IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL DAVID CADATAL, Appellant.	No. 42172-1-II UNPUBLISHED OPINION

Hunt, J. — Michael Cadatal appeals his jury conviction for fourth degree assault. He argues that the trial court erred in refusing to give a *Petrich*[1] unanimity instruction. We affirm.

FACTS

Seventeen-year-old M[2] lived with her father, Michael Cadatal, who assigned her chores. One day in April 2010, he picked her up from school, asked her if she was keeping track of the hours that she had worked, and "back-handed" her when she interrupted him. Report of Proceedings (RP) (Apr. 27, 2010) at 86. When they returned home a "couple minutes" later, M went into her room, with Cadatal in pursuit. RP (Apr. 27, 2010) at 88. When M tried to leave the apartment, Cadatal grabbed her by the hair and pulled her back into the apartment, causing her to fall.

After M stopped crying, she joined Cadatal in the living room, where he was watching a

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[1] *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

[2] It is appropriate to provide some confidentiality in this case. Accordingly, it is hereby ordered that initials will be used in the body of the opinion to identify the juvenile involved.

National Association for Stock Car Auto Racing (NASCAR) race on television. When M made a rude remark about NASCAR, Cadatal jumped up and pinned her to the floor with his forearm. M was unable to breathe and seeing "little black, like, stars, pinwheels." RP (Apr. 27, 2010) at 91. Cadatal released M before she lost consciousness. After a further struggle, during which Cadatal told her that she would not be allowed to leave, he changed his mind and took her to her mother's house. According to M, "[All] together [the incident] must have been about 30 minutes." RP (Apr. 27, 2010) at 94.

The following Monday, M's second cousin and her foster mother learned about Cadatal's actions, noticed bruises on M's arms and back, and called the police. M was later diagnosed with a contusion to her back.

The State charged Cadatal with second degree assault. M testified as described above. The trial court instructed the jury that fourth degree assault was a lesser included crime of second degree assault. Cadatal requested an "alternative means" jury unanimity instruction.[3] The trial court refused the instruction, ruling, "There aren't multiple occasions. There is one occasion. If anything, this might be a continuing act." RP (Apr. 28, 2010) at 324.

The jury found Cadatal guilty of the lesser included offense of fourth degree assault. He

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[3] Cadatal requested the following instruction:

> The State alleges that the defendant commited acts of Assault in the Fourth Degree on multiple occasions. To convict the defendant of Assault in the Fourth Degree, one particular act of Assault in the Fourth Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Assault in the Fourth Degree.

Clerk's Papers (CP) at 42.

appeals.[4]

ANALYSIS

Cadatal argues that the trial court erred in refusing to give his requested "alternative means" jury unanimity instruction because the fourth degree assault conviction could have been based on (1) "back-handing" M in the car, (2) pulling M back into the apartment by her hair, or (3) pinning M to the floor with his forearm, with the jury potentially not having been unanimous about any one of these three alternatives. Br. of Appellant at 8. This argument fails.

When multiple acts could constitute the charged crime, the State must elect the particular act upon which it will rely or the court must instruct the jury that it must be unanimous as to which act has been proved beyond a reasonable doubt. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). But where the evidence of multiple acts indicates a "continuing course of conduct," the jury need not be so instructed. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Where the trial court refuses to give an instruction based on the facts of the case, such as concluding that there was either only one occasion or that it was one continuing act, we review the refusal for an abuse of discretion. *State v. Hunter*, 152 Wn. App. 30, 43, 216 P.3d 421 (2009), *review denied*, 168 Wn.2d 1008 (2010). We find no such abuse of discretion here.

The uncontroverted evidence showed that all of Cadatal's assaultive acts against M occurred sequentially within a short period of time, about 30 minutes. We hold, therefore, that the trial court did not abuse its discretion in refusing to give the requested "alternative means" unanimity instruction.

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[4] A commissioner of this court initially considered Cadatal's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Worswick, C.J.

Van Deren, J.