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SC 93878

IN THE SUPREME COURT OF MISSOURI

LOUIS MALLOW,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Denial of Post-Conviction Relief
Circuit Court of Phelps County, Missouri
25th Judicial Circuit, Division 2
The Honorable Mary W. Sheffield, Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Louis Mallow, appeals the denial of his Rule 29.15 motion for post-conviction relief after an evidentiary hearing by the Circuit Court of Phelps County.

In *State v. Mallow*, CR304-$_{1069FX}$, Mallow was found guilty after a jury trial of the class B felony of Child Molestation under § 566.067 RSMo. He was sentenced to a fourteen-year term of incarceration. Mallow was delivered to the Department of Corrections on or about July 10, 2006.

Mallow appealed his conviction and sentence to the Southern District Court of Appeals in case number SD 27859. The Court of Appeals affirmed the conviction and sentence on June 26, 2008, and issued its mandate on July 14, 2008. Mallow timely filed his *pro se* Rule 29.15 motion on September 12, 2008. Counsel timely filed an amended post-conviction motion on January 7, 2009.

The Motion Court conducted a post-conviction evidentiary hearing on April 5, 2012. On May 15, 2012, the Motion Court issued findings of fact and conclusions of law denying the post-conviction motion. Mallow timely filed his notice of appeal on June 18, 2012.

The appeal was initially decided in the Missouri Court of Appeals, Southern District, pursuant to Mo. Const., Art. V, Section 3, Section 477.060 RSMo. The case was ordered transferred to the Missouri Supreme Court pursuant to Mo. Const., Art. V, Section 9; and Mo. S. Ct. Rule 83.04.

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STATEMENT OF FACTS

Mallow appeals the Circuit Court's denial of his Rule 29.15 motion. (PCR L.F. 49).

Underlying Criminal Action

In the underlying criminal action, *State v. Mallow*, CR304-1069FX, Mallow was found guilty after a jury trial of the class B felony of child molestation under § 566.067 RSMo. (Tr. 417; L.F. 87-89).[1] The charge arose out of alleged sexual abuse committed against a child, C.B.K., during the period of February 1, 2003, to July 17, 2004. (L.F. 34-35).

C.B.K., who was born in April of 1992, lived with her mother across the street from Mallow, where he lived with his two children. (Tr. 234-35, 244, 245). C.B.K. played with Mallow's children in his home. (Tr. 214, 236, 239). C.B.K. spent the night on several occasions at Mallow's home, and his children spent the night at C.B.K.'s home. (Tr. 214). C.B.K.'s mother testified that C.B.K. has Turner's disease which affects her ability to learn, her speech, her vision, and her hearing, and also

[1] The Record of Appeal consists of the direct appeal legal file (L.F.), direct appeal supplemental legal file (Supp.L.F.), the direct appeal trial transcript (Tr.), the post-conviction legal file ("PCR L.F."), the evidentiary hearing transcript ("PCR Tr."), and the post-conviction exhibits 1 – 13 ("Movant's Ex.").

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results in physical problems. (Tr. 210). C.B.K. functions about three or four years behind her peers. (Tr. 210).

According to C.B.K.'s mother, C.B.K. first told her about the alleged abuse on July 1, 2004. (Tr. 217). When C.B.K.'s mother questioned C.B.K. after noticing that she had been quiet and did not play much, C.B.K. eventually told her mother that Mallow had touched her and told her to sleep in her bra and underwear at her house. (Tr. 217, 249, 279).

C.B.K.'s mother told other family members but did not report the allegations to child welfare or law enforcement officials. (Tr. 218-219). Eventually, however, a third person heard about the allegations and made a hotline call to the Division of Social Services on July 16. (Tr. 184, 220-220, 357). Social Services initiated an investigation. (Tr. 184-187).

C.B.K. was interviewed on July 27, 2004, and again on November 10, 2004. (Tr. 188-189, 250, 292-295). The videotapes of both interviews were admitted into evidence and shown to the jury. (Tr. 299, 302, 308; State's Exs. 3 & 4). Transcripts of the interviews were admitted into evidence at the post-conviction action as Movant's Exhibits 9 and 13. (PCR Tr. 35).

Evidence concerning specific incidents

In the two forensic interviews, C.B.K. alleged that Mallow engaged in sexual acts in a number of alleged incidents that occurred in Mallow's home. (Movant's Ex. 9; Movant's Ex. 13). The State's argument focused on alleged incidents that occurred

in the bathroom, in the living room when Mallow allegedly had C.B.K. dance, and in the bedroom when Mallow allegedly had C.B.K. get into bed with him. (Tr. 414).

In the bathtub in the bathroom:

First interview: In the first interview, C.B.K. first said, Mallow told her to get in the bathroom with him, to pull down her pants, and to sit on his lap while he was wearing his underwear sitting in the bathtub. (Movant's Ex. 9, pp. 7, 9-12). C.B.K. said that Mallow had her sit on his lap one time. (Movant's Ex. 9, p. 12). She said he touched her on her pee-pee in the bathroom. (Movant's Ex. 9, p. 14).

Second interview: C.B.K. said that Mallow touched her with his hands on her chest, girl part, and on her whole body while in the bathtub. (Movant's Ex. 13, pp. 5-6). She said that both of them had their clothes on; Mallow was wearing boxer undershorts and a robe, and she had on pants and a shirt. (Movant's Ex. 13, p. 6-7, 9). C.B.K. said that Mallow made her sit on his lap, and she described feeling his boy part get hard. (Movant's Ex. 13, pp. 7-9). She said that his boy part touched her girl part. (Movant's Ex. 13, pp. 8-9).

Trial: C.B.K. testified at trial that Mallow wanted her to get in the bathtub with him while he was wearing only underwear, but she couldn't remember if she did that. (Tr. 248, 255). C.B.K. also testified about deposition testimony in which she said she did get into the bathtub with Mallow, but then said she didn't. (Tr. 280-281).

"Coyote Ugly" dance in the living room:

First interview: In the first interview, C.B.K. said that on two occasions, Mallow made her do a dance she had seen in a movie--the "Coyote Ugly" dance--

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while in the living room. (Movant's Ex. 9, p. 7-8, 12). She said he touched her on her pee-pee in the living room. (Movant's Ex. 9, p. 14). She said the touching was at his house, and nobody else was there. (Movant's Ex. 13, p. 14). But she also said that everybody was outside, and that Mallow made her pull down her pants when she went inside. (Movant's Ex. 13, p. 14).

Second interview: In the second interview, C.B.K. said that Mallow had her take off all of her clothes and do the Coyote Ugly dance. (Movant's Ex. 13, p. 10). She said that he had his clothes on and did not take out his boy part, but she also said that "he touched her with his boy – the skin part on my girl part, but I didn't feel it." (Movant's Ex. 13, p. 10).

Trial: At trial C.B.K. said that she did not do the dance for Mallow. (Tr. 246-47).

Getting into bed in the bedroom

First interview: In the first interview, C.B.K. said that Mallow "told me to wear a bra and panties," and to get into bed with him. (Movant's Ex. 9, pp. 15-16). C.B.K. said that Mallow was wearing his underwear and asked her to touch him all over, including his private part, which she did. (Movant's Ex. 9, pp. 16-17, 23-24).

Second interview: C.B.K. did not specifically discuss any alleged touching that might have occurred while in the bedroom in the second interview. (Movant's Ex. 13).

Trial: At trial, C.B.K. said that she did not sleep with Mallow. (Tr. 246-47). On cross-examination, C.B.K. also testified that Mallow tried to touch and kiss her in

the bedroom, but she refused and nothing else happened. (Tr. 265-266). C.B.K. testified that Mallow wanted her to touch his penis, but she refused and even refused to look at his penis. (Tr. 266). However, she said that Mallow's "private part was hard." (Tr. 254). During redirect examination, the State also elicited testimony from C.B.K. that Mallow tried to touch her and made her wear her bra and underwear to bed. (Tr. 279).

Evidence at trial concerning contact generally

At trial, C.B.K. testified that Mallow touched her on her "private parts" with her clothes on (Tr. 240, 241, 243), circled the groin area of a diagram of a girl to indicate where Mallow touched her (Tr. 242), and referred to the area as "my girl part" (Tr. 242). C.B.K. said that Mallow touched her girl part only one time. (Tr. 245).

Defense counsel also questioned C.B.K. generally about the nature of any contact with Mallow and whether Mallow touched her on her genitals or just on her hand "by her legs." (Tr. 262, 267). The State went back to this questioning to get C.B.K. to clarify that Mallow touched her on her private part between her legs. (Tr. 278-279).

Mallow's interview

In addition to C.B.K.'s statements, the State submitted evidence of a three to five hour police interrogation of Mallow. (Tr. 189, 191, 202, 315, 324). In the interrogation, Mallow denied having any sexual contact with C.B.K. and said that C.B.K. must be mistaken or confused. (Tr. 336-37). But he also said he had never known C.B.K. to lie. (Tr. 330). When told he would be arrested, Mallow seemed

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indifferent and said that while these allegations did not happen, he was willing to accept the penalty. (Tr. 340, 342).

The charges

Mallow was charged in counts 2 and 3 of the class B felony of child molestation under § 566.067, and one count of the unclassified felony of statutory sodomy in the first degree under § 566.062. (L.F. 34-35). In the first count, Mallow was alleged to have "subjected C.B.K. . . . to sexual contact" "between February 1, 2003, and July 17, 2004. . . ." (L.F. 34). In the second count, Mallow was alleged to have "subjected C.B.K. . . . to sexual contact, at a time different than that alleged in Count 1" "between February 1, 2003, and July 17, 2004. . . ." (L.F. 34). Mallow was charged with statutory sodomy for his act in allegedly engaging in deviate sexual intercourse with C.B.K. (L.F. 35).

Verdict directors

On the first count of child molestation, the jury was instructed as follows:

> As to Count One, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that between February 1, 2003 and July 17, 2004, in the County of Phelps, State of Missouri, the defendant touched the genitals of [C.B.K.] and
>
> Second, that he did so for the purpose of arousing or gratifying his own sexual desire, and
>
> Third, that [C.B.K.] was then less than fourteen years old,

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then you will find the defendant guilty under Count One of child molestation 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. 71).

On the second count of child molestation, the jury was instructed as follows:

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

First, that between February 1, 2003 and July 17, 2004, in the County of Phelps, State of Missouri, the defendant touched the genitals of [C.B.K.] and

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

Third, that [C.B.K.] was then less than fourteen years old, and

Fourth, that the incident complained of in Count Two occurred at a different time than the incident complained of in Count One,

then you will find the defendant guilty under Count Two of child molestation in the first degree.

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> 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. 72).

On the statutory sodomy charge, the jury was instructed to find Mallow guilty if it found that he "had [C.B.K.] touch his penis with her hand." (L.F. 73).

During the instructions conference, trial counsel stated that the defense had no objection to instructions "1 through 10[.]" (Tr. 384-385). Trial counsel indicated that he initially had some question about whether "sexual contact" was included in Instruction No. 5, but said that he was deferring to the prosecutor's reliance on "one of the notes on use" for that instruction in deciding not to raise an objection to it. (Tr. 384-385).

Argument

In its argument to the jury, the prosecutor urged the jurors to find Mallow guilty if they believed some type of abuse occurred:

> The question that you have to decide today . . . is whether you believe that [C.B.K.] who sat here and testified was a victim. That's what it boils down to. If you think she's a victim, then I ask you to find the defendant guilty. If you think, based on the evidence that was presented, she was sexually maltreated, sexually abused by this defendant, I ask you to find him guilty.

(Tr. 390).

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With respect to the two child molestation charges, the prosecutor argued that "[i]f you find that twice this defendant touched the genitals of [C.B.K.] then you can find him guilty of both of those offenses." (Tr. 291). The prosecutor noted that although C.B.K. testified at trial that it happened only once, she said that it happened eleven times in her interviews. (Tr. 393-395). The prosecutor also noted C.B.K. identified three different locations where Mallow touched her genitals:

> Where did it happen, how many times, living room. She told you that, happened in the living room, happened in the bathroom. That's at least two right there. Happened in the bedroom, that's three.

(Tr. 414).

Defense counsel argued that C.B.K. could not even remember two of the counts occurring and was not even certain if Mallow actually touched her genitals rather than her hand. (Tr. 402, 404, 405). Defense counsel noted her inconsistent statements about what, if anything, occurred. (Tr. 400-405, 407-410). Counsel specifically noted C.B.K.'s trial testimony with respect to each incident. (Tr. 400-403, 408-409). He noted that her testimony that she was allowed to go back to Mallow's home after telling her mother was implausible. (Tr. 403, 406). He argued that the forensic interviewers were leading C.B.K. in her interviews, and that at one point, C.B.K. questioned whether what she was saying was a lie. (Tr. 404-405). With respect to Mr. Mallow's interrogation, defense counsel noted that the police summary of the lengthy interrogation was only two pages long, and the interrogating officer could not even

remember what was in his report. (Tr. 407). Counsel argued that Mallow's reaction to being arrested was reasonable given the circumstances. (Tr. 401).

Jury verdicts

The jury convicted Mallow in Count I of child molestation but acquitted him of of child molestation in Count II and of the statutory sodomy charge in Count III. (Tr. 417; L.F. 85-89). The jury recommended a sentence of fourteen years (Tr. 443; L.F. 90). The trial court sentenced Mallow to fourteen year's imprisonment. (Sent. Tr. 24).

Mallow appealed, arguing that C.B.K.'s trial testimony with respect to the nature of the contact was so contradictory that the evidence was not sufficient to convict Mallow. (Movant's Ex. 7). The Southern District Court of Appeals denied the appeal and upheld the verdict in *State v. Mallow*, SD 27859.

Rule 29.15 claims

Mallow filed a post-conviction action on September 12, 2008, and appointed counsel filed an amended motion on January 6, 2009. (PCR L.F. 4; PCR Tr. 4-5). The amended motion included the claims asserted in Mallow's *pro se* motion. (PCR L.F. 22, 27, 29-39).

Mallow's first *pro se* claim asserted that he was denied effective assistance of trial and appellate counsel by counsels' failure to raise the issue that the verdict directors for the two child molestation counts were unconstitutionally vague and subjected him to double jeopardy, in that the directors did not adequately identify which of the alleged incidents was being considered in each count. (PCR L.F. 29-31).

Mallow's trial attorney was not questioned about this claim. (PCR Tr. 26-34).

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Mallow's direct appeal attorney testified at the post-conviction hearing that he normally would look at the instructions and did not recall seeing any problems with the verdict directors. (PCR Tr. 6-9). Had appellate counsel noticed a problem, he would have raised that as an issue. (PCR Tr. 7). Appellate counsel's only strategy reason for not raising an issue on appeal would be to not raise issues that did not have merit. (PCR Tr. 7-8).

The motion court denied this and all of Mallow's *pro se* issues by concluding that the direct appeal attorney "indicated that he considered the issues raised in Movant's motion for new trial and made a conscious decision not to include them in his appeal. This was a sound strategic decision and appellate counsel was not ineffective." (PCR L.F. 47; App. A-8).

This appeal follows.

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POINTS RELIED ON

I. Appellate counsel was ineffective

The motion court clearly erred in denying Mallow's post-conviction Rule 29.15 motion after an evidentiary hearing, because appellate counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, thereby resulting in prejudice to Mallow and violating his rights to effective assistance of counsel, due process of law, a fair trial, a unanimous verdict, and freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 18(a), 19 and 22(a), of the Missouri Constitution, in that appellate counsel failed to properly raise as an issue on appeal that the verdict directors for the two child molestation counts were unconstitutionally vague, did not require unanimity and subjected Mallow to double jeopardy, because the directors did not adequately identify which of the alleged incidents was being considered in each count or require the jury to unanimously agree on the criminal conduct committed.

State v. Celis-Garcia, 344 S.W.3d 150 (Mo. banc 2011);

Anderson v. State, 196 S.W.3d 28 (Mo. banc 2006);

Mo. Const., Art. I, Secs 10, 18(a), 19, & 22(a);

U.S. Const., Amends. V, VI & XIV;

Mo. S. Ct. Rule 29.15.

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II. Trial counsel was ineffective

The motion court clearly erred in denying Mallow's post-conviction Rule 29.15 motion after an evidentiary hearing, because trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, thereby resulting in prejudice to Mallow and violating his rights to effective assistance of counsel, due process of law, a fair trial, a unanimous verdict, and freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 18(a), 19 and 22(a), of the Missouri Constitution, in that trial counsel failed to properly raise as an issue at trial that the verdict directors for the two child molestation counts were unconstitutionally vague, did not require unanimity, and subjected Mallow to double jeopardy in that the directors did not adequately identify which of the alleged incidents he was being considered in each count or require the jury to unanimously agree on the criminal conduct committed.

State v. Celis-Garcia, 344 S.W.3d 150 (Mo. banc 2011);

State v. Mitchell, 704 S.W.2d 280 (Mo. App. S.D. 1986);

Mo. Const., Art. I, Secs. 10, 18(a), 19, & 22(a);

U.S. Const., Amends. V, VI & XIV;

Mo. S. Ct. Rule 29.15.

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ARGUMENT

I. Appellate counsel was ineffective[2]

The motion court clearly erred in denying Mallow's post-conviction Rule 29.15 motion after an evidentiary hearing, because appellate counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, thereby resulting in prejudice to Mallow and violating his rights to effective assistance of counsel, due process of law, a fair trial, a unanimous verdict, and freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 18(a), 19 and 22(a), of the Missouri Constitution, in that appellate counsel failed to properly raise as an issue on appeal that the verdict directors for the two child molestation counts were unconstitutionally vague, did not require unanimity and subjected Mallow to double jeopardy, because the directors did not adequately identify which of the alleged incidents was being considered in each count or require the jury to unanimously agree on the criminal conduct committed.

Standard of Review

A post-conviction movant has the burden of proving his claims for relief by a preponderance of the evidence. Rule 29.15(i). Appellate review of a hearing court's

[2] In this brief, Appellant has reversed the order of his two points from the briefing in the Southern District, but has not altered the basis of the claims raised.

decision in a Rule 29.15 proceeding is limited to determining whether the findings and conclusions of the hearing court are clearly erroneous. Rule 29.15(k). A hearing court's findings and conclusions are deemed clearly erroneous if a full review of the record leaves the appellate court with a definite and firm impression that a mistake has been made. *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006).

Discussion

Appellate counsel was ineffective in failing to raise a claim concerning the lack of specificity in the verdict directors. The error was apparent on the record. The record shows no reasonable strategic reason for appellate counsel to not raise this issue. Given the defense asserted and the facts and circumstances in this case, the error was so substantial as to amount to a manifest injustice or a miscarriage of justice.

The right to the effective assistance of counsel is mandated by the Missouri Constitution, Art. I, Sections 10 and 18(a), and by the Sixth Amendment to the United States Constitution. It is a fundamental right guaranteed to state defendants through the Fourteenth Amendment. *Gideon v. Wainwright*, 287 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). To prove that counsel was ineffective, a defendant must show (1) that counsel's performance "did not conform to the degree of skill, care, and diligence of a reasonably competent attorney" and (2) that the defendant was thereby prejudiced. *Anderson*, 196 S.W.3d at 33 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

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The verdict directors were unconstitutionally vague

As noted by the prosecutor, C.B.K.'s statements indicated that Mallow touched her genitals with his hand eleven times. (Movant's Ex. 9, pp. 12-13; Tr. 393). Further, C.B.K. also said that the touching occurred in three different locations: the bathroom, the living room, and the bedroom. (Movant's Ex. 9, pp. 6-14; Tr. 263-266, 414). And consistent with C.B.K.'s initial statements, the State charged Mallow with two separate counts of child molestation. (L.F. 34). However, neither the charges nor the instructions attempted to identify which incident was being charged in each count. (L.F. 34). Adding to the ambiguity contained in the verdict directors, the prosecutor urged the jurors to find Mallow guilty if they believed he committed any type of sexual abuse and made no attempt to identify which incident should be considered with respect to each count. (Tr. 390-391, 393, 395, 414).

Missouri has long recognized that when the State presents evidence of multiple acts by the defendant, the verdict director must specify which incident is charged in each count. Most recently, this Court found that a trial court committed plain error in submitting verdict directors that did not adequately identify which specific incident the jury was to consider when there was evidence of multiple incidents. *State v. Celis-Garcia*, 344 S.W.3d 150, 154-158 (Mo. banc 2011). In *Celis-Garcia*, the defendant was charged with one count of statutory sodomy with respect to each of her two daughters. 344 S.W.3d at 152. The evidence indicated numerous separate incidents at different locations that might have supported the charge of statutory sodomy with respect to each child. *Id*. at 155. However, the verdict directors merely required the

jurors to find that the defendant or her boyfriend placed her or his hand the child's genitals, without specifying which incident. *Id.* at 155-156. The Missouri Supreme Court found that this was plain error because it was impossible to determine whether the jury unanimously agreed on any one of these separate incidents and thus violated the defendant's constitutional right to a unanimous verdict. *Id*. at 158.

In the current case, the verdict directors set forth the type of sexual contact alleged, *i.e.*, hand to genital contact. (L.F. 71-72). But it was impossible for the jurors to know which incident described at trial was the subject of which verdict director. Thus, as in *Celis-Garcia*, the verdict directors were erroneous, confusing, and may have led to the jurors' conviction based on different incidents.

There was substantial evidence of "multiple acts" of alleged child molestation

The State argued in the Southern District that, unlike the facts in *Celis-Garcia*, this "was not a 'multiple acts' case with multiple victims, [and thus] there is no possibility that the jurors convicted Appellant on the basis of different acts." (Respondent's Brief, 18). In making this argument, the State ignored the evidence and argument it submitted at the criminal trial.

At the criminal trial, the State submitted evidence showing that Mallow allegedly engaged in sexual contact with C.B.K. multiple times. In the forensic

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interviews, which were admitted as evidence in the case,[3] C.B.K. said that Mallow touched her a lot and touched her genitals with his hand eleven times. (Movant's Ex. 9, pp. 12-13; Movant's Ex. 13, pp. 14-15) The State's evidence indicated that occurred in separate incidents including: (1) C.B.K. sitting on Mallow's lap and other contact in a bath tub (Movant's Ex. 9, pp. 7-9, 14; Movant's Ex. 13, pp. 5-9, 17-18); (2) Mallow touching C.B.K. while she did the "Coyote Ugly" dance in the living room (Movant's Ex. 9, pp. 7-8, 12, 14; Movant's Ex. 13, pp. 10); and (3) incidents when Mallow had C.B.K. get into bed with him (Movant's Ex. 9, 15-16).

Consistent with the evidence, the State submitted multiple counts to the jury, including one count of statutory sodomy and two counts of child molestation. (L.F. 71-73). And in arguing the case, the State noted that the evidence indicated that there were multiple incidents and urged the jurors to find Mallow guilty if they believed he committed any type of sexual abuse without attempting to identify which incident should be considered with respect to each child molestation count. (Tr. 390-391, 393, 395, 414).

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[3] Movant's Exhibit 9 is the transcript of the video of C.B.K.'s first forensic interview, which admitted into evidence in criminal trial as State's Exhibit 3; Movant's Exhibit 13 is the transcript of the second forensic interview, which was admitted into evidence at the criminal trial as State's Exhibit 4. (Tr. 299, 302, 308; State's Exs. 3 & 4; PCR Tr. 35).

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The fact that C.B.K. testified at trial that Mallow touched her only one time (Tr. 245-246) did not resolve this issue. There was no indication in C.B.K.'s trial testimony which specific incident she was talking about. (Tr. 240-248, 254-255, 263-265, 280-281). Was it the incident in the bathtub, the times when she was doing the "Coyote Ugly" dance, the time he asked her to get into bed, or some other incident? C.B.K. did not say.

The jury's verdict also does not resolve the issue. By convicting Mallow of one count of child molestation and acquitting him of the other count, the jurors had reasonable doubt with respect to some of the incidents discussed by C.B.K. in her forensic interviews. However, it is not possible to know whether the jurors unanimously agreed on which specific incidents occurred and which did not. Some jurors may have concluded that the Mallow touched C.B.K. in the bathtub, others that he did so while making her dance, and others that he did so while the two were in bed. As there was no indication in the instructions that the jurors needed to unanimously agree with respect to the specific conduct allegedly committed by Mallow, the courts cannot be assured that the verdict was unanimous.

Appellate counsel's performance

In assessing an appellate attorney's performance, the same standards apply as those for trial counsel as set forth in *Strickland v. Washington*, 466 U.S. 668, 687-92 (1984). *State v. Kidd*, 75 S.W.3d 804, 809 (Mo. App. W.D. 2002). Generally, "strong grounds must exist showing that counsel failed to assert a claim of error which would have required reversal had it been asserted and which was so obvious from the record

that a competent and effective lawyer would have recognized it and asserted it." *Reuscher v. State*, 887 S.W.2d 588, 591 (Mo. 1994); *Anderson v. State*, 196 S.W.3d 28, 36 (Mo. banc 2006); *Hamilton v. State*, 208 S.W.3d 344, 350 (Mo. App. S.D. 2006).

The motion court's findings in this case do not actually address this claim. The motion court denied all of Mallow's *pro se* claims by finding that appellate counsel "indicated that he considered the issues raised in Movant's motion for new trial and made a conscious decision to not include them in his appeal." (PCR L.F. 47; App. A-8). However, this issue was not raised in the motion for new trial. (L.F. 61-66). Thus, appellate counsel's testimony about considering issues raised in the motion for new trial was not relevant.

With respect to the issues concerning the verdict directors, appellate counsel testified that he would typically review the jury instructions but had no specific recollection about any issues with the instructions in this case. (PCR Tr. 6-8, 18, 21-22). Counsel also testified that the only reason he would have had for not raising an issue would be if it had no merit. (PCR Tr. 8). On this record, it cannot be said that appellate counsel actually considered the issue and had a strategic reason to reject it. *See Radmer v. State*, 362 S.W.3d 52, 56-57 (Mo. App. W.D. 2012); *Anderson*, 196 S.W.3d at 40-41.

Further, even if appellate counsel had some strategic basis to not raise the issue, counsel's strategy was not reasonable. The view that appellant counsel's selection of the issues to raise on appeal, no matter how misguided, is unassailable as "trial

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strategy" is contrary to the prevailing law. In the leading federal decision on this issue stated:

> Were it legitimate to dismiss a claim of ineffective assistance of counsel on appeal solely because we found it improper to review appellate counsel's choice of issues, the right to effective assistance of counsel on appeal would be worthless. When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). This view has been adopted by the United States Supreme Court, which cited the *Gray* decision in stating that although counsel need not raise every non-frivolous claim, "it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim [on direct appeal]. . . ." *Smith v. Robbins*, 528 U.S. 259, 287-88 (2000).

In this case, the error was apparent. It would have been apparent on reviewing the verdict directors that they did not clearly specify which alleged incident was to be considered with respect to each count. This lack of specificity was not cleared up at trial or during argument. To the contrary, the State urged the jurors to find Mallow

guilty if they merely believed that C.B.K. had been abused in any way (Tr. 390) and to just pick and choose between the three incidents alleged to have occurred in the bathroom, in the living room and in the bedroom (Tr. 414).

Additionally, the sole issue raised by appellate counsel was not a strong issue. In the direct appeal, appellate counsel argued that C.B.K.'s testimony at trial that Mallow touched her hand (Tr. 267) was so inconsistent with her previous testimony that he touched her vagina through her clothes with his hand (Tr. 240-243, 275) that it was not entitled to any probative weight without corroboration. (Movant's Ex. 7, pp. 8-13). As noted by the State, the problem with this argument was that defense counsel's questioning of C.B.K. appeared to relate to the alleged incident when Mallow wanted her to touch his penis. The testimony in question was as follows:

Q. Now you said that Ed wanted you to touch his private part.

A. Yes.

Q. But you never did.

A. No.

Q. And you never saw Ed's private part because you turned your head.

A. Yes.

Q. And you had your eyes closed too?

A. Yes

Q. And you never saw it.

A. No.

Q. And you never touched it?

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A. No.

Q. And he only touched your hand with his hand.

A. Yes, with my clothes on.

Q. Right, with your clothes on.

A. Only on top.

Q. And he stopped.

A. Yes.

Q. And he never touched you anywhere else?

A. No.

(Tr. 266-267). Given the standard of review on a sufficiency claim and the extremely limited application of the doctrine of destructive contradictions, *State v. Nelson*, 818 S.W.2d 285, 288–90 (Mo. App. E.D. 1991), there was little chance of success on this issue with the record in this case. Thus, even had appellate counsel actually considered the instructional error and consciously rejected it in favor of the one issue raised by counsel, appellate counsel's decision to do so would not have been objectively reasonable.

***Celis-Garcia* does not constitute a substantive change in the law**

Although *Celis-Garcia* was decided in 2011, after Mallow's appeal, the Court's decision in *Celis-Garcia* was consistent with long standing precedent. For example, the Court in *Celis-Garcia*, cited to the 1912 decision *State v. Washington*, 242 Mo. 401, 146 S.W. 1164 (1912), in which the defendant was charged with one count of setting up and keeping gambling devices. Although there was evidence in *Washington*

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that the defendant kept more than one gambling table, the instructions did not adequately specify which table was the subject of the charge. *Id.* at 1166. The Court held that the instruction was clearly erroneous because it allowed the jury to convict the defendant even though some of the jurors may have agreed to a verdict of guilty as to one table and disbelieved the testimony as to the other table, while the other jurors may have found the opposite to be true. *Id.* at 1166.

Somewhat more recently, this court considered a similar claim in *State v. Mitchell*, 704 S.W.2d 280, 282-284 (Mo. App. S.D. 1986). The defendant in *Mitchell* was charged with two counts of exhibiting a lethal weapon in an angry or threatening manner, one count for an incident at a house, and the other for an incident at a café. *Id*. at 282-83. The verdict directors, however, were identical, so there was no way for the jury to know which count referred to the house and which to the café. *Id*. at 283. The defendant claimed that the verdict directors were "prejudicially erroneous in that they . . . [subjected] him to 'the possibility of double jeopardy,' and, in addition, that the instructions 'were misleading and confusing to the jury, granted it a roving commission to convict [defendant] and hindered [defendant] in raising the issue of double jeopardy in the event of acquittal.'" *Id.* at 281. The Southern District agreed, finding that the instructions were erroneous because "it was impossible for the jury to know which incident was the subject of" each verdict director. *Id*. at 284.

Unlike *Celis-Garcia*, the court in *Mitchell* did not base its decision on the jury unanimity provisions of the Missouri Constitution. *Celis-Garcia*, 344 S.W.3d at 154-159; *Mitchell*, 704 S.W.2d at 283-287. Rather, the decision in *Mitchell* appears to be

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founded on double jeopardy concerns. *Mitchell*, 704 S.W.2d at 288; Mo. Const., Art. I, Sec. 19; U.S. Const., Amend. V. Courts in other states have noted double jeopardy concerns in similar situations. *Commonwealth of Massachusetts v. Hrycenko*, 630 N.E.2d 258, 262-264 (Mass. 1994); *State of Hawaii v. Mundon*, 219 P.2d 1126, 1140-1142 (Haw. 2009).

The court in *Mitchell* also found that the failure to specify which incident was the subject of each verdict director was prejudicial. *Mitchell*, 704 S.W.2d. at 286. Given that defense sought to discredit the State's evidence and to extenuate defendant's conduct in each incident, "the jury in the instant case had to decide whether defendant's actions during either, or both, of the incidents mentioned in the evidence constituted" the crime charged. *Id*. Thus the error was prejudicial and required reversal. *Id*. at 286-287.

Consistent with these decisions, the notes on use in the Missouri Approved Instructions have continually cautioned attorneys and courts in "multiple acts" cases to take care to adequately identify which incident is the subject of each charge. Thus, the notes on use of MAR-CR3d 304.02 warn trial courts of the need to instruct jurors specifically about the incident they are to consider. MAI-CR3d 304.02, Note on Use 6. It stresses the importance of including the place of the offense in the verdict director when evidence of multiple acts is presented to the jury:

> The place of the offense may become of "decisive importance" under certain circumstances, such as … (c) where the defendant may have committed several separate offenses against the same victim at the same

> general location within a short space of time. In such a situation, upon request of the defendant or on the Court's own motion, the place should be more definitely identified, such as "the front bedroom on the second floor," "the southeast corner of the basement," etc.

MAI-CR3d 304.02, Note on Use 6.

Due to these considerations, the Eastern District Court of Appeals found that counsel should have been aware of this issue even before the Court handed down the decision in *Celis-Garcia*. *Barmettler v. State*, 399 S.W.3d 523, 529-530 (Mo. App. E.D. 2013). As noted by the court in *Barmettler*, "we are not persuaded that the reasoning of *Celis-Garcia* presents a substantive change in the law that insulates both trial counsel and appellate counsel from not advancing the argument of a potential non-unanimous jury verdict either at trial or on appeal." *Id.* at 529. Rather, given the Supreme Court's discussion of the Note on Use 6 to MAI-Cr3d 304.02, the court in *Barmettler* noted that it did "not view *Celis-Garcia* as presenting a substantive change in the law that automatically shields defense counsel from a claim of ineffectiveness." *Id*. at 529. As explained by the Eastern District:

> Notably, *Celis-Garcia* did not establish the right of criminal defendants to a unanimous jury verdict, and was not the first judicial decision to recognize that imprecisely drafted verdict directors could violate this constitutional right. *See State v. Pope*, 733 S.W.2d 811, 813 (Mo.App. W.D.1987). Moreover, *Celis-Garcia* did not invalidate the applicable MAI, but found the verdict directors based upon the MAI to be

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> erroneous in that instance because they failed to include sufficient specificity to ensure a unanimous verdict. *Celis-Garcia*, 344 S.W.3d at 158. Important to our analysis is the express warning and guidance provided by Note on Use 6 for MAI 302.02 [*sic.*] regarding the risks associated with non-specific verdict directors submitted in multiple acts cases. *Id*. at 157-58. The Supreme Court's conclusion that the MAI Note on Use was insufficient to validate an otherwise deficient verdict director does not preclude a finding that, prior to *Celis-Garcia*, reasonable and effective defense counsel would have heeded the warning provided by Note on Use 6, and should have considered requesting that the verdict directors be supplemented with sufficient factual details allowing the jury to distinguish between the alleged incidences of alleged sexual abuse and the uncharged incidents of abuse to which AL testified.

Barmettler v. State, 399 S.W.3d at 529-530.

Prejudice

To show prejudice for failing to raise an issue on appeal, a movant "must also have shown that the claimed error was sufficiently serious to create a reasonable probability that, if it was raised, the outcome of the appeal would have been different." *Anderson*, 196 S.W.3d at 36 (quotations and citations omitted). With respect to unpreserved errors (as was the situation in this case), "the right to relief due to ineffective assistance of appellate counsel tracks the plain error rule and requires that the error not raised be so substantial as to amount to a manifest injustice or a

miscarriage of justice." *Id.*; *see also Hamilton v. State*, 208 S.W.3d 344, 349-50 (Mo. App. S.D. 2006).

In many respects, this case is similar to the circumstances considered by the Missouri Supreme Court in *Celis-Garcia*. The defendant in that case sought to exploit factual inconsistencies and raise doubts about the plausibility of specific incidents alleged by the defendant's daughters. 344 S.W.3d at 158. In determining whether the court committed plain error in instructing the jury without specifying which incident was to be considered by the jury, the Court noted that "the fact that [the defendant] relied on evidentiary inconsistencies and factual improbabilities respecting each specific allegation of hand-to-genital contact makes it more likely that individual jurors convicted her on the basis of different acts." *Id.* at 160. Thus, the Court concluded that "the verdict directors misdirected the jury in a way that affected the verdict, thereby resulting in a manifest injustice." *Id.*

The defense in this case was based on the fact that C.B.K. gave vague and inconsistent statements as to what actually occurred, and that—whatever may have happened between Mallow and C.B.K.—the State failed to prove Mallow's guilt to the offenses as charged. (Tr. 397-398, 402-410). The State's position was that Mallow was guilty if he did something, and to not worry with the particulars. (Tr. 390-391, 393, 395, 413-414). By acquitting Mallow of one count of child molestation and the statutory sodomy charge, it appears that the jurors did have reasonable doubt about the accuracy of C.B.K.'s interview statements. Given these circumstances, it is likely that the verdict directors misdirected the jury in a way that affected the verdict, and a

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manifest injustice occurred. *See Celis-Garcia*, 344 S.W.3d at 158-159. And thus Appellate counsel was ineffective in failing to raise this issue. *Anderson*, 196 S.W.3d at 36; *Hamilton*, 208 S.W.3d at 349-50.

Since *Celis–Garcia* was decided, the lower courts have tended to find that any instructional error to be harmless if a defendant generally attacked the credibility of the complaining witness or pursues a "unitary defense." *State v. LeSieur*, 361 S.W.3d 458, 465 (Mo. App. W.D. 2012); *State v. Payne*, 414 S.W.3d 52, 56-57 (Mo. App. W.D. 2013); *State v. Rose*, SD 32168, slip op. at *5, --- S.W.3d --- (Mo. App. S.D. Sept. 30, 2013). These decisions are not consistent with this Court's decision in *Celis-Garcia* or fundamental concepts of due process and the right to a unanimous verdict.

The leading decision holding that a defendant is not prejudiced by unspecific verdict directors if the defense presents a "unitary defense," is the Western District's decision in *LeSieur*, 361 S.W.3d at 458. The court in *LeSieur* concluded that *Celis-Garcia* established a "clear" holding "that, to establish manifest injustice based on an insufficiently specific verdict director in a 'multiple acts' case, the defendant ***must*** have mounted an incident-specific defense, which would have given the jury a basis to distinguish among the various incidents mentioned in the evidence," and "that, where the defendant instead mounts a unitary defense to all alleged actions, attacking the victim's credibility generally, manifest injustice does not exist." *Id*. at 465 (emphasis added).

Contrary to this reading of *Celis-Garcia*, this Court's reference to unspecified hypothetical cases in which "the defense simply argues that the [victim] fabricated

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[her] stories," is *dicta*. Statements made by the Court concerning hypothetical situations not before the Court is non-binding *dicta*. *See In re C.W.*, 211 S.W.3d 93, 98 (Mo. banc 2007) (refusing to follow a statement in a prior opinion regarding the lack of prejudice conditioned upon a hypothetical situation), *abrogated on other grounds by In re B.H.*, 348 S.W.3d 770 (Mo. banc 2011).

In addition to constituting *dicta*, the Court's reference to hypothetical cases in which "the defense simply argues that the [victim] fabricated [her] stories," does not support the appellate courts' formulation of a rule that a defendant can never be prejudiced "where the defendant . . . mounts a unitary defense to all alleged actions, attacking the victim's credibility generally." At no point in *Celis-Garcia* did the Court make any reference to the presentation of "a unitary defense," or state that it is not possible that individual jurors may have convicted the defendant on the basis of different acts in a given case where a defendant "generally attacked the credibility" of the complaining witnesses.

Rather, the Court's reference to hypothetical cases in which the defense simply argued that the complaining witness fabricated her story seemed to suggest that the defense presented was only a factor to consider in determining the likelihood that individual jurors convicted the defendant on the basis of different acts. *Celis-Garcia*, 344 S.W.3d at 159. As stated by the Court, "the fact that Ms. Celis–Garcia relied on evidentiary inconsistencies and factual improbabilities respecting each specific allegation of hand-to-genital contact makes it ***more likely*** that individual jurors convicted her on the basis of different acts." 344 S.W.3d at 159 (emphasis added). In

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making this assertion, the Court did not appear to consider "the defense" asserted as necessarily dispositive. Rather, the issue was whether it was likely that individual jurors might have convicted the defendant based on different acts. Although the nature of the defense asserted is a factor to consider, so too are other factors, such as the nature of the State's evidence. Where, as here, the State's evidence provided a basis for the jurors to conclude that some but not all of the incidents occurred (which was confirmed by the split verdicts), it is more likely that the jurors did not come to an agreement about which alleged criminal act occurred.

Additionally, by looking solely at "the defense" presented, the courts misdirect the focus of the inquiry. The relevant inquiry is the likelihood that individual jurors did not reach an agreement as to the specific criminal act committed by the defendant. The defense asserted is a relevant factor, but is not dispositive.

Additionally, it is not clear what constitutes a "unitary defense," or that Mallow actually pursued a "unitary defense[4]" in this case. The defense was focused on the fact

[4] And the very notion that a defendant puts on "a defense" is misnomer. A defendant may challenge a specific element of a charged offense (such as by claiming alibi), but doing so does not necessarily constitute an admission to or relieve that State from its burden of proving each element of each charged offense. *See State v. Phegley*, 826 S.W.2d 348, 355 (Mo. App. W.D. 1992) (noting that an alibi is not a "true defense"); *State v. Hubbard*, 351 Mo. 143, 152-53, 171 S.W.2d 701, 707 (1943) ("[T]he state has the burden of proving the presence of the accused at the time and place of the crime

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that C.B.K.'s statements with respect to each alleged incident were vague and inconsistent, and thus the jury could not be reasonably sure that the specific incidents occurred or that Mallow engaged in the specific criminal conduct alleged. (Tr. 397-398, 401-410). So, for example, the defense noted C.B.K.'s inconsistent statements concerning the bath tub incidents (247-248, 254-255, 264, 280-281), the dancing incidents (246-247, 263), and the incidents in the bedroom 247, 249, 265-255, 279). (Tr. 400-403, 408-409). Thus, counsel argued:

> Now, this is going to take awhile, the inconsistencies in her story. Now you guys, I'm just going to highlight a few of them because I told you in opening statement there were going to be major discrepancies, okay, from her testimony.
>
> She gets up here and says she doesn't remember, doesn't recall a lot of the things that happened. Two of the counts for sure she couldn't remember, didn't recall. Now the only thing she testified on direct exam was he touched her outside of her clothes on her girl part. Now, during cross examination I sat up here and I asked her questions and as you saw, they were not trick questions, but she would say what you wanted her to say. By the time I was finished with her, asking her questions, do you

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when that fact is essential to his guilt and [i]t is a prisoner's burden, the only burden ever put upon him by the law, that of satisfying the jury that there is a reasonable doubt of his guilt").

remember, the only contact was hand to hand by the time we were finished. I said that the only contact was hand to hand, he touched your hand, you told him no, he stopped and that was the end of it. Remember that? No trick questions. She admitted on the stand, no touching of the penis.

Now, during the cross exam you also might have noticed that I talked about the first touching took place in the living room, which she agreed to, and then it was the bedroom, and then it was the bathtub. Those are all things that I asked her and she gave me answers to, and that was one of the things we discussed during voir dire, was the suggestibility of children. You ask them questions, they are easily led in one direction. I just asked her the question, she gave me the answer. If she is not firmly convinced of what happened, where it happened, how can you? Now, there were several more.

Now she had stated that there was an incident in the bathtub. Only happened one time. Then on cross examination it was no times, that he tried to do these things, but she wouldn't do it, she said no, she didn't do it. Then there was the incident where she said she sat on his lap and did the Coyote Ugly dance. Cross examination was, he wanted me to, but I didn't do it. She also said that on direct examination, not from me, from the prosecutor who is supposed to be eliciting helpful testimony, but she said she didn't do that. Then when I asked her about

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the touching and the bedroom, the living room, bathtub, and that it only happened one time, then she goes home and tells her mom and it never happens again. Now she tells her mother about this and yet she's allowed to continue to go over to Ed's house. Now, does that make sense to you?

Then there was some question about what he was wearing. One incident he's wearing boxers, the same incident he's wearing boxers and a robe. On cross examination, I sat up here and I asked her, I said, he was wearing white underwear and no shirt when it happened, and she said yes. Again, she is not for sure of what happened. If she's not firmly convinced of what happened, how can you?

* * *

Now, there was discussion about the number of times it happened in the video. On one occasion she says it happened one time in the bathtub, eleven times in general, two times she did the Coyote Ugly dance. Well, when she sat up here, again, she said he tried to, I didn't do it, or it was, no. Eleven times. I didn't hear eleven times. After we cross examined her it was simply hand to hand touching.

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The second video tape, there were inconsistencies on there too. There's no need to go into depth about those. You guys will remember those.

(Tr. 401-405).

Now, when you go back there I want you to think about the inconsistencies in her statement, think about the cross examination, think about the deposition, the video tapes, and how many times her story has changed, and it was hard to keep track of exactly what happened, what room, and where, what happened to her just in general. They are saying her story's consistent that the touching happened, at least one count, so what they're saying is, we know that there's at least one there based on her testimony. But remember, by the time we were finished it was hand to hand touching.

Now, there's a long list that I had of inconsistencies. I touched on the major points. I'm going to ask you to recall her testimony up here when the questions were asked. He tried to make her do the Coyote Ugly Dance, but it was with clothes on. That was her testimony. Some of the other things says that she was naked or nude or things of that nature, but the detective asked Louis about if he'd ever seen her nude, no.

There was some discussion about sleeping in the bed with him. She got up on the stand and said, no, she didn't do that. He tried to get

her to go into the bathtub. She stated on direct, she doesn't know if she did that or not. He tried to make her touch him, she didn't do it, that's what she said on direct exam. She didn't sit on his lap. That's what she said on direct exam. And when the prosecutor, remember the pauses in direct exam when she didn't recall or didn't remember some of these incidents, he was trying to ask her if she remembers about telling Ms. Olmstead certain things. One of the things was about touching Ed's penis. Don't remember telling Nicole that. That's what she said. Now, she said she didn't know of any other touchings, didn't remember Louis touching her chest, which was one of the things she mentioned in the videos. She never testified to that, and after cross examination it was clear that that didn't happen. She stated on direct exam she didn't feel the touching. Remember that, didn't feel the touching. She said that on the stand and that was, this was all direct exam, questions that the state was asking, and that's what Britney said. She stated on direct exam she never saw his private part, don't know if she touched it. She didn't remember how Louis was dressed. Didn't remember sitting on his lap in the bathtub, and then there's the notion that she doesn't lie because she's a handicapped child, her mind, on direct exam, I never brought this up, direct exam.

(Tr. 408-409).

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In many respects, Mallow's defense was similar to that asserted in *Celis-Garcia*, "which relied on evidentiary inconsistencies and factual improbabilities" with respect to each specific incident. 344 S.W.3d at 158-159.

Additionally—regardless of the defense asserted by Mallow—the jury's split verdict clearly indicates that the jurors did not believe that all of the incidents occurred, even while still finding Mallow guilty of one count. By acquitting Mallow of one count of child molestation and the statutory sodomy charge (L.F. 85-89), the jury had reasonable doubt about the veracity of C.B.K.'s interview statements. Given these circumstances, there was a reasonable probability that all of the jurors did not agree that any specific incident occurred in finding Mallow guilty of the one count. Based on the facts and circumstances in this case, had this issue been raised on direct appeal, the judgment would have been reversed. Appellate Counsel failed to exercise the degree of care that a reasonably competent attorney would have exercised under similar circumstances by not raising the issue, and Mallow was prejudiced as a result.

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II. Trial counsel was ineffective

The motion court clearly erred in denying Mallow's post-conviction Rule 29.15 motion after an evidentiary hearing, because trial counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, thereby resulting in prejudice to Mallow and violating his rights to effective assistance of counsel, due process of law, a fair trial, a unanimous verdict, and freedom from double jeopardy, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10, 18(a), 19 and 22(a), of the Missouri Constitution, in that trial counsel failed to properly raise as an issue at trial that the verdict directors for the two child molestation counts were unconstitutionally vague, did not require unanimity, and subjected Mallow to double jeopardy in that the directors did not adequately identify which of the alleged incidents he was being considered in each count or require the jury to unanimously agree on the criminal conduct committed.

Standard of Review

A post-conviction movant has the burden of proving his claims for relief by a preponderance of the evidence. Rule 29.15(i). Appellate review of a hearing court's decision in a Rule 29.15 proceeding is limited to determining whether the findings and conclusions of the hearing court are clearly erroneous. Rule 29.15(k). A hearing court's findings and conclusions are deemed clearly erroneous if a full review of the

record leaves the appellate court with a definite and firm impression that a mistake has been made. *State v. Schaal*, 806 S.W.2d 659, 667 (Mo. banc 1991).

Discussion

Trial counsel was ineffective in failing to object to the lack of specificity in the verdict directors. Trial counsel's failure to object could not have been due to reasonable trial strategy, as the defense strategy was to note inconsistencies with respect to C.B.K.'s accounts of the alleged abuse and thus to raise doubts about the occurrence of any or all of the specific incidents. Given this defense and the facts and circumstances in this case, there was a reasonable probability that the outcome of the trial would have been different.

The right to the effective assistance of counsel is mandated by the Missouri Constitution, Art. I, Sections 10 and 18(a), and by the Sixth Amendment to the United States Constitution. It is a fundamental right guaranteed to state defendants through the Fourteenth Amendment. *Gideon v. Wainwright*, 287 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). To prove that counsel was ineffective, a defendant must show (1) that counsel's performance "did not conform to the degree of skill, care, and diligence of a reasonably competent attorney" and (2) that the defendant was thereby prejudiced. *State v. Hall*, 982 S.W.2d 675, 680 (Mo. banc 1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

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The verdict directors were unconstitutionally vague

As set forth in Point I, the verdict directors were unconstitutionally vague and failed to require the jurors to unanimously agree on the specific criminal conduct committed by Mallow to find him guilty. As noted by the prosecutor, C.B.K. in her statements indicated that Mallow touched her genitals with his hand eleven times. (Tr. 393-395). Further, C.B.K. also said that the touching occurred in two—and possibly three—different locations: the bathroom, the living room and the bedroom. (Tr. Movant's Ex. 9, 14-16; Tr. 263, 414). And consistent with C.B.K.'s statements, the State charged Mallow with two separate counts of child molestation. (L.F. 34-35). However, neither the charges nor the instructions attempted to identify which incident was being charged in each count. (L.F. 34-35, 71-72).

Adding to the ambiguity contained in the verdict directors, the prosecutor urged the jurors to find Mallow guilty if they believed he committed any type of sexual abuse, and made no attempt to identify which incident should be considered with respect to each count. (Tr. 390, 391, 393-395, 414).

Missouri has long recognized that when the State presents evidence of multiple acts by the defendant, the verdict director must specify which incident is charged in each count. Most recently, the Missouri Supreme Court found that a trial court committed plain error in submitting verdict directors that did not adequately identify which specific incident the jury was to consider when there was evidence of multiple incidents. *State v. Celis-Garcia*, 344 S.W.3d 150, 154-158 (Mo. banc 2011).

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Although decided in 2011, after Mallow's appeal, the Court's decision in *Celis-Garcia* was consistent with long standing precedent, including *State v. Washington*, 242 Mo. 401, 146 S.W. 1164 (1912), and *State v. Mitchell*, 704 S.W.2d 280, 282-284 (Mo. App. S.D. 1986). Unlike *Celis-Garcia*, the court in *Mitchell* did not base its decision on the jury unanimity provisions of the Missouri Constitution. *Celis-Garcia*, 344 S.W.3d at 154-159; *Mitchell*, 704 S.W.2d at 283-287. Rather, the decision in *Mitchell* appears to be founded on double jeopardy concerns. *Mitchell*, 704 S.W.2d at 288; Mo. Const., Art. I, Sec. 19; U.S. Const., Amend. V. Courts in other states have noted double jeopardy concerns in similar situations. *Commonwealth of Massachusetts v. Hrycenko*, 630 N.E.2d 258, 262-264 (Mass. 1994); *State of Hawaii v. Mundon*, 219 P.2d 1126, 1140-1142 (Haw. 2009).

Additionally, the notes on use in the Missouri Approved Instructions have continually cautioned attorneys and courts in "multiple acts" cases to take care to adequately identify which incident is the subject of each charge. Thus, the notes on use for MAR-CR3d 304.02 warn trial courts of the need to instruct jurors specifically about the incident they are to consider. MAI-CR3d 304.02, Note on Use 6. It stresses the importance of including the place of the offense in the verdict director when evidence of multiple acts is presented to the jury. MAI-CR3d 304.02, Note on Use 6. Due to these considerations, the Eastern District Court of Appeals found that counsel should have been aware of this issue even before the Court handed down the decision in *Celis-Garcia*. *Barmettler v. State*, 399 S.W.3d 523, 529-530 (Mo. App. E.D. 2013).

In the current case, the verdict directors set forth the type of sexual contact alleged, *i.e.*, hand to genital contact. But it was impossible for the jurors to know which incident described at trial was the subject of which verdict director. Thus, as in *Mitchell* and *Celis-Garcia*, the verdict directors were erroneous.

Trial counsel's performance

"Although counsel's actions should be judged by her overall performance, the right to effective assistance of counsel 'may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial.'" *Deck v. State*, 68 S.W.3d 418, 429 (Mo. banc 2002) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). The submission of faulty instructions on a critical issue can be sufficiently egregious so as to deprive a defendant of reasonably effective assistance of counsel. *Id*.

"In reviewing the performance prong, Movant must overcome the presumptions that any challenged action was sound trial strategy, that counsel rendered adequate assistance, and that he made all significant decisions in the exercise of professional judgment. *Strickland,* 466 U.S. at 689–90." However, the mere assertion that conduct of trial counsel was "trial strategy" is not sufficient to preclude a movant from obtaining post-conviction relief based on a claim of ineffective assistance of trial counsel. *State v. Hamilton,* 871 S.W.2d 31, 34 (Mo. App. W.D. 1993). For "trial strategy" to be the basis for denying post-conviction relief, the strategy must be reasonable. *Id*; *State v. Galicia*, 973 S.W.2d 926, 930 (Mo. App. S.D. 1998).

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In this case, there would have been no reasonable strategic basis to not have objected to the instructions. As was the case in *Celis-Garcia* 344 S.W.3d at 158-159, Mallow's defense was premised on pointing out inconsistencies in C.B.K.'s various accounts to cast doubt on whether any or some of the incidents happened and—if they happened—what type of contact occurred. (Tr. 397-398, 402-410). For example, there was a lot of discussion about whether Mallow actually touched C.B.K.'s hand or legs rather than her genitals in one incident. (Tr. 262, 267, 278-279, 402, 404, 405, 413-414). Thus, the defense was premised on the notion that even if something occurred, the State failed to prove that Mallow was guilty of the offenses as charged. Given the situation in this case, it was critical for the verdict directors to adequately identify the specific incident being charged to avoid giving each juror a roaming commission to pick and choose one of the incidents without agreement by all twelve jurors. Trial counsel failed to do this.

In the post-conviction action, Mallow's post-conviction attorney did not question his trial attorney about why the trial attorney did not address this issue at trial. (PC Tr. 26-38). Even without testimony from trial counsel, however, the facts and circumstances in this case demonstrate that trial counsel had no objectively reasonable basis to not have objected.

The question of whether reasonably competent counsel would have performed differently—including whether there was a reasonable strategic reason for counsel's action—is an objective standard. *Love v. State*, 670 S.W.2d 499, 501-502 (Mo. banc 1984); *see also McNeal v. State*, 412 S.W.3d 886, 896-897 (Mo. banc 2013) (Wilson,

J., dissenting) . Although counsel testimony may be necessary to determine whether counsel's actions met this objective standard, there may be circumstances where the court may conclude that no competent attorney would have acted as trial counsel did. Thus, for example, this Court in *Anderson v. State*, 196 S.W.3d 28, 40-41 (Mo. banc 2006), held that "any strategy" that would leave on the jury a juror who indicated a strong preference for the death penalty and also stated that he would require the defense to convince him that death, was "wholly unreasonable." *Id*. Similarly, the Western District in *Patterson v. State*, 110 S.W.3d 896, 903-904 (Mo. App. W.D. 2003), found that there was no reasonable trial strategy for defense counsel to have submitted a defected instruction on a lesser included charge.

In this case, there was no conceivable benefit to Mallow, and thus no reasonable strategic basis, to permit the jury to be instructed in such a way that is was possible for the jurors to convict Mallow without unanimous agreement about the specific criminal conduct giving rise to the charge. As this Court concluded in *Celis-Garcia*, this type of instructional error constituted a manifest injustice or a miscarriage of justice. 344 S.W3d 150.

Prejudice

As set forth in Point I, the instructional error was prejudicial to Mallow. "The prejudice element of an ineffective assistance claim requires a defendant to 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Butler*, 951 S.W.2d 600, 610 (Mo. banc 1997) (quoting *Strickland*, 466 U.S. at 694). However, a movant is not

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required to meet "an 'outcome-determinative' test by showing that it is more likely than not that counsel's deficient conduct altered the outcome of the case. . . ." *Deck v. State*, 68 S.W.3d 418, 426 (Mo. banc 2002); *Strickland*, 466 U.S. at 693. Rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Deck*, 68 S.W.3d at 426; *Strickland*, 466 U.S. at 694. A different "outcome" can include the possibility of a hung jury. *Cravens v. State*, 50 S.W.3d 290, 298 (Mo. App. S.D. 2001).

Errors that "had a pervasive effect on the inferences to be drawn from the evidence" and alter the entire evidentiary picture are more likely to result in prejudice. *Butler*, 951 S.W.2d at 610. "Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id*.

As evidenced by Mallow's acquittal of the statutory sodomy charge and one of the two child molestation charges, the State's evidence was not overwhelming. Further, as this Court found in similar circumstances in *Celis-Garcia*, 344 S.W.3d at 158-160, the instructional error created a real possibility that the jurors convicted *Mallow* without unanimous agreement about what he actually did. Thus, but for trial counsel's failure to object to the instructions and require that they specify the incident being charged in each count or requiring the jurors to unanimously agree on the specific incident, there was a reasonable probability that the outcome of the trial would have been different, either resulting in an acquittal on all charges or a hung jury.

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CONCLUSION

Therefore, the motion court's denial of Louis Mallow's post-conviction claims of ineffective assistance of counsel was clearly erroneous. Mallow requests that this court reverse the motion court's ruling denying his Rule 29.15 motion, vacate the judgment of conviction and sentence in *State v. Mallow*, CR304-1069FX.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Frederick J. Ernst, hereby certify as follows:

The attached brief complies with the limitations contained in Supreme Court Rule 84.06(b). The brief was completed using Microsoft Office Word 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service and the appendix, this brief contains 12,030 words, which does not exceed the 31,000 words allowed for an appellant's brief under Rule 84.04.

A true and correct copy of the attached brief and appendix was sent through the e-filing system on March 5, 2014, to: Evan Buchheim, Criminal Appeals Division, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, evan.buchheim@ago.mo.gov.

/s/ Frederick J. Ernst
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