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DIVISION II

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STATE OF WASHINGTON  
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No. 36745-9

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**DANIEL DUANE EASTMAN.**

Appellant.

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Lewis County Superior Court

Cause No. 07-1-00212-4

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**RESPONDENT'S BRIEF**

L. MICHAEL GOLDEN  
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by *Lori Smith*  
**Lori Smith, Deputy Prosecutor**

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## **STATEMENT OF THE CASE**

Appellant's recitation of the facts of the case is adequate for purposes of responding to this appeal.

## **ARGUMENT**

**I. A UNANIMITY INSTRUCTION WAS NOT NECESSARY IN THIS CASE AND THE PETRICH RULE DOES NOT APPLY BECAUSE THE ASSAULTS REPRESENT A "CONTINUING COURSE OF CONDUCT" AND, FURTHERMORE, THERE IS SUFFICIENT EVIDENCE TO SUPPORT EACH ASSAULT BEYOND A REASONABLE DOUBT.**

Eastman argues that the trial court erred when it failed to give a unanimity instruction (a "Petrich instruction") in this case. Eastman is wrong.

The Amended Information in this case charges just one count of Assault in the Second Degree, committed when the Defendant assaulted Daryl Doll with his vehicle. CP 39. The language of the Amended Information states, in pertinent part:

By this Amended Information the Prosecuting Attorney for Lewis County accuses the defendant of the crime of Assault in the Second Degree. . . in that defendant on or about March 24, 2007, in Lewis County, Washington, then and there assaulted another with a deadly weapon, to-wit: Daryl Doll with a Ford Bronco; against the peace and dignity of the State of Washington.

CP 39. Just one specific count of assault second degree is charged in this document. Nonetheless, despite the fact that just

one count of assault with a vehicle was charged here, where more than one incident of assault occurs over a short period of time like it did here, a unanimous jury verdict is not required because the assaults represent "a continuous course of conduct" and a unanimity instruction is therefore not necessary. State v. Crane, 116 Wn.2d 315, 804 P.2d 10 (1991) (continuous course of conduct-no unanimity instruction required); State v. Gooden, 51 Wn.App. 615, 754 P.2d 1000, *review denied*, 111 Wn.2d 1012 (1988) (no need for jury unanimity as to each specific act of prostitution when there was a continuing course of conduct); State v. Craven, 69 Wn.App. 581, 849 P.2d 681(1993). In the Crane case, the court applied the continuous conduct exception alternative to the Petrich rule. (State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984)). Under Crane's analysis, a unanimous jury verdict would not be required as to each incident of assault during a short period of time; instead, the jury would only need to be unanimous in its determination that the conduct occurred. Crane, 116 Wn.2d at 324-26. Thus, pursuant to the previously-cited cases, it is the State's position that the Petrich rule does not apply to the facts of the present case: "[t]he Petrich rule applies only to multiple act cases (those cases where *several acts are alleged*, any one of

which could constitute the crime charged). State v. Stockmyer, 83 Wn.App. 77, 86, 920 P.2d 1201 (1996)(emphasis added) citing State v. Kitchen 110 Wn.2d 403, 756 P.2d 105 (1988). In other words, the Petrich rule does not apply to "alternative means" cases or cases involving a "continuous act." Petrich, supra; State v. Crane, 116 Wn.2d 315, 804 P.2d 10 (1991) (finding that a Petrich instruction was not required because the defendant's conduct constituted a "continuous act" where there were repeated assaults on a child over a three week period); State v. Boyd, 137 Wn. App. 910, 9220923, 155 P. 3d 188 (2007) (Petrich instruction need not be given when evidence shows a continual course of conduct rather than several distinct acts).

To determine whether criminal conduct constitutes one continuing act, "the facts must be evaluated in a commonsense manner." State v. Petrich, 101 Wn.2d at 571; State v. Elliott, 114 Wn.2d 6, 14, 785 P.2d 440 (1990); State v. Gooden, 51 Wn.App. at 618. If the criminal conduct occurred in one place during a short period of time between the same aggressor and victim, then the evidence tends to show one continuing act. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). That is what happened in the present case: Eastman first ran over the victim with his vehicle and

then Eastman grabbed a piece of iron pipe or rebar and said something to the effect of "I'm going to kill you." 1RP 18; 20 (victim guessing that entire incident, including the incident with the rebar lasted "probably five minutes total, if that.") Because these acts ran together over a short period of time they thus were one continuous act, and no unanimity instruction was required.

Moreover, as another case explains,--and contrary to the Defendant's argument regarding different definitions of "assault"-- juror unanimity is simply not required in a case such as this:

Three definitions of assault are recognized in Washington: (1) an attempt, with unlawful force, to inflict bodily injury upon another (attempted battery); (2) an unlawful touching with criminal intent (battery); and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm (common law assault). . . . [But] definitional instructions do not create alternative means of committing the crime, necessitating jury unanimity.

(citations omitted), State v. Winings, 126 Wn.App. 75, 89-90, 107 P.3d 141 (2005) (emphasis added) (and disagreeing with Division One in the holding of Nicholson, 119 Wn.App. 855, 560, 84 P.3d 877 (2003). Under the reasoning of Winings, then, a juror unanimity instruction is not required under the similar facts of the

present case where these three definitions of assault are given, and the Defendant's argument to the contrary should be disregarded.

Furthermore, juror unanimity is not required in a case as to each of the alternative means by which the crime may have been committed, as long as there is substantial evidence presented to support each alternative means. State v. Fortune, 128 Wn.2d 464, 909 P.2d 930 (1996). State v. Linehan, 147 Wn.2d 638, 56 P.3d 542 (2002), cert. denied, 538 U.S. 945, 123 S.Ct. 1633, 155 L.Ed.2d 486 (2003); State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); Petition of Jeffries, 110 Wn.2d 326, 752 P.2d 1338 (1988). Evidence is constitutionally sufficient to support each alternative means if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find each means of committing the crime proved beyond a reasonable doubt. Kitchen, supra; State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987), citing State v. Whitney, 44 Wn.App. at 23 ("jury need not be unanimous as to the method by which the first degree rape was committed because sufficient evidence supported each alternative way of committing the crime charged"); State v. Arndt, 87 Wn.2d 374, 376-77, 553 P.2d 1328 (1976) ("...if substantial evidence supports each of the alternative means of committing the single

crime charged and the alternative means are not repugnant to one another, jury unanimity as to the mode of commission is not required"); State v. Ortega-Martinez, 124 WN.2d 702, 881 P.2d 231 (1994) (jury unanimity is not required if sufficient evidence exists to support each of the alternative means relied upon). In the present case, when viewing the evidence in the light most favorable to the State, sufficient evidence supported an assault with the vehicle and an assault with the pipe or rebar. For example, The victim, Mr. Doll testified about the Defendant's Bronco running over him. 1 RP 17, 18. The victim also testified that the Defendant had something in his hand and that the Defendant said while holding the pipe or rebar, "I'm going to kill you." 1RP 18. Then Charles Eastman testified that he heard the "rig" (the Bronco) "rev" up and he heard gravel flying and he went out and saw the victim lying just off the side of the Defendant's vehicle. 1RP 37. Charles Eastman said that the Defendant "was standing by the garage with, it looked like a hose, or something in his hand. I said, Duane, it is over, and he laid it down, got in his "rig" and drove off. 1RP 37. Donald Clevenger testified that the Defendant was standing beside his Bronco with a chunk of rebar and Jose told him to "drop it" and that was the end of it. 1 RP 50. Deputy Almond went to the scene of

the accident and saw victim Daryl Doll's elbow wrapped up and he saw a "road rash" type injury on Doll's back side. 1RP 56, 58. The Defendant, Duane Eastman testified and admitted that he ran over the victim with his Bronco. 1RP 73. Eastman went on to say, "I jumped up and I grabbed a piece of rebar three feet long laying there by the garage . . ." 1 RP 79. Duane Eastman said he did not intend to run over the victim. 1RP 86.

In closing, the Deputy Prosecutor emphasized the assault with the vehicle:

The fact this happened with a deadly weapon does not appear to be in dispute either. The definition of deadly weapon includes a vehicle which when it is used is readily capable of causing death or substantial bodily injury. And we know when you get hit by a car that's the case.

2RP 4. The prosecutor then added, "[t]hen he gets out of the truck, with his rebar pipe and he's going to finish the job." 2RP 5. In sum, all of the evidence, when viewed in the light most favorable to the State, shows that there was sufficient evidence presented to support both means of assault mentioned in the case --assault with vehicle and with the rebar. Therefore, a unanimity instruction was not required in this case.

However, even if this Court decides that a unanimity instruction should have been given in the present case, it should find that any error in failure to give this instruction was harmless. Assuming arguendo that the present case *is* a "multiple acts" case (and the State is not conceding that it is) and that the Petrich rule applied, the standard of review in such cases for harmless error is whether a "rational trier of fact could find that each incident was proved beyond a reasonable doubt." State v. Gitchel, 41 Wn.App. 820, 823, 706 P.2d 1091, *review denied*, 105 Wn.2d 1003 (1985). Similar to the argument in the previous paragraph above, overwhelming evidence exists in this case for the jury to have concluded that the elements of both assaults were proved beyond a reasonable doubt. Put differently, no rational trier of fact could entertain a reasonable doubt that each incident established the crime of assault with a deadly weapon. Indeed, here it is undisputable that there was sufficient evidence to prove beyond a reasonable doubt both assaults -- the assault with either the Bronco or the pipe. Stockmyer, 83 Wn.App. at 68-88 (even if multiple acts, harmless error where elements established for both potential assaults). Again, the facts previously set out in the paragraph above show that there was evidence presented in this case to

prove beyond a reasonable doubt that both assaults were committed. Therefore, even if there was instructional error, any error was harmless beyond a reasonable doubt.

**II. THE TRIAL COURT DID NOT ERR WHEN IT EXCLUDED THE TESTIMONY OF SEVERAL POTENTIAL DEFENSE WITNESSES.**

Eastman also argues that the trial court erred in excluding the testimony of several defense witnesses. But Eastman has not shown that the trial court abused its discretion in this regard and this argument, too, is without merit.

"Admissibility of evidence lies within the sound discretion of the trial court and the court's decision will not be reversed absent abuse of that discretion." State v. Ellis, 136 WN.2d 498, 522-523, 963 P.2d 843 (1998) (internal citations omitted). "An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court." Id. Furthermore, the right to present defense witnesses is not absolute as "a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). The defense bears the burden of establishing the relevance and admissibility of the proposed testimony. State v. Roberts, 80 Wn.App. 342, 351, 908 P.2d 892 (1996). "Washington

defines the right to present witnesses as a right to present material and relevant testimony. State v. Roberts, 80 Wn.App. 342, 350, 908 P.2d 892 (1996), citing State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). And, ER 403 states that

[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Id. Exclusion of relevant evidence under ER 403 based on the danger of it causing confusion or unfair prejudice is a determination within the trial court's sound discretion. State v. Wilson, 60 Wn.App. 887, 808 P.2d 754 (1991). Under ER 403, a trial court has authority to exclude testimony that, although relevant, is essentially repetitive and would confuse the jury. State v. Brenner, 53 Wn.App. 367, 768 P.2d 509, rev. den. 112 Wn.2d 1020 (1989).

In the present case, the trial court's oral ruling excluding defense witness testimony was explained on the record as follows:

I am going to sustain the state's objection. I guess that would be to all four witnesses, the sister because it is cumulative, and testimony's already been given that, yes, he came back and that he called his sister and all of that is already in. On the mother's testimony of an incident 13 years ago is really, one, it's already been admitted that there was, it's two, remote, and it is also a specific instance of conduct

which is inadmissible under either 405 or 608, the way I see it. Then, the Dunhams, again specific instances of conduct which might be admissible if self defense were at issue here, but it doesn't seem to me that it is so it's inadmissible. . . .

1RP 101. Thus the trial court, in excluding this evidence, found that some of the testimony would be cumulative, some was remote, and other evidence was inadmissible under other rules of evidence. Id. Wilson and Brenner, supra. Accordingly, the trial court did not abuse its discretion in ruling the testimony of these witnesses was inadmissible and this ruling should be affirmed.

#### **CONCLUSION**

The Petrich rule is not applicable to the facts of this case because the assaults comprised one continuous act and because, alternatively, there was sufficient evidence presented to support the elements of each assault. Thus, no unanimity instruction was necessary under the circumstances of this case. But even if this Court decides a unanimity instruction was required, any error should be deemed harmless because sufficient evidence exists to support each assault beyond a reasonable doubt. Furthermore, the trial court did not abuse its discretion in excluding the testimony of several defense witnesses, and this ruling by the trial court should

also be upheld. Accordingly, Eastman's conviction should be affirmed in all respects.

DATED this 27th day of May, 2008.

L. MICHAEL GOLDEN  
PROSECUTING ATTORNEY

by:

A handwritten signature in cursive script that reads "Lori Smith". The signature is written in black ink and is positioned above a horizontal line.

Lori Smith, WSBA 27961  
Deputy Prosecutor

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, ) NO. 36745-9-II  
Respondent, )  
vs. )  
DANIEL DUANE EASTMAN, ) DECLARATION OF  
Appellant. ) MAILING  
\_\_\_\_\_ )

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STATE OF WASHINGTON  
DEPUTY

LORI SMITH, Deputy Prosecutor for Lewis County, Washington,

declare under penalty of perjury of the laws of the State of Washington that the following is true and correct: On 5/28/08, I served appellant with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

John A. Hays  
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DATED this 28th day of May, 2008, at Chehalis, Washington.

  
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Declaration of  
Mailing