In the Missouri Court of Appeals
Eastern District

DIVISION TWO

STATE OF MISSOURI,	)	ED108656
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
	)	1922-CR02121
v.	)	
	)	Honorable Clinton R. Wright
JAMEL JONES,	)	
	)	Filed: March 2, 2021
Appellant.	)	

Jamel Jones (Appellant) appeals from the trial court's judgment, after a jury trial, convicting him of eight counts of first-degree statutory sodomy, four counts of second-degree statutory sodomy, and two counts of first-degree child molestation. The trial court sentenced him as a persistent offender to consecutive 15-year sentences on three counts of first-degree statutory sodomy, three consecutive 10-year sentences on three other counts of first-degree statutory sodomy, concurrent 10-year sentences on the two counts of child molestation, and concurrent 15-year sentences for the remaining two counts of first-degree statutory sodomy and for the four counts of second-degree statutory sodomy, for a total sentence of 75 years of imprisonment. We affirm.

BACKGROUND

Appellant was charged in the Circuit Court of the City of St. Louis with eight counts of first-degree statutory sodomy, four counts of second-degree statutory sodomy, and two counts of

first-degree child molestation.[1] Viewed in the light most favorable to the verdict, the following evidence was adduced during the week-long trial.

In 2003 Appellant began a relationship with Wanda Dailey (Mother), the mother of victim daughters, PD[2] and AD when PD was "really little" and AD was just born. AD thought of Appellant as her real father. Appellant and Mother had another daughter, JJ, and a son together. The family struggled to meet their basic needs and moved frequently. They lived in very small apartments throughout St. Louis on West Steins, Indiana, Texas, Gravois, and South Grand streets. PD moved between the apartments with Mother's and her father's home in Poplar Bluff. In 2016, PD and her own infant moved into the Gravois apartment with Mother, but they were permanently evicted in December 2016, after an argument turned physical and police became involved.

In February 2017, a suicide note written by AD was discovered at school. It alleged Appellant was molesting her and her sister JJ. AD was taken to the hospital by police and questioned by social worker, Karen Gudic, and by Children's Advocacy Center (CAC) investigator, Tammy Hackworth. JJ and her brother were also taken to the hospital and interviewed. PD alleged Appellant had molested her, too. Appellant turned himself in to the police. He was indicted with fourteen counts of sex offenses against PD, AD, and JJ for events alleged to have occurred from January 1, 2011, though February 2, 2017.

The three victims, PD, AD, and JJ, testified during the September 2019 trial about the various acts of sexual contact they alleged against Appellant. PD was 20 years old, AD was almost 16, and JJ was 13 at trial. They alleged that Appellant inflicted numerous and different

[1] Appellant was also charged in Count 12 with one count of possession of a controlled substance, but that was severed from this case prior to the jury trial. The counts were renumbered for submission to the jury but not for judgment and sentence.
[2] We refer to the victims by their initials to protect their privacy. Section 595.226, RSMo. 2017.

kinds of sexual acts on them at different residences over time. The State submitted to the jury the acts and dates in Instruction Nos. 5 through 18.

January 2011 – January 2012

Instruction 9/Count 5: Statutory Sodomy First (PD)
Instruction 10/Count 6: Statutory Sodomy First (PD)

The alleged acts began between January 1, 2011, and January 1, 2012, when the family lived in the West Steins apartment and PD was in fifth or sixth grade at the Lyon school. PD alleged that while they were playing the game "Four Walls," where everyone hid with the lights off and Appellant would look for them, he would find PD and they would have oral sex. PD explained sex acts would happen on the side of the bed, in the bathroom, or various places in the apartment even though it was small. The State charged first-degree statutory sodomy in Count 5 and instructed the jury in Instruction No. 9, asking them to find Appellant placed his genitals in PD's mouth during this time period. Count 6 also charged first-degree statutory sodomy related to PD, and instructed the jury with Instruction No. 10, asking the jury to find that Appellant placed his mouth on PD's genitals during this time period.

March 2013 – December 2014

Instruction 12/Count 8: Statutory Sodomy Second (PD)
Instruction 13/Count 9: Statutory Sodomy Second (PD)
Instruction 14/Count 10: Statutory Sodomy Second (PD)

PD testified that Appellant did "sexual things" to her about when she was in fifth grade. PD testified that during the time their family lived in the Indiana apartment, approximately March 7, 2013 through December 31, 2014, Appellant had her get out of bed at night to touch her and have her perform oral sex on him. She said it was not the same every time, but these were things he did to molest her. The State charged Appellant with Count 8, second-degree

statutory sodomy, and instructed the jury in Instruction No. 12 to find Appellant guilty if they believed he knowingly placed his genitals in PD's mouth during this time period.

PD also testified there was a time when the other kids were at a park and Mother went to the store. She said Appellant performed oral sex on her on the bathroom floor while they lived in the Indiana apartment. The State charged Appellant in Count 9, second-degree statutory sodomy, and instructed the jury in Instruction No. 13, to find Appellant guilty for knowingly placing his mouth on PD's genitals during the time period from March 7, 2013 to December 31, 2014. PD also testified Appellant touched her with his hand as one of the ways he molested her. Appellant did this when everyone else was asleep. The State charged Appellant with Count 10, second-degree statutory sodomy, and also asked the jury to find Appellant guilty of acts occurring during the same time period – March 7, 2013, through December 31, 2014. Instruction No. 14 asked the jury to find Appellant guilty if they believed he knowingly touched PD's genitals with his hand during this time.

May 1, 2014 – October 14, 2015

Instruction 5/Count 1: Child Molestation (AD)

AD testified that Appellant started to touch her "private areas" when she was doing gymnastics moves in a swimsuit. He made her promise not to tell anyone. He also started touching her "behind" over her swimsuit. AD testified that for the time period of May 1, 2014 through October 14, 2015, when she was 11 years old and the family was living in an apartment on Texas, Appellant touched her vagina over her clothes. She provided general details about putting on clothing before he touched her this way. She said Appellant threatened to kill AD's mother if AD ever told anyone about the abuse. The State charged Appellant with Count 1, child

molestation, and instructed the jury in Instruction No. 5 to find him guilty if they believed he touched AD's genitals through her clothing during this time period.

March 28, 2016 – November 1, 2016

Instruction 16/Count 12: Statutory Sodomy First (JJ)

During the time period from March 28, 2016, to November 1, 2016, when the family lived in the Gravois apartment, JJ remembered Appellant touching her vagina with his mouth on one occasion. Appellant cross-examined JJ to impeach her credibility regarding her deposition testimony that she was touched this way 25 percent of the 100 times of abuse, or five times, but the deposition testimony was not properly admitted for its truth as substantive evidence. The State charged Appellant with Count 12, statutory sodomy in the first degree, and instructed the jury in Instruction No. 16 to find Appellant guilty of the crime if they believed he knowingly placed his mouth on JJ's genitals during this time period when JJ was less than twelve years old.

October 15, 2016 – December 31, 2016

Instruction 6/Counts 2: Statutory Sodomy First (AD)
Instruction 7/Count 3: Child Molestation (AD)

During a very limited time when the family lived in the Grand/"Bates" apartment, AD testified that Appellant committed several acts of sexual misconduct. She said "sometimes" it happened in the back room, sometimes in the front room, sometimes when her sister was around, sometimes when she was sitting up, and sometimes when she was lying down. The State charged Appellant with Count 2, first-degree statutory sodomy, and instructed the jury in Instruction No. 6 to find Appellant guilty if they found he knowingly touched AD's genitals with his hand during this time when AD was less than fourteen years old.

AD further testified that Appellant would put his mouth on her breasts during this time period, sometimes to get her horny before he touched her vagina. The State charged Appellant

with Count 3, child molestation, and instructed the jury in Instruction No. 7 to find Appellant guilty if they believed he touched the breasts of AD with his mouth during this time period when AD was less than fourteen years old.

November 1, 2016 – January 31, 2017

Instruction 15/Count 11: Statutory Sodomy First (JJ)
Instruction 17/Count 13: Statutory Sodomy First (JJ)

JJ testified that during the time her family lived in the Gravois apartment, starting when she was ten years old, she remembered Appellant touching her genitals with his hand. She was not certain of the day or time it happened, nor could she recall how many times. She knew it happened more than once. The State charged Appellant in Count 11 with first-degree statutory sodomy and instructed the jury in Instruction No. 15 to find Appellant guilty if they believed that he knowingly touched JJ's genitals with his hand during this time period.

JJ also testified she remembered touching Appellant's penis one time when they lived at the Gravois apartment and did not do so anywhere else. She said Appellant put his hand next to hers and just did nothing. During a deposition not admitted for its truth, she testified she did "less than five times." The State charged Appellant in Count 13 with statutory sodomy in the first degree and instructed the jury in Instruction No. 17 to find Appellant guilty if they believed he knowingly placed JJ's hand on his genitals during this time period.

January 1, 2017 – February 17, 2017

Instruction 8/Count 4: Statutory Sodomy First (AD)
Instruction 18/Count 14: Statutory Sodomy First (AD)

AD testified that during the time her family lived in the Grand apartment, "multiple times" and in "different scenarios," Appellant would use his mouth on her genitals. The State charged Appellant with Count 4, statutory sodomy in the first degree, and instructed the jury in

Instruction No. 8 to find Appellant guilty if they believed he knowingly placed his mouth on AD's genitals during this time period when AD was less than fourteen years old.

AD testified generally that Appellant placed her hand on his genitals when they lived in the Grand apartment. She did not know how many times this happened or how often, but it happened more than once. Her testimony alleged the same conduct occurred in the Gravois and Texas apartments, but the jury was instructed to determine Appellant's guilt only during the timeframe when the family lived in the Grand apartment. The State charged Appellant with Count 14, first-degree statutory sodomy and instructed the jury in Instruction No. 18 to find Appellant guilty if it believed he knowingly placed AD's hand on his genitals during this time period when she was less than 14 years old.

Verdicts, Sentencing, and Appeal

The jury retuned verdicts finding Appellant guilty of all counts. Appellant filed a motion for new trial and a supplemental motion for new trial alleging, in part, that the verdicts were not unanimous. The trial court entered a written order denying the motions. The trial court found Appellant to be a prior and persistent offender based on guilty pleas for possession of a controlled substance and first-degree tampering. On January 15, 2020, the trial court sentenced Appellant to serve consecutive 15-year sentences on three counts of first-degree statutory sodomy, three consecutive 10-year sentences on three other counts of first-degree statutory sodomy, concurrent 10-year sentences on the two counts of child molestation, and concurrent 15-year sentences for the remaining two counts of first-degree statutory sodomy and for the four counts of second-degree statutory sodomy, for a total sentence of 75 years of imprisonment in the Missouri Department of Corrections. This appeal follows.

DISCUSSION

Appellant raises three points on appeal, each alleging the trial court erred in its judgment and sentence. First, Appellant claims the trial court plainly erred in submitting several jury instructions, accepting the guilty verdicts, and sentencing him because they failed to specify a particular incident of sexual conduct or instruct the jury that they must unanimously agree on the same incident of conduct in presenting evidence of multiple acts of alleged sexual conduct with AD, PD, and JJ. Second, Appellant alleges the trial court erred in sentencing him as a persistent offender as to several counts because the State failed to prove he pled guilty to two felonies before the commission of those offenses. Third, Appellant alleges the trial court erred in denying his motions for judgment of acquittal at the end of the State's case and at the close of all the evidence because the evidence was insufficient as a matter of law. We review each point in the order raised.

Point I

In his first point, Appellant alleges the trial court plainly erred in submitting to the jury Instruction Nos. 5 through 10 and Instruction Nos. 12 through 18, and then accepting the guilty verdicts and in sentencing Appellant. Appellant contends the verdict directors for Counts 1 through 6 and Counts 8 through 14 failed to specify a particular incident of sexual contact, or instruct the jurors that they must unanimously agree on the same incident or conduct, thereby violating Appellant's rights to due process, a fair trial, unanimous verdict, and freedom from double jeopardy. Appellant alleges the State presented evidence of multiple acts of alleged sexual contact with AD, PD, and JJ, including multiple separate instances of hand and mouth contact to vagina, hand to penis contact, mouth to breast contact, and touching through clothes that occurred from 2011 to 2017 in apartments throughout St. Louis on the streets of West Steins,

Texas, Gravois, and Grand, yet the verdict directors did not delineate these incidents from each other. Therefore, it was unclear as to which incident Appellant was found guilty of, allowing the possibility that the jurors failed to unanimously find the same incident of sexual contact for each count. Appellant argues this resulted in manifest injustice because he was entitled to unanimous verdicts of the jury upon the issue of his guilt of each particular act.

Standard of Review

Appellant affirmatively stated during trial that he had no objections to any of the verdict directors. Therefore, the alleged error is not preserved. It is reviewable only for plain error. *State v. Myles*, 479 S.W.3d 649, 656, 57 (Mo. App. E.D. 2015). To show the trial court plainly erred in submitting an instruction, a defendant bears the burden of showing that the trial court so misdirected or failed to instruct the jury that it is apparent to this Court that the error affected the jury's verdict. *Id.* at 655-56. Manifest injustice or miscarriage of justice results only if it is apparent that the jury's verdict was tainted by the instructional error. *Id.* at 656. Instructional error seldom constitutes plain error. *Id.* at 655.

Analysis

In *State v. Celis-Garcia*, 344 S.W.3d 150, 155-56 (Mo. banc 2011), the Missouri Supreme Court explained that a "multiple acts case" arises when evidence is presented 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. *Id.* To determine if a case is a multiple acts case requiring more specificity in a verdict director, courts consider the following factors: "(1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether

there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct." *Id.* (citing 75B AM.JUR. 2D *Trial* § 1511).

A defendant's right to a unanimous verdict would be protected in a multiple acts case by either the state (1) electing the particular criminal act on which it will rely to support the charge, or (2) the verdict director specifically describing the separate criminal acts presented to the jury and instructing the jury that it must agree unanimously that at least one of those acts occurred. *Id.* at 157.

In *Celis-Garcia* the state presented evidence of multiple, separate instances of hand-to-genital contact committed against both victims, any of which would have supported the charged offenses. The Missouri Supreme Court held that because it was impossible to determine whether the jury unanimously agreed on any one of the separate incidents, the verdict directors were erroneous in permitting the jury to convict the defendant of two counts of sodomy without identifying the acts the jurors were to agree she committed, thereby violating her right to a unanimous jury verdict under the Missouri Constitution. *Celis-Garcia*, 344 S.W.3d at 158. The jury was free to believe or disbelieve any of the witness testimony. *Keveney v. Missouri Military Acad.,* 304 S.W.3d 98, 105 (Mo. banc 2010). However, the Court noted the fact that Ms. Celis–Garcia 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. *Celis-Garcia*, 344 S.W.3d at 159. Consequently, the Court found that the verdict directors misdirected the jury in a way that affected the verdict, thereby resulting in manifest injustice. *Id.*

However, *Celis-Garcia* and its progeny do not require a finding of error in submitting the multiple acts in one count when the evidence would not easily allow the jury to rely upon

different acts to find the defendant guilty of multiple acts counts. In fact, a footnote in *Celis-Garcia* distinguishes the specific acts in that case from others in which the evidence of a defendant's conduct in committing the same offense against a victim in a repeated, indistinguishable manner such that the jury could not differentiate between the acts in each verdict director. The *Celis-Garcia* Court noted:

> The state argues that requiring the state to differentiate between multiple acts would make it impossible to prosecute sexual abuse 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. The case hypothesized by the state was not the one presented here because both [victims] provided details of multiple sexual acts that were committed at different times and in different locations.

Celis-Garcia, 344 S.W.3d at 157 n.8.

Evidence of an appellant's conduct in committing the same offense against a child victim in a repeated, indistinguishable manner renders it impossible for the jury to differentiate between the repeated acts falling within each verdict director, such that there is no violation of a defendant's right to unanimity. *State v. Walker*, 549 S.W.3d 7, 12 (Mo. App. W.D. 2018) (multiple acts of statutory rape committed in an identical manner in the same location approximately every other day over a period of time); *State v. Armstrong*, 560 S.W.3d 563, 570-74 (Mo. App. E.D. 2018) (repeated acts of statutory sodomy, attempted statutory sodomy, and child molestation were committed in the same manner and location during each charged time period). When the jury has no evidentiary basis upon which to differentiate between the repeated acts, the defendant's right to a unanimous verdict is not at risk of being violated. *Walker*, 549 S.W.3d at 12. To meet the burden that plain error occurred which results in manifest injustice or miscarriage of justice, the defendant must show it is apparent that the jury's verdict was tainted by the instructional error. *Myles*, 479 S.W.3d at 656-57.

Appellant's case includes multiple acts in that there was evidence of multiple, distinct criminal acts of sexual contact, each of which could serve as the basis for a criminal charge. *Celis-Garcia*, at 155-56. Allegations of separate sexual acts Appellant performed with each of the three girls served as a basis for each of the many criminal charges against him. To avoid violating a defendant's right to a unanimous verdict in a multiple acts case, the State was required to either elect "the particular criminal act on which it will rely to support the charge," or the verdict director must specifically describe the "separate criminal acts presented to the jury," with the jury being instructed that it must unanimously agree that at least one of those acts occurred. *Id.* at 157. The State elected the particular criminal acts to support the charges against Appellant and the verdict directors specifically described the separate criminal acts presented to the jury -- hand and mouth contact to vagina, hand to penis contact, mouth to breast contact, and touching through clothes – as well as which victim was involved and the dates that corresponded to the time the family was living in the apartment location described. Thus, our focus is on whether the evidence reflects multiple, distinct acts of the separate acts described in each verdict director such that it would warrant more specificity in the verdict directors to insure jury unanimity. In applying the *Celis-Garcia* factors for multiple acts to each of the contested verdict directors here, we find no multiple, distinct acts requiring more specificity than what the verdict directors already provided to insure jury unanimity.

Single-Act Verdict Directors

Instruction No. 16 (Count 12: first-degree statutory sodomy, JJ)

The State charged Appellant with Count 12, statutory sodomy in the first degree, and instructed the jury with Instruction No. 16 to find Appellant guilty of the crime if they believed he knowingly placed his mouth on JJ's genitals in the City of St. Louis during this time period –

March 28, 2016, to November 1, 2016, when JJ was less than twelve years old. The instruction further asked the jury to find such conduct constituted deviate sexual intercourse.[3]

JJ testified on direct examination that she remembered Appellant touching her vagina with his mouth on one occasion while in the apartment on Gravois in 2016. This testimony was sufficient to focus the jury's attention on a single act, as the State did in Instruction No. 16. Appellant attempted to impeach JJ's testimony with her prior inconsistent deposition testimony but did not seek to admit her testimony as substantive evidence by asking if it was true. "To admit a prior inconsistent statement as substantive evidence, the only necessary foundation is the inquiry as to whether the witness made the statement and whether the statement is true." *State v. Tolen*, 295 S.W.3d 883, 889 (Mo. App. E.D. 2009) (citing *State v. Reed,* 282 S.W.3d 835, 838 (Mo. banc 2009)). Without a proper foundation for substantive evidence, impeachment evidence of JJ's prior inconsistent deposition testimony that Appellant touched her this way 25 percent of the 100 times he abused her, or five times, does not provide substantive evidence of the alleged crime here to convert this charge into a multiple acts count. Consequently, Instruction No. 16 is not an instruction of multiple acts and thus, no error occurred in submitting it to the jury, accepting the guilty verdict and sentencing Appellant.

Instruction No. 17 (Count 13: first-degree statutory sodomy, JJ)

The State charged Appellant with first-degree statutory sodomy in Count 13 and instructed the jury in Instruction No. 17 to find Appellant guilty if they believed Appellant knowingly placed JJ's hand on his genitals on or between November 1, 2016, and January 31,

[3] Deviate sexual intercourse was defined by this and all the instructions as:

> any act involving genitals of one person, and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ, or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim.

2017, in the City of St. Louis. The instruction asked the jury to find the conduct constituted deviate sexual intercourse and that JJ was less than twelve years old. JJ testified at trial that she remembered touching Appellant's penis only one time in the apartment on Gravois. She described the event in that Appellant placed his hand next to hers and did nothing. Similar to her testimony regarding Count 12, Appellant argues that JJ's prior deposition testimony that she was touched this way 25 percent of the 100 times of abuse, or five times, is inconsistent with a single incident described. We disagree and do not find this instruction in violation of the rule against submitting multiple acts in one count because it is a single, descriptive incident.

Multiple-Act Verdict Directors

Instruction No. 6 (Count 2: first-degree statutory sodomy, AD)

The State charged Appellant with Count 2, first-degree statutory sodomy, and instructed the jury in Instruction No. 6 to find Appellant guilty if they found he knowingly touched AD's genitals with his hand during this time when AD was less than fourteen years old. AD testified that during the time when her family lived in the Grand/"Bates" apartment, several acts of sexual misconduct occurred. She said "sometimes" it happened in the back room, sometimes in the front room, sometimes when her sister was around, sometimes when she was sitting up, and sometimes when she was lying down. The instruction was narrowed by the date, between October 15, 2016, and December 31, 2016, which corresponds to the time the family lived in the Grand apartment. Distinguished from a multiple acts case described in *Celis-Garcia*, AD was unable to differentiate a single episode of Appellant's multiple incidents of touching her genitals in the same apartment location and within a short period of time. 344 S.W.3d at 157 n.8. We do not find the trial court erred in submitting the instruction, accepting the guilty verdict, and sentencing Appellant on this count.

Instruction No. 7 (Count 3: child molestation, AD)

The State charged Appellant with Count 3, child molestation, and instructed the jury in Instruction No. 7 to find Appellant guilty if they believed he touched the breasts of AD with his mouth during this time period of October 15, 2016, to December 31, 2016, when AD was less than fourteen years old. AD testified that Appellant would put his mouth on her breasts during this time period when the family lived in the Grand/"Bates" apartment, sometimes to get her horny before he touched her vagina. It was not explicitly associated with any particular act of hand-to-genital contact as Appellant claims. This frequent conduct, even when associated with watching pornography, was impossible to identify as a single, specific act such that it should have been instructed differently pursuant to *Celis-Garcia*, 344 S.W.3d at 157. The trial court did not err in submitting the instruction, accepting the guilty verdict, and sentencing Appellant on this count.

Instruction No. 8 (Count 4: first-degree statutory sodomy, AD)

The State charged Appellant in Count 4, statutory sodomy in the first degree, and instructed the jury in Instruction No. 8 to find Appellant guilty if they believed he knowingly placed his mouth on AD's genitals during this time period between January 1, 2017, and February 17, 2017, when AD was less than fourteen years old. The State instructed the jury to find this conduct was deviate sexual intercourse. AD testified that during this time period when her family lived in the Grand apartment, Appellant would use his mouth on her genitals "multiple times" and in "different scenarios." This generalized testimony did not specify a time or place, AD said it happened more than once and she did not know how many times. We find this was not a distinct act within the charged time period that could be differentiated in an

instruction pursuant to *Celis-Garcia*, 344 S.W.3d at 157. The trial court did not err in submitting the instruction, accepting the guilty verdict, and sentencing Appellant on this count.

Instruction No. 9 (Count 5: first-degree statutory sodomy, PD)

The State charged Appellant with first-degree statutory sodomy in Count 5 and instructed the jury in Instruction No. 9 to find Appellant guilty if they believed he placed his genitals in PD's mouth during this time period between January 1, 2011, and January 1, 2012. The jury was instructed to find this conduct was deviate sexual intercourse and that it was with a child less than fourteen years old. The evidence showed that was the time when the family lived in the West Steins apartment and PD was in fifth or sixth grade at the Lyon school. PD testified that Appellant would play the game "Four Walls" with the kids, where everyone hid with the lights off. When Appellant would look for everyone, he would find PD and have oral sex with her. The sex acts would happen on the side of the bed, in the bathroom, or various places in the apartment even though it was small. Unlike in *Celis-Garcia*, the conduct occurred frequently and there was nothing distinguishable about each specific act. 344 S.W.3d at 158. The acts were narrowed to a short timeframe of one year when the family lived in the West Steins apartment where the game took place. It did not include other similar conduct PD described from a time when she was younger and went to a different school. The prosecutor specifically argued this instruction was for the conduct that occurred during the "Four Walls" game. The trial court did not err in submitting the instruction, accepting the guilty verdict, and sentencing Appellant on this count.

Instruction No. 10 (Count 6: first-degree statutory sodomy, PD)

Similar to Count 5, the State charged Appellant with first-degree statutory sodomy in Count 6, instructing the jury to find Appellant guilty in Instruction No. 10 if they believed

Appellant placed his mouth on PD's genitals during the same time period, from January 1, 2011, to January 1, 2012. To find Appellant guilty, the State also asked the jury to find the conduct was deviate sexual intercourse that occurred when the child was less than fourteen years old. PD described engaging in oral sodomy with Appellant frequently during the game "Four Walls," this instruction was limited to the time period when this conduct occurred, and the prosecutor limited it to the "Four Walls" game in argument. For the same reasons as we found in Instruction No. 9, supra, the trial court did not err in submitting this instruction without objection, accepting the guilty verdict, and sentencing Appellant on this count.

Instruction No. 12 (Count 8: second-degree statutory sodomy, PD)

The State charged Appellant with Count 8, second-degree statutory sodomy, and instructed the jury in Instruction No. 12 to find Appellant guilty if they found he knowingly placed his genitals in PD's mouth during this time period between March 7, 2013 and December 31, 2014. The jury was required to find this conduct constituted deviate sexual intercourse and PD was a child less than seventeen years old. PD testified that Appellant started to do "sexual things" to her about when she was in fifth grade. She said that during the time their family lived in the Indiana apartment, including the time from March 7, 2013, to December 31, 2014, Appellant got her out of bed at night to touch her and have her perform oral sex on him. She said it was not the same every time, but these were things he did to molest her. Again, the frequent but non-distinctive acts were impossible to identify and instruct upon like in *Celis-Garcia*, 344 S.W.3d at 158. The instruction here was appropriate because of Appellant's repeated similar conduct against his victim. Thus, the trial court did not err in submitting this instruction without objection, accepting the guilty verdict, and sentencing Appellant on this count.

Instruction No. 13 (Count 9: second-degree statutory sodomy, PD)

Similar to Count 8, the State charged Appellant in Count 9 with second-degree statutory sodomy, and instructed the jury in Instruction No. 13 to find Appellant guilty if they believed he knowingly placing his mouth on PD's genitals during the time period from March 7, 2013 to December 31, 2014, which constituted deviate sexual intercourse and PD was less than seventeen years old. This also correlated to the time the family lived in the Indiana apartment. PD recalled Appellant performing oral sex on her on the bathroom floor when the other kids were at a park and her mother went to the store. As in Count 8, Appellant's conduct was not the same every time, but repeatedly molested PD such that identification of a single distinct act was impossible. The trial court did not err in submitting this instruction without objection, accepting the guilty verdict, and sentencing Appellant on this count. Even assuming this instruction raises some question because PD testified to conduct correlated to details of the family away at the park and Mother at the store, in addition to the other acts of molestation that occurred outside the presence of the family, we find the instruction did not result in a manifest injustice. Appellant did not meet his burden of showing that plain error occurred in that the jury's verdict was tainted by instructional error. *See Myles*, 479 S.W.3d at 656-57.

Instruction No. 14 (Count 10: second-degree statutory sodomy, PD)

The State charged Appellant with Count 10, second-degree statutory sodomy, and also instructed the jury in Instruction No. 14 to find Appellant guilty if they believed he knowingly touched PD's genitals with his hand during this time period of March 7, 2013, through December 31, 2014. The jury was required to also find this constituted deviate sexual intercourse and PD was a child less than seventeen years old. In referencing the many ways Appellant molested her, PD testified Appellant touched her with his hand at night when everyone else was asleep.

Similar to Counts 8 and 9, PD testified the conduct was not the same every time, but Appellant did these things to molest her. Just as we found in the other instructions, this does not raise a *Celis-Garcia* issue of multiple acts in an instruction such that the jury could not unanimously agree on any of the distinct acts because no single incident can be identified here based on the repeated similar crimes Appellant committed against PD. 344 S.W.3d at 158. The trial court did not err in submitting the jury instruction without objection, accepting the guilty verdict, and sentencing Appellant on this count.

Instruction No. 15 (Count 11: first-degree statutory sodomy, JJ)

The State charged Appellant in Count 11 with first-degree statutory sodomy and instructed the jury in Instruction No. 15 that it should find Appellant guilty if it believed that he knowingly touched JJ's genitals with his hand during this time period, from November 1, 2016 to January 31, 2017. The instruction required the jury to also find that such conduct was deviate sexual intercourse and that JJ was a child less than twelve years old. JJ testified that during the time her family lived in the Gravois apartment, starting when she was ten years old, she remembered Appellant touching her genitals with his hand. She was not certain of the day or time it happened, nor could she recall how many times. She knew it happened more than once. This is not a multiple acts case like *Celis-Garcia* because here no single incident can be identified, nor can the date or time, based on the frequent and similar conduct Appellant committed against PD. 344 S.W.3d at 158. The trial court did not err in submitting the jury instruction without objection, accepting the guilty verdict, and sentencing Appellant on this count.

Instruction No. 18 (Count 14: first-degree statutory sodomy, AD)

The State charged Appellant with Count 14, first-degree statutory sodomy, and instructed the jury in Instruction No. 18 to find Appellant guilty if they believed he knowingly placed AD's hand on his genitals during this time period between January 1, 2017, and February 17, 2017, when AD was less than fourteen years old. The jury also was required to find the conduct constituted deviate sexual intercourse. AD testified generally that Appellant placed her hand on his genitals when they lived in the Grand apartment. She did not know how many times this happened or how often, but it happened more than once. Her testimony alleged the same conduct occurred in the Gravois and Texas apartments, but the jury was instructed to determine Appellant's guilt only during the timeframe when the family lived in the Grand apartments. We do not find this instruction raises a *Celis-Garcia* issue of multiple acts preventing a unanimous verdict because here the indistinguishable acts occurred often without specificity.

Under the circumstances here, the verdict directors for each count specifically described the alleged conduct attributed to each victim by a specific date corresponding with the family's residence. Any further multiple, frequent, and non-specific conduct would have been impossible to submit as single acts. Appellant failed to meet his burden in demonstrating the trial court plainly erred in submitting jury instructions Nos. 5-10 and 12-18 by including multiple acts such that they prevented a unanimous verdict and created a manifest injustice. Appellant's first point is denied.

Point II

In his second point, Appellant alleges the trial court erred in sentencing him as a persistent offender as to Counts 1, 5, 6, 7, 8, 9, and 10, because the State failed to prove that Appellant pled guilty to two felonies before the commission of those offenses and thereby

violated Appellant's rights to due process of law and a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, Article I, Sections 2, 10, and 18(a) of the Missouri Constitution, and Section 558.016.6, RSMo.[4] Appellant claims the State's evidence was that Appellant pled guilty to possession of a controlled substance on October 14, 2015, which occurred after the dates when Counts 1, 5, 6, 7, 8, 9, and 10 were alleged to have been committed. The State argues Appellant waived his claim of plain error in agreeing that he was a persistent offender, and nevertheless, the sentences were not affected by the persistent offender finding.

Standard of Review

Appellant did not object to the prior and persistent finding at trial, nor did he raise the error in his motions for a new trial. Rule 29.11(d). Plain error review is permitted at the discretion of this Court pursuant to Rule 30.20, reviewing for plain errors affecting substantial rights, which may be considered when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

An announcement of "no objection" amounts to an affirmative waiver of appellate review of the issue. *State v. Collins*, 188 S.W.3d 69, 77 (Mo. App. E.D. 2006). When there is an affirmative waiver, even plain error review is not warranted. *Id.* This general rule not only applies when the issue is admissibility of evidence, but also when a court's conduct or ruling regarding a jury is challenged as erroneous. *Id.* Appellant affirmatively waived this claim when he agreed to be sentenced as a persistent offender and plain error review is not warranted.

[4] All statutory references are to RSMo. (2017).

Analysis

Even assuming *arguendo* that Appellant did not affirmatively waive his claim of error, he nonetheless has failed to show he was prejudiced by the error such that a manifest injustice has resulted therefrom. "[C]ourts must look at whether the defendant has established that the erroneous sentence classification resulted in manifest injustice." *State v. Darden*, 263 S.W.3d 760, 770 (Mo. App. W.D. 2008). Here, it did not.

The State must plead all essential facts in the information or indictment to warrant a finding that the defendant is a prior or persistent offender. Section 558.021.1. The facts must be pleaded, established, and found before the court submits the case to the jury. Section 558.021.2.

Section 558.016.3 provides that a persistent offender is one who has been found guilty of two or more felonies committed at different times. Section 558.016.6 states that the findings of guilt "shall be prior to the date of the commission of the present offense." Furthermore, subsection 7 subjects a persistent offender to the authorized term of imprisonment that is one class higher than the class of conviction. Section 558.016.7. If the court finds that a defendant is a prior or persistent offender, then the judge sentences the defendant rather than allowing the jury to recommend a sentence. Section 557.036.4(2). Where the court determines that a defendant is a persistent offender, the defendant becomes subject to a greater maximum term of imprisonment. Section 558.016.7; *State v. Nesbitt*, 299 S.W.3d 26, 29 (Mo. App. E.D. 2009).

Appellant was indicted with fourteen counts of sex offenses against PD, AD, and JJ for events alleged to have occurred from January 1, 2011, though February 2, 2017. Counts 1, 5, 6, 7, 8, 9, and 10 were for conduct alleged to have been committed prior to October 2015.

The Superseding Indictment charging Appellant with fifteen counts alleged Appellant was a prior and persistent offender pursuant to Sections 558.016 and 557.036, "punishable by

sentence to an extended term of imprisonment" in that "he has pleaded guilty to, been found guilty of, or been convicted of two or more felonies committed at different times." It listed felonies from May 24, 2001, when Appellant plead guilty to first-degree tampering in the City of St. Louis, and October 14, 2015, when Appellant plead guilty to possession of a controlled substance in the City of St. Louis. The order finding Appellant was a prior and persistent offender was entered September 9, 2019, listing the October 14, 2015 felony of possession as well as a June 22, 2001 felony of first-degree tampering with a motor vehicle.

With one felony on his record prior to all counts in the indictment, Appellant was properly found to be a prior offender and was not entitled to jury sentencing. *State v. Anderson*, 294 S.W.3d 96, 100 (Mo. App. E.D. 2009). Appellant admits the sentences for Counts 1, 5, and 6 were within both the standard and increased ranges, so it is "unclear how the sentences . . . may have been affected." *State v. Jolley*, 45 S.W.3d 548, (Mo. App. E.D. 2001). Moreover, "[i]t is well established that the sentencer may consider a defendant's prior convictions." *State v. Smith,* 32 S.W.3d 532, 557 (Mo. banc 2000). *Darden*, 263 S.W.3d at 769. The court could have considered the prior convictions regardless of the dates to determine an overall sentence even without enhancing it based on persistent offender status. Appellant also alleges his parole eligibility "could be affected by the error." A speculative claim does not support a finding of manifest injustice. *State v. Stafford*, 589 S.W.3d 705, 715 (Mo. App. E.D. 2019). Appellant therefore does not meet his burden of showing a manifest injustice with respect to Counts 1, 5, and 6; plain error is denied. *Id.* at 710-11.

However, Appellant alleges he was subjected to an increased range of punishment on Counts 7 through 10, from the standard range of up to 7 years to, instead, a sentence of 15 years, the maximum punishment for a B felony. We find that Appellant's numerous other counts were

committed after the prior guilty plea and resulted in a long line of consecutive sentences totaling 75 years, such that a correction in sentences for Counts 7 through 10 would be negligible. Without a showing of manifest injustice, we refuse to find plain error. Appellant's second point is denied.

Point III

Appellant's third and final point alleges the trial court erred in denying his motions for judgment of acquittal at the close of the State's case and at the close of all of the evidence because the State failed to prove beyond a reasonable doubt that Appellant committed the crimes charged, and thereby violated his rights to due process of law and a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution. Appellant argues the evidence, when viewed in the light most favorable to the verdict, was insufficient as a matter of law from which a reasonable juror could have found beyond a reasonable doubt that the evidence was sufficient to sustain a verdict as to the elements of the offenses because complaining witnesses PD, AD, and JJ were so inconsistent and tainted that their testimony was completely lacking in evidentiary value such that no reasonable juror could have found Appellant guilty.

Standard of Review

The court reviews the denial of a motion for judgment of acquittal to determine if the state adduced sufficient evidence to make a submissible case. *State v. Moore*, 432 S.W.3d 779, 781 (Mo. App. E.D. 2014). We will affirm a trial court's denial of a motion for judgment of acquittal if, at the close of the evidence, there was sufficient evidence from which a reasonable person could have found the defendant guilty of the charged offense. *State v. Sistrunk*, 414 S.W.3d 592, 596 (Mo. App. E.D. 2013). In considering whether the evidence is sufficient to

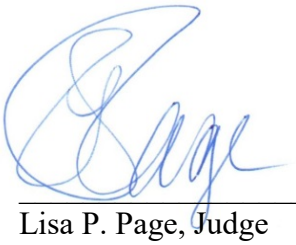
support the jury's verdict, we look to the elements of the crime and consider each to determine whether a reasonable juror could find each of the elements beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc 1993) (internal citations omitted). This Court reviews the evidence and all reasonable inferences therefrom in the light most favorable to the verdict. *Id.*

Analysis

In arguing this point on appeal, Appellant focuses on the credibility of the victim witnesses, PD, AD, and JJ, arguing that their testimony was "so lacking in evidentiary value that no reasonable juror could have found Appellant guilty." Appellant argues the victims were impeached extensively about their lies, exaggerations, and inconsistencies. However, we defer to the jurors' superior position to weigh and value the evidence, determine the witnesses' credibility and resolve any inconsistencies in their testimony. *State v. Lopez-McCurdy*, 266 S.W.3d 874, 876 (Mo. App. S.D. 2008). The evidence adduced at trial, viewed in this light, is detailed in the "Background" section of this opinion, *supra*, and we need not repeat it. Moreover, if a party does not support its contentions with relevant authority or argument beyond conclusory statements, the point is deemed abandoned. *Kuenz v. Walker,* 244 S.W.3d 191, 194 (Mo. App. E.D. 2007). *See also* Rule 84.04(e); *Johnson v. Buffalo Lodging Assocs.,* 300 S.W.3d 580, 582 (Mo. App. E.D. 2009) (appellant did not develop her claim of error "by showing the interaction between the relevant principles of law and the facts of the particular case" in violation of Rule 84.04(e)). Appellant's point raises no deficiency in the evidence as to any particular crime or element thereof to support reversal on the trial court's denial of his motion for judgment of acquittal. The trial court did not err in denying Appellant's motion. Appellant's third point is denied.

CONCLUSION

The judgment of the trial court is affirmed.



Lisa P. Page, Judge

Robin Ransom, P.J. and
Sherri B. Sullivan, J., concur.