ELECTRONICALLY FILED FEB 10, 2021 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-1509

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMEESHA RENAE ALLEN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE DAVID PORTER, JUDGE

APPLICATION FOR FURTHER REVIEW
(Iowa Court of Appeals Decision: January 21, 2021)

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Iowa Code section 708.1 states that a person commits an assault by doing any of several acts such as those intended to cause harmful or offensive contact and display of a dangerous weapon in a threatening manner. The Court of Appeals compared the elements of these alternatives to conclude the display-of-a-weapon alternative was a "wholly new and different" different offense from assault causing bodily injury. *See* Iowa R. Crim. P. 2.4(8). Did the Court of Appeals err?

Authorities

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State v. Cooper, 223 N.W.2d 177 (Iowa 1974)
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Iowa Code § 707.1

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Iowa Code §§ 707.2(1)(*a*)–(*f*)
Iowa Code §§ 708.1(2)(*a*)–(*c*)
Iowa R. App. P. 6.903(3)
Iowa R. Crim. P. 2.4(8)(a)
Iowa R. Crim. P. 2.5(5)

STATEMENT IN SUPPORT OF THE APPLICATION FOR FURTHER REVIEW

The Court of Appeals held that the district court improperly allowed the State to amend the trial information. *State v. Allen*, No. 19–1509, slip op. 10–11 (Jan. 21, 2021); *see* Iowa R. Crim. P. 2.4(8). "Because the new charge had elements not included in the original charge and carried a harsher punishment, under [*State v. Sharpe*, 304 N.W.2d 220 (Iowa 1981)], the district court should have disallowed the amendment." *Id*. p. 10. The Court of Appeals' decision conflicts with a variety of Supreme Court precedent including *State v. Schertz*, 330 N.W.2d 1 (Iowa 1983) and *State v. Williams*, 305 N.W.2d 428 (Iowa 1981).

But it also reflects a growing divergence from the Court's preferred analysis whether two offenses are "wholly new and different" or "the same." *Compare State v. Abrahamson*, 746 N.W.2d 270 (Iowa 2008) (concluding alternatives within Iowa Code section 124.401(1) are "the same" for purposes of speedy indictment) *with State v. Briscoe*, 816 N.W.2d 415, 418–19 (Iowa Ct. App. 2012) (concluding alternatives within Iowa Code section 124.401(1) were not "wholly new and different" given *Abrahamson*); *State v. Vandermar*k, No. 19–2112, 2021 WL 210972, *3–4 (Iowa Ct. App.

Jan. 21, 2021) (interpreting *Briscoe* to mean offenses are the same if they "involve the same elements" and "same times, dates, and places;" and the theory of prosecution and defense are the same).

This divergence has also yielded a peculiar split in the Court of Appeals. Here, the Court concluded that assault while displaying a weapon was "wholly new and different" from assault causing bodily injury because of its different elements. But in *State v. Michael*, the Court of Appeals concluded that use or display of a weapon was not "wholly new and different" than assault with intent to inflict serious injury in a domestic abuse assault prosecution. No. 00–0602, No. 99–1578, 2000 WL 1675715, *2 (Iowa Ct. App. Nov. 8, 2000). Both were alternatives of committing the crime. *Id.*

Functionally, the Court of Appeals here employed a *Blockburger*-style comparison of elements of two alternatives (as well as the facts or defenses that would support the alternatives) when deciding whether to allow an amendment under Iowa Rule of Criminal Procedure 2.4(8). Numerous crimes contain alternative means for their commission. *See* Iowa Code §§ 124.401(1) ("at least thirty-six" controlled substance offense alternatives according to *Abrahamson*, 746 N.W.2d at 277); 707.2(1) (listing six alternatives of

first-degree murder); 708.1(2) (three alternatives of assault); 709.1 (six alternatives of sexual abuse in three subsections); 709.8(1) (five general alternatives of lascivious acts); 710.1 (five alternatives of kidnapping); 711.1 (three alternatives of robbery); 711.4(1) (seven alternatives of extortion); 712.2 (two alternatives of first-degree arson); 713.3(1) (four alternatives of first-degree burglary); and 714.1 (listing ten alternatives satisfying definition of theft). Every alternative contains elements different from others and entail different proof and defenses. *Abrahamson* rejected comparison of elements. 746 N.W.2d at 277. But the Court of Appeals' modern approach to Rule 2.4(8) appears to have embraced it.

The Court should grant further review to dispel the growing uncertainty over when to amend a trial information or file a new one. *See* Iowa R. App. P. 6.1103(1)(b)(1), (3), or (4).

STATEMENT OF THE CASE

Nature of the Case

A jury convicted Jameesha Allen of assault while using or displaying a dangerous weapon, an aggravated misdemeanor. *See* Iowa Code §§ 708.1, 708.2(3) (2017). The Court of Appeals concluded the district court erred to permit amending the trial information to charge this rather than assault causing bodily injury.

The Honorable David M. Porter presided.

Course of Proceedings and Facts

The State charged Allen by trial information on April 2, 2019 with two offenses: third-degree criminal mischief and assault causing bodily injury. Trial Info. (filed Apr. 2, 2019); App. 10–11. Sometime between July 19 and July 24, the local prosecutor would later argue, the State filed an amended trial information with the court but waited for approval until the day of trial. Tr. Vol. I p. 4, l. 20–p. 5, l. 7. The State wished to amend the charges to willful injury and assault while displaying or using a dangerous weapon. *Id.* Defense counsel filed her proposed jury instructions anticipating the amended charge. *Id.* p. 19, l. 12–p. 20, l. 12.

On July 29, 2019, the morning of Allen's two-day trial, the district court refused to allow the amended charge of willful injury.

Id. p. 1, l. 9, p. 16, l. 5–p. 22, l. 12. But the court approved amending the assault charge from bodily injury to use or display of a dangerous weapon. The jury trial concluded the next day with Allen's conviction as charged. Tr. Vol. III p. 84, l. 25–p. 85, l. 4. The amended trial information was time-stamped that day. Amend. Trial Info. (filed July 30, 2019); App. 14.

The district court denied Allen's posttrial motions on August 16, 2019. Tr. (Aug. 16, 2019) p. 7, l. 16–p. 10, l. 22. It imposed a two-year sentence, granted her probation, and levied a $625 fine. Sent. Order; App. 23–27.

Allen filed a timely notice of appeal.

Facts

On February 3, 2019 at 11:15 a.m., a man—later identified as Desean Waldrip—called 9-1-1 saying he was at the Dollar General Store on Martin Luther King Jr. Avenue (in Des Moines) and was being chased. Tr. Vol. II p. 15, ll. 6–24; St. Ex. 1. He said there were three people and two cars—one white, one blue (one of them a Ford). St. Ex. 1 at 02:16–02:24, 05:03, 05:30. In the course of his 9-1-1 call, he moved from the Dollar General Store to the nearby Hy-Vee grocery store. *See, e.g.*, *id.* at 04:05, 04:50–04:56, 05:26–05:36. He said he

had been run over by one of the cars and was injured. *See, e.g.*, *id.* at 04:05, 04:50–04:56, 05:26–05:36.

Hy-Vee Assistant Store Manager James Knapp—whose store was across Urbandale Avenue from the Dollar General Store—later testified that he encountered a bleeding man. Tr. Vol. II p. 20, ll. 1–6, p. 21, ll. 7–11. A surveillance video at Hy-Vee showed a man running toward the store and around a blue car. St. Ex. 2 at 00:32–00:53. As the man passed the blue car, a woman exited from it and chased him. *Id.* Then, once inside, a white car passed in front of the store. *Id.*; Tr. Vol. II p. 31, ll. 1–15. (In the 9-1-1 recording, the caller described the vehicles circling the lot and asked others to take down the cars' license plates. St. Ex. 1 at 05:15–05:36.)

The man told Knapp, that he "just got ran over by his girlfriend's mom." Tr. Vol. II p. 27, l. 22–25. He said it occurred at the Subway across the street. *Id.* p. 28, ll. 1–4. Knapp recalled the man mentioned a white car. *Id.* p. 28, ll. 5–29. Knapp did not remember him saying anything about a blue car. *Id.*

Earlier, Brianna Alexander saw a car chasing the man. *Id.* p. 35, ll. 2–13. She was dropping her husband off for work at the Subway across from Hy-Vee. *Id.* p. 34, ll. 5–16; Tr. Vol. III p. 4, l. 18–p. 5, l. 5.

She was standing near the drive-through lane. Tr. Vol. II p. 34, ll. 5–16; Tr. Vol. III; *see* St. Ex. 3. She heard a customer exclaim, "Somebody got hit." Tr. Vol. III p. 5, ll. 21–22. She saw a white car chasing a man and later a blue car. Tr. Vol. II p. 38, ll. 3–22. She described the man as Black, wearing a white T-shirt, "maybe 200 pounds, medium height." Tr. Vol. III p. 5, ll. 11–13.

Although initially unaware the store had a surveillance system, Ms. Alexander subsequently watched a recording of the drive-through. *Id.* p. 40, l. 21–p. 41, l. 1. She confirmed the accuracy of the date, time, and store number stamp. *Id.* The video showed a blue car driving over a gravel median and a man running from it, then stumbling, then walking away. St. Ex. 5 at 00:02–00:07. Ms. Alexander confirmed the man in the video looked to be the one she saw at the time and the car looked similar to what she recalled. Tr. Vol. III p. 6, l. 15–p. 7, l. 1.

Des Moines Police Officer Mark Stuempfig met Waldrip at the Hy-Vee. *Id.* p. 13, ll. 5–16. Waldrip was wearing a white T-shirt and had blood dripping from his hand. *Id.* He was "excited, agitated, sweaty, short of breath." *Id.* ll. 21–24. He acknowledged that he called 9-1-1 and he had been hit by a car but was otherwise

uncooperative and refused medical treatment. *Id.* p. 13, l. 8–p. 15, l. 2. Officer Stuempfig learned a white and a blue car were involved. *Id.* p. 15, ll. 15–24. Officer Steumpfig's partner spotted a blue car registered to Jameesha Allen on Martin Luther King Avenue. *Id.* p. 17, ll. 2–16.

Detective Brad Youngblut investigated the next day. *Id.* p. 23, l. 21–p. 24, l. 2. Familiar with the area, he obtained security footage from the Storage Mart, which is located on east side of Martin Luther King Avenue. *Id.* p. 27, ll. 1–23. The Storage Mart security camera looked across the road to the Dollar General Store. *Id.* p. 27, l. 23–p. 29, l. 16. The first video clip from the surveillance camera showed a man walking north on Martin Luther King Avenue from Wellbeck Road at 11:14. St. Ex. 8 clip 1 at 00:00–00:32. The figure stands or paces near the rear of the Dollar General Store until 11:16 before walking south. *Id.* at 00:32–02:27. Moments later, the man in the white shirt runs back north through the Dollar General parking lot with two men in pursuit. St. Ex. 8 clip 2 at 00:00–01:00. Two seconds later, a blue car turns in to the lot and drives over a berm in pursuit. *Id.* at 01:00–01:14. The balance of the clip shows people at the Storage Mart looking in the direction of that travel, running

about, and moving in an apparent effort to follow events. *Id.* at 01:00–03:15.

The detective also obtained security footage from the Dollar General for the same time frame. Tr. Vol. III p. 31, l. 14–p. 32, l. 10. The camera pointed from the south corner of the building and points northeast. *Id.* p. 33, ll. 4–21. The first of its two clips show a man in a white shirt briefly pursued by two men to the north. St. Ex. 7 clip 1 at 00:00–00:42. The second clip shows the man overtaken by a blue car and two men following on foot. *Id.* clip 2 at 00:00–00:15. Detective Youngblut testified this was the same blue vehicle. Tr. Vol. III p. 34, ll. 3–11.

The detective spoke with Jameesha Allen later on the 4th. *Id.* p. 34, l. 18–p. 35, l. 9. When the detective described the blue car jumping the curb at the Dollar General, Allen said, "yeah, that's me. I was chasing him." St. Ex. 6 clip 1 at 00:00–00:11. "There was a whole bunch of people" chasing Waldrip, she said. *Id.* at 00:11–00:17, 00:39–00:41. Claiming not to know who was driving the white car, she insisted the blue "Ford Fusion was me, for sure." *Id.* at 00:17–00:28. "I was driving." *Id.* at ~00:40. "You know who I am in this situation," she told the Detective. *Id.* at 00:40–00:45. "I was

completely pissed off yesterday." *Id.* clip 2 at 00:20–00:28. "I was driving," she repeated. *Id.* Insisting the white car was not involved, she repeated that "it was the blue car," she was driving, but she did not think Waldrip "got hit." *Id.* at ~00:50–01:10.

On cross-examination, the Detective admitted he did not see Allen driving the car. Tr. Vol. III p. 43, l. 15–p. 44, l. 22. But he identified Allen in the video by, among other things, the distinctive bandage to her hand. *Id.* "[I]t matches her description to a 'T'." *Id.* p. 44, ll. 15–22.

Allen testified first, seemingly, that Waldrip cut her that morning. *Id.* p. 52, l. 24–p. 53, l. 3. Later she said she could not remember who cut her. *Id.* p. 53, l. 21–p. 54, l. 5. She recalled nothing special from the morning. *Id.* p. 53, ll. 18–20. She claimed she had been asleep that morning and her family had her car. *Id.* p. 54, ll. 13–18. She denied assaulting Waldrip with her car or even driving it. *Id.* p. 55, ll. 5–7, p. 55, ll. 19–21. Neither did she know if anyone did. *Id.* p. 54, ll. 8–9.

She claimed that she said otherwise to Detective Youngblut because "I was injured and I had family" and "just wanted him to get out of my mom's house, honestly." *Id.* p. 56, ll. 22–25, p. 57, ll. 1–6.

She said, "it was a miscommunication because I really didn't understand what he was trying to get at." *Id.* p. 58, ll. 5–12.

ARGUMENT

I. The Court of Appeals erred to hold display of a dangerous weapon was a "wholly new and different offense" than the alternative of assault causing bodily injury for purposes of amending a trial information.

Preservation of Error

The State does not contest error preservation. Iowa R. App. P. 6.903(3).

Standard of Review

Because Rule 2.4(8)(a) provides that the district court "may" amend the trial information, that decision is generally reviewed for abuse of discretion. *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). Review shifts to correction of errors at law for questions concerning prejudice to the defendant's substantial rights or charging a wholly new and different offense. *Id.*

Merits

The district court properly amended the trial information. The amendment alleged a different means of committing assault. The amendment did not impact Allen's denial defense, thus caused her no substantial prejudice.

Iowa Rule of Criminal Procedure 2.4(8) provides:

> The court may, on motion of the state, either before or during the trial, order the indictment amended so as to correct errors or omissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new and different offense is charged.

Iowa R. Crim. P. 2.4(8)(a); *see* Iowa R. Crim. P. 2.5(5) (making rules pertaining to indictment applicable to a trial information). The Court has interpreted Rule 2.4(8) to require a "two part test." *Maghee*, 573 N.W.2d at 5. An information may be amended so long as it does not 1) prejudice the substantial rights of the defendant and 2) charge a "wholly new or different offense." *Id.*

A. "Wholly New and Different Offense" Analysis.

Relying principally on *State v. Sharpe*, 304 N.W.2d 220 (Iowa 1981), the Court of Appeals held that because the two alternatives do not share identical elements or punishments, they are "wholly new and different" from one another. *Allen*, No. 19–1509, slip op. p. 10 (Jan. 21, 2021). While *Sharpe* considered these distinctions, they do not govern here.

In *Sharpe*, the State sought to amend a charge from second-degree murder to first. 304 N.W.2d at 221. The court observed that

first-degree murder contained elements that second-degree murder did not and the difference in punishment was great. *Id.* at 223; *compare* Iowa Code §§ 707.1, 707.2 [first-degree murder], and 902.1 [life imprisonment] *with* 707.3 [second-degree murder] and 902.9 [25 years' imprisonment]. *Sharpe* distinguished, however, instances in which a single crime may be committed by alternative means. 304 N.W.2d at 222. This is the principle that governs here.

In *State v. Fuhrmann*, 257 N.W.2d 619, 623–24 (Iowa 1977), the Court considered an amendment to add felony-murder to a charge of first-degree premeditated murder. Iowa Code section 707.2(1) contains several alternatives of murder, including premeditated murder, felony murder, killing during an escape, killing a police officer, and certain kinds of child endangerment resulting in death. Iowa Code §§ 707.2(1)(*a*)–(*f*). The Court concluded the amendment did not allege a wholly new and different offense. "There is but one crime called murder in Iowa. First-degree murder may be committed in several ways. Therefore, the amendment alleging an alternative method by which defendant committed first-degree murder was authorized." *Fuhrmann*, 257 N.W.2d at 624; *see also Steinkuehler v. State*, 507 N.W.2d 716, 723 (Iowa Ct. App. 1993)

(upholding amendment to add felony-murder to a charge of first-degree premeditated murder).

In *State v. Williams*, 305 N.W.2d 428, 430 (Iowa 1981), the Court considered an amendment to add conspiracy to deliver a controlled substance to two counts alleging delivery and possession with intent to deliver. *See* Iowa Code § 204.401(1) (1979) (now Iowa Code § 124.401(1)). The Court approved because "the effect of the amendment was not to add another offense but to merely add a new means of committing the same offense, drug trafficking . . ." The Court recognized that the "wholly new" language in Rule 2.4(8)(a) "preserve[s] the right to amend by charging a different means of committing an offense . . ." *Williams*, 305 N.W.2d at 430; *see Powell v. State*, No. 15–1004, 2016 WL 1696904, *1 (Iowa Ct. App. Apr. 27, 2016) (permitting amendment of trial information to charge theft by exercising control over property of another under section 714.1(4) as well as theft by taking under section 714.1(1)); *Stephen v. State*, No. 07–0126, 2008 WL 2038421, *3–4 (Iowa Ct. App. May 14, 2008) (holding amendment to charge possession of one kind of controlled substance to another was not a "wholly new and different offense" notwithstanding the "entirely different material").

In *State v. Schertz*, 330 N.W.2d 1, 2 (Iowa 1983), the Court considered an amendment to add first-degree kidnapping by intentionally subjecting the victim to torture to a charge of first-degree kidnapping by holding the victim as hostage or inflicting serious injury. *Id.*; *see* Iowa Code § 710.2. The defendant argued the newly charged alternative was "wholly new and different" because it required proof of different elements, but the Court rejected that elements-based test. *Schertz*, 330 N.W.2d at 2. Instead, the Court noted, "[w]e have held that amending to add another means of committing a particular offense does not amount to alleging a new offense." *Id.* Because the defendant remained charged with the same offense—first-degree kidnapping—the addition of a new means of committing that offense did not violate the amendment rule.

In *State v. Abrahamson*, the Supreme Court considered whether the alternatives under Iowa Code section 124.401—thirty-six in all—were different from one another because they contained different elements. 746 N.W.2d at 274. If they were not "the same," then the State could avoid a speedy trial dismissal. *Id.* As it did in *Sharpe* and *Williams*, the Court refused to undertake a *Blockberger*-style comparison of elements to determine whether two alternatives

were the “same.” *Id.* at 274, 277; *Schertz*, 330 N.W.2d at 2; *Sharpe*, 304 N.W.2d at 223; *Williams*, 305 N.W.2d at 431. Adhering to the analysis for whether an offense was “the same” for speedy trial purposes or “wholly new and different” for amendment purposes had the benefit of consistency. *Abrahamson*, 746 N.W.2d at 276–77. Concluding that alternatives of an offense were “the same” (that is not wholly new and different) would protect defendants from sequential prosecutions. *Id.* at 277.

Thus, merely standing the elements and punishment of one alternative up against those of another does not answer the issue here. It does not follow *Sharpe* and its progeny. And it hazards the danger *Abrahamson* foresaw. Elements for any given alternative will always differ, to say nothing of the proof. If alternatives of assault are wholly new and different, then the State could simply prosecute a defendant on a new trial information.

Turning to the issue here, the State originally charged Allen with assault causing bodily injury and sought to amend it to assault while displaying a dangerous weapon. There are three means of committing an assault:

> A person commits an assault when, without justification, the person does any of the following:
>
> (a) Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
>
> (b) Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, or offensive, coupled with the apparent ability to execute the act.
>
> (c) Intentionally points any firearm toward another or displays in a threatening manner any dangerous weapon toward another.

Iowa Code §§ 708.1(2)(*a*)–(*c*); *see* Jury Instr. No. 11 (listing same alternative elements of assault); App. 31. At the risk of stating the obvious, the various alternatives—a harmful touch, an act intended so, and display of a dangerous weapon—are all alternatives within a single Code section.

In addition to finding this structure of alternatives unpersuasive, the Court of Appeals observed the increased punishment for assault while displaying a dangerous weapon. *Allen*, No. 19–1509 at slip op. p. 10–11. The following Code section governs penalties. Section 708.2(2) makes it a serious misdemeanor to cause

bodily injury in an assault. Section 708.2(3) makes it an aggravated misdemeanor to "use or display a dangerous weapon" in an assault.

Punishment alone is not germane. In *Maghee*, the Court permitted an amendment to a possession with intent to deliver and conspiracy to deliver charge from a Class "C" offense to a Class "B" based on the amount of substance at issue. 573 N.W.2d at 4. Noting *Sharpe*, the Court still concluded there was but one controlled substance crime; the change of penalty did not make the amendment wholly new or different. *Id.* at 4–5; *see State v. Briscoe*, 816 N.W.2d 415, 417–19 (Iowa Ct. App. 2012) (holding same notwithstanding change of type of controlled substance).

It is one thing, of course, to attempt to amend a trial information from a second-degree felony to a first-degree felony such as murder, sexual abuse, or kidnapping. Those amendments jump from one Code section to another bringing different elements and punishments along with them. *Compare* Iowa Code §§ 707.2 (first-degree murder with alternatives and Class "A" punishment), 709.2 (containing alternatives for first-degree sexual abuse and Class "A" punishment), and 710.2 (first-degree kidnapping alternatives and Class "A" felony status) *with* Iowa Code §§ 707.3 (stating second-

degree murder is murder that is *not* first-degree and making it a Class "B" felony), 709.3 (second-degree sexual abuse with Class "B" sentence), and 710.3 (elements of second-degree kidnapping and Class "B" felony punishment). That the Legislature would delineate separate crimes by encapsulating offense and sentence together has some traction to it. But when not so encapsulated, that also suggests something.

In this case, assault occurs in one of three ways under section 708.1(2)(*a*)–(*b*). The penalties for any given alternative are listed elsewhere.[1] Here, "[a] person who commits an assault, as defined in section 708.1, and uses or displays a dangerous weapon in connection with the assault is guilty of an aggravated misdemeanor." Iowa Code § 708.2(3). There is, like several other crimes in the Code, but one kind of "assault" and its punishment varies according which alternative the State proves.

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[1] The Court of Appeals observes "how the code editor arranges various crimes is not controlling." *Allen*, No. 19—1509, slip op. at 10–11 (citing *State v. Webb*, 156 N.W.2d 299, 301 (Iowa 1968)). To be more precise, the Code editor's selection of a *heading* is not part of the law. *State v. Kehoe*, 804 N.W.2d 302, 312 (Iowa Ct. App. 2011) (citing *State v. Chenoweth*, 226 Iowa 217, 220, 284 N.W. 110, 112 (1939)). Section 708.2 only proscribes penalties for a 708.1 offense and does not set forth a different crime with different elements and different punishment. No one has suggested otherwise.

There is another kind of assault—domestic abuse assault—and the Court of Appeals treated amendments to a trial information charging it contrary to that here. In *State v. Michael*, the Court of Appeals considered an amendment from domestic abuse assault with intent to inflict serious injury to allege "the use or display of a dangerous weapon," that being a van used to strike the victim. No. 00—0602, No. 99—1578, 2000 WL 1675715, *1 (Iowa Ct. App. Nov. 8, 2000). The Code stated, "[f]or purposes of this chapter, 'domestic abuse assault' means an assault, as defined in section 708.1, which is domestic abuse as defined." Iowa Code § 708.2A(1). A first-offense, aggravated misdemeanor occurs "if the domestic abuse assault is committed with the intent to inflict a serious injury upon another, or of the person uses or displays a dangerous weapon in connection with the assault." Iowa Code § 708.2A(2)(*c*).

The Court of Appeals then reasoned,

> Iowa Code section 708.1(3) provides an assault is committed if one "displays in a threatening manner any dangerous weapon toward another." It is one of three means of committing an assault. Amending a trial information to allege "a different means of committing the crime, specified in [a] new statute as separate divisions … would clearly not be a 'wholly new and different offense.'" … The amendment only alleged an alternative

> means of committing the crime which is set forth as an alternative in *both* section 708.1 and 708.2A(2)(*c*).

Id. (citations omitted and emphasis added).

Unfortunately, despite authorities from *Fuhrmann* to *Abrahamson*, the Court of Appeals has begun to reason that alternatives of an offense are different if they require different proof. In *State v. Johnson*, the Court concluded that sexual abuse under what is now Iowa Code section 709.4(1)(*a*) was wholly new and different than an offense under what is now section 709.4(1)(*d*) because it was "conceivable one's defense strategy would greatly differ depending on which theory of prosecution is being pursued." No. 16–1693, 2018 WL 1182547, *3 (Iowa Ct. App. Mar. 7, 2018). In *State v. Vandermark*, the Court of Appeals interpreted its earlier opinion in *Briscoe* to ask whether the amended charge entailed the "same elements;" "same times, dates, and places of the alleged offenses; and whether the "State's theory of offenses and defenses would be identical under both." No. 19—2112, 2021 WL 210972, *3 (Iowa Ct. App. Jan. 21, 2021) (citing *Briscoe*, 816 N.W.2d at 418–19).

Proof always differs according to the alternative of a charged offense. A drug conspiracy requires proof of an agreement, whereas

possession with intent to deliver does not. *See* Iowa Code § 124.401(1); Model Jury Instr. No. 600.1, 600.2, 2300.2. Possession requires custody or control, whereas manufacturing does not. *See* Iowa Code § 124.401(1); Model Jury Instr. No. 200.47, 2300.1. Similar arguments obtain for the different alternative of murder, from premeditated murder to death while participating in an act of terrorism. *See* Iowa Code §§ 707.2(1)(*a*)–(*f*); Model Jury Instr. No. 700.1. Nevertheless, from *Fuhrmann* to *Abrahamson*, the rule has been that amending one alternative of a crime for another does not allege a "wholly new and different offense" for purposes of Rule 2.4(8). Further analysis might show an amendment would cause prejudice—perhaps because the proof would be so different that the defendant could not adequately prepare. But exchanging one alternative for another does not itself preclude amendment.

Thus, the district court correctly determined the amendment here did not charge a wholly new and different offense. The State may prove an assault by a variety of means. These include showing an act intended to result in offensive contact, an act intended to place the victim in fear of it, or an act of display of a dangerous weapon. *See* Iowa Code §§ 708.1(2)(*a*)–(*c*). The grade of offense may change

depending on the alternative, but the offense itself has not changed as a matter of law. *Compare id. with* 708.2(2) and 708.2(3).

The Court of Appeals erred to conclude otherwise.

B. Substantial Prejudice Analysis.

"An amendment prejudices the substantial rights of the defendant if it creates such surprise that the defendant would have to change trial strategy to meet the charge in the amended information." *Maghee*, 573 N.W.2d at 6.

Allen claims she was prejudiced in two ways: first, the amendment enhanced the penalty and, second, she believes she was entitled to rely on an absence of proof of bodily injury. Appellant's Pr. Br. pp. 17–18. Neither are availing.

The penalty did increase. And it is true the difference might mean serving in prison (rather than jail) and submitting a DNA sample. *See* Iowa Code §§ 81.2, 903.1(1), 903.4. But the most pressing change here was one year, not the difference between life in prison and a 25-year sentence discussed in *Sharpe*. *Compare* Iowa Code §§ 708.2(2) and 708.2(3) *with* 903.1(1)(*b*) and 903.1(2). Certainly it is less than the change in penalty the defendant in *Maghee* faced, from a Class "C" offense to a Class "B" felony.

Allen's reliance interest requires a fuller discussion. It is not enough to state that one enjoys a privilege to rely on the State's difficulty proving one alternative or grade of an offense. *See* Appellant's Pr. Br. p. 18 (citing *State v. Cooper*, 223 N.W.2d 177, 180 (Iowa 1974)). Rather, surprise or inability to follow through on a defense is a more compelling question and there was little here given the minutes. They made plain that the method of Allen's crime was driving and hitting Waldrip with her car. *Compare Maghee*, 573 N.W.2d at 6 (noting minutes of testimony disclosed amount of controlled substance meeting threshold for amended grade of offense). Irrespective of amendment, the State could prove assault by display of a dangerous weapon (the car). *See* Iowa Code § 708.1(2)(*c*). And the record implies Allen's counsel anticipated the amended charge: she filed proposed jury instructions based on the amended charges. *See* Tr. Vol. I p. 19, l. 12–p. 20, l. 12 (counsel stating she filed proposed instructions for amended charge of willful injury at the direction of court administration).

Further supporting the absence of surprise, counsel did not ask for a continuance. *See Maghee*, 573 N.W.2d at 6 (noting counsel did not ask for a continuance, the "traditionally appropriate remedy for a

defendant's claim of surprise"). Allen was not in custody and had waived speedy trial. Order Init. App. (filed Feb. 28, 2019); Waiver Speedy Tr. (filed May 2, 2019); App. 6-9, 13. If counsel were truly surprised, she would more likely have asked for a continuance. She did not.

Finally, the amendment did not change Allen's defense. She claimed to have not been involved at all. *Id*. p. 53, l. 21–p. 54, l. 5. She recalled nothing special from the morning. *Id*. p. 53, ll. 18–20. She claimed she had been asleep that morning and her family had her car. *Id*. p. 54, ll. 13–18. She denied assaulting Waldrip with her car or even driving it. *Id*. p. 55, ll. 5–7, p. 55, ll. 19–21. Neither did she know if anyone else did. *Id*. p. 54, ll. 8–9. Like the defendant in *Maghee*, Allen's defense was total denial. Whether the State asserted use of a dangerous weapon or bodily injury would have no impact on this defense.

The district court properly allowed the amendment. The Court of Appeals erred.

CONCLUSION

The Court should grant further review, reverse the Court of Appeals, and reinstate the verdict.

REQUEST FOR ORAL SUBMISSION

The State requests oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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