SUPREME COURT NO. 19-1509
POLK COUNTY NO. AGCR325199

IN THE SUPREME COURT OF IOWA

STATE OF IOWA
Plaintiff-Appellee,

v.

JAMEESHA RENAE ALLEN
Defendant-Appellant.

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

FINAL REPLY BRIEF FOR APPELLANT

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PROOF OF SERVICE & CERTIFICATE OF FILING

On September 2, 2020, I served this brief on the Appellant at her last known address in Des Moines and all other parties by EDMS to their respective counsel:

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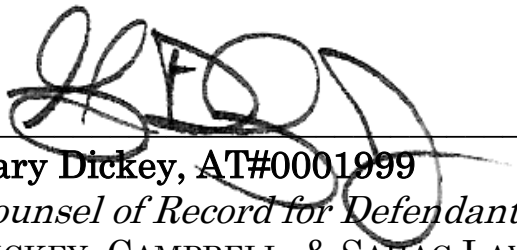
I further certify that I did file this proof brief with the Clerk of the Iowa Supreme Court by EDMS on September 2, 2020.



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REPLY ARGUMENT

I. IOWA RULE OF CRIMINAL PROCEDURE 2.4(8) DOES NOT PERMIT THE STATE TO AMEND THE TRIAL INFORMATION AT TRIAL TO ALLEGE ASSAULT WITH A DANGEROUS WEAPON INSTEAD OF ASSAULT CAUSING BODILY INJURY

On the morning of the first day of trial, Jameesha Allen's prosecutor faced a dilemma. He charged her with assault causing bodily injury, yet he did not subpoena her accuser to appear at trial. Accordingly, he lacked proof to prove the existence of bodily injury beyond a reasonable doubt. Rather than dismiss the case for lack of evidence, he amended the trial information to charge assault with a dangerous weapon. Not only did the amendment change the elements of Allen's charge, it ratcheted up her punishment. Because Iowa Rule of Criminal Procedure 2.4(8) prohibits such gamesmanship, her conviction must set aside.

A. Because assault with a dangerous weapon is a wholly new and different offense than assault causing bodily injury, the State's amendment was improper

The State defends the day-of-trial amendment on the basis that the new charge is simply "a different means of committing assault." (State's Br. at 21). This is a false premise. Iowa case

law draws a clear distinction between an amendment that stays within the same code section and an amendment that asserts an offense found in a different code section. Because the State's amendment in this case falls into latter category, it constitutes a "wholly new and different offense" under Iowa Rule of Criminal Procedure 2.4(8) and should not have been allowed.

The State's attempt to find a foothold in the decisions from *State v. Fuhrmann*, 257 N.W.2d 619 (Iowa 1977), *State v. Williams*, 305 N.W.2d 428 (Iowa 1981), *State v. Schertz*, 330 N.W.2d 1 (Iowa 1983), and *State v. Maghee*, 573 N.W.2d 1 (Iowa 1997), is unavailing. (State's Br. at 21-26). Each of these decisions is easily distinguishable. *Fuhrmann*, for example, involved an amendment to add felony-murder to a charge of first-degree murder. *Id.* at 623-24. The amendment at issue in *Fuhrmann* involved the murder statute under the old criminal code, which defined murder as a single crime. *State v. Brown*, 253 Iowa 658, 663-64, 113 N.W.2d 286, 289-90 (1962) ("Under our law there is but one crime called murder"). Following the revisions to the criminal code and criminal rules, murder was separated into

different degrees. For this reason, *Fuhrmann* no longer remains authoritative. Indeed, the Iowa Supreme Court said as much in in *State v. Sharpe*, 304 N.W.2d 200 (Iowa 1981):

> Other cases, allowing amendments, must be distinguished: [*Fuhrman*] held that it was permissible under section 773.43, The Code 1975, to amend a trial information charging first-degree murder by adding a charge of felony-murder. We held the amendment did not charge a "different" offense: felony-murder was only an alternative means of committing the crime of first-degree murder. *However, whether there remains only one crime of murder is left in doubt by our new rules.* The statutory form of indictment in effect at the time of *Fuhrmann* and *Brown* was merely: "A.B. murdered C.D." § 773.35, The Code 1958 and 1975. Under the new rules, however, the form for indictment specifies the degree of the offense. Iowa R. Crim. P. 30 (Form 10) ("A.B. committed murder in the __ degree, resulting in the death of C.D.").

Id. at 222-23 (emphasis added). The State's reliance on *Furhmann*, therefore, is misplaced.

The State fares no better under the *Williams*, *Schertz*, and *Maghee* decisions. In *Williams*, the prosecution added a drug trafficking conspiracy count to a trial information that already contained charges for delivery and possession with intent to

deliver.[1] *Williams*, 305 N.W.2d at 430. The statute at issue in *Williams* provided:

> Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

Id. (citing Iowa Code section 204.402(1) (1977)). Similarly, in *Schertz*, the prosecution amended a first-degree kidnapping charge three days before trial to add the allegation that

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[1] In *Williams*, the court found persuasive federal case law distinguishing the elements of an offense from "alternative means of committing the same offense." *Williams*, 305 N.W.2d at 431 (citing *United States v. Viserto*, 596 F.2d 531 (2d Cir. 1979)). Subsequent federal case law has undermined this reasoning. In *Mathis v. United States*, ___ U.S. ___ 136 S. Ct. 2243 (2016), the United States Supreme Court clarified the difference between the "elements" of an offense and the "means" by which to commit the offense. "Elements are the constituent parts of a crimes legal definition—the things the prosecution must prove to sustain a conviction." *Id.* at ___, 136 S. Ct. at 2248. The means of committing an offense, in contrast, are "legally extraneous circumstances." *Id.* at ___, 136 S. Ct. at 2249. "If statutory alternatives carry different punishments, then under *Apprendi* they must be elements." *Id.* at ___, 136 S. Ct. at 2256. "Conversely, if a statutory list is drafted to offer illustrative examples, then it includes only a crime's means of commission." *Id.* Under this contemporary case law, the amendment in Allen's case is a distinct offense and not merely an alternative means of committing the offense.

defendants subjected their victim to torture. *Schertz*, 330 N.W.2d at 2. There, the statute provided that first-degree kidnapping occurs "when the person kidnapped, as a consequence of the kidnapping, suffers serious injury, or is intentionally subjected to torture or sexual abuse." *Id.* at 1-2 (citing Iowa Code section 710.2 (1981)). Likewise, in *Maghee* the prosecution amended the trial information on the morning of trial to allege a larger amount of drugs sufficient to trigger an enhanced sentence under Iowa Code section 124.401. *Maghee*, 573 N.W.2d at 4. In each of these cases, the statutes contained a "base prohibition" that covered all the pre- and post-amendment allegations. *Id.* at 5. And, the allegations and offenses stayed within "the same code section." *Id.*

The amendment in this case is an animal of a different stripe. Any analogy to *Fuhrmann*, *Williams*, *Schertz*, and *Maghee*, therefore, is untenable. Here, the amendment crossed over different code sections—from Iowa Code section 708.2(2) to section 708.2(3). The amended charge also introduced a new element not contained in the original offense: the display of a weapon. Accordingly, the amendment alleged a "wholly new and

different offense." *Sharpe*, 304 N.W.2d at 222-23 (holding that first-degree murder is a "wholly new and different offense" than second-degree murder based in part on different elements). In all these respects, the decisions cited by the State offer no guidance.

B. The amendment prejudiced Allen's substantial rights by subjecting her to a greater penalty

Alternatively, Rule 2.4(8) prohibits substitution of charges if the defendant's substantial rights would be prejudiced by the amendment. Iowa R. Crim. P. 2.4(8). There can be no meaningful dispute that Allen the increase in penalty from a serious misdemeanor to an aggravated misdemeanor adversely affected her substantial rights. The difference between the two categories of misdemeanors is significant in terms of the severity of punishment, place of confinement, and requirement to submit a DNA specimen. Iowa Code §§ 81.2, 903.1(1); 903.4. The State has virtually no answer to the prejudice arising from the increased punishment following the amendment except to say, by virtue of facing an increased punishment except to suggest that it could have been worse:

> The penalty did increase, but not substantially. The change here was one year, not the difference between life in prison and a 25-year sentence discussed in *Sharpe*. Certainly it is less than the change in penalty the defendant in *Maghee* faced, from a Class "C" offense to a Class "B" felony.

(State's Br. at 27)(citations omitted). Through a rhetorical slight-of-hand, the State attempts to increase Allen's standard of proof by suggesting she must show "substantial prejudice." (State's Br. at 26). The text of Rule 2.4(8), however, requires only a showing of "prejudice" to her "substantial rights." Under the correct standard, the district court erred in allowing the amendment.

II. ALLEN WAS PREJUDICED BY THE PROSECUTION'S SUGGESTION THAT THE ACCUSER DID NOT TESTIFY BECAUSE "SNITCHES GET STICHES"

The State does not take issue with Allen's characterizing the prosecutor's statements in closing statement as implying that the accuser did not testify because he feared she would retaliate with physical violence. (State's Br. at 46-47). Nor does the State attempt to defend the prosecutor's comment as being appropriate. (State's Br. at 48-50). Instead, the State embraces the idea that any error was harmless because its "case was strong." (State's Br. at 52). In the State's world, a prosecutor is free to break the rules

as long as he or she presents strong evidence of guilt. The implications of the State's position are astounding and intolerable.

Fortunately, prosecutorial misconduct is not subject to harmless error analysis. A prosecutor who violates the duty to see that justice is done violates a defendant's constitutional right to a fair trial. *State v. Plain*, 898 N.W.2d 801, 818 (Iowa 2017). Because such due process violation is "of a constitutional dimension, the State must show beyond a reasonable doubt the error did not result in prejudice." *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010); *State v. Traywick*, 468 N.W.2d 452, 455 (Iowa 1991). It cannot meet its burden on this record. The insinuation that Allen would give her accuser stitches if he testified implies a propensity to commit violence, which "unquestionably has a powerful and prejudicial impact." *State v. Sullivan*, 679 N.W.2d 19, 30 (Iowa 2004). Accordingly, Allen is entitled to a new trial.

CONCLUSION

For the reasons set forth above, Jameesha Allen requests this Court reverse her conviction.

COST CERTIFICATE

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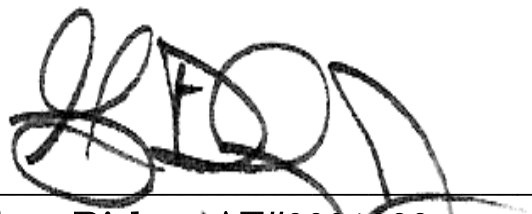

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