Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-562

NOVEMBER TERM, 2003

State of Vermont v. Mark David Andrews	}	APPEALED FROM: District Court of Vermont, Unit No. 2, Rutland Circuit DOCKET NO 1177-8-00 RdCr Trial Judge: Nancy Corsones

In the above-entitled cause, the Clerk will enter:

Defendant appeals his jury conviction of unlawful restraint, arguing that the State' s amended information was too vague and failed to give him fair notice of the crime for which he was charged. We affirm.

On August 18, 2000, defendant was charged with unlawful restraint in the second degree, domestic assault, and aggravated domestic assault based on an incident between him and his wife that began on the night of May 23, 2000 and continued into the next morning. Regarding the unlawful restraint charge, the original information stated that on May 23 defendant knowingly restrained his wife " by threatening her with a crowbar and then telling her not to leave the house, in violation of 13 V.S.A. §2406(a)(3)." On the day of the jury draw, the trial court allowed the State to amend the information to read that between noon on May 23 and noon on May 24 defendant knowingly restrained his wife " by threatening her with a metal bar and then telling her not to leave the house." On the morning the trial was to begin, the State again sought to amend the information, this time to read that between 11:00 p.m on May 23 and 3:00 a.m. on May 24 defendant knowingly restrained his wife " by threatening her with physical violence and telling her not to leave the house."

Defense counsel objected, arguing that the complaining witness was going to testify that defendant threatened her at several points in time during the night of May 23, and that eliminating the specificity in the information could result in some jurors assuming that she was restrained at one time, while other jurors would assume that she was restrained at another time " in which case there would be no unanimity in the verdict. The state' s attorney responded that the very nature of the offense suggested restraint over a period of time rather than a moment of time, and that the State was in fact alleging that defendant effectuated the crime through a serious of continuing threats over time. The trial court agreed, noting that the jury might have to be instructed on there being a single course of conduct and not separate charges. When defense counsel repeated his concerns that a verdict might not be unanimous with respect to when the complaining witness was restrained, the court stated that any problems could be cured through interrogatories or a specific instruction. Defense counsel then expressed his concern not only that the amended charge lacked specificity but also that the State' s last-minute amendment might affect his ability to defend against the charge. The court noted defendant' s objection, but allowed the State to amend the information, stating that the amendment actually narrowed the time frame in which the offense was alleged to have been committed.

At trial, the complaining witness testified that defendant woke her up at eleven o' clock in the evening of May 23 and began to yell at her about an e-mail he had just read that she wrote to a former boyfriend. According to the complaining witness, defendant dragged her downstairs and struck her. Then, he dragged her back upstairs, loaded a gun, and threatened to shoot himself. Later, defendant and his wife went back downstairs, where defendant first threatened to shoot the dog, and then swung a crowbar at his wife before smashing holes in the wall. The complaining witness

testified that she asked defendant several times during the night if she could leave, but he refused to let her go. Defendant testified that he never threatened to kill the dog, never threatened her with a crowbar, and never told her she could not leave. Essentially, his defense was that, over time, his wife had embellished her story as to what occurred during an admittedly terrible night. The jury convicted defendant on the unlawful restraint and domestic assault charges, but acquitted him on the aggravated domestic assault charge. Defendant appeals only the unlawful-restraint conviction. He argues that the State' s last-minute amended information lacked specificity and changed the acts upon which the State' s charge was based, thereby prejudicing him by not giving him fair notice of the charge against which he had to defend himself.

A prosecutor may amend an information or indictment at any time before trial without leave of the court, but that right is subject to the constitutional requirement that the defendant receive fair notice of the amended charge. See Reporter' s Notes, V.R.Cr.P. 7(d); see also State v. Beattie, 157 Vt. 162, 170 (1991); State v. Jewett, 148 Vt. 324, 331 (1986). " Our recent cases have used a common sense approach to the constitutional and criminal rule notice obligation." State v. DeLaBruere, 154 Vt. 237, 276 (1990). Under this approach, the State' s information " must provide a defendant with sufficient notice of the charged offense to enable him to prepare an intelligent defense." State v. Brown, 153 Vt. 263, 272 (1989). The information does not need to include allegations of everything the State intends to prove; indeed, as long as the defendant is sufficiently apprised of the charges, " it is sufficient to allege the statutory elements of the offense without more." DeLaBruere, 154 Vt. at 277. Further, in determining whether the defendant has been fairly apprised of the charges, we may examine not only the information itself, but also the alleged facts contained in the affidavit of probable cause accompanying the information. Id. at 276; Brown, 153 Vt. at 272.

Here, the amended information and accompanying probable cause affidavit plainly and amply apprised defendant of the unlawful restraint charge and the acts upon which the charge was based. We find unavailing defendant' s argument that, in amending the information to allege that defendant restrained his wife by threatening her with physical violence rather than by threatening her with a crowbar, the State deprived him of an opportunity to present an effective defense. The alleged threatening acts were specified in the probable cause affidavit, and defendant was on notice before the information was amended that he would have to respond to the accusations contained therein. In fact, he did respond to those accusations, testifying that he did not threaten his wife with a crowbar, did not threaten to kill the dog, and did not tell her she could not leave. Notwithstanding defendant' s arguments to the contrary, we fail to see how his defense was prejudiced in any significant way. As the trial court pointed out, if defendant felt he needed to reconsider his trial tactics in light of the amendment, he could have sought a continuance of the trial, but he did not do so. In short, we reject defendant' s argument that the State' s amendment on the eve of trial denied him fair notice of the charge and impaired his ability to defend against the charges.

Defendant relies heavily upon State v. Woodmansee, 124 Vt. 387, 390 (1964), in claiming that the State' s amended information deprived him of fair notice of the unlawful restraint charge. That case is inapposite, however, because there the State was permitted, after trial commenced, to amend an essential element of the crime. See State v. Verge, 152 Vt. 93, 96 (1989) (distinguishing Woodmansee on basis that essential element of charge was amended in that case). Here, as in Verge, the State did not amend any of the elements contained in the unlawful restraint charge " that defendant knowingly restrained his wife by threatening her with physical violence. See 13 V.S.A. §2406(a)(3) (person who knowingly restrains another person commits unlawful restraint in second degree); 13 V.S.A. §2404(4)(B) (restraint is without consent if accomplished by force, threat or deception).

Defendant argues, however, that, by failing to specify the precise acts upon which the unlawful restraint charge was based, there was no assurance of unanimity in the jury' s verdict; according to defendant, some jurors may have concluded that he restrained his wife by threatening to kill the dog, for example, while others may have relied upon one of the other threatening acts to which the complaining witness testified. In making this argument, defendant relies upon State v. Bonilla. There we stated the general rule that " ' where the information alleges one unlawful act and the evidence reflects two or more such acts, the State can obtain only one conviction and should be required to elect which act it will rely upon for conviction.' " 144 Vt. 411, 413-14 (1984) (quoting State v. Bailey, 144 Vt. 86, 98 (1984)); see State v. Zele, 168 Vt. 154, 158 (1998) (when trial evidence reflects two or more criminal acts, but defendant is charged with only one such act, State must elect specific act it seeks to use as basis for conviction). " The rule avoids the risk that certain jury members will base a determination of guilt on one act, while others will rely on another, . . . [resulting in] an absence of unanimity that the defendant committed any single identifiable criminal act." Zele, 168 Vt. at 158; see

Bonilla, 144 Vt. at 414.

Defendant' s argument fails for at least two reasons. First, defendant does not raise the argument in its proper context. At no time, either at trial or here on appeal, has defendant argued that the State failed to make an election after the close of evidence between two separate acts that could have constituted the offense. Nor has defendant challenged the trial court' s jury instructions by arguing, for example, that the court should have given a specific unanimity instruction. Cf. Zele, 168 Vt. at 158 (defendant argued that State failed to elect and trial court failed to give specific unanimity charge); Bonilla, 144 Vt. at 413 (same); Bailey, 144 Vt. at 98 (same). Rather, defendant challenges only the sufficiency of the information, an argument that we reject for the reasons stated above. Thus, defendant has waived any argument that the State failed to elect the acts upon which the charge was based, or that the trial court failed to give a specific unanimity instruction. See In re Dunnett, 172 Vt. 196, 203 n.* (2001) (we will not address issues not briefed on appeal).

Second, even if presented in its proper context, such an argument would be unavailing here. An exception exists to the general rule that the State must elect between two or more criminal acts relied upon for a single charged act. Zele, 168 Vt. at 158. No election is required (1) " when numerous acts are so related as to constitute a single transaction or offense," or (2) " ' where a single criminal act is involved and the proof shows its commission in different modes and by different means.' " Id. (quoting, in part, State v. Coomer, 105 Vt. 175, 178-79 (1933)); see Schad v. Arizona, 501 U.S. 624, 631-32 (1991) (jurors are not required to agree on preliminary factual issues underlying verdict or upon single means of commission of offense); United States v. Fejes, 232 F.3d 696, 702 (9th Cir. 2000) (trial court is not required to instruct jury that it must agree on single set of facts based on single theory of liability); United States v. Yeaman, 194 F.3d 442, 453 (3d Cir. 1999) (right to unanimous jury does not mean defendant has right to " unanimous agreement on the means by which each element is satisfied"); State v. Drake, 562 A.2d 1130, 1133 (Conn. App. Ct. 1989) (specific unanimity charge is required only if alternative acts are conceptually distinct); Washington v. United States, 760 A.2d 187, 198 (D.C. 2000) (when single count is charged and facts show continuing course of conduct rather than succession of clearly detached incidents, special unanimity instruction is not required; single charge of stalking involves continuous course of conduct). Courts have held that, by their nature, crimes such as kidnapping and unlawful restraint entail a continuous series of acts and thus typically do not require a specific unanimity instruction. E.g., People v. Ordonez, 277 Cal. Rptr. 382, 395 (Cal. App. 2 Dist. 1991) (continuous crime such as kidnapping does not require specific unanimity instruction). As the Hawaii Supreme Court recently stated in construing an unlawful restraint statute similar to 13 V.S.A. §2406(a), " [i]t is not difficult to imagine a series of threats and coercive conduct that might be employed to sustain a kidnapping or unlawful restraint over a period of time." State v. Apao, 24 P.3d 32, 40, (Haw. 2001). In that case, the Court held that a specific unanimity instruction was not required where defendant' s acts, as proved by the prosecution, constituted a continuing course of conduct initiated by a single impulse and intent. Id. at 43. The same is true in this case.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice