No. SC93878

In the
Supreme Court of Missouri

LOUIS MALLOW,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Phelps County Circuit Court
Twenty-Fifth Judicial Circuit
The Honorable Mary W. Sheffield, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant (Defendant) appeals from a Phelps County Circuit Court judgment overruling his Rule 29.15 motion for postconviction relief seeking to set aside a conviction on one count of first-degree child molestation, for which he was sentenced to 14 years' imprisonment.

In the underlying criminal case, Defendant was charged by information with two counts of first-degree child molestation and one count of first-degree sodomy. (L.F. 34, 35).[1] A mistrial was declared in Defendant's first trial before any evidence was presented because of a dispute regarding the admissibility of certain out-of-court statements.[2] (L.F. 20). Defendant was tried by a jury on May 15-17, 2006, with Judge Mary W. Sheffield presiding. (L.F. 24–25). The jury found Defendant guilty of one of the child-molestation charges (Count I), and it acquitted Defendant of the second child-molestation charge (Count 2) and the statutory-sodomy charge (Count 3). (L.F. 25, 85–87).

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[1] The record consists of the legal file (L.F.), trial transcript (Tr.), and sentencing transcript (Sent. Tr.) from Defendant's direct appeal, Case No. SD27859, and the legal file (PCR L.F.) and evidentiary-hearing transcript (PCR Tr.) from this postconviction appeal.

[2] A partial transcript of this proceeding and the events leading to the mistrial is contained in record on appeal.

The trial court later sentenced Defendant to the jury-recommended sentence of 14 years' imprisonment. (L.F. 90–94; Sent. Tr. 24).

Viewed in the light most favorable to the verdict, the evidence presented at trial showed the following:

Victim, who was born in April 1992, has Turner's disease, which affected her ability to learn and caused problems with her speech, sight, and hearing; the disease also caused "female problems," which would prevent Victim from ever having children. (Tr. 210–11, 245). Victim functioned about three or four years behind her peers. (Tr. 210). Her condition required her to be supervised by her mother "most of the time," and Victim did not "go out much." (Tr. 211).

Victim and her mother lived across the street from Defendant (Tr. 234, 244, 245). Defendant lived there with his two children. (Tr. 235). Victim played with Defendant's children at Defendant's home. (Tr. 214, 236, 239). Victim also spent the night perhaps two or three times at Defendant's home, and Defendant's children spent the night at Victim's home. (Tr. 214).

Victim testified that Defendant touched her on her "private parts" with her clothes on. (Tr. 240, 241). Victim circled the groin area on a diagram of a girl to indicate where Defendant touched her. (Tr. 242). She referred to the area as "my girl part" and "vagina." (Tr. 242). She said that Defendant touched her there only one time. (Tr. 245–46).

She also said that Defendant "tried to make me do the Coyote Ugly dance," which she described as "stripper dancing," in the living room "[o]nly with [her] clothes on." (Tr. 246–47). She did not do the dance. (Tr. 246).

Defendant also wanted her to sleep with him, which she defined as "two persons in a bed" (Tr. 247). Victim said she did not do the dance or sleep with Defendant (Tr. 246, 247). Defendant wanted her to get in the bathtub with him while he was wearing only underwear, but she could not remember if she did that (Tr. 248, 255). Defendant wanted Victim to touch his penis, but she refused to touch, or even look at, his penis (Tr. 266). But she said that Defendant's "private part was hard." (Tr. 254).

Victim said she told her mother about these things right after they happened, which, according to Mother's testimony, occurred on July 1, 2004, when Victim was 12 years old. (Tr. 249). Victim never went back to Defendant's home after that. (Tr. 250).

On July 19, 2004, a state child-abuse investigator contacted Mother. (Tr. 185, 186). He had learned that Victim had shared some information with her mother on July 1, 2004 about the sexual abuse. (Tr. 186). Victim was eventually interviewed on July 29, 2004, at Kids Harbor Child Advocacy Center (Tr. 187, 188). A copy of the recorded interview was given to a Phelps County Sheriff's detective. (Tr. 189).

On July 30, 2004, the detective and the child-abuse investigator interviewed Defendant. (Tr. 313, 315, 316). Defendant was given the *Miranda* warnings and informed of Victim's allegations. (Tr. 316, 317). Defendant said that he had never known Victim to lie, but he denied any sexual contact with her. (Tr. 330, 340). After the interview, Defendant was arrested. (Tr. 324). Defendant again denied Victim's allegations, but also said he was willing to accept the penalty. (Tr. 340).

In November 2004, Victim was interviewed a second time at Kids Harbor Advocacy Center due to additional allegations. (Tr. 193).

The Court of Appeals, Southern District affirmed Defendant's conviction and sentence in Case No. SD27859 and issued its mandate on July 14, 2008. (L.F. 21, 40).

Defendant later filed a *pro se* motion for postconviction relief, and appointed counsel filed an amended motion. (PCR L.F. 4–39). Postconviction counsel also physically attached Defendant's pro se claims to the amended motion at Defendant's "request." (PCR L.F. 27, 29–39). One of those pro se claims (#1) alleged ineffective assistance of counsel relating to the verdict-directing instructions for the child-molestation counts. (PCR L.F. 29–31). The motion court held an evidentiary hearing, during which Defendant's trial and direct-appeal counsel testified. (PCR Tr. 1–41). The motion court later

entered findings and a judgment overruling Defendant's motion for postconviction relief. (PCR L.F. 40–47).

STANDARD OF REVIEW

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

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

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

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

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

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

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

ARGUMENT

The motion court did not clearly err in rejecting, after an evidentiary hearing, Defendant's postconviction claim that his trial and direct-appeal counsel were ineffective for failing to challenge the verdict directors on the child-molestation counts on the ground that they violated Defendant's right to a unanimous verdict because this specific claim was not alleged in the postconviction motion and is being raised for the first time on appeal.

Alternatively, Defendant failed to carry his burden of proving this claim because he: (1) presented no testimony from either trial or direct-appeal counsel at the postconviction evidentiary hearing on the specific issue of juror unanimity; (2) failed to rebut the presumption that any action taken, or not taken, was based on reasonable trial strategy; (3) bases his current claim of ineffectiveness on this Court's decision in *State v. Celis-Garcia*, which was decided three years after issuance of the mandate in Defendant's direct appeal; (4) failed to carry his burden of proving that the jury did not unanimously agree on a specific act for its guilty verdict and instead relies on speculative assertions of prejudice, which is insufficient to prove *Strickland* prejudice. (Responds to Defendant's Points I and II).

A. The record regarding this claim.

Defendant's postconviction counsel attached Defendant's pro se claims to the amended motion. (PCR L.F. 27). In pro se "Claim #1," Defendant asserted that he "was denied effective assistance of trial and appellate counsel[ ] because…they failed to raise the issue that [Instructions No. 5 and No. 6] were unconstitutionally vague so that they subjected [Defendant] to double jeopardy and resulted in [Defendant] being convicted without now being able to determine which of the two sexual touching incidents testified about by the alleged victim was the crime that the jury found [Defendant] guilty of committing and which [one] the jury acquitted [Defendant]" on. (PCR L.F. 29). Defendant alleged that Victim "testified about two separate and distinct incidents of child molestation," but "neither the charging document nor the jury instructions distinguish what the [Defendant] specifically" did to have committed the crime alleged in "Count 1 as opposed to the crime [alleged in] Count 2." (PCR L.F. 29). Defendant then specifically alleged that *trial counsel* was ineffective "for failing to protect [Defendant]'s constitutional rights by requesting the trial court to provide sufficing [sic] instruction to the jury through…Instructions No. 5 and No. 6 so the that jury could distinguish which of the two incidents of sexual touching constituted the crime[s] alleged in Count 1 and…Count 2." (PCR L.F. 30). Defendant also alleged that "Instructions No. 5 and No. 6 make absolutely no distinction between the two

incidents of sexual touching, other than saying that they occurred at different times." (PCR L.F. 30). Finally, Defendant alleged that "it was impossible for the jury to differentiate between the two incidents of sexual touching," and that no one can "determine which of the two incidents the jury convicted [Defendant] of committing." (PCR L.F. 31). Defendant's pro se claim concludes by stating that "caselaw, arguments, and facts supporting this claim…will be provided when appointed counsel amends this motion into the 'lawyerlike' amendment required to fulfill the statutory obligation of Rule 29.15." (PCR L.F. 31).

The child-molestation counts in the State's information alleged in Count 1 "that between February 1, 2003 and July 17, 2004,…the defendant subjected [Victim],…who was then less than fourteen years old, to sexual contact. (L.F. 34). Count 2 alleged that "that between February 1, 2003 and July 17, 2004,…the defendant subjected [Victim],…who was then less than fourteen years old, to sexual contact, at a time different than that alleged in Count 1." (L.F. 34). Count 3 alleged that Defendant committed first-degree statutory sodomy between these same dates by having deviate sexual intercourse with Victim. (L.F. 35).

At trial, Victim testified that Defendant "touched me with his hands on my private parts…with my clothes on." (Tr. 240). She circled the groin area on a diagram, which she referred to as her "girl part" or "vagina." (Tr. 242).

She specifically denied that Defendant touched her on the part "that you use to go to the bathroom," but that he touched her only "over [her] clothes." (Tr. 243). She said that Defendant touched her only one time. (Tr. 245). On redirect examination, Victim said that Defendant "touched me with his hand on my private part…with my clothes on." (Tr. 275).

During cross-examination, defense counsel, through leading questions, got Victim to admit that the "first time" Defendant touched her was the time he unsuccessfully tried to get her to do the "Coyote Ugly dance," which she said on direct had occurred in the living room. (Tr. 246–47, 263). Moments later, defense counsel got Victim to say that the "first time [Defendant] touched you with his hand…was in the bathtub," which presumably was in the bathroom. (Tr. 264–65). A few questions later, defense counsel got Victim to admit that she told her mother that the Defendant "first touched [her] in the bedroom." (Tr. 165).

She said that Defendant tried to make her touch his parts but she did not do it. (Tr. 248). Victim did not remember telling the interviewer at Harbor House that she touched Defendant's penis or that Defendant touched her private part 11 times. (Tr. 252). Although she said that she remembered telling the interviewer that Defendant's private part was "hard," she did not know how she knew this because she did not see it. (Tr. 254).

During trial, redacted versions of Victim's recorded Harbor House interviews were admitted into evidence and shown to the jury.[3] (Tr. 293–308).

During Victim's first interview, she said that Defendant touched her "private parts." (Movant's Ex. 9, p. 6). She also said that while she and Defendant were in the bathroom, he told her to pull her pants down and to sit on the "private part of his lap" while he was wearing his underwear. (Movant's Ex. 9, p. 9–10). She also said that he told her to move "like when people are married and…they want to have sex." (Movant's Ex. 9, p. 11). She said that this occurred one time and that Defendant had touched her 11 times. (Movant's Ex. 9, p. 12). Defendant touched her with his hand on her chest and her "pee-pee" on the skin, but outside of it. (Movant's Ex. 9, p. 12–14). She said this occurred in the living room and the bathroom. (Movant's Ex. 9, p. 14). She also said that Defendant made her get into bed and touch him on his "private part," which she did. (Movant's Ex. 9, p. 16–17). When asked at the end of the interview whether she had told "things that really

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[3] Transcripts of the recorded interviews (State's Exhibits 1 and 2) were also admitted into evidence during trial. (Tr. 309–10). Transcripts of the recorded Harbor House interviews that were shown to the jury during trial were admitted in lieu of the tapes themselves at the postconviction evidentiary (Movant's Exhibits 9 and 13). (PCR Tr. 34–37).

happened," the transcript shows her "shaking [her] head no." (Movant's Ex. 9, p. 31). When asked if she told things that did not happen, Victim said that she told things that "happened a long time ago." (Movant's Ex. 9, p. 31).

During the second interview, Victim again said that Defendant touched her "girl part" and her chest with his hands. (Movant's Ex. 13, p. 5–6). She said that this occurred in the bathtub but that they both had clothes on. (Movant's Ex. 13, p. 6). She also said that Defendant's "boy part" got "hard" and that Defendant touched his "boy part" on her "girl part." (Movant's Ex. 13, p. 8–9). She said that she had on pants and a shirt. (Movant's Ex. 13, p. 9).

The verdict director for Count 1 (Instruction No. 5) instructed the jury to find Defendant guilty of first-degree child molestation as alleged in Count 1 if "First, that between February 1, 2003 and July 17, 2004, …the defendant touched the genitals of [Victim]; and Second, that he did so for the purpose of arousing or gratifying his own sexual desire; and Third, that [Victim] was less than fourteen years old, …. (L.F. 71).

The verdict director for the other child-molestation count (Count 2) was nearly identical except that it contained a fourth paragraph that stated: "Fourth, that the incident complained of in Count Two occurred at a different time than the incident complained of in Count One…." (L.F. 72).

The verdict director for the statutory sodomy count (Count 3) contained the same date range as the other two child-molestation counts and required the jury to find that "the defendant had [Victim] touch his penis with her hand." (L.F. 73). The jury found Defendant guilty of child molestation as charged in Count 1 and acquitted Defendant of the other two charges. (L.F. 87–89).

Defendant did not object to the verdict directors at trial, though the record indicates that he had some concern with Instruction No. 5 but resolved that with the prosecutor:

> Your Honor, I would state that what we have numbered as instructions…1 through 10, I have no objection to those. We had some questions, or I did, about instruction number 5, the verdict director, where it talks about the defendant touched the genitals of [Victim] based on the fact that it's alleged that there was sexual contact that took place. I was not sure whether or not you had put in there that it was sexual contact and then explained the behavior. Apparently during the break [The Prosecutor] had whipped that up and he stated that it was copied correctly. He read one of the notes on use. I have no reason to doubt what he had said about the MAI instruction as he was reading it to us out loud. So I have no objection to 1 through 10….

(Tr. 384–85).

During closing argument, the prosecutor said the question for the jury is whether it believed that there was a victim in this case. (Tr. 390). He then directed the jury's attention to the child-molestation verdict directors and said that if the jury finds "that twice this defendant touched the genitals of [Victim] then you can find him guilty of both of those offenses." (Tr. 390–91). The prosecutor spent much of the remainder of the argument attempting to explain Victim's inconsistent statements during the interviews, deposition, and trial. (Tr. 392–99).

Defendant's trial counsel began his argument by noting that no physical evidence supported Victim's story and no evidence or eyewitnesses were presented to corroborate her story (Tr. 399–400). He then proceeded to highlight inconsistencies in Victim's story, which he told the jury was "going to take awhile." (Tr. 401). During this part of the argument, counsel reminded the jury that Victim said "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." (Tr. 402). He then asked the jury, "[i]f she is not firmly convinced of what happened, where it happened, how can you [be]?" (Tr. 402). Counsel then stressed to the jury the inconsistencies of Victim's answers about the bathtub, the dancing, what Defendant was wearing, and about how many times it happened. (Tr. 403–04). Counsel urged jurors to consider all of Victim's inconsistent statements:

> 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.

(Tr. 408). After outlining several more inconsistencies, counsel closed by saying, "if she is not firmly convinced that this happened, about the details, how can you?" (Tr. 410).

The prosecutor responded by noting that Victim told them that it occurred in the living room and bathroom—"[t]hat's two right there"—and that it happened in the bedroom, "that's three." (Tr. 414).

Trial counsel did not raise a claim regarding the verdict directors in his motion for new trial. (Tr. 61–66).

During the postconviction evidentiary hearing, Defendant's direct-appeal counsel's attention was drawn to Defendant's claim that "Instructions No. 5 and 6 were erroneous." (PCR Tr. 6). Counsel testified that he did not recall whether he had thought there was anything wrong with the verdict directors, but if he had seen an issue regarding them he would have "at least…made a note of it." (PCR Tr. 7). When asked if he had any trial-strategy for not raising an issue about the instructions, counsel replied that he would not raise one if it did not have any merit:

Q. And what I'm primarily getting at is with regard to an issue with instructions. Would you have any strategy reason for not raising those if the results in this instance would have been remanding the case back for a new trial?

A. A strategy for not raising it? I guess if I didn't think it had any merit.

Q. All right.

A. I—I don't—I don't recall.

(PCR Tr. 8).

Direct-appeal counsel said that his general process in deciding which issues to assert on appeal would be to look at the motion for new trial to find "well-preserved issues." (PCR Tr. 19). If in reviewing the transcript he sees other issues worth asserting, one of the factors he looks at is whether it has been preserved in the motion for new trial. (PCR Tr. 20). He had no doubt that he went through this process for Defendant's appeal. (PCR Tr. 20).

Counsel said that he also specifically reviews the instructions to determine if there are any issues worth raising:

Q. And do you typically look at, for example, the instructions that are submitted or the instructions that are offered and refused?

A. Well, they're always part of the legal file.

Q. Okay. Do you try to make a dec—and I really don't know the answer to this question. But do you typically look at it and—and try to make a

decision, well, do I—is there anything in there in the instructions worth raising?

A. Yes, I—I look at the instructions. I—obviously if it's in a motion for a new trial, I'll key into it a little more. But I—I always consider.

(PCR Tr. 21).

Counsel also said that he tried to keep up on the latest appellate opinions to know the current state of the law and that this process also influences his decision on whether to raise a particular issue on appeal: "If this issue clearly has already been decided…yes, that would… definitely weigh into my decision." (PCR Tr. 23).

Trial counsel was not asked any questions about the verdict directors or why he did not object to them on the grounds asserted in the pro se claim attached to the amended postconviction motion. (PCR Tr. 26–34).

The motion court did not specifically address Defendant's pro se claims, but its judgment states that the court had "examined and considered each of them." (PCR L.F. 47). The judgment also states that Defendant's direct-appeal counsel ("Mr. Ward") "indicated that he considered the issues raised in [Defendant]'s motion for new trial and made a conscious decision to not include them in his appeal." (PCR L.F. 47). The motion court concluded that this "was a sound strategic decision and appellate counsel was not ineffective." (PCR L.F. 47).

B. Defendant's postconviction allegations are insufficient to raise the jury-unanimity issue asserted for the first time on appeal.

Defendant's pro se claim attached to his amended postconviction motion alleged mere conclusions, rather than specific facts. Defendant alleged that the verdict directors were "unconstitutionally vague" and subjected him to "double jeopardy." He did not cite to Missouri's constitutional provision requiring a unanimous jury verdict, and while the only case cited to support his claim, *State v. Johnson*, 62 S.W.3d 612 (Mo. App. W.D. 2001) (PCR L.F. 29), involved identical verdict directors, it did not specifically address the unanimous-verdict requirement.

Although Defendant generally alleged that it cannot be determined which specific acts the jury found in reaching its guilty verdict on Count 1 and its not-guilty verdict on Count 2, he never alleged that the jurors did not unanimously agree on the acts committed in reaching either verdict. In other words, Defendant's complaint was that it cannot be determined from the verdict directors alone which specific act the jurors found in reaching their verdicts. He did not allege that in reaching their guilty verdict, the jurors did not unanimously agree on a specific act Defendant committed. Defendant also did not allege any facts from which it could be reasonably inferred that the jury's verdict was not unanimous. *See Strong v. State*, 263 S.W.3d 636, 644 (Mo. banc 2008) (noting that while the postconviction defendant made "a

general allegation of juror misconduct, he fails to articulate any basis for suspecting juror misconduct"); *State v. Kinder*, 942 S.W.2d 313, 338 (Mo. banc 1996) (rejecting ineffectiveness claim regarding jury selection because the defendant had "not alleged that any of the jurors who served on his trial were biased against him").

Defendant's allegations actually cut against his current appellate claim that the verdict was not unanimous. His postconviction allegations actually assumed that the jury's verdicts were based on its finding of two distinct incidents of sexual touching; his only complaint was that he cannot identify which specific acts go with each verdict director. (PCR L.F. 31).

Defendant also failed to allege that the failure to object to the verdict directors or to request that they identify specific acts, or to raise this as a plain-error claim on direct appeal, was unreasonable trial strategy. *See McNeal v. State*, 412 S.W.3d 886, 889 (Mo. banc 2013) (holding that a postconviction defendant claiming ineffective assistance for the failure to request an instruction "must plead facts…showing that the decision not to request the instruction was not reasonable trial strategy") (internal quotation marks omitted).

Defendant's failure to plead facts and his reliance on purely conclusory allegations renders the claim non-cognizable under Missouri's postconviction

rules. A postconviction motion must plead specific facts, not mere conclusions, supporting the claim for relief:

> In sum, pleading requirements are not merely technicalities. The purpose of a Rule 29.15 motion is to provide the motion court with allegations sufficient to enable the court to decide whether relief is warranted. Where the pleadings consist only of bare assertions and conclusions, a motion court cannot meaningfully apply the *Strickland* standard for ineffective assistance of counsel.

Morrow, 21 S.W.3d at 824. "As distinguished from other civil pleadings, courts will not draw factual inferences or implications in a Rule 29.15 motion from bare conclusions or from a prayer for relief." *Morrow*, 21 S.W.3d at 822. The requirement to plead specific facts is found in the rule itself:

> (e) When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether *sufficient facts* supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert *sufficient facts* or include all claims known to the movant, counsel shall file an amended motion that *sufficiently alleges the additional facts* and claims.

Rule 29.15(e) (emphasis added). "The redundant requirement to plead facts [contained in Rule 29.15(e)] makes clear that a Rule 29.15 motion is no ordinary pleading where missing factual allegations may be inferred from bare conclusions or implied from a prayer for relief." *White v. State*, 939 S.W.2d 887, 893 (Mo. banc 1997). This pleading requirement advances the twin policies of the need to bring finality to the criminal process and to preserve scarce judicial resources that would otherwise be wasted on speculative claims unsupported by any factual basis:

> A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment of a court. While courts are solicitous of post-conviction claims that present a genuine injustice, that policy must be balanced against the policy of bringing finality to the criminal process. Requiring timely pleadings containing reasonably precise factual allegations demonstrating such an injustice is not an undue burden on a Rule 29.15 movant and is necessary in order to bring about finality. Without requiring such pleadings, finality is undermined and scarce public resources will be expended to investigate vague and often illusory claims, followed by unwarranted courtroom hearings.

Id. (citation omitted). *See also Dorris v. State*, 360 S.W.3d 260, 269 (Mo. banc 2012).

In addition, this pleading deficiency cannot be cured by the presentation of evidence during a postconviction evidentiary hearing. *See Johnson v. State*, 333 S.W.3d 459 (Mo. banc 2011) (holding that "[p]leading defects cannot be remedied by the presentation of evidence and refinement of a claim on appeal"); *State v. Brooks*, 960 S.W.2d 479, 497 (Mo. banc 1997) ("An evidentiary hearing is not a means by which to provide movant with an opportunity to produce facts not alleged in the motion."). This is because pleadings may not be amended to conform to the evidence after the time for amending pleadings under Rule 29.15 has passed. *See Rohwer v. State*, 791 S.W.2d 741, 743–44 (Mo. App. W.D. 1990). Neither can Defendant seek plain-error review of this claim because "[t]here is…no plain error review of post-conviction judgments." *Hoskins v. State*, 329 S.W.3d 695, 697 (Mo. banc 2010).

The mischief that can occur when this Court's requirement for specific factual allegations in postconviction pleadings is ignored is directly reflected in the transcript of the evidentiary hearing in this case. Nowhere in the transcript is either trial or direct-appeal counsel specifically asked about the jury-unanimity issue. The simple explanation for this is that it was not an issue under the allegations in the pro se claim attached to the amended motion and thus was not considered to be an issue by postconviction counsel, the prosecutor, or the motion court. This, in turn, explains why the motion

court did not directly address the jury-unanimity issue in its findings and conclusions.

Defendant should not be excused for failing to fulfill his obligation under Rule 29.15 to plead specific facts showing that a jury-unanimity issue was being asserted and then be permitted to assert such a claim for the first time on appeal. By asserting these unpreserved claims for the first time on appeal, Defendant is attempting to force this Court into the precarious position of ruling on a claim with an inadequate record and which the motion court did not know even existed, much less had the opportunity to consider. The law does not allow Defendant to do this.

Claims not raised in the Rule 29.15 motion for post-conviction relief may not be asserted for the first time on appeal and are waived. *See State v. Clay*, 975 S.W.2d 121, 141–42 (Mo. banc 1998) ("In actions under Rule 29.15, any allegations or issues that are not raised in the Rule 29.15 motion are waived on appeal."); *Cloyd v. State*, 302 S.W.3d 804, 807 (Mo. App. W.D. 2010) (holding that under Rule 29.15 "claims not presented to the motion court cannot be raised for the first time on appeal"). This principle derives from the express language of Rule 29.15, which requires that the motion "shall include every claim known to the movant." Rule 29.15(d). The rule also requires the defendant to "declare in the motion" that "all claims for relief known to the" defendant are included in the motion and provides that the defendant

"waives any claim for relief known to the [defendant] that is not listed in the motion." *Id.*

Since the jury-unanimity claim was not contained in Defendant's postconviction motion, it should be rejected.

C. Defendant failed to prove counsel acted incompetently.

The motion court did not clearly err in rejecting this claim because Defendant failed to carry his burden of proving that trial counsel's failure to object to the verdict directors and request that they identify specific acts or direct-appeal counsel's failure to assert a jury-unanimity claim on appeal was unreasonable trial strategy. Defendant's failure to present evidence on this issue makes it impossible for him to rebut *Strickland's* presumption that counsel's actions were the product of reasonable trial strategy.

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. The defendant must overcome the presumption that, under the circumstances, trial counsel's challenged action might be considered reasonable trial strategy. *Id. See also Taylor v. State*, 126 S.W.3d 755,, 760 (Mo. banc 2004) ("There is a presumption that counsel's alleged omissions were sound trial strategy.") (quoting *State v. Tokar*, 918 S.W.2d 753, 766 (Mo. banc 1996)).

1. Trial counsel.

Defendant made no effort to prove that trial counsel's decision not to object to the verdict directors and ask that they be changed to identify specific acts was unreasonable trial strategy. When a postconviction defendant fails to present counsel's testimony at the postconviction evidentiary hearing regarding a claim of alleged ineffectiveness, the defendant cannot meet his burden of rebutting the presumption that trial counsel's action constituted reasonable trial strategy. *See State v. Tokar*, 918 S.W.2d at 768 (holding that *Strickland's* trial-strategy presumption cannot be overcome when the defendant failed to ask counsel at the postconviction evidentiary hearing why he failed to object despite questioning counsel about other issues); *Helmig v. State*, 42 S.W.3d 658, 681–82 ((Mo. App. E.D. 2001) (holding that when the postconviction defendant did not ask trial counsel why he failed to object to certain testimony, he "failed to rebut the presumption that counsel's decision not to object was reasonable trial strategy"). "Failure to present evidence at a hearing in support of factual claims in a post-conviction motion constitutes abandonment of that claim." *State v. Nunley*, 980 S.W.2d 290, 293 (Mo. banc 1998).

The record suggests that trial counsel likely had valid trial-strategy reasons for not objecting to the two child-molestation verdict directors and for not requesting that they identify separate, specific incidents.

Defendant's defense at trial was that Victim had fabricated the allegations of molestation based on the numerous inconsistencies in her out-of-court statements and her in-court statement that only one incident of touching occurred. Counsel would have had no reason to focus the jury's attention on the specific acts identified in Victim's out-of-court statements by including specific references to those acts in the verdict directors, especially since Victim testified at trial that only one unspecified act of touching over the clothes had occurred. The obvious defense strategy was to sow confusion among the jurors on the issue of reasonable doubt by demonstrating that Victim was confused and inconsistent about what, if anything, Defendant had actually done to her. Forcing the jury to focus on the specific incidents by having the verdict directors modified to identify the separate incidents of touching Victim had related in her out-of-court statements would only operate to mitigate that confusion. It made no sense to force the jury to consider the acts by location or some other distinguishing factor when attempting to obtain an outright acquittal. Such a process only reminds the jury that multiple acts are alleged to have occurred, which might lead them more to a guilty verdict than an acquittal.

The only possible reason a defendant would seek to have the verdict directors include specific incidents in a multiple-acts case would be if the defense were conceding that one or more incidents occurred, but that others

did not. Here, of course, the defense was that no acts of child-molestation occurred and that Victim had fabricated the allegations.

The statements in *Barmettler v. State*, 399 S.W.3d 523 (Mo. App. E.D. 2013), suggesting that "absent a compelling strategic reason, reasonable and effective trial counsel would have acted upon the cautionary language of [MAI-CR 3d 302.02] Note on Use 6 and objected to, or requested modification of, the verdict directors to ensure against the risk of a non-unanimous jury verdict" do not compel a different conclusion. This statement turns *Strickland's* trial-strategy presumption on its head since it presumes counsel should automatically be found ineffective for not objecting in such a situation unless a "compelling strategic reason" is proved otherwise. Moreover, no reasonable defense counsel would seek to focus the jury's attention on the evidence of the different specific acts allegedly committed when the defense is that the alleged victim fabricated the allegations.

Additionally, if it was so obvious from Note on Use 6 that an objection to, and modification of, the verdict directors was needed, as *Barmettler* seems to suggest, why was MAI-CR 3d 304.02 modified to add Note on Use 7 after this Court's decision in *Celis-Garcia*, which was well after Defendant's trial, to warn of the need for specificity in verdict directors used in multiple-acts cases to protect a Defendant's right to a unanimous verdict as outlined in *Celis-Garcia*.

Moreover, why would trial counsel seek to "ensure against the risk of a non-unanimous jury verdict" when that risk—if it did in fact exist—would more likely inure to the defendant's benefit by promoting a not guilty verdict. It is highly unlikely that if the jurors did not unanimously agree on the specific act committed that they would still return a guilty verdict.

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

Finally, just because the MAI's notes on use give a defendant the option of asking that the verdict directors specifically identify the individual incidents borne out by the evidence does not mean that it is wise trial strategy for defense counsel to invoke it. Simply because an appellate court looking at a

case from its vantage point finds that specific verdict directors are preferable to avoid jury-unanimity issues does not mean that a defense attorney in the middle of trial and trying to win an acquittal would see the case the same way. *See State v. Maddix*, 935 S.W.2d 666, 671 (Mo. App. W.D. 1996) (holding that appellate courts cannot employ "hindsight" in reviewing postconviction claims).

The record also shows that defense counsel carefully considered the verdict directors and initially had a question about them before satisfying himself that they complied with the MAI. He then announced that he had no objection to the verdict directors. This implies that the failure to object was a product of reasonable trial strategy as opposed to simple inadvertence.

2. Direct-appeal counsel.

To prevail on a claim of ineffective assistance of appellate counsel, strong grounds must exist showing that counsel failed to assert a claim of error that would have required reversal had it been asserted and that it was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it. *State v. Edwards*, 983 S.W.2d 520, 522 (Mo. banc 1999); *Taylor v. State*, 262 S.W.3d 231 (Mo. banc 2008). There "is a strong presumption that counsel provided adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *McCain v. State*, 317 S.W.3d 657, (Mo. App. S.D. 2010).

Appellate counsel does not have the duty to raise every non-frivolous claim on appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). "[A]ppellate counsel has 'no duty to raise every possible issue asserted in the motion for new trial on appeal, and no duty to present non-frivolous issues where appellate counsel strategically decides to winnow out arguments in favor of other arguments." *Baumruk v. State*, 364 S.W.3d 518, 539 (Mo. banc 2012) (quoting *Storey v. State*, 175 S.W.3d at 148). "Appellate counsel is not ineffective for failing to raise unpreserved allegations of error." *Tisius v. State*, 183 S.W.3d 207, 213 (Mo. banc 2006).

A decision based on reasonable trial strategy is virtually unchallengeable. *See State v. Sanders*, 903 S.W.2d 234, 240 (Mo. App. E.D. 1995). "Rarely will a strategic decision of trial counsel be declared so unsound that it constitutes ineffective assistance of counsel." *Malady v. State*, 748 S.W.2d 69, 72 (Mo. App. S.D. 1988). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. The reasonableness of counsel's actions must be viewed as of the time counsel's conduct occurred, taking into consideration the circumstances of the particular case. *Id.* at 690. The proper standard is to "determine,

whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

Defendant did not specifically ask direct-appeal counsel about the jury-unanimity issue. He simply inquired if counsel considered the verdict directors, and counsel replied that he did and that he would have raised an issue on appeal if he had seen one. Counsel could not think of any strategy for not raising an issue regarding the verdict directors other than lack of merit. Counsel also confirmed that he reviewed the entire record while preparing his brief.

Based on this meager record, the motion court did not clearly err in rejecting Defendant's claim that direct-appeal counsel acted incompetently. Defendant's failure to address the jury-unanimity issue with counsel at the evidentiary hearing—presumably because that specific claim was not included in either the amended motion or the attached pro se claims—precludes him from rebutting the presumption that counsel's decision not to include such a claim on appeal was anything other than reasonable strategy.

The fact that counsel said he could not remember a reason why he did not raise a claim challenging the verdict directors does not overcome *Strickland's* strong presumption that a trial-strategy reason existed for that decision. *See Rios v. State*, 368 S.W.3d 301, 311 (Mo. App. W.D. 2012) (the fact that "counsel could not recall or identify his strategy in failing" to elicit testimony

"does not overcome the strong presumption that counsel had a strategic reason for [his decision]") (alteration in original); *Dawson v. State*, 315 S.W.3d 726, 734 (Mo. App. W.D. 2010) (counsel's "lack of recollection alone does not overcome the presumption that her decision not to object was a reasonable trial strategy"); *Bullock v. State*, 238 S.W.3d 710, 715 (Mo. App. S.D. 2007) (counsel's failure to "verbalize a trial strategy" or to recall why a witness was not called "does not overcome the strong presumption that counsel had a strategic reason for not calling" the witness); *Rickey v. State*, 52 S.W.3d 591, 596 (Mo. App. W.D. 2001) (counsel's "inability to remember why he took a specific course action during trial does not establish lack of competent performance").

Defendant relies on *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. banc 2011), to support his claim that appellate counsel was ineffective for failing to raise a plain-error claim challenging the verdict directors on the ground that Defendant's right to a unanimous jury verdict was violated. *Celis-Garcia* is a "multiple acts case," which "arises when there is evidence of multiple, distinct criminal acts, each of which could serve as the basis for a criminal charge, but the defendant is charged with those acts in a single count." *Id.* at 155–56.

The difficulty with Defendant's reliance on *Celis-Garcia* to support his ineffectiveness claim against direct-appeal counsel for not raising a jury-unanimity issue as identified in that case is that the *Celis-Garcia* opinion

was handed down almost three years *after* the Southern District issued its mandate in Defendant's direct appeal. Appellate counsel cannot be found incompetent for failing to predict the outcome in *Celis-Garcia* three years before it happened. "Counsel will generally not be held ineffective for failing to anticipate a change in the law." *Zink v. State*, 278 S.W.3d 170, 190 (Mo. banc 2009) (quoting *Glass v. State*, 227 S.W.3d 463, 472 (Mo. banc 2007)).

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

Although Defendant claims that he is not relying on *Celis-Garcia* to support his argument that counsel was ineffective for not asserting a plain-error claim regarding jury unanimity, his brief extensively relies on that case to support that argument. In *Felton v. State*, 753 S.W.2d 34 (Mo. App. E.D. 1988), the postconviction defendant alleged counsel was ineffective for not challenging the exclusion of African-Americans from his jury. *Id.* at 35. The problem with the defendant's claim, however, was that *Batson v. Kentucky* was handed down 10 years after his trial. *Id.* Although the defendant expressly claimed that he was not seeking retroactive application of *Batson* to his case, the Court of Appeals nevertheless rejected his claim because "his argument circuitously arrives at that result." *Id.* The same is true in Defendant's case.

Next Defendant argues that *Celis-Garcia* did not amount to a change in the law and he relies on dicta from *Barmettler* stating that *Celis-Garcia* did not "present[ ] a substantive change in the law that automatically shields defense counsel from a claim of ineffectiveness." *Barmettler*, 399 S.W.3d at 529. Both Defendant and *Barmettler* are incorrect. Although *Celis-Gacia* did not establish the right to a unanimous jury verdict, it certainly was the first

time this Court directly ruled on how instructional issues should be handled in multiple-acts cases involving sexual abuse claims.[4]

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

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

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

In arguing that he is not relying on *Celis-Garcia* to support a finding that appellate counsel had a duty to raise the jury-unanimity issue, Defendant cites to *State v. Washington*, 242 Mo. 401, 146 S.W. 1164 (Mo. 1912). In *Washington*, the defendant was charged in one count of setting up and keeping gambling devices. *Id.* at 1165. The evidence at trial showed that defendant kept more than one gambling table—a poker table and a craps table. *Id.* The jury instructions were written in the disjunctive and allowed jurors to convict if they found the defendant kept a "a crap table…and a poker table, …or either of them." *Id.* at 1166. The court found that the instruction was clearly erroneous and reversed the conviction because "[u]nder this instruction and the general verdict returned, some of the jurors may have believed the testimony in support of the charge as to one of the gaming devices and disbelieved the testimony as to the other, while the remaining members of the jury may have found and believed conversely." *Id.* Thus *Washington* is similar to cases involving a disjunctive verdict director, rather than one in which multiple, similar criminal acts were charged in a single count. *See, e.g., State v. Mackey*, 822 S.W.2d 933 (Mo. App. E.D. 1991); *State v. Oswald*, 306 S.W.2d 559 (Mo. 1957).

Defendant's case is distinguishable because his case did not involve a disjunctive verdict director and the evidence did not prove multiple, different criminal acts, i.e., the possession of different gambling tables (craps and poker), but only the act of child molestation allegedly committed on multiple occasions. Moreover, the evidence presented in *Washington* and the defendant's defense in that case, which did not refute existence of the gaming tables but only the defendant's knowledge and keeping of them, could have permitted jurors to reach differing conclusions about the defendant's knowledge and control over each type of table. Here, on the other hand, the sole defense was that the charges were completely fabricated and that no inappropriate touching had ever taken place.

In another case on which Defendant relies, *State v. Mitchell*, 704 S.W.2d 280 (Mo. App. S.D. 1986), the defendant was charged in two counts with the same offense—exhibiting a lethal weapon in an angry or threatening manner—involving two distinct, separate offenses occurring on the same day. *Id.* at 281. The verdict directors for each count, *which the defendant objected to*, were worded identically. *Id.* The court held that this constituted error and that the verdict directors should have specified the specific instance to which they referred. *Id.* at 286. In Defendant's case, on the other hand, he did not object to the verdict directors, which charged two distinguishable counts of child molestation.

In *State v. Pope*, 733 S.W.2d 811 (Mo. App. W.D. 1987), the defendant was charged with two counts of sodomy involving two different victims; the counts identified the specific acts of deviate sexual intercourse. *Id.* at 812. The two verdict directors were identical except for the name of the victim, but only required the jury to generally find that deviate sexual intercourse occurred. *Id.* Complicating the case, the jury also heard evidence of multiple acts of sodomy committed in an alternative manner not alleged in the indictment, and, according to the court, the evidence of sodomy not alleged in the indictment was more believable than what was alleged. *Id.* at 812–13. In reversing the conviction, the court apparently relied on a variance between the charging document, which identified the specific acts of sodomy, and the verdict directors, which did not; it did not mention the constitutional right to a unanimous verdict. *Id.*

Caselaw existing when Defendant's direct-appeal counsel filed his brief, on the other hand, suggested that a plain-error claim challenging the verdict directors for failing to identify the specific incident being charged would likely have been unavailing.

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

The defendant in *Smith* sought plain-error review on the giving of these instructions. Although the court suggested that the instructions could have been clearer by supplying more detail as to the location of each offense, it found no plain error in giving these instructions:

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

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

> The parties have cited cases involving similar infirmities, but we do not consider them in detail because of the defendant's failure to comply with Rule 28.03. The defendant, having failed in this respect, does not persuade us that there is plain error requiring us to excuse her failure to comply with the governing rule.

Id.

Similar claims had also been rejected in other cases decided when Defendant's appeal was being prosecuted, including in *State v. Burch*, 740 S.W.2d 293 (Mo. App. E.D. 1987), *State v. Staples*, 908 S.W.2d 189 (Mo. App. E.D. 1995), and *State v. Rudd*, 759 S.W.2d 625 (Mo. App. S.D. 1988).

In *Burch*, the jury was given an instruction stating that each count should be considered separately, along with two identical verdict-directing instructions for sodomy. *Burch*, 740 S.W.2d at 295. The court noted that the jury was given the instruction based on MAI-CR 2d 2.70, a predecessor to MAI-CR 3d 304.12, which instructed the jury that "[e]ach offense and the law applicable to it should be considered separately." *Id.* The Court found that this adequately guarded against any danger that the jury would impose multiple punishments for a single crime. *Id.* Although *Burch* is primarily a double-jeopardy case, the *Burch* court stated that the submission of allegedly insufficiently differentiated instructions did not warrant reversal where the defendant made no complaint at trial and where the defense to the two counts was the same. *Burch*, 740 S.W.2d at 295-296.

In *Staples*, the defendant was charged with two counts of rape. The instructions for each rape charge were identical except for the reference to the count number. *Staples*, 908 S.W.2d at 190. Although the court noted that the notes applicable to the form instructions suggested fixing the conduct by referring to time, place, or some other reference, the court must still

determine whether the failure to give an instruction as provided in the applicable notes on use is prejudicial error. *Id.* In *Staples*, the court found that the defendant was not prejudiced because the jury was instructed to consider and return a verdict separately for each count. *Id.* Moreover, the defense in *Staples* was that the victim consented, so the defense did not vary from count to count. *Id.* at 190–91. Finally, the *Staples* court held that no prejudicial error occurred even though the defendant preserved the alleged instructional error for appellate review. *Id.* at 189.

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

> We agree with the general proposition that if multiple offenses are submitted against a single defendant, the different offenses submitted should be distinguished. …Nevertheless, the possibility that the jury might be confused by an attempt to distinguish between offenses which are indistinguishable except in relation to each other is to be considered.

> In the case at hand, we are convinced that the jury clearly understood that the defendant was charged with different offenses in distinct counts and that each offense was to be considered separately.

Id. at 630.

In each of these cases, the verdict directors were identical except for the reference to the count number, yet the appellate court rejected claims that the jury was confused by the instructions or had not agreed on the same act or incident constituting the offense. In light of this existing caselaw at the time of Defendant's direct-appeal, it can hardly be said that direct-appeal counsel overlooked an obvious error in failing to assert a plain-error claim on the jury-unanimity issue.

The motion court did not clearly err in failing to find that direct-appeal counsel acted incompetently in failing to assert a plain-error claim on this issue.

D. Defendant failed to prove *Strickland* prejudice.

Even if this Court were to find that trial and appellate counsel acted incompetently in failing to raise a plain-error claim regarding jury unanimity in a multiple-acts case, an issue that gained prominence in a case decided three years after direct-appeal counsel filed his brief, Defendant has failed to carry his burden of proving that he was prejudiced by counsel's actions.

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

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

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694.

In *Celis-Garcia*, the child-victims identified "at least seven separate acts" of hand-to-genital sodomy occurring "at different times (some more than three days apart) and in different locations" within the house in which they lived with their mother (the defendant) and her boyfriend. 344 S.W.3d at 156. "Despite evidence of multiple, separate incidents of statutory sodomy, the verdict directors failed to differentiate between the various acts in a way that ensured the jury unanimously convicted [the defendant] of the same act or acts." *Id.* The verdict directors (one for each victim) permitted the jury to find

the defendant "guilty of first-degree statutory sodomy if they believed "that between [specified dates]…the defendant, or [her boyfriend] placed her or his hand on [the victim's] genitals." *Id.* This Court found that this verdict director was erroneous because it allowed a finding of guilt when jurors may not have unanimously agreed on the same specific incident of sodomy:

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

Id.

After this Court in *Celis-Garcia* determined that the trial court had erred by failing to correctly instruct the jury, it went on to consider whether the defendant had established that plain error, i.e., manifest injustice or miscarriage of justice, had occurred. In addressing this issue, this Court noted that "[u]nlike some statutory sodomy cases in which the defense simply argues that the victims fabricated their stories," the defendant in *Celis–Garcia* "sought to exploit factual inconsistencies and raise doubts about the plausibility of the *specific* incidents of statutory sodomy." *Id.* at 158 (emphasis added). The court then described the specific and different

evidence relied on by the defense to refute the allegations that any sodomy could have occurred in the bedroom, bathroom, porch, or shed in the manner described by the victims. *Id.* at 158-59. In finding that the trial court plainly erred in *Celis-Garcia* in submitting the challenged verdict directors, the court rested its decision on "the fact that [the defendant] relied on evidentiary inconsistencies and factual improbabilities respecting each specific allegation of hand-to-genital contact," which made "it more likely that individual jurors convicted her on the basis of different acts." *Id.* at 159.

Defendant suggests that this language is dicta because it was based on a hypothetical situation not before the Court. App. Br. 35–36. But to support this argument Defendant cites language from *Celis-Garcia* responding to the State's argument that it would be impossible to craft verdict directors identifying specific acts in cases "involving repeated, identical sexual acts committed at the same location and during a short time span because the victim would be unable to distinguish sufficiently among the acts." *Id.* at 157 n.8. This Court did not address this argument because the "case hypothesized by the state was not the one presented here." *Id.* But this language appears in that part of the opinion addressing whether the trial court had even erred in submitting the challenged verdict directors, not the part addressing whether the defendant had proven manifest injustice. This Court's language regarding the defendant's incident-specific defense cannot be dicta since it is

intricately related to whether the defendant proved manifest injustice. In other words, the type of defense employed determines whether it was likely the jurors based their finding of guilt on different acts and did not unanimously agree on each act it found the defendant guilty of committing.

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

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

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

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

The record of Defendant's underlying criminal trial shows that Defendant employed a unitary defense in which he simply challenged the Victim's credibility as part of a defense strategy to show that Victim had fabricated these allegations. In other words, Defendant did not rely on evidentiary details relating to the separately identified incidents to show that one or

more of them did not occur. Instead he attacked the Victim's credibility during cross-examination by showing inconsistencies in her in-court and out-of-court statements and then argued to the jury that it could not believe anything that she said.

Defendant also contends that because the jury found him guilty on only one count of child molestation but not the other, the jurors likely did not agree on which specific act Defendant committed. But he cites to no evidence adduced in the postconviction evidentiary hearing or in the record to support this speculation. A postconviction defendant cannot prove *Strickland* prejudice with speculative conclusions. *See Williams v. State*, 168 S.W.3d at 433, 442 (Mo. banc 2005) (holding that post-conviction allegations containing "speculative conclusions" of prejudice are insufficient to warrant even an evidentiary hearing). *State v. Patterson*, 824 S.W.2d 117, 123 (Mo. App. E.D. 1992) (holding that "[c]onjecture or speculation is not sufficient to establish the required prejudice" for post-conviction relief). Moreover, is it not equally likely that in finding him guilty on only one count but not the other, the jury necessarily considered and agreed upon which specific act of child molestation he committed?

The record in the underlying criminal trial suggests that the jury found Defendant guilty based on Victim's trial testimony in which she said that Defendant touched her genitals over her clothes on only one occasion. She did

not, however, identify the specific location where this occurred. In her out-of-court statements, she identified various locations in Defendant's residence, e.g., the bathroom, the bedroom, and the living room, where sexual contact occurred, but at trial she said only one instance of such touching occurred. Consequently, it is not clear that a verdict director could have been crafted to track Victim's trial testimony because she did not testify to any facts upon which to distinguish the act of child molestation she identified at trial as having occurred.

Defendant's argument that he proved prejudice because the vague verdict directors subjected him to possible double jeopardy is also unavailing because if a later charge is brought that potentially violates the defendant's right to be free from double jeopardy, a future court can "look to the record" to determine whether double jeopardy should apply. *LeSieur*, 361 S.W.3d at 465 (rejecting the defendant's double-jeopardy claim in a case involving non-specific verdict directors because "a future court may look to the record to determine whether a defendant has been charged with an offense for which he was previously placed in jeopardy"); *State v. Jennings*, 761 S.W.2d 642, 644 (Mo. App. W.D. 1988) (rejecting a double-jeopardy challenge on the ground that the verdict-directors did not sufficiently differentiate between counts); *Rudd*, 759 S.W.2d at 628.

In *State v. Baker*, 103 S.W.3d 711 (Mo. banc 2003), the defendant argued for the first time on appeal that he suffered manifest injustice by submission of a disjunctive verdict director for the possession of chemicals with the intent to create a controlled substance on the ground that since it was "impossible to ascertain which chemical he was found to have possessed, he will be unable to plead former jeopardy as to possession of all of the listed chemicals." *Id.* at 723. This Court flatly rejected the claim:

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

Id.

Defendant failed to carry his burden of proving that he was prejudiced and the motion court did not clearly err in rejecting this claim.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 12,213 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2007 software; and that a copy of this brief was sent through the electronic filing system on April 11, 2014, to:

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