Supreme Court of Missouri
en banc

SC99260
WD83152

May Session, 2021

State of Missouri,
Respondent,

vs. (TRANSFER)

Michael Lewis Gibbons,
Appellant.

Now at this day, on consideration of Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2021, and on the 31st day of August, 2021, in the above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 31st day of August, 2021.

Betsy AuBuchon, Clerk

Deputy Clerk

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Missouri Court of Appeals
WESTERN DISTRICT

July 27, 2021

IMPORTANT NOTICE

To: All Attorneys of Record

Re: STATE OF MISSOURI, RESPONDENT,

vs.

MICHAEL LEWIS GIBBONS, APPELLANT.

WD83152

Please be advised that Appellant's motion for rehearing is **OVERRULED** and motion for transfer to Supreme Court pursuant to Rule 83.02 is **DENIED**. Appellant's motion to file exhibit out of time is **DENIED**.

Kimberly K. Boeding

Kimberly K. Boeding
Clerk

cc: SHAUN MACKELPRANG
JAMES R HOBBS
SHEENA ANN FOYE

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In the
Missouri Court of Appeals
Western District

STATE OF MISSOURI, **Respondent,** **v.** **MICHAEL LEWIS GIBBONS,** **Appellant.**	**WD83152** **OPINION FILED:** **June 29, 2021**

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Jack Richard Grate, Judge

Before Division One:
Anthony Rex Gabbert, P.J., Edward R. Ardini, Jr., and Thomas N. Chapman, JJ.

Michael Gibbons appeals his convictions, following a jury trial, for two counts of statutory sodomy in the first degree and two counts of child molestation in the first degree and sentences of ten years' imprisonment for each count of statutory sodomy and five years' imprisonment for each count of child molestation, with the ten-year sentences to run consecutively to each other, and the five-year sentences to run concurrently with the ten-year sentences. Gibbons raises nine points on appeal. The judgment is affirmed.

Factual and Procedural Background

On November 26, 2018, Gibbons was charged in the Circuit Court of Jackson County with two counts of first-degree statutory sodomy and two counts of first-degree child molestation

The touching occurred when Victim was in her bed,[2] and Gibbons "would come in the middle of the night, and he would start touching [her], even after [she] told him not to." The touching made Victim "feel very uncomfortable." She told him to stop, but he did not stop. Gibbons "threatened to touch [her] younger two siblings if [she] told." He gave her things that she wanted "to keep [her] mouth shut." Mother observed that Gibbons "started buying her things and just being more...secretive."

When Victim was nine or ten years old, or "[f]rom 2012 to about 2014," the touching occurred "[a]bout once a week." She did not tell anyone at first "[b]ecause [she] was afraid no one would believe [her]." By the time Gibbons was putting his fingers inside Victim's vagina, the touching was occurring "[o]nce or twice a week."

On one occasion, Gibbons "had his hands down [Victim's] pants" in the middle of the night, and Mother "walked in on him touching [Victim]."[3] Mother saw Gibbons "standing at the bedside with [Victim] in the bed," and she asked what was going on. Gibbons said "nothing," and quickly left the room. Victim buttoned up her pajama top. The next day, Mother asked Victim what had happened, and Victim told Mother that Gibbons "had touched her breasts." Mother "kicked [Gibbons] out of the house" for three days. She allowed him to return after he "promised that he had not done anything and he wouldn't never do anything like that." Mother told Victim that she "would let [Victim] sleep in her bed and lock the door to make sure that he

[2] Victim testified that when she was first adopted, she slept in a regular bed and her younger sister slept in a toddler bed. When her younger sister was three years old, the two girls got bunkbeds, with Victim on the top bunk and her sister on the bottom. Once her sister got older, Victim was on the bottom bunk and her sister was on the top. Victim never specified which bed she was in at any particular time that Gibbons touched her.

[3] The record is unclear on when this incident occurred. On direct examination, Victim testified that she was "between the ages of 10 and 11," which would have been between July 31, 2013 and July 30, 2015. On cross-examination, she said it occurred "in the summer of 2012" when she would have been eight or nine years old. Mother testified that this incident happened when Victim was "around the age of 11 or 12."

red as if she had been crying." The deputy tried to talk to Victim, but she did not feel comfortable talking in front of her parents.

Outside, Victim told Deputy Postlethwait that she "didn't want to be around anymore" and that she "didn't want to be there." She said that "there was somebody in the house that [she] didn't feel comfortable with." She repeatedly said that she "didn't want 'it' to happen anymore." She also said that she "didn't want to disturb the family dynamic, but she was concerned for her sister." Victim did not explain what "it" was, and the deputy did not ask for clarification. Victim said that "the last time 'it' happened was about November 2016." She said that "a male family member who resided" in the home had been involved in the November 2016 incident.

Victim was taken to the hospital. She told Tammy Kemp, a social worker at the hospital, that Gibbons "was touching her in places that she didn't want to be touched." Victim said that the last touching was in "November of 2016, but it had been going on since she was 11." She said that it had happened "about ten times during that timeframe from 11 to her age." Victim received psychiatric care for "stabilization."

A few days later, Mother talked to Victim at the hospital, and Victim told her that Gibbons had "touched her on the breasts and lower." Victim gestured "with her hands through the abdomen area and lower." Over the "next several days to months," Victim told Mother that Gibbons "had touched her in the breast and in the vagina area."

On May 27, 2017, Dana Plas, an investigator from the Jackson County Children's Division, talked to Victim. Victim was reluctant to speak to Plas and appeared to be "scared and apprehensive." However, she eventually told Plas that she felt safe in her home "with her mom there." She said that she "did not feel safe if [Gibbons] was there." She disclosed that Gibbons "had touched her in places that made her feel uncomfortable."

not contact her or get to her." When asked whether Victim had "led him on," Gibbons said that "he didn't know," and told the detective "to ask [Victim]."

The jury found Gibbons guilty of the four charged offenses. The trial court sentenced him to consecutive ten-year terms of imprisonment for each count of first-degree statutory sodomy and to five-year terms of imprisonment for each count of first-degree child molestation to run concurrently with the ten-year sentences. This appeal by Gibbons followed. To avoid repetition, additional relevant facts are presented below in the discussion of the issues raised in this appeal.

Sufficiency of Information

In his first point on appeal, Gibbons contends that the trial court erred in denying his motion to dismiss the felony information on grounds of vagueness or, in the alternative, for a bill of particulars because the four counts of the information were not sufficiently clear to place him on notice of the accusations against him. He asserts that the counts did not state with sufficient particularity the dates and locations where the alleged acts occurred.

Appellate review of the trial court's denial of a motion to dismiss a criminal charge is for an abuse of discretion. *State v. Metzinger*, 456 S.W.3d 84, 89 (Mo. App. E.D. 2015). However, whether an information fails to state an offense is a question of law reviewed *de novo*. *Id.* The denial of a motion for a bill of particulars will not be disturbed unless an abuse of discretion by the trial court is shown. *State v. Celis-Garcia*, 420 S.W.3d 723, 730 n.7 (Mo. App. W.D. 2014). "A trial court abuses that discretion when the denial of the motion results in the defendant being insufficiently informed of the necessary factual details of the offense to prevent an adequate preparation of a defense." *Id.*

The information adequately charged the time and location of the offenses. "A person commits the crime of statutory sodomy in the first degree if he has deviate sexual intercourse with another person who is less than fourteen years of age." § 566.062.1, RSMo Supp. 2014. "Deviate sexual intercourse" is defined, in pertinent part, as "any act involving the genitals of one person and the hand...of another person or a sexual act involving the penetration, however slight, of the...female sex organ...by a finger...done for the purpose of arousing or gratifying the sexual desire of any person[.]" § 566.010(1), RSMo Supp. 2014. The pattern charge for first-degree statutory sodomy in effect at the time of the offenses required the information to allege, in pertinent part:

> that (on) (on or about) [*date*], in the (City) (County) of _____, State of Missouri, the defendant (for the purpose of arousing or gratifying the sexual desire of [*name of person*]) (for the purpose of terrorizing [*name of victim*]) had deviate sexual intercourse with [*name of victim*], who was then a child less than (fourteen) (twelve) years old, by [*Describe acts constituting deviate sexual intercourse.*] (.)

MACH-CR 20.11.

Counts I and II charged Gibbons with statutory sodomy in the first degree. Count I alleged that "on or between July 31, 2012 and July 30, 2015, in the County of Jackson, State of Missouri, the defendant for the purpose of arousing or gratifying the sexual desire of the defendant, had deviate sexual intercourse with [Victim], who was then less than twelve years old, by touching [Victim's] genitals with the defendant's fingers." Count II was identical, except that it alleged that the offense occurred "on or between July 31, 2016 and May 14, 2017," and that defendant used his "hand."

"A person commits the crime of child molestation in the first degree if he or she subjects another person who is less than fourteen years of age to sexual contact." § 566.067.1, RSMo Supp. 2014. "Sexual contact" is defined, in pertinent part, as "any touching of another person

App. E.D. 2015). "One reason general allegations of time are permitted in child sex abuse cases, in particular, is that children who are the victims of abuse may find it difficult to recall precisely the dates of offenses against them months or even years after the offense has occurred." *Id.* at 473-74 (internal quotes and citation omitted). Section 545.030.1(5), RSMo 2016, provides that a charging document will not be deemed invalid for omitting the time at which the offense was committed, or for stating it imperfectly, in cases where time is not of the essence. *Tucker*, 468 S.W.3d at 474.

Here, Victim did not specifically identify when all of the various acts occurred, but her statements indicated that Gibbons started touching her vagina with his fingers or hand when she was ten years old and continued until shortly before she reported the sexual abuse on May 14, 2017. However, one definite dividing point for the evidence was Victim's thirteenth birthday, because Victim identified a specific act of digital penetration of her vagina in November 2016, when she was thirteen years old. Accordingly, the information properly alleged that Count I occurred between July 31, 2012 (Victim's ninth birthday), and July 30, 2015 (the day before her twelfth birthday), and that Count II occurred between July 31, 2016 (her thirteenth birthday), and May 14, 2017 (the date she ultimately disclosed the sexual abuse).

The time periods were also sufficiently definite in Counts III and IV. Victim described multiple, identical instances when Gibbons made her touch his penis through clothing. A distinguishing detail was that this conduct occurred both when Victim was eleven years old and twelve years old. Thus, the information properly alleged that Count III occurred between July 31, 2014, and July 30, 2015 (when Victim was eleven) and that Count IV occurred between July 31, 2015, and July 30, 2016 (when Victim was twelve).

Furthermore, the information was not insufficient for failing to allege specific locations

addition of the phrase, "in [Victim's] bedroom at 1822 N. Vista while [Victim] was on top of her bunkbed." He argues that in the absence of this modification, the verdict directors violated his right to a unanimous verdict because they were not sufficiently specific to guarantee that each juror agreed on the same underlying act for each count.

Whether a jury has been properly instructed is a question of law, which is reviewed *de novo*. *State v. Walker*, 549 S.W.3d 7, 10 (Mo. App. W.D. 2018). "Article I, section 22(a) of the Missouri Constitution protects the right to a unanimous jury verdict." *Id.* (citing *State v. Celis-Garcia*, 344 S.W.3d 150, 155 (Mo. banc 2011)). "For a jury verdict to be unanimous, the jurors must be in substantial agreement as to the defendant's acts, as a preliminary step to determining guilt." *Celis-Garcia*, 344 S.W.3d at 155 (internal quotes and citations omitted). The issue of jury unanimity may be implicated in multiple act cases. *Walker*, 549 S.W.3d at 11. "A multiple acts case arises when there is evidence of multiple, distinct criminal acts, each of which could serve as the basis for a criminal charge, but the defendant is charged with those acts in a single count." *Celis-Garcia*, 344 S.W.3d at 155-56.

In *Celis-Garcia*, the State presented evidence of multiple acts (separate instances) of hand-to-genital contact (statutory sodomy) against the child victims, and those separate instances could be differentiated by specific surrounding circumstances and by location (different rooms of the same home). *Id.* at 153-54. However, the verdict directors generically alleged one hand-to-genital contact during a time frame that included the various multiple and distinct *and distinguishable* instances of alleged abuse. *Id.* at 154-55. "'In such cases, the possibility exists that jurors follow the trial court's instructions, yet individually choose differing instances of the crime on which they base the conviction, violating the defendant's right to a unanimous verdict.'" *State v. Dutcher*, 583 S.W.3d 440, 441-42 (Mo. App. S.D. 2019) (quoting *State v.*

in the residence and by what was on television. *Id.* at 151.[6] At trial, the victim generally testified about multiple incidents of molestation involving hand-to-genital contact, then testified on cross-examination that these incidents always occurred while Victim was seated in the defendant's lap, and "sometimes" occurred when she and the defendant were "playing crafts." *Id.* The *Adams* court concluded that the cross-examination testimony did not differentiate any of the multiple incidents of molestation in a sufficiently specific way as to permit the conclusion that more than one specifically particularized incident had been identified in the evidence. *Id.* at 152. Thus, it concluded that the defendant's right to a unanimous verdict was not implicated because the evidence did not describe multiple, distinct acts where the defendant touched the victim's genitals. *Id.* at 152.

Multiple, Distinct, but Undifferentiated, Criminal Acts
Count I (Instruction No. 5), Count III (Instruction No. 9), and Count IV (Instruction No. 11)

In this matter, Instruction No. 5, the verdict director for the first count of first-degree statutory sodomy (Count I) directed the jury to determine, in pertinent part, whether "in the County of Jackson, State of Missouri, the defendant knowingly penetrated [Victim's] genitals with the defendant's fingers for the first time" on or between July 31, 2012, and July 30, 2015 (i.e., on the day or after Victim turned nine years old but before she turned twelve years old). Gibbons's proffered Instruction A would have directed the jury to determine, in pertinent part, whether "in the County of Jackson, State of Missouri, the defendant knowingly penetrated [Victim's] genitals with the defendant's fingers for the first time *in [Victim's] bedroom at 1822*

[6] In *Adams*, the defendant also challenged a separate conviction on appeal, and said conviction was reversed and remanded, as there were separate distinct multiple acts of abuse in the time frame being addressed, whereas the verdict director for that charge did not provide sufficient details of one of the distinct multiple acts to thus ensure juror unanimity. *Id.* at 146-49.

sodomy) that occurred during the time frame encompassed in Instruction No. 5, none of the acts were specifically described (distinguishable) as would violate Gibbons's right to a unanimous verdict. *See Walker*, 549 S.W.3d at 11-12. *See also Dutcher*, 583 S.W.3d at 442, and *Armstrong*, 560 S.W.3d at 572-574, for similar holdings where there were multiple (but undifferentiated) acts that did not implicate the defendants' right to a unanimous verdict.

Gibbons asserts that the instruction should have further clarified that the digital penetration occurred "for the first time in [Victim's] bedroom at 1822 N. Vista while [Victim] was on top of her bunkbed." While Victim did testify that she was in her bed when Gibbons touched her "in" or "inside" her vagina, she did not specify where her bed was situated (regular bed or top or bottom bunk) when the acts occurred. When pressed about when the change in bed arrangements occurred, Victim could not give a precise timeline, and never correlated that change with any of the instances of alleged abuse (regarding any of the counts). The evidence presented was that every chargeable act of statutory sodomy (digital penetration of Victim's vagina by Gibbons), in the given time frame, took place when Victim was in her bed, in her bedroom, at her home in Jackson County. There was no direct evidence that the Gibbons first digitally penetrated Victim's vagina at a time she was on the top bunk of her bunkbed. The trial court did not err in giving Instruction No. 5 and in refusing Instruction A, as there were no multiple distinct and differentiated acts of abuse, and there was no evidentiary basis to qualify the instruction on Count I as proposed by Gibbons.[8]

[8] Gibbons also argues that Victim "also testified the alleged abuse occurred in [Gibbons's] bed." Victim testified that on those occasions, Gibbons was trying "to get on top of [her]" or trying "to put his penis in [her]." She also testified that on those occasions, nothing else happened. There was no evidence that Gibbons penetrated Victim's genitals with his fingers while on Gibbons's bed; and therefore, no evidence of a distinguishable/differentiated incident of statutory sodomy.

Victim's bedroom, in her house, and in her bed. Since the Victim did not testify where her bed was situated when these acts occurred, it would have been improper to require the jury to determine that the alleged indistinct act of molestation took place when Victim was on the top bunk. There were not multiple, distinct acts that could be differentiated and considered by the jury, consequently "there was no risk that the jurors could have based the conviction[] on different underlying criminal acts." *Dutcher*, 583 S.W.3d at 442.

Instruction No. 11, the verdict director for the second count of first-degree child molestation (Count IV), directed the jury to determine, in pertinent part, whether "in the County of Jackson, State of Missouri, the defendant caused [Victim's] hand to touch defendant's genitals through the clothing for the last time" on or between July 31, 2015 and July 30, 2016 (i.e., while Victim was twelve years old). Gibbons's proffered Instruction D would have again directed the jury to determine, that such act of abuse occurred "in the County of Jackson, State of Missouri;...for the last time *in [Victim's] bedroom at 1822 N. Vista while [Victim] was on top of her bunkbed*" on or between July 31, 2015 and July 30, 2016. (emphasis added).

The trial court did not err in submitting Instruction No. 11, and in refusing to give Instruction D. Victim testified that when she was twelve years old and her mother was out, Gibbons "made [her] touch his penis" in her bedroom. She said that Gibbons made her touch his penis "[e]very time [Mother] went out." In her forensic interview, Victim stated that she was twelve years old the last time Gibbons made her touch his "private part."[10] Victim's testimony

[10] Gibbons does not challenge this statement in the State's brief regarding Victim's statement in the forensic interview. As noted in footnote 4 above, Gibbons failed to include the exhibit containing the forensic interview in this record on appeal. Its contents, including this statement by Victim during the interview, are therefore taken as favorable to the trial court's ruling and unfavorable to Gibbons. *Johnson*, 372 S.W.3d at 553 n.1.

As previously described, Victim testified that Gibbons started touching the inside of her vagina when she was eleven to twelve years old and that the touching would occur in her bedroom once or twice a week. This testimony described repeated, undifferentiated acts of digital penetration of Victim's genitals. While it is not entirely clear from Victim's testimony whether these repeated, undistinguishable instances of digital penetration had stopped (or continued) into November of 2016, it is clear that Victim provided details about a single, specific incident in November 2016 when Gibbons touched her in her bedroom. On that occasion, Victim "was texting her friends and he came in [her] room and started doing what he normally did." He touched the "inside" of Victim's vagina and touched her breasts.[11] No other details were provided about any other particular incident that may have occurred in November of 2016, and there is nothing in Victim's testimony that distinguishes where, in her bedroom, the specifically-described incident, or other possible incidents, occurred.

If the incident where Victim was texting her friends shortly before she was abused was the only incident of statutory sodomy supported by the evidence in November of 2016, there would be no issue at all respecting multiple acts of juror unanimity (regarding Count II, Instruction No. 7). However, in the absence of testimony clearly indicating that the one specifically described incident was the only incident in November of 2016, the jurors might have inferred that there were multiple distinct acts of statutory sodomy (defendant's hand/fingers inserted in Victim's vagina) in that period. That being the case, we must examine whether Instruction No. 7 adequately assured juror unanimity regarding the one count of statutory

[11] That same month, Victim went to Oklahoma. She testified that while there, Gibbons touched her vagina and breasts. That conduct did not occur in Jackson County; thus, the verdict director did not need to further differentiate that conduct from the charged conduct.

evidence of one distinct incident of Gibbons's penetrating Victim's vagina in November 2016, and because there was no evidence that the one differentiated incident (or that the other possible undifferentiated incidents) occurred "on the top of [Victim's] bunkbed," the trial court did not err in giving Instruction No. 7 and in refusing Instruction B.

Point two is denied.

Failure to Give Curative Instruction During Voir Dire

In his third point on appeal, Gibbons contends that the trial court erred in failing to give a curative limiting instruction during jury selection when the prosecutor stated that the defense would possibly call witnesses. He asserts that the comment improperly shifted the burden of proof to him.

The trial court generally has wide discretion in the conduct of voir dire, and is vested with discretion to judge the appropriateness of specific questions. *State v. Oates*, 12 S.W.3d 307, 310 (Mo. banc 2000). The appellate court reviews the trial court's refusal to give a curative instruction for an abuse of discretion. *State v. Byers*, 551 S.W.3d 661, 667 (Mo. App. E.D. 2018). The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.* at 667-68.

During voir dire, the prosecutor stated, "Part of your job as a jury will be to determine the credibility of the witnesses that are called in this case, either by the State *or possibly by the defense.*" (emphasis added). At the bench, defense counsel objected, stating that the defense had no obligation to present any evidence and that the statement was "a direct comment on the defendant." Defense counsel asked the trial court to instruct the jury that "the defense has no obligation to adduce any evidence." The trial court agreed that the defense was not obligated to

Furthermore, to the extent that the prosecutor's comment could have been viewed as an indirect suggestion that the defense had the burden of proof, the trial court did not abuse its discretion in deciding not to highlight the comment with a curative instruction. "The trial court is in the best position to determine any prejudicial effect on the jury." *State v. Russell*, 533 S.W.3d 807, 815 (Mo. App. E.D. 2017). Sometime, a curative instruction will serve only to amplify an otherwise isolated comment. *Id.* Here, trial court specifically stated that it did not want to emphasize the statement by giving an instruction. Because the prosecutor did not directly state that the defense had to call witnesses or prove any facts, the court's direction to the prosecutor not to intimate that the defense "might or should call witnesses" was sufficient.

Finally, the prospective jurors were repeatedly informed during voir dire that the State bore the burden of proof. Defense counsel also informed the jury that if Gibbons elected not to testify, it might be instructed that it could not "use his election not to testify as any evidence whatsoever against him." The trial court instructed the jury in accordance with MAI-CR 4th 402.04 discussed above. It also instructed the jury in accordance with MAI-CR 4th 408.14, which provided, "Under the law, a defendant has the right not to testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify." Thus, any error in failing to give a curative instruction was cured during voir dire and by the court's instructions to the jury. The trial court did not abuse its discretion in failing to give a curative instruction during voir dire.

Point three is denied.

Failure to Strike Venireperson for Cause

In his fourth point on appeal, Gibbons contends that the trial court erred in failing to strike for cause Venireperson 21. He claims that the venireperson was not a fair and impartial

disclosure did not require expert testimony; the testimony did not satisfy the standards of section 490.065.2, RSMo Cum. Supp. 2020, governing the admissibility of expert testimony in criminal cases, because it was not based on sufficient facts or data and was not the product of reliable principles or data; and the methods and principles could not be applied to the facts of the case without usurping the authority of the jury.

"A trial court has broad discretion to admit or exclude evidence at trial." *State v. Zink*, 181 S.W.3d 66, 72 (Mo. banc 2005) (internal quotes and citation omitted). Appellate review of the trial court's ruling on the admission of evidence is for abuse of discretion. *Id.* at 72-73. On direct appeal, review is "for prejudice, not mere error." *Id.* (internal quotes and citation omitted). "Trial court error in the admission of evidence is prejudicial if the error so influenced the jury that, when considered with and balanced against all of the evidence properly admitted, there is a reasonable probability that the jury would have reached a different conclusion without the error." *State v. Suttles*, 581 S.W.3d 137, 145 (Mo. App. E.D. 2019) (internal quotes and citation omitted).

Williams testified, in relevant part, that disclosure is "a process not an event. So oftentimes that means that children may disclose in different ways and in different pieces." She explained that a child might deny abuse or "minimiz[e] something...say[ing] something like, it only happened one time." She stated that children "often then become more active in their disclosure" after an initial disclosure. She said that children will also recant, which can be followed by reaffirmation of the original disclosure.

Williams testified that, in her experience as a forensic interviewer, "most children are not disclosing right away." She indicated that most times, "[t]hese are things that happened when they were younger and they told later, or someone found out something later and then asked

Gibbons next asserts that Williams's testimony "should have been excluded as the jurors' own knowledge and experience made them capable of understanding various reasons for delayed disclosures without expert testimony." He argues that expert testimony should not be admitted unless it is clear that, for want of experience or knowledge of the subject, the jurors are not capable of drawing correct conclusions from the facts proved.

Discussing the 2017 enactment of subsection 2 of section 490.065, the Missouri Supreme Court recently explained, "Nothing in this statute requires that jurors must be wholly ignorant of the topic on which the expert would testify or utterly incapable of drawing a proper conclusion from the facts in evidence without it." *State v. Carpenter*, 605 S.W.3d 355, 360 (Mo. banc 2020). "Instead, the threshold test is merely whether the expert's testimony (which may or may not include opinions) will 'help' the jury understand the evidence or decide the contested issues." *Id.* Generalized testimony about "behaviors commonly found in child-victims of sexual abuse" is relevant and admissible because it "assists the jury in understanding the behavior of sexually abused children, a subject beyond the range of knowledge of the ordinary juror." *Suttles*, 581 S.W.3d at 149 (internal quotes and citation omitted). "Missouri courts have long recognized that testimony explaining delayed disclosures, even if not given that precise phrase, assists the jury in understanding the behavior of sexually abused children." *Id.* at 151 (internal quotes and citation omitted).

Gibbons next argues that Williams's testimony did not satisfy the requirements of section 490.065.2. He claims that her testimony was "not based on sufficient facts or data," in that she testified that "she has not reviewed or been a part of studies or research regarding delayed disclosures." He asserts that she was "not aware of any articles or empirical studies conducted by Tom Lyons, a respected expert in the field of forensic interviews." He also asserts that

reliable studies that support opinions about reasons a witness may or may not disclose child abuse in terms of timing."

Williams testified that she had received ongoing delayed disclosure training when she trained on the ChildFirst protocol and other protocols. She testified that based on her "experience of actually interviewing children," children often delayed their disclosures. She provided various reasons that might cause children to delay disclosure, and said that she had found those reasons to be true across interviews that she had actually performed.

Finally, Williams testified that she had not "reviewed or been a part of any studies or research regarding late disclosures." She could not "express an opinion as to why" Victim did not disclose the sexual abuse until May 2017 after the last act in November 2016, and that such opinion was "not subject to any peer review study."

Under section 490.065.2(1), "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) The testimony is based on sufficient facts or data;
>
> (c) The testimony is the product of reliable principles and methods; and
>
> (d) The expert has reliably applied the principles and methods to the facts of the case[.]

§ 490.065.2(1).

In this case, Williams did not offer an "opinion" about Victim's delayed disclosure, but testified "otherwise" about the process of disclosure and delayed disclosure as part of that process. The trial court did not abuse its discretion in permitting this testimony.

disclosures by child-victims of sexual abuse [has] long-standing support in scientific literature and among experts." *Suttles*, 581 S.W.3d at 150 (citing *State v. J.L.G.*, 190 A.3d 442, 464 (N.J. 2018)). "Although the delayed-disclosures theory is not easily subject to peer review and/or publication under the *Daubert* factors, scientists generally accept the theory to explain a common behavior seen in child-victims of sexual abuse." *Id.* at 151. "As a theory, delayed disclosure testimony rests upon good grounds, based on what is known." *Id.* (internal quotes and citation omitted). [13]

Finally, Williams "reliably applied the principles and methods to the facts of the case." § 490.065.2(1)(d). She testified that she followed her training in interviewing Victim, and she offered only generalized testimony about the process of disclosure and delayed disclosure. Williams's testimony satisfied the requirements of section 490.065.2.

Gibbons finally asserts that Williams's particularized testimony on delayed disclosure usurped the authority of the jury. Gibbons seems to acknowledge that Williams gave "generalized" testimony, but asserts, "Given her work in this particular case, [her] testimony could only be viewed by the jury as particularized."

In child sexual abuse cases, two types of testimony are typically at the forefront of a challenge against an expert witness—generalized and particular. *Suttles*, 581 S.W.3d at 148. "General testimony describes behaviors and characteristics commonly found in victims. Particularized testimony concerns a specific victim's credibility as to the abuse." *Id.* (internal

[13] *See also State v. Marshall*, 596 S.W.3d 156 (Mo. App. W.D. 2020), where this court held that, when the expert does not offer particularized testimony or a specific opinion about the child sex-abuse victim but only generalized testimony based on specialized knowledge, a different analysis regarding reliability is appropriate. *Id.* at 161. Thus, certain *Daubert* factors (such as "the testing or replicability of [the expert's] analysis, the error rate of that analysis, or the standards and controls governing the application of that analysis") are not relevant. *Id.*

Appellate review of the trial court's decision to admit testimony under section 491.075 is limited to whether the trial court abused its discretion. *State v. McClure*, 482 S.W.3d 504, 506 (Mo. App. W.D. 2016).

Section 491.075 governs the admissibility of out-of-court statements of child witnesses. *State v. Hawkins*, 604 S.W.3d 785, 790 (Mo. App. W.D. 2020). It provides, in pertinent part, that a child's otherwise inadmissible, out-of-court statement relating to an offense under Chapter 566 is admissible to prove the truth of the matter asserted if: "(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and (2)(a) The child...testifies at the proceedings[.]" § 491.075.1, RSMo 2016. In order to determine whether a statement bears sufficient indicia of reliability, the totality of the circumstances must be examined. *State v. Johnstone*, 486 S.W.3d 424, 430 (Mo. App. W.D. 2016). In evaluating the totality of the circumstances, the following non-exclusive factors are considered: "(1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) the lack of motive to fabricate; and (4) knowledge of subject matter unexpected of a child of similar age." *Id.* (internal quotes and citations omitted). "The lapse of time between when the acts occurred and when the victim reported them is also a factor to consider." *State v. Wadlow*, 370 S.W.3d 315, 320 (Mo. App. S.D. 2012) (internal quotes and citation omitted). The technique employed by the interviewer may also be considered. *Id.* "The trial court decides whether or not to admit the victim's out-of-court statements based on the information provided at the [491] hearing." *Id.* (internal quotes and citation omitted).

Deputy Postlethwait testified at the 491 hearing that he went to Victim's house on May 14, 2017, in response to a report of a suicidal person. He stated that Victim was "visibly upset"

was consistent with subsequent disclosures. Considering the content and circumstances of Victim's statement to the deputy, the trial court did not abuse its discretion in determining that Victim's statements to Deputy Postlethwait bore a sufficient indicia of reliability.

Tammy Kemp testified at the 491 hearing that she was a medical social worker at Children's Mercy Hospital. She testified about her education and licenses, and that she had received specialized training on how to interview children. She explained that, at the hospital, they tried to minimize interviews of children and that the purpose of an interview was to obtain information "to guide the medical exam or tell us what kind of reporting we need to do." She said that she was trained on leading versus nonleading questions, and that she tried to ask nonleading questions.

Kemp testified that Victim told her that "her father was touching her in places that she didn't want to be touched." Victim said that the last incident of touching had occurred in November 2016. Victim told her that it had happened "at least ten times since she was 11 years old." Victim said that her mother "was aware of five instances," and that she had told her older brother. Kemp testified that Victim told her that she asked her dad to stop, told him no, and asked him to leave.

The trial court did not err in finding that Victim's statements to Kemp bore sufficient indicia of reliability. The evidence supported an inference that Victim spontaneously reported that her father had touched her "in places that she didn't want to be touched." Kemp was trained in interviewing children and leading versus nonleading questions. There was no evidence that she led Victim to make the general disclosure, and she did not press Victim for details. Finally, Victim's disclosure about the last incident occurring in November 2016 was consistent with what she told Deputy Postlethwaite immediately prior to going to the hospital. The trial court did not

Brandy Williams testified at the 491 hearing that she had extensive education, training, and experience in conducting forensic interviews. She stated that she had conducted more than 1,900 forensic interviews and that she had been using the ChildFirst protocol since 2014. She explained that the protocol allows interviewers to use open-ended questions "to get a narrative from the child." She said that "[t]he open-ended questions then often lead to more direct questions trying to get overall information and details about what else is occurring."

The video recording of the forensic interview of Victim was admitted into evidence, and Williams testified about the interview. She said that Victim's leg was shaking during the interview and that Victim "cried a little bit throughout the interview." Williams outlined various disclosures that Victim had made, and said that Victim had referred to her "private parts" and had pointed "to a general area of her chest and then also to her vagina."

The trial court did not abuse its discretion in finding that Victim's statements to Williams bore sufficient indicia of reliability. The evidence supported an inference that Victim spontaneously reported the additional details about the sexual activity. Williams was trained in interview protocols, including the use of non-leading questions, which were sometimes followed by more direct questions to clarify the child's disclosures. There was no evidence that Williams improperly led Victim to make new disclosures. Gibbons argues that "'forced choice' or leading questions occurred multiple times" during the forensic interview.[15] He does not, however, identify any particular questions or instances. Furthermore, as noted in footnote 4 above, Gibbons failed to include the exhibit containing the forensic interview in this record on appeal.

[15] Williams testified at trial that a "forced choice or funneling" question presents the child with options, including an "opt out" option that permits the child to give a response that is not included among the other definite options. She further testified that forced choice or funneling questions are not considered leading questions.

subject to cross-examination." *Id.* (internal quotes and citation omitted). "Indeed, prejudice will not be found from the admission of hearsay testimony where the declarant was also a witness at trial, testified on the same matter, and was subject to cross-examination because the primary defects in hearsay testimony are alleviated." *Id.* (internal quotes and citation omitted). Here, because Victim was a witness at trial, testified on the same matters, and was subject to cross-examination about her various statements, Gibbons was not prejudiced. *Id.*; *McClure*, 482 S.W.3d at 507-08.

Point six is denied.

Improper Bolstering

In his seventh point on appeal, Gibbons contends that the trial court erred in overruling his objections to the prosecutor's questioning Victim about prior statements that she gave and her motive for testifying. He argues that the line of questioning allowed the prosecutor to improperly bolster Victim's testimony and to imply that she was a trustworthy and credible witness before she had been impeached.

During direct examination of Victim, the prosecutor elicited that Victim had made only limited disclosures to her mother and brother and two friends before she disclosed the sexual abuse to a law enforcement officer. Victim testified that she had not been comfortable telling anyone else before those limited disclosures. The prosecutor then asked, "How many people do you think that you had to talk to about being abused by Mr. Gibbons [since the disclosure to the law enforcement]?" Defense counsel objected to the prosecutor's question, arguing that the prosecutor was attempting to bolster Victim's credibility. The prosecutor responded that Victim's answer would explain her demeanor on the stand and "some of the inconsistent statements because of the amount of statements that she had to give." The trial court overruled

his witness or a prosecutor exposes on direct examination the terms of his accomplice witness's plea bargain. *Id.*

The prosecutor did not improperly bolster Victim's testimony in questioning her about prior statements that she gave and her motive for testifying. The fact that Victim made several statements to several people was not offered solely to be duplicative or corroborative of her trial testimony. The timing and reasons for Victim's various statements in relation to prior disclosures (and failures to disclose) were relevant to Victim's credibility. Furthermore, the prosecutor explained that it was offered to explain her demeanor at trial and some of her prior inconsistent statements.

In this case, defense counsel's opening statement showed the defense's intent to use Victim's failure to disclose and her various different statements to attack Victim's credibility. For example, counsel summarized Victim's first disclosure to her mother and then stated, "We ask you to pay careful attention to the accounts by [Victim] each time she describes the story." Counsel also intimated that Victim's allegations were a product of unfortunate personal circumstances related to her adoption, which caused "acting out, tantrums, having issues of mental concern," and "depression." The defense sought to portray Victim as untruthful in light of her various statements and motivated to make up allegations in light of her troubled circumstances. The prosecutor's anticipation of impeachment of Victim and attempt to minimize its damaging impact on her credibility by having Victim explain it on direct examination was proper. *Id.* The trial court did not abuse its discretion in permitting Victim's testimony.

Point seven is denied.

the last controlling decision of the Missouri Supreme Court. *State v. Norman*, 618 S.W.3d 570, 579 (Mo. App. W.D. 2020).

The evidence was sufficient to support Gibbons's convictions. Counts I and II charged Gibbons with first-degree statutory sodomy. "A person commits the crime of statutory sodomy in the first degree if he has deviate sexual intercourse with another person who is less than fourteen years of age." § 566.062.1, RSMo Supp. 2014. "Deviate sexual intercourse" is defined, in pertinent part, as "any act involving the genitals of one person and the hand...of another person or a sexual act involving the penetration, however slight, of the...female sex organ...by a finger...done for the purpose of arousing or gratifying the sexual desire of any person[.]" § 566.010(1), RSMo Supp. 2014.

Victim testified that after she was adopted when she was nine years old, Gibbons started touching her. She said that when she was ten or eleven years old, he started touching her vagina. The touching started over her clothing, but then progressed to under the clothes. She said that when he touched her vagina under the clothes, he would touch her on the "inside." She further testified that when she was eleven or twelve years old, Gibbons "started putting his fingers inside [her]." By this time, the touching was occurring once or twice a week. From this evidence, reasonable jurors could have found that Gibbons put his finger inside Victim's vagina during the time period of July 31, 2012 (Victim's ninth birthday), to July 30, 2015 (the day before Victim's twelfth birthday), in order to find him guilty of first-degree statutory sodomy in Count I.

Victim further testified that in November 2016, Gibbons touched her in her bedroom. On that occasion, she was texting her friends when he came into her room and "started doing what he normally did." She said that he touched her breasts and the inside of her vagina. From this

Gibbons made Victim touch his penis through his clothing during the charged time period of July 31, 2015, (Victim's twelfth birthday) to July 30, 2016 (the day before Victim's thirteenth birthday), in order to find him guilty of first-degree child molestation in Count IV.

There was sufficient evidence from which a reasonable jury could have found Gibbons guilty beyond a reasonable doubt on all four counts. *Porter*, 439 S.W.3d at 211.

Point eight is denied.

Closing Argument

In his ninth and final point on appeal, Gibbons contends that the trial court erred in overruling his objection to the prosecutor's closing argument that according to the State's expert, Brandy Williams, Victim's testimony was consistent and believable. He asserts that such argument violated Missouri's prohibition against particularized testimony in sexual abuse cases and resulted in improper vouching and bolstering of Victim.

"The trial court has broad discretion in controlling the scope of closing arguments." *State v. Swalve*, 598 S.W.3d 682, 689 (Mo. App. S.D. 2020) (internal quotes and citation omitted). The State is permitted to argue the evidence and all reasonable inferences therefrom. *Id.* While the State has wide latitude in closing argument, the trial court should exclude statements that misrepresent the evidence or the law, that introduce irrelevant, prejudicial matters, or that otherwise tend to confuse the jury. *Id.* at 689-90. Review of alleged error during closing argument is for abuse of discretion. *Id.* at 689.

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interview. As noted in footnote 4 above, Gibbons failed to include the exhibit containing the forensic interview in this record on appeal. Its contents, including this statement by Victim during the interview, are therefore taken as favorable to the trial court's ruling and unfavorable to Gibbons. *Johnson*, 372 S.W.3d at 553 n.1.

Conclusion

The convictions are affirmed.

Tom Chapman

Thomas N. Chapman, Judge

All concur