

Summary of SC90980, *State of Missouri v. Maura L. Celis-Garcia*

Appeal from the Clay County circuit court, Judge Larry D. Harman

Argued and submitted December 8, 2010; opinion issued June 14, 2011

Attorneys: Celis-Garcia was represented by Rosemary E. Percival of the public defender's office in Kansas City, (816) 889-7699; and the state was represented by Evan J. Buchheim of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A mother appeals her conviction for statutory sodomy for acts involving her minor daughters. In a unanimous decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri reverses the judgment and remands (sends back) the case. The trial court violated the mother's right to a unanimous jury by failing to instruct the jury that it had to agree on the same acts or acts of contact that the mother committed in finding her guilty of statutory sodomy. Because the mother raised inconsistencies and improbabilities as to each specific allegation, it is more likely that individual jurors convicted her on the basis of different acts, resulting in manifest injustice entitling the mother to a new trial.

Facts: After two minor children younger than 14 years were removed from their mother's home and placed in foster care, they told their foster mother that their mother and her boyfriend had abused them sexually on several occasions. The foster parents reported the allegations to the division of children's services, and the children subsequently were interviewed and taken to a hospital for sexual assault forensic examinations (SAFE). The safe reports indicate that one girl had a segment of her hymen missing and that the other girl's genitals showed no abnormalities. The mother was charged with one count of first-degree statutory sodomy for acts involving each of her two daughters. At trial, the state presented the testimony of both children through videotaped depositions. During their depositions, each child described separate incidents of statutory sodomy. The state also presented testimony from a forensic interviewer at a child advocacy center and a licensed social worker, both of whom interviewed the girls regarding the allegations of statutory sodomy. At the end of the forensic interviewer's testimony, the state played a video recording of her interview with the children. Both witnesses stated the children described an occasion during which their grandmother stopped a sexual encounter involving their mother and the mother's boyfriend that occurred while the children were showering; the children did not describe this incident during their depositions. The defense presented testimony from the grandmother that she never witnessed the mother or boyfriend inappropriately touching the children and that the children had a reputation for lying. The jury returned a verdict finding the mother guilty on both counts of first-degree statutory sodomy, and the trial court sentenced her to two concurrent prison terms of 25 years each. The mother appeals.

REVERSED AND REMANDED.

Court en banc holds: (1) The trial court violated the mother’s right to a unanimous jury by failing to instruct the jury that it had to agree on the same acts or acts of contact that the mother committed in finding her guilty of statutory sodomy.

(a) Article I, section 22(a) of the Missouri Constitution requires that “the right of trial by jury as heretofore enjoyed shall remain inviolate” This Court has interpreted “as heretofore enjoyed” as protecting all common law rights to jury trial, one of which is the right to a unanimous jury verdict. *State v. Hadley*, 815 S.W.2d 422, 425 (Mo. banc 1991) (citing *State v. Hamey*, 67 S.W. 620, 623 (Mo. banc 1902)).

(b) The factual scenario presented by the mother’s case is a “multiple acts” case in which 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. Accepting the children’s videotaped statements as true, there were at least seven separate acts of statutory sodomy that occurred at different times and in different locations. To avoid violating a defendant’s right to a unanimous jury verdict in a multiple acts case, the state either must elect the specific act on which it asks the jury to convict, as noted in *State v. Jackson*, 146 S.W. 1166, 1169 (Mo. 1912), or the verdict director must describe specifically the separate criminal acts presented to the jury and must instruct the jury that it must agree unanimously that at least one of those acts occurred, as noted by several other states. The applicable Missouri approved instructions do not require differentiation among multiple, separate criminal acts that each could constitute the charged offense, unless the defendant requests it or the court elects to do so on its own motion. Further, the modification permitted by the notes on use for the applicable instruction is insufficient to protect the constitutional right to a unanimous jury verdict in a multiple acts case. To the extent the Missouri approved instruction and its notes on use conflict with the substantive law, they are not binding.

(c) The verdict-directing jury instructions used in the mother’s case failed to differentiate among the various acts the children described in a way that ensured the jury unanimously convicted the mother of the same act or acts. Instead, the verdict directors allowed the jurors to find the mother guilty of first-degree statutory sodomy if they found she engaged in herself or assisted her boyfriend in hand-to-genital contact with the children generally. Because it is impossible to determine whether the jury unanimously agreed on any one of the separate incidents, the verdict directors violated the mother’s right to a unanimous jury verdict under article I, section 22(a). Further, because the mother relied on evidentiary inconsistencies and factual improbabilities regarding each specific allegation of hand-to-genital contact, it is more likely that individual jurors convicted her on the basis of different acts. As such, the verdict directors misdirected the jury in a way that affected the verdict, resulting in manifest injustice. Accordingly, the mother is entitled to a new trial.

(2) Because the mother’s conviction is reversed because of the lack of a unanimous jury verdict, this Court need not decide whether the trial court erred in admitting the testimony of the forensic examiner and social worker. In child sex abuse cases, there typically are two types of expert testimony that are challenged: generalized and particularized. *State v. Churchill*, 98 S.W.3d 536,

539 (Mo. banc 2003). The trial court has discretion to admit generalized testimony, in which an expert describes the general behaviors and characteristics commonly found in children who have been abused sexually, whereas the trial court may not admit particularized testimony, in which an expert testifies about a specific victim's credibility as to whether the victim actually was abused, because this usurps the jury's province to determine a witness's credibility. On retrial, should the state seek to introduce the same testimony, the trial court's ruling as to its admissibility should be governed by whether the testimony is generalized or particularized as defined in *Churchill*.