

**IN THE COURT OF APPEALS OF IOWA**

No. 2-020 / 11-0563  
Filed February 15, 2012

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**BRANDON DAVID ZMUDA,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Clinton County, C.H. Pelton,  
Judge.

The defendant appeals from convictions for assault causing serious injury  
and willful injury while armed with a dangerous weapon. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Aurther Adams,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant  
Attorney General, and Michael L. Wolf, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

**DANILSON, J.**

Brandon Zmuda appeals from judgment and sentences imposed upon his convictions for assault with intent to commit serious injury as a lesser-included offense of attempted murder (count I) and willful injury while armed with a dangerous weapon (count II). Because the convictions arose from a series of assaults, they do not merge; we affirm.

**I. Background Facts and Proceedings.**

A reasonable juror could find that Brandon Zmuda had the following series of altercations with his former girlfriend's new boyfriend, David Specht.

Zmuda was living with his parents about a block away from his former girlfriend, Emily Huizenga.<sup>1</sup> Specht was Huizenga's current boyfriend. At about 3:00 a.m. on September 9, 2010, believing Zmuda had just thrown a rock through Huizenga's front door, Specht stuck a steak knife in his back pocket ("just in case . . . he came at me with a knife"), grabbed a two-by-four board, and went to Zmuda's parents' house by way of an alley. Using the two-by-four, Specht broke out a side window of Zmuda's vehicle and turned to run back to Huizenga's.

Zmuda came out of the house and chased Specht down. Specht threw down the board. Zmuda hit Specht in the left side a "couple times." Specht tried to run away, turning and running toward Zmuda's house. Zmuda caught Specht again and hit Specht a couple more times. Specht pushed Zmuda away and ran ten to twenty feet before Zmuda caught up with him again. Zmuda's father tried to restrain Zmuda, and Specht got away again, but Zmuda caught him again and

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<sup>1</sup> Huizenga had obtained a no-contact order as a result of an alleged domestic assault by Zmuda.

hit Specht a couple more times. Specht was able to tackle Zmuda to the ground and then lost all his strength. Zmuda's father jumped on top of Zmuda, and Specht got away. Specht made his way back to Huizenga's, stripping his clothes off along the way to see why they were wet. He collapsed on Huizenga's front steps, covered in his own blood.

When taken to the hospital, it was discovered Specht had nine stab wounds: two to his lower left side; one to his left armpit; one in the right side of his chest; three on the right side of his back; one in the lower left side of his back; and one in the back of his neck. He had a collapsed lung and a punctured bowel. He had lost at least forty percent of his blood. Specht spent five days in the hospital. At the time of trial, Specht had several scars, as well as nerve damage to his left arm, which deprived him of full use of that limb.

Zmuda was charged with attempted murder in violation of Iowa Code section 707.11 (2009) (count I) and willful injury causing serious injury while armed with a dangerous weapon in violation of sections 708.4(1) and 902.7 (count II).

After trial, on count I, the jury found Zmuda guilty of the lesser-included offense of assault with intent to inflict serious injury; on count II, the jury convicted Zmuda as charged. The court sentenced Zmuda on both counts.

Zmuda appeals, contending section 701.9 prohibits a court from imposing sentences for both his conviction for assault with intent to inflict serious injury and for willful injury.

## **II. Scope and Standard of Review.**

Our review of an alleged violation of section 701.9 is for correction of errors at law. *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000). To the extent defendant's claim has a constitutional dimension, review is de novo. *State v. Nail*, 743 N.W.2d 535, 538 (Iowa 2007).

## **III. Analysis.**

The Iowa merger doctrine is expressed in Iowa Code section 701.9 and Iowa Rule of Criminal Procedure 2.6(2). See *State v. Anderson*, 565 N.W.2d 340, 343 (Iowa 1997). Section 701.9 codifies the double jeopardy protection against cumulative punishment. *State v. Halliburton*, 539 N.W.2d 339, 344 (Iowa 1995).

Section 701.9 provides:

No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Zmuda was originally charged with attempted murder and willful injury. Willful injury is not a lesser-included offense of attempted murder. See *State v. Clarke*, 475 N.W.2d 193, 196 (Iowa 1991) ("Application of the legal elements test plainly demonstrates that willful injury is not a lesser-included offense of attempted murder. No reason appears to depart from the legal elements test in the present case just because both offenses arise out of the same course of conduct by the defendant."). However, Zmuda contends his conviction for the

offense of assault causing serious injury<sup>2</sup> is a lesser-included offense of willful injury causing serious injury. See *State v. Hilpipre*, 395 N.W.2d 899, 902 (Iowa Ct. App. 1986) (noting three elements of willful injury are “(1) that there was an assault; (2) with intent to commit serious injury upon another; and (3) serious injury is in fact inflicted upon another”).

Iowa Rule of Criminal Procedure 2.6(2) provides: “Upon prosecution for a public offense, the defendant may be convicted of either the public offense charged or an included offense, but not both.”

Double jeopardy principles, however, do not apply when a defendant is convicted of multiple offenses for different assaults. See *State v. Delap*, 466 N.W.2d 264, 264 (Iowa Ct. App. 1990) (defendant could be convicted under both sections 708.2(1) and 708.2(2) where defendant had committed a series of assaults); see also *State v. Heemstra*, 721 N.W.2d 549, 557 (Iowa 2006) (noting in discussing merger of willful injury and felony-murder convictions that “if defendant assaulted the victim twice, first without killing him and second with fatal results, the former could be considered as a predicate felony, but the second could not because it would be merged with the murder”).

On appeal, Zmuda recognizes merger is not required where there have been multiple assaults, but argues:

[T]he state made no claim that the underlying events here constituted anything other than one assault. There was no argument that each separate stab would constitute an individual assault. There was no attempt to label each tackle and subsequent fight as anything more than a running and continual assault. Because there is only one assault, as argued and presented to the

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<sup>2</sup> This offense was submitted as a lesser-included offense of attempted murder.

jury, the convictions on both counts should merge into the single count of willful injury causing serious injury.

The State disagrees, arguing the evidence shows there were numerous separate assaults by Zmuda, resulting in nine separate stab wounds, inflicted at different times, and “at different geographical locations spread over an area of more than half a city block.” We agree. The trial information alleged two separate counts. Moreover, this case was presented as a series of “altercations,” each of which involved assaults. We note particularly this line of questioning during cross-examination of Specht:

Q. So you had an altercation here, attempted to flee, and got this far; correct? A. Yes

Q. And there was another altercation between you and Mr. Zmuda; correct? A. Yes.

Q. And did I ask you to indicate that with a circled number 5 on this exhibit? And does it appear that I’m pointing the laser pen at where you indicated that second altercation was? A. Yes.

Q. And that appears to be immediately to the right on the diagram, east in a compass direction, of the Zmuda’s home; correct? A. Yes.

Q. And then there was a final altercation I believe you testified about, between yourself and Brandon Zmuda, where you tackled him and then suddenly lost all your strength, and I asked you to indicate that with a number 6; correct? A. Yes.

Given this record, we are persuaded the district court committed no error in sentencing Zmuda on each conviction. See, e.g., *State v. Walker*, 610 N.W.2d 524, 426-27 (Iowa 2000). We affirm.

**AFFIRMED.**