permit some jurors to find that the two acts of sodomy occurred in the kitchen but not the bathroom

or vice versa. The record in the underlying criminal trial suggests that the jury found Defendant guilty based on either Victim's trial testimony in which she said that Defendant touched her genitals more than once perhaps in the kitchen, or, more likely, on the evidence of Defendant's confession in which he admitted touching Victim twice in the bathroom.

Courts in other states facing similar claims of ineffective assistance in multiple-acts cases have found no *Strickland* prejudice. In *State v. Van Buren*, 746 N.W.2d 545 (Wis. App. 2008), the defendant, who was convicted of exposing a child to harmful material, claimed that his trial counsel was ineffective for failing to ask for a "specific unanimity instruction" after the victim identified two different pictures of "naked kids" that she said the defendant had showed her. *Id.* at 552. The defendant argued that without this instruction it was possible that different jurors considered different pictures as the basis for his conviction. *Id.* The court rejected this claim because he had not shown a reasonable probability that the lack of a specific unanimity instruction resulted in a non-unanimous verdict: "There is simply no basis in the record to suggest that the jury might have believed the victim with respect to one of the images and not the other, or found one of the images harmful and the other not." *Id.*

In *Miller v. State*, 16 P.3d 937 (Idaho App. 2000), the defendant was charged with only one count of committing a lewd and lascivious act on a

minor but evidence was presented of "six separate incidents of manual-genital contact [that] occurred" between the defendant and the victim. *Id.* at 943–44. The defendant claimed that his counsel was ineffective for failing to request that a "unanimity instruction" be given directing the jurors to agree that the same underlying act had been proven beyond a reasonable doubt. *Id.* at 944. The court rejected this claim and held that even if the failure to request the instruction was deficient performance, the defendant was not prejudiced because the defense at trial was that the victim had fabricated the charges and the victim's testimony was uncontradicted. *Id.*

The motion court did not clearly err in rejecting Defendant's postconviction claim that trial counsel was ineffective for failing to object to the verdict directors.

II (failure to call an expert witness at sentencing).

The motion court did not clearly err in rejecting, after an evidentiary hearing, Defendant's postconviction claim that trial counsel was ineffective for failing to call an expert witness to testify during the sentencing hearing because Defendant failed to carry his burden of proving that this testimony would have provided mitigating evidence that would have lessened Defendant's sentence.

A. The record regarding this claim.

In his amended postconviction motion, Defendant alleged that trial counsel was ineffective for failing to call an expert such as Dr. Bill Geis to present mitigation testimony during the sentencing hearing regarding Defendant's "mental disability." (PCR L.F. 33). Defendant alleged that if this testimony had been presented, a reasonable probability existed that Defendant "would have received a lesser sentence." (PCR L.F. 33).

Since Defendant was found to be a prior offender, there was no jury sentencing. (Tr. 60). After the jury found Defendant guilty, the court ordered that a sentencing assessment report (SAR) be prepared.[7] (Tr. 506).

During the sentencing hearing before the court, Victim's father made a brief statement on behalf of himself and Victim's recently deceased

[7] The SAR is not part of the record in this postconviction case.

grandmother expressing their hope that Defendant "rots in prison where he belongs." (Tr. 511).

Defendant did not present any witnesses or evidence during the hearing, but his attorney highlighted for the court several items of mitigating evidence contained in the SAR, including: (1) an abusive father who left him when he was three years old and Defendant's difficult childhood; (2) having "mental issues" while in school and being in special education classes; (3) dropping out of school at a young age to help his mother with work; (4) history of abusing alcohol before 1998 but not drinking since then; (5) maintaining employment for long stretches and having a "good employment history"; and (6) that he had "turned his life around" since being released from prison in 1998. (Tr. 516–21). Defendant personally addressed the court and said that he should not be punished for something that he did not do. (Tr. 521).

When imposing sentence, the court told Defendant that he was not being punished for something that he did not do, and the court reminded Defendant that a jury had found him guilty, and that based on the evidence, the court agreed with that verdict. (Tr. 521–22). The court then referred to the SAR and noted Defendant's prior convictions, his denial of having a sexual attraction to small children, his improper sexual behavior in DOC, and his failure to respect the boundaries in relationships:

> And I look at the SAR in this case, Mr. Hoeber, and you've taken the life of another person previously. You previously sexually abused a child back in the early '90s. You deny you have a sexual attraction to small children; nonetheless, you have that conviction, as well as this one.
>
> You deny that you have any type of sexual deviant behavior and, yet, you and another individual in the Department of Corrections were giving each other hickeys to see who would leave the most passionate mark. And you were having sexual intercourse with another male at the institution.
>
> That's kind of—doesn't speak to someone who isn't in that type of situation. That speaks to someone who has no understanding about the bounds and what sexual relations are all about.

(Tr. 522).

In his pro se Rule 29.15 postconviction motion and attachments thereto, Defendant wrote extensively about the underlying criminal case, his counsel's alleged ineffectiveness, and evidence of which he was aware that showed someone else had sexually abused Victim. [8] (PCR L.F. 7–29). Defendant

[8] When asked about letters Defendant had written to the court, Dr. Geis, who evaluated Defendant for mental retardation in the postconviction case, testified that it was "a more functional letter than you'd really expect from somebody who is mentally retarded." (PCR Tr. 65–66). He also said that

repeatedly referred to the "false" charges brought against him and claimed someone else had committed the crime.[9] (PCR L.F. 8, 10, 15, 17, 24, 27). Defendant described the caring relationship he had with Victim and how happy Victim was that Defendant took care of her. (PCR L.F. 16–17). Defendant even asked if there was "any way [he] could see [Victim] after I give this time back to you for something I did not do to her." (PCR L.F. 15).

During the postconviction evidentiary hearing, trial counsel testified that he had done "hundreds" of sentencing hearings by the time he handled Defendant's case. (PCR Tr. 86–87). He was aware of Defendant's apparent mental retardation from school records. (PCR Tr. 89). He also said that he was aware of Dr. Geis, who had been called by other public defenders, but did not consider having Defendant psychologically evaluated for sentencing

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based on Defendant and his background, "you would not expect that the handwriting would be this good; that he can actually form sentences that are this good." (PCR Tr. 66). Dr. Geis was "struck" by the writings he had reviewed. (PCR Tr. 66). He then suggested that Defendant perhaps possessed "a certain kind of street skills" that enabled him to do this. (PCR Tr. 66).

[9] Defendant's pro se motion included an extensive timeline of when he was incarcerated in an effort to show that he could not have committed the crime during the time alleged in the information. (PCR L.F. 18–19).

purposes. (PCR Tr. 95–97). He claimed not to have had a strategy reason for not presenting such evidence. (PCR Tr. 99).

Defendant also called Dr. Geis to testify about a forensic evaluation he performed on Defendant for the postconviction case.[10] (PCR Tr. 13). Dr. Geis reviewed documents and conducted a four-hour interview with Defendant, whom Dr. Geis described as "low functioning. (PCR Tr. 19, 29). He reviewed documents relating to Defendant's difficult childhood and school records revealing Defendant's apparent mental retardation. (PCR Tr. 13, 15–19, 31–32). Dr. Geis also noted Defendant's three previous incarcerations and his sending holiday cards to Victim, apparently from prison. (PCR Tr. 27).

One of Defendant's previous incarcerations involved his fondling of a four-year-old girl. (PCR Tr. 37). While living in a halfway house following his release from prison on a manslaughter conviction, Defendant was found with a pair of children's underwear; Defendant claimed that the underwear got mixed in with his clothes when he did his girlfriend's laundry. (PCR Tr. 38).

Dr. Geis, who said Defendant's full-scale IQ was 69, found Defendant had "mild" mental retardation and poor social functions. (PCR Tr. 42–43). He did

[10] Dr. Geis had also apparently evaluated Defendant on his competency to be tried in the underlying criminal case, and found that he was competent to stand trial. (PCR Tr. 45).

not evaluate Defendant on whether he could conform his behavior to community standards, but did evaluate Defendant on whether he was a pedophile "in a very technical sense." (PCR Tr. 47).

Rather than directly answering the question of whether Defendant was a "wired pedophile," Dr. Geis instead described two classifications of sexual offenders: a "fixated offender" and a "regressed offender." (PCR Tr. 48). Fixated offenders are "much closer to the really technical understanding of [a] pedophile" in the sense that they "have a compulsion that continues." (PCR Tr. 48). A regressed offender, on the other hand, is powered by circumstances, and the focus of that offender's sexual interest depends on the circumstances. (PCR Tr. 49).

Dr. Geis believed that Defendant was "much closer to the profile of a regressed offender" and that there was "little evidence of him being a fixated" offender. (PCR Tr. 50–51). Dr. Geis noted that Defendant only touched, but did not have coitus, with Victim. (PCR Tr. 50–51). Although he admitted that Defendant's relationship with Victim could be seen as "grooming," he stressed that with regressed individuals it is "meaningful" if you can remove or limit their access to children. (PCR Tr. 51). Although Defendant had violated probation (and the law) by moving to within 1000 feet of a school, Dr. Geis believed that Defendant was not someone who "actively" searches out children. (PCR Tr. 55).

Dr. Geis conceded that while factors related to pedophilia are present for Defendant, he believed that those factors were "counterweighted" by other factors showing Defendant to be a regressed, rather than fixated, offender. (PCR Tr. 60). He then noted that Defendant had never had sexual-offender training or forensic case management. (PCR Tr. 53–54). Dr. Geis suggested that Defendant could have a "central kind of intervention" in a group home for the mentally retarded where his time and location is strictly regulated. (PCR Tr. 55–56). This type of monitoring was not possible for probation and parole because of limited resources, and forensic case managers are not available in every jurisdiction. (PCR Tr. 55–56).

But Dr. Geis testified that even with a high degree of structure and "very serious and strong skills training," he could not say that Defendant would not reoffend. (PCR Tr. 55). In fact, Dr. Geis said it was impossible to predict if Defendant would reoffend. (PCR Tr. 57).

In rejecting this claim, the motion court noted Defendant's prior convictions, his denial of any mental-health problems, and his sexual misconduct violations in prison for having sexual intercourse with another inmate. (PCR L.F. 67). The motion court, which was also the same court that had sentenced Defendant, rejected this claim because there was no reasonable probability that Defendant's sentence would have been different if Dr. Geis had been called to testify. (PCR L.F. 67–68).

B. Defendant failed to prove counsel was ineffective.

The two-pronged test from *Strickland* applies to claims of ineffective assistance of counsel arising out of a sentencing hearing. *Cherco v. State*, 309 S.W.3d 819, 825 (Mo. App. W.D. 2010). "In order to satisfy the performance prong, [the defendant] must demonstrate that trial counsel's failure to call…witnesses at his sentencing hearing fell below an objective standard of reasonableness. *Id.* "There exists a strong presumption that counsel's conduct was reasonable and effective." *Id.*

To prove prejudice, the postconviction defendant must show "that but for counsel's deficient performance, there is a reasonable probability he would have received a lesser sentence." *Rush v. State*, 366 S.W.3d 663, 666 (Mo. App. E.D. 2012). To establish prejudice from the failure to call a witness or offer evidence, a postconviction movant must prove that the testimony or evidence would have provided a viable defense. *See Kates v. State*, 79 S.W.3d 922, 927 (Mo. App. S.D. 2002). "If a potential witness's testimony would not unqualifiedly support a defendant, the failure to call such a witness does not constitute ineffective assistance." *State v. Jones*, 885 S.W.2d 57, 58 (Mo. App. W.D. 1994).

"It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. "[N]ot every error that conceivably could have influenced the outcome

undermines the reliability of the result of the proceeding." *Id.* The movant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

"The selection of witnesses and evidence are matters of trial strategy, virtually unchallengable in an ineffective assistance claim." *Williams v. State*, 168 S.W.3d at 433, 443 (Mo. banc 2005); *State v. Kenley*, 952 S.W.2d 250, 266 (Mo. banc 1997) ("Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable."). Missouri courts have held that "[i]neffective assistance will not lie…where the conduct involves the attorney's use of reasonable discretion in a matter of trial strategy." *State v. Heslop*, 842 S.W.2d 72, 77 (Mo. banc 1992). "It is only the exceptional case where a court will hold a strategic choice unsound." *Heslop*, 842 S.W.2d at 77. "Counsel is vested with wide latitude in defending his client and should use his best judgment in matters requiring trial strategy." *State v. Jones*, 863 S.W.2d 353, 360 (Mo. App. W.D. 1993). Appellate courts should avoid applying "hindsight" when examining such claims. *Id.*

Defendant failed to carry his burden of proving counsel was ineffective in failing to call Dr. Geis as an expert witness. Dr. Geis's testimony was not unqualifiedly supportive of Defendant for sentencing purposes. While some of Dr. Geis's testimony regarding Defendant's mental retardation might have

had some mitigation value, it would have been substantially outweighed by the testimony suggesting that he might reoffend if released from prison. In fact, much of Dr. Geis's testimony could be viewed as aggravating and supportive of a long prison sentence rather than mitigating.

For example, Dr. Geis could not deny that Defendant was a pedophile. Instead he referred to Defendant as a "regressed" offender who would act on his sexual impulses if the circumstances presented themselves. But the record suggests that Defendant did not always wait for circumstances to present themselves and that he formed relationships with women who have small children. Moreover, Dr. Geis flatly admitted that there was no way he could say that Defendant would not reoffend.

In addition, Dr. Geis noted Defendant's numerous previous convictions, including the sexual abuse of a child. The court was also aware of these prior convictions from the SAR and mentioned them during sentencing.

The record also shows that Defendant denied any wrongdoing and claimed that he had been falsely imprisoned. It is difficult to implement Dr. Geis's suggestion of a group home setting in which Defendant would be closely monitored, when Defendant denies, as he did in his pro se postconviction motion, that he has committed any crime. This is especially true when Defendant has expressed a desire to contact Victim when he gets out of prison, and was apparently sending her greeting cards while the underlying

criminal case was pending. Even with close monitoring and intensive education, Dr. Geis could not say that Defendant would not reoffend.

The failure to present mental-health evidence during a non-bifurcated sentencing proceeding has been held not to be ineffective assistance when the motion court is also the court that imposed the sentence same and the court specifically finds that the omitted evidence would not have changed the sentence. In *Wills v. State*, 321 S.W.3d 375 (Mo. App. W.D. 2010), the postconviction defendant claimed that counsel was ineffective for failing to present evidence of the defendant's "long history of mental illness and treatment." *Id.* at 384. The court rejected this claim because the defendant could not demonstrate prejudice when the motion court expressly found that the sentence it had previously imposed would not have changed even if it had heard the omitted evidence:

> Before this Court, [the defendant] fails to respond to the trial court's critical finding and conclusion that when "considering the evidence of mental health that Movant presented at the evidentiary hearing, this court's determination of the sentence would not have changed." Accordingly, it is difficult to discern how [the defendant] was even plausibly prejudiced by the failure to present the evidence pertaining to his mental health at the sentencing hearing.

Id. (footnote omitted).

The cases on which Defendant relies do not establish that the motion court erred in rejecting this postconviction claim.

In *Vaca v. State*, 314 S.W.3d 331 (Mo. banc 2010), trial counsel hired a forensic psychologist *before* trial to examine the defendant, who was diagnosed with schizophrenia, "a serious mental disease," and had an IQ of 73. *Id.* at 332. This was confirmed by government documents assessing a disability due to schizophrenia. *Id.* The psychologist's "report also documented a violent history including incidents in which [the defendant] stabbed an elementary school classmate with a pencil, punched a woman who allegedly made comments about him and physically fought with family members." *Id.* at 333. The report contained the psychologist's conclusions that defendant's schizophrenia "clearly could have had an impact on his ability to form rational thought and conform his behavior to the expectations of society at the time of the offense" and that the defendant's condition of low intelligence (borderline intellectual functioning)…could have affected his ability to understand the impact of his actions." *Id.* Although defense counsel and the psychologist discussed this report before trial, counsel failed to call the psychologist during the penalty phase of a bifurcated trial. *Id.*

The psychologist testified to his examination and findings during the postconviction evidentiary hearing. *Id.* at 334. Although trial counsel knew the case centered on the penalty phase since the evidence of guilt was

overwhelming, he did not consider calling the psychologist as a witness and could think of no trial-strategy reason for not doing so. *Id.* In finding counsel ineffective, this Court stated that "the holding of this case is not that counsel was ineffective for not calling" the psychologist, but that "this case rests on the fact that the question of whether to call [the psychologist] was never considered." *Id.* at 337.

At least one court has distinguished *Vaca* on the ground that it involved jury sentencing, rather than sentencing by the court alone:

> The instant case is distinguishable from *Vaca v. State* because (among other reasons) in *Vaca* the Supreme Court of Missouri dealt with the issue of jury sentencing. Here, because the motion court was the court that sentenced [the defendant], it was in a unique position to conclude that no prejudice followed to [the defendant] by his attorney's failure to submit this mental health evidence at the sentencing hearing.

Wills v. State, 321 S.W.3d at 384 n.6.

Williams v. Taylor, 529 U.S. 362 (2000), another case cited by Defendant, is also distinguishable. In *Williams*, a capital case in which the defendant was sentenced to death, trial counsel had "documents prepared in connection with [the defendant]'s [juvenile] commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was 'borderline mentally retarded,'

had suffered repeated head injuries, and might have mental impairments organic in origin." *Id.* at 370. The court found that counsel were also ineffective for failing to "to conduct an investigation that would have uncovered extensive records graphically describing [the defendant]'s nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." *Id.* at 395. These records showed that the defendant's "parents had been imprisoned for the criminal neglect of [the defendant] and his siblings, that [the defendant] had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody." *Id.* Moreover, "the very judge who presided at [the defendant]'s trial, and who once determined that the death penalty was 'just' and 'appropriate,' concluded that there existed 'a reasonable probability that the result of the sentencing phase would have been different' if the jury had heard that evidence." *Id.* at 396–97. Defendant's case is clearly distinguishable from what occurred in *Williams*. *See Lyons v. State*, 39 S.W.3d 32, 40–41 (Mo. banc 2001) (distinguishing *Williams*); *McLaughlin v. State*, 378 S.W.3d 328, 353–54 (Mo. banc 2012) (distinguishing *Williams* as a

case that "involved a complete failure by trial counsel to introduce important mitigating evidence").

Two other cases relied on by Defendant are inapposite as they dealt with claims of ineffective assistance for failing to call expert witnesses during the guilt phase of trial to counter the State's evidence. *See Cravens v. State*, 50 S.W.3d 290 (Mo. App. S.D. 2001) (failing to call a gun-shot residue expert); *Wolfe v. State*, 96 S.W.3d 90 (Mo. banc 2003) (failing to have unidentified hair samples tested).

The motion court did not clearly err in rejecting this claim.

CONCLUSION

The motion court did not clearly err, and its judgment overruling Defendant's motion for postconviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached reply brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 13,851 words, excluding the cover and certification, as determined by Microsoft Word 2010 software; and that a copy of this brief was sent through the electronic filing system on November 6, 2015, to:

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