IN THE SUPREME COURT OF IOWA
Supreme Court No. 21–1425

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GERRY HARLAND GREENLAND,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DECATUR COUNTY
THE HON. JOHN LLOYD, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

The State requests retention. The Iowa Supreme Court should overrule *State v. Braggs*, 784 N.W.2d 31, 36–37 (Iowa 2010), and hold that assault is not a lesser included offense of attempted murder. *See* Iowa R. App. P. 6.1101(2)(f).

STATEMENT OF THE CASE

Nature of the Case

This is Gerry Harland Greenland's direct appeal from his convictions for attempted murder of a peace officer, a Class B felony with a sentencing enhancement, in violation of Iowa Code section 707.11(1) and 707.11(5); and assault on a peace officer with intent to inflict serious injury, a Class D felony, in violation of Iowa Code section 708.1 and 708.3A (2019).[1] Greenland was found guilty by the trial court after a bench trial. He was sentenced to terms of incarceration, set to run concurrently, producing a 25-year term of incarceration with no eligibility for parole under section 707.11(5)(c). *See* Sentencing Order (9/7/21); App. 52–56.

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[1] Greenland was also convicted of simple misdemeanor assault, in violation of Iowa Code section 708.1, as a lesser-included offense of another charge involving a different victim (Trevor Greenland), not the police officer. Neither of Greenland's challenges on direct appeal involve that simple misdemeanor conviction, which is outside of the scope of his right of appeal. *See* Iowa Code § 814.6.

On appeal, Greenland argues **(1)** the evidence was insufficient to support his convictions for attempted murder of a peace officer and for assault on a peace officer with intent to inflict serious injury; and **(2)** those two convictions and sentences should have merged.

Course of Proceedings

The State accepts Greenland's statement of the relevant course of proceedings. *See* Def's Br. at 8–10; Iowa R. App. P. 6.903(3)

Statement of Facts

On May 23, 2019, Trevor Greenland was working on a pickup truck at his grandmother's place, northwest of Grand River. His uncle is defendant Gerry Greenland. *See* TrialTr. 10:22–13:8. As Trevor was attempting to start the truck, there was a confrontation:

> **TREVOR**: . . . Gerry came out of the house and came down to the road and peered inside the passenger window and asked me what we were doing, and I told him it didn't concern him.
>
> And I think he said, I think it does.
>
> And I said, I don't think so.
>
> He pulled open the door and struck me in the face.
>
> **THE STATE**: With what?
>
> **TREVOR**: His fist.

TrialTr. 16:25–19:8. Trevor got out of the truck. Greenland tried to punch Trevor again, but Trevor parried and struck back. Then, Trevor and a hired hand (Brandon Quayle) got the upper hand and "held

[Greenland] down on the ground for awhile." When Greenland told them that "he had calmed down," Trevor and Quayle "let him up." Greenland and Trevor "stood at the pickup and had words," and then Greenland walked back into the house. Trevor called his father, Monte. *See* TrialTr. 19:9–20:15. Then, Trevor discussed what happened with his grandmother and Quayle. Trevor decided to call the sheriff's office and tell them that Greenland stuck him. *See* TrialTr. 20:16–21:16.

Monte arrived. When Greenland saw Monte, he armed himself with a crowbar. Monte grabbed a pipe. Then, as Monte approached, Greenland switched to a different weapon:

> My dad [Monte] walked down there with the pipe, and at that point, [Greenland] threw the crowbar up in the air and ran back into the shop and my dad followed him in there, and I didn't see what happened inside, but he started the tractor, and was trying to run my dad down with the tractor outside.

TrialTr. 25:18–26:6. By that point, Greenland had affixed "bale spears" to the front of the tractor. *See* TrialTr. 27:1–3; *accord* TrialTr. 61:3–12.

Greenland rammed Monte's pickup with the tractor. *See* TrialTr. 27:4–28:4. Trevor and Quayle got into vehicles and fled. Greenland went after them, which gave Monte an opportunity to get his pickup and drive away. Greenland chased them for a while, but his tractor was too slow. *See* TrialTr. 28:5–48:18; TrialTr. 63:20–66:23.

During that encounter, the bale spears were in a low position where they went under the door of the pickup and hit the frame. *See* TrialTr. 95:14–96:18. The bale spears could be raised or lowered by someone in the driver's seat of the tractor—and Greenland knew how to operate that mechanism. *See* TrialTr. 80:6–82:14; TrialTr. 125:1–7.

Three law enforcement vehicles entered the farm property, where Greenland was waiting in another vehicle. When Greenland saw officers approaching, he got back into the tractor. The lead officer saw Greenland start the tractor and raise the tips of the bale spears up to "three and a half feet high, roughly." *See* TrialTr. 138:4–139:20. Greenland rammed into the middle vehicle, which was being driven by Decatur County Sheriff Ben Boswell. Greenland "dropped a gear and pushed the vehicle" around a corner, and then "out of the [road] and into [a nearby] ditch." *See* TrialTr. 144:10–145:10; *accord* TrialTr. 150:10–154:11. At the trial, Sheriff Boswell described it like this:

> I pulled into the driveway and I saw the tractor coming and I decided that I was not going to try to block his path, so I pulled off of the driveway and into the grass.
>
> [. . .]
>
> The tractor was coming down the driveway. I made eye contact with [Greenland] who was in the tractor. He saw me. He raised up the tines of the bale stabbers, and he turned right into my car.
>
> [. . .]

> One tine went through right in front of the door area, and the other tine hit right below my door handle . . . in the car door.
>
> [. . .]
>
> So I was leaning over to get away from the tractor as far as I could. When the tractor hit [my car], it would have thrown me back towards the window, and I could actually see the tine sticking through the door, and I was trying to lean across to my right as far as I could to stay away from the bale tine.

TrialTr. 174:5–176:15; *accord* TrialTr. 180:2–182:9; State's Ex. 11–14; App. 23–26. After that initial collision, Greenland continued to drive. He pushed Sheriff Boswell's car along, as he headed towards obstacles.

> . . . I realized that I could not steer the car. I then tried to break the car, could not brake the car.
>
> As I looked over my left shoulder to try to steer to see where we were heading, I realized that it looked like we were either going towards a dropoff, like, a culvert or a set of trees, and I knew that if I either got — dropoff the culvert or smashed up against the trees that I probably wasn't going to be there for very long.

TrialTr. 176:16–179:10. Greenland only stopped when his tractor was no longer able to maintain traction in a patch of mud, as the weight of Sheriff Boswell's vehicle on the bale spears was lifting up the tractor's back wheels. *See* TrialTr. 179:11–16; TrialTr. 193:19–194:5.

After Greenland rammed the sheriff's car and came to a stop, the two deputies positioned their vehicles near the tractor, exited, and drew their weapons. At that point, Greenland surrendered; he turned

off the tractor and eventually submitted to arrest. *See* TrialTr. 146:9–147:15; TrialTr. 160:6–162:16. Sheriff Boswell needed assistance from one of the deputies to get out through the passenger-side door of his impacted vehicle, which had been pushed into the ditch. *See* TrialTr. 147:9–15; TrialTr. 162:12–163:3. Sheriff Boswell was uninjured, but he had feared for his life. *See* TrialTr. 178:8–18; *id.* at 186:25–187:4.

Sheriff Boswell's vehicle was not marked, but it was the middle car, directly between two other vehicles that *were* marked as Decatur County Sheriff vehicles. And Sheriff Boswell's car had "very visible" emergency lights, and they were all engaged—flashing red and blue. *See* TrialTr. 142:21–145:1; State's Ex. 15; App. 27; *accord* TrialTr. 174:5–7; TrialTr. 182:13–183:12; TrialTr. 185:20–186:23.

In its written verdict, the trial court found Greenland guilty of assaulting Sheriff Boswell with intent to inflict serious injury and with knowledge that Sheriff Boswell was a peace officer, and also found him guilty of attempting to kill Sheriff Boswell with knowledge that Sheriff Boswell was a peace officer and was acting in official capacity. *See* Verdict (7/16/21); App. 29–41.

Additional facts will be discussed when relevant.

ARGUMENT

I. The evidence was sufficient to support conviction.

Preservation of Error

There is no longer an error-preservation requirement for challenges to sufficiency of the evidence on direct appeal. *See State v. Crawford*, 972 N.W.2d 189, 194–202 (Iowa 2022).

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *See State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

Merits

A verdict withstands a sufficiency challenge if it is supported by substantial evidence. That means evidence which, if believed, would be enough to "convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *See State v. Hennings*, 791 N.W.2d 828, 823 (Iowa 2010) (quoting *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008)). A reviewing court will "view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences tending to support it." *See State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995). That generally means accepting and crediting any testimony and reasonable inferences that align with the verdict.

A. The trial court could infer that Greenland knew that Sheriff Boswell was a peace officer.

Greenland argues that the evidence was insufficient to support a finding that he knew that Sheriff Boswell was a peace officer. *See* Def's Br. at 20–22. Greenland is incorrect to suggest that the heightened knowledge requirement for eluding is applicable here. The State did not have to prove that his actions were directed at "a marked official law enforcement vehicle driven by a uniformed peace officer after [he was] given a visual and audible signal to stop." *See id.* at 22. It only had to prove that Greenland knew that Sheriff Boswell was a peace officer.

Sheriff Boswell was in the middle car. The lead car was marked. All three had their emergency lights activated, flashing red and blue. That included Sheriff Boswell's vehicle. *See* TrialTr. 142:21–145:1; TrialTr. 174:5–7. This was more than just a single light bar:

> There is visor lights, which would be just below the roof line. On the picture they're red and blue. There's license plate lights, which in the picture are red and blue. Right above the license plate there's two flashing strobe lights. They were activated at the time, but the picture does not show it. On the left-hand side of the picture, which would be the passenger side of the Explorer, down at the running boards is a blue light that flashes, and on the driver's side in the same area would be a red light that flashes.

TrialTr. 182:13–183:12; State's Ex. 15; App. 27. Also, the license plate said "Iowa sheriff," with a star. *See* State's Ex. 15; App. 27.

The trial court could infer that Greenland would know that the person driving that car with the "Iowa sheriff" license plate and the flashing red and blue lights—between two other vehicles marked as Decatur County Sheriff vehicles—would be a peace officer. He had a clear view of the lead car; he saw "the fully marked vehicle operated by [a uniformed deputy] enter the driveway with its emergency lights operating." *See* Verdict (7/16/21) at 9; App. 37; TrialTr. 134:6–12; 136:23–25. It could also infer that Greenland would expect that law enforcement would respond to reports of what he had already done, so he would understand that these cars were being driven by officers "acting in the officer's official capacity." *See* Iowa Code § 707.11(5)(b). As the trial court explained:

> At the time of the impact on Sheriff Boswell's vehicle, its red and blue emergency lights were operating. That vehicle entered the premises on 120th shortly after the fully marked vehicle driven by [a uniformed deputy] entered the premises. [Greenland] was fully aware of the events that had transpired earlier including a fist fight with his nephew, deliberate ramming of his brother's vehicle, and attempts to chase [Trevor], [Quayle], and [Monte] with the tractor, causing them to leave the premises. He knew why law enforcement vehicles were coming to the premises. He knew that those vehicles were operated by peace officers acting in the performance of their duties.

Verdict (7/16/21) at 11; App. 39. This element was proven by valid and reasonable inference from the evidence, so Greenland's challenge fails.

B. Greenland committed an assault with intent to inflict serious injury on Sheriff Boswell when he raised the bale spears and rammed them into the driver's side of Sheriff Boswell's vehicle.

Greenland argues "it is possible [he] was attempting to place the bale spears under the vehicle but wasn't aware the bale spears could not be lowered far enough to fit under the vehicle." *See* Def's Br. at 23. This ignores the evidence that Greenland *raised* the bale spears as he accelerated towards Sheriff Boswell's vehicle. *See* TrialTr. 138:4–139:20. Sheriff Boswell testified: "I made eye contact with [Greenland] who was in the tractor. He saw me. He raised up the tines of the bale stabbers, and he turned right into my car." *See* TrialTr. 174:18–22. This supports the inference that Greenland specifically intended for the bale spears to ram into the driver's side door and pierce through into the passenger compartment, causing injury to the driver.

The trial court could infer that Greenland intended to cause injury to Sheriff Boswell because that was "[t]he natural result of an act that causes the bale tines to penetrate the passenger compartment of an occupied vehicle." *See* Verdict (7/16/21) at 11; App. 39; *accord State v. Chatterson*, 259 N.W.2d 766, 770 (Iowa 1977) (explaining that specific intent to cause injury can be established with an inference that "a person intends the natural consequences of his intentional acts").

Note that Greenland specifically chose to ram Sheriff Boswell's vehicle. He could have stayed on the driveway and driven past all three law enforcement vehicles—but instead, he turned off of the driveway and directed his bale spears into the driver-side door of the vehicle that Sheriff Boswell was driving. *See* TrialTr. 174:8–175:16; State's Ex. 4–5; App. 16–17; *see also* TrialTr. 191:11–24 ("[H]e had a clear line out of the driveway. And when he saw me parked in the grass, he changed directions and came at my car. . . . I was completely out of his way and he chose not to go that way."); *accord State v. St. Cyr*, No. 20–0628, 2021 WL 4891065, at *6 (Iowa Ct. App. Oct. 20, 2021) (rejecting claim that "collisions with the van were merely efforts to leave the scene and were not intended to be assaultive conduct" when evidence supported inference that the collisions were deliberate and were accomplished by "driving directly into the driver's side of the van in front of him"). He could have avoided Sheriff Boswell's vehicle entirely, or he could have lowered the bale spears (or not raised them). Instead, Greenland chose to ram Sheriff Boswell's vehicle, with the bale spears raised to a height where they would pierce the driver-side door and cause serious injury by either impaling or crushing the driver. *See* TrialTr. 175:20–176:15; TrialTr. 180:2–181:2; State's Ex. 11–12; App. 23–24.

C. Greenland attempted to murder Sheriff Boswell by continuing to drive forward as his bale spears trapped Sheriff Boswell in the vehicle, where he would be impaled or crushed in the next collision.

The first time that Sheriff Boswell feared for his life was when he saw Greenland raise the bale spears and accelerate towards him. The second time that Sheriff Boswell feared for his life was when he realized that Greenland was still pushing his vehicle, as he was trying to "stay away from the bale time"—and it looked like Greenland was driving them towards "a culvert or a set of trees," and he was about to get "smashed up" inside his vehicle. *See* TrialTr. 176:7–179:10; *accord* State's Ex. 6–10; App. 18–22. At that point, it would have been obvious to Greenland that he had speared a vehicle with the driver still inside, and any further head-on collision would either drive those bale spears further into the passenger compartment (spearing the trapped driver) or crumple the car (crushing the driver inside).

Still, Greenland kept going. He completed a 90-degree turn onto an adjoining roadway. He could have proceeded straight down that roadway. But instead, he veered to the right, towards a group of trees—so a collision with a nearly immovable object was imminent and would have likely occurred if Greenland had not lost his traction in the mud. *See* TrialTr. 178:24–179:16; State's Ex. 10; App. 22; Def's

Ex. A; App. 28; TrialTr. 193:19–194:5. This was an additional attempt to kill Sheriff Boswell by impaling him or crushing him—*after* the initial ramming assault—by continuing to push the sheriff's vehicle towards a second collision. In doing that, Greenland "expected [he would] set in motion a force or chain of events that would cause or result in the death" of Sheriff Boswell. *See* Verdict (7/16/21) at 10; App. 38.

The trial court could infer that Greenland's subsequent driving was intended to cause the bale spears to pierce much further into the passenger compartment of Sheriff Boswell's vehicle (or crush it), and so "the natural result" of that subsequent act "is death to the occupant of the vehicle impacted." *See* Verdict (7/16/21) at 10–11; App. 38–39. Note that the pictures do not show the full extent to which the spears penetrated into the vehicle's passenger compartment, while the tractor was still pushing forward. *See* TrialTr. 180:2–182:9; State's Ex. 11–14; App. 23–26. At that point, Sheriff Boswell was truly trapped—the door of his vehicle "was pressed up against [his] ribs while [he] was laying over the computer." *See* TrialTr. 181:9–17. Greenland would be able to see that Sheriff Boswell was trapped and "bracketed," and that pushing the right spear further in would gore him—and, seeing that, he steered towards a suitable collision. *See* Verdict (7/16/21) at 6; App. 34.

Greenland argues that "none of the other vehicles previously impacted by [him] were occupied." *See* Def's Br. at 23. But there was no evidence that Greenland tried to push Monte's unoccupied pickup into another collision—instead, he disengaged from Monte's pickup and chased Trevor, Quayle, and Monte. The evidence supported an inference that Greenland knew how to disengage his bale spears from a vehicle that he had rammed—he had done it, just moments earlier. But this time, he kept pushing the sheriff's vehicle towards another head-on collision *because it was occupied*, and because he wanted to impale or crush the person inside. This bolsters the strong inference that he acted with specific intent to kill Sheriff Boswell. *Cf. State v. Shoemaker*, No. 18–1382, 2019 WL 5067177, at *3 (Iowa Ct. App. Oct. 9, 2019) (finding sufficient evidence for attempted murder by vehicle when the evidence "established that Shoemaker was able to see Chief Behning's service vehicle for several seconds before the collision" and also "established his willingness to use the vehicle he was driving as a battering ram several times" during events preceding that collision).

The evidence supports the trial court's finding that Greenland acted with specific intent to kill Sheriff Boswell. *See* Verdict (7/16/21) at 9–12; App. 37–40. As such, Greenland's challenge fails.

II. Merger of these two convictions is not required.

Preservation of Error

Error was not preserved. Greenland never raised the issue of merger before sentencing. But since this is a claim that his separate sentences are illegal under section 701.9, it can be raised for the first time on appeal. *See State v. Love*, 858 N.W.2d 721, 723 (Iowa 2015).

Standard of Review

"We review the failure to merge convictions required by statute for correction of errors at law." *See State v. Johnson*, 950 N.W.2d 21, 23 (Iowa 2020).

Merits

Greenland argues that, under *State v. Braggs*, assault is a lesser-included offense of attempted murder, so merger is required. *See* Def's Br. at 15–18 (citing *State v. Braggs*, 784 N.W.2d 31, 36–37 (Iowa 2010)). This Court should reject that argument.

A. Even under *Braggs*, merger is not required because the evidence supports two convictions. Each of these two offenses can be established by proof of a separate assault and attempted killing.

"Merger is not required when each charged offense may be proven by a different criminal act." *See State v. Clay,* No. 14–0864, 2015 WL 4935606, at *6 (Iowa Ct. App. Aug. 19, 2015) (citing *State v.*

McKettrick, 480 N.W.2d 52, 56 n.2 (Iowa 1992)); *accord State v. Bibby*, 21–0565, 2022 WL 3068909, at *3 (Iowa Ct. App. Aug. 3, 2022) (citing *State v. Smith*, 573 N.W.2d 14, 19 (Iowa 1997) and agreeing with the argument that "merger is inappropriate here because each conviction is supported by a separate assault").

Sheriff Boswell's testimony illustrates that there were two acts that caused him to fear for his life. The first was Greenland's act of driving towards him and ramming his vehicle with the bale spears, to begin with. The second was Greenland's distinct act of driving onward after that initial collision, pushing Sheriff Boswell's vehicle along as he turned a corner and headed towards a treeline where he could collide with something that would cause the sheriff to be impaled or crushed. *See* TrialTr. 177:24–178:18. These are two qualitatively different acts. And Greenland had time to reflect and deliberate on that second act, as he rounded a corner (and as Sheriff Boswell grabbed his radio and called out for help). *See* TrialTr. 179:20–180:1; *cf. State v. Velez*, 829 N.W.2d 572, 582–83 (Iowa 2013) (discussing break-in-the-action test as "a way to define if a separate act had occurred"); *State v. Walker*, 610 N.W.2d 524, 526–27 (Iowa 2000) (knocking victim to the ground and kicking victim on the ground supported two separate convictions).

Thus, even if similar convictions would merge under other circumstances, Greenland's convictions would not merge because the record establishes that Greenland committed separate criminal acts to support separate convictions for assault and attempted murder. First, he turned his tractor towards Sheriff Boswell's vehicle, raised his bale spears, and rammed the driver-side door with those spears. That was an assault. Then, he pushed the vehicle around the corner and veered off towards the treeline, intending to cause a collision that would impale or crush the peace officer trapped inside (before he was foiled by his loss of traction in the mud). That was attempted murder. Each act occurred at a distinct point in time. Greenland could have committed the initial assault without proceeding onward to attempt to impale or crush Sheriff Boswell, a fair distance down the roadway. And each act caused Sheriff Boswell to experience a separate moment of fear of imminent death or injury. *See* TrialTr. 177:24–178:18. Thus, even under *Braggs*, these two convictions would not merge.

B. *Braggs* is incorrect. Assault is not a lesser included offense of attempted murder.

The Iowa Supreme Court should overrule and disavow *Braggs* because it is incompatible with other Iowa precedent on merger. Here is the reasoning from *Braggs*, in its entirety:

> Even though the attempted murder statute no longer includes assault in its title, it is impossible to commit attempted murder without also performing an act which meets the statutory definition of an assault under Iowa Code section 707.1(1).
>
> Both statutes require an expectation that the act will result in some harm. Attempted murder requires that the person expects to do something which will cause or result in the death of another. Iowa Code § 707.11. Assault has a similar element in that the offense requires a person have "the apparent ability to execute the act." *Id.* § 708.1. Apparent ability under the assault statute means only that the ability to complete the act be apparent to the actor, meaning "'that his expectations of placing another in fear [or of causing them pain or injury] must be reasonable.' " *State v. Jackson*, 305 N.W.2d 420, 423 (Iowa 1981) (quoting 4 John L. Yeager & Ronald L. Carlson, *Iowa Practice: Criminal Law and Procedure* § 174 (1979)), *overruled on other grounds by State v. Lyman*, 776 N.W.2d 865, 873 (Iowa 2010); *accord Bacon ex rel. Bacon v. Bacon*, 567 N.W.2d 414, 418 (Iowa 1997) (stating what is important is the actor's intent, not the victim's perception). We find assault as defined under Iowa Code section 708.1(1) is a lesser-included offense of attempt to commit murder, as attempted murder cannot be committed without committing an assault as defined under that subsection.

Braggs, 784 N.W.2d at 36–37.

There are three problems with the analysis in *Braggs*. First, it conflicts with the plain language of the relevant statutes (section 708.1 and section 707.11). Second, it ignores the applicable portion of Yeager and Carlson's commentary, which supports the opposite result. Third, and perhaps most importantly, it misapplies the impossibility test.

1. An assault requires "apparent ability to *execute* the act" causing injury. Attempted murder only requires an act "by which the person expects to *set in motion* a force or *chain of events* which will cause or result in the death of the other person." An attempt can occur before or without assault.

Braggs is right that an assault is usually part of an attempt to commit murder. But it is generally the *last* part, and actions taken up to that point can amount to "attempted murder" long before that. *See State v. Spies*, 672 N.W.2d 792, 797–98 (Iowa 2003) (quoting *State v. Roby*, 188 N.W. 709, 714 (Iowa 1922)). That is why section 707.11 does not contain the same requirement of "apparent ability to execute" a specific act "intended to cause pain or injury," which defines assault in section 708.1(2)(a). Attempted murder can be established by proof of acts that "set in motion a force or chain of events" which eventually will "cause or result in the death of the other person." *See* Iowa Code § 707.11(1). That chain of events can include further action to be taken by the defendant. *See, e.g.*, *State v. Carberry*, 501 N.W.2d 473, 475, 477 (Iowa 1993) (finding sufficient evidence to prove attempted murder when defendant told Myre that they needed to kill Hall, "forced [Hall] from the truck, and held [Hall] while Myre went to fetch a large rock").

While an assault is often the "last proximate act" in a murder, the crime of attempted murder does not require completion of that

last proximate act. *Accord State v. Leggio*, No. 09–0990, 2010 WL 624221, at *4 (Iowa Ct. App. Feb. 24, 2010) (quoting *State v. Erving*, 346 N.W.2d 833, 836 (Iowa 1984)) (defining actus reus of attempt as acts that "reach far enough towards the accomplishment . . . to amount to the commencement of the consummation"—but they do not need to include "the last proximate act to the consummation of the offense").

A "chain of events" to result in death may be "set in motion" long before anyone has "apparent ability to execute" a last proximate act that can cause injury. An attempt may even be *foiled* before that. *See, e.g.*, *Gentilini v. State*, 231 P.3d 1280, 1285 (Wyo. 2010) (finding sufficient evidence for attempted murder when defendant fought with victim, said he would be back with a gun, went home, retrieved a gun, returned to the scene with the gun, saw police there, tried to flee, and then later told police that he "came back to kill him"); *State v. Reeves*, 916 S.W.2d 909, 910, 913–14 (Tenn. 1996) (finding sufficient evidence for attempted murder when co-defendants brought rat poison to their teacher's desk but were stopped before they could pour it in her coffee, and explaining that "failing to attach criminal responsibility . . . until the actor is on the brink of consummating the crime endangers the public and undermines the preventative goal of attempt law").

Section 707.11(1) criminalizes attempts to commit murder that have "gone beyond mere preparation" but are foiled before their final execution. *See Leggio*, 2010 WL 624221, at *4 (citing *Spies*, 672 N.W.2d at 797). Section 708.1(2)(a) does not—it only applies if the actor had "apparent ability to execute the act" and cause an injury. *See* Iowa Code § 708.1(2)(a). So attempted murder can be committed without committing an assault, which means that assault is not a lesser included offense of attempted murder.

2. The 1978 criminal code revision, together with Yeager and Carlson's authoritative commentary, establishes that attempted murder is not assault and does not include assault as a lesser offense.

Before the 1978 revisions to the criminal code, attempted murder was specifically defined as an assault offense. *See* Iowa Code § 690.6 (1968). The decision to remove any reference to assault from the definition of a crime formerly labeled "assault with intent to murder" must be construed as deliberate. *See Davis v. State*, 682 N.W.2d 58, 61 (Iowa 2004) ("When an amendment to a statute adds or deletes words, a change in the law will be presumed unless the remaining language amounts to the same thing."); *accord Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013) (quoting *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 637 (Iowa 2002))

(discussing the principle of *expressio unius est exlusio alterius*—"legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned"). Beyond typical canons of statutory construction, leading commentary also confirmed that the 1978 Iowa Criminal Code intentionally broadened the scope of Iowa's attempted murder statute.

> The code does not contain a general criminal attempts provision. The preferred approach is to define the substantive crime in such a way as to include within its definition all activity which is to be considered as criminal. For obvious reasons, attempts to commit homicide cannot be dealt with in this way. Prior Iowa law depended primarily on the assault law to cover the attempt problem . . . , and this code also contains such provisions, § 708.3. However, all attempted homicides are not assaults, and the function of this section is to define all unsuccessful homicides which are to be made criminal.

Yeager & Carlson, *Iowa Practice: Criminal Law & Procedure* § 161, at 49. Thus, section 707.11 was designed to criminalize attempted murder *without* requiring an assault.

Contrast section 707.11 with statutes defining assault crimes—its definition of attempted murder does not include the word "assault" and it does not reference section 708.1. *Compare* § 707.11(1), *with* §§ 708.2A(1), 708.3. Nor does it incorporate "apparent ability to execute" or any other language that resembles assault under section 708.1(2)(a).

Compare § 707.11(1), *with* § 708.1(2)(a). Generally, "[w]here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed." *See Farmers Co-op Co. v. DeCoster*, 528 N.W.2d 536, 539 (Iowa 1995). And attempted murder appears in chapter 707. If it were an assault crime, it would be found in chapter 708, alongside other assaults. *See* §§ 708.2(1), 708.4; *cf. State v. Meyers*, 129 N.W.2d 88, 90 (Iowa 1964) (noting that "assault with intent to commit rape is not an included offense in incest," in part because those offenses "are found in different chapters of the code"); *State v. Wilson*, No. 15–1141, 2016 WL 1359051, at *2 (Iowa Ct. App. Apr. 6, 2016) ("[B]ecause the crimes are found in two different chapters of the Iowa Code, each has a separate purpose and each address[es] a different harm. . . .").

In adopting the 1978 revised criminal code, the Legislature chose *not* to define attempted murder using the term assault, or using terms that it used to define or describe assaults. It also chose *not* to put attempted murder in Chapter 708, titled "Assault." Those choices reflect a legislative intent to "define all unsuccessful homicides which are to be made criminal" without requiring that they include assaults, because of the reality that some attempted murders "are not assaults."

See Yeager & Carlson, *Iowa Practice: Criminal Law & Procedure* § 161, at 49. *Braggs* quoted Yeager and Carlson's commentary for a different proposition, while ignoring the more relevant portion of that same commentary that explained why the legislature did not intend for assault to be a lesser included offense of attempted murder.

3. It is possible to commit attempted murder without committing assault, so assault is not a lesser included offense of attempted murder.

"To determine whether a crime is a lesser included offense of another crime, [Iowa courts] use the 'impossibility test.'" *See State v. Johnson*, 950 N.W.2d 232, 236 (Iowa 2020) (quoting *State v. Miller*, 841 N.W.2d 583, 588 (Iowa 2014)). Merger is not required if it is possible to commit the "greater" offense and not the "lesser" offense. "In deciding whether a crime is a lesser included offense, we look to the elements of the offense, not to the particular facts of a case." *See id.* at 237 (citing *Krogmann v. State*, 914 N.W.2d 293, 325 (Iowa 2018)). For example, *Johnson* held that homicide by reckless driving was not a lesser included offense of homicide by OWI because it could identify scenarios where homicide by OWI would not involve driving at all:

> . . . Johnson's argument goes, one can't cause an unintentional death by operating a vehicle without also driving it. But as the State shows, situations are easy to conceive to defeat this argument. Say, for example, an

> intoxicated person starts a car in a closed garage with an infant buckled in the backseat and immediately passes out in the driver's seat, resulting in the death of the infant by carbon monoxide poisoning. *See, e.g.*, *In re Rugh's Est.*, 211 Iowa 722, 234 N.W. 278, 278 (1931) (describing a factual scenario in which two children perished from carbon monoxide poisoning in a car in a closed garage along with their mother). This act would fit the definition of unintentionally causing death "by operating a motor vehicle while intoxicated." But it would not involve driving, let alone "reckless driving."
>
> Which takes us back to the impossibility test: Does the homicide by intoxicated operation include every essential element of homicide by reckless driving? No, because "driving" is an essential element of homicide by reckless driving, but isn't an element required to prove homicide by intoxicated operation. . . . The fact that Johnson's conduct in this case involved driving and not some nonmoving form of operating a vehicle doesn't change the analysis.

Id. at 237. By the same token, if there is a fact pattern where a person would commit attempted murder without committing assault, then assault cannot be a lesser included offense of attempted murder.

The obvious example is murder-for-hire. *See Leggio*, 2010 WL 624221, at *4–5. Leggio hired someone to commit murder—there was nothing left for him to do, before the murder would be carried out (or so he thought). Nobody committed any assault at any point. Still, the Iowa Court of Appeals held that was sufficient to establish that Leggio attempted to commit murder, and rightly so. *See id.*; *accord People v. Superior Court [Decker]*, 157 P.3d 1017, 1022–23 (Cal. 2007) ("Although

Decker did not himself point a gun at his sister, he did aim at her an armed professional who had agreed to commit the murder.").

Or consider an attempt to commit murder by abandoning the victim in the wilderness, under circumstances where the defendant knew and intended that the victim would not be able to survive. *See, e.g.*, *Dillon v. Warden, Ross Correctional Inst.*, 541 Fed. Appx. 599, 608 (6th Cir. 2013) (finding the evidence supported conviction for attempted murder because a fact-finder "could have concluded that Dillon dumped M.B., a fourteen-month-old child, in a wilderness area on a winter night and that this abandonment constituted a substantial step toward the commission of murder"). This attempted murder can be fully carried out without an assault, too.

Additionally, as previously discussed, there are foiled attempts. *See Gentilini*, 231 P.3d at 1284–85; *accord State v. Wilson*, 346 P.2d 115, 121–22 (Or. 1959) (quoting *People v. O'Connell*, 60 Hun. 109, 14 N.Y.S. 485 (1891)). "[T]he law of attempts would be largely without function if it could not be invoked until the trigger was pulled." *See State v. DiSanto*, 688 N.W.2d 201, 207 (S.D. 2004) (quoting *People v. Dillon*, 668 P.2d 697, 703 (Cal. 1983)). A murder plot that is foiled just before anyone commits an assault can still be attempted murder.

The Maryland Court of Appeals identified a variety of other ways to commit attempted murder without committing assault:

> [A]n overt act can qualify as an attempt and yet not rise to the level of an assault. For example, . . . [a]n aborted attempt to bomb an airplane would not be an assault, but it would be attempted murder. . . . If a defendant procures the services of a "feigned accomplice"—someone who pretends to go along with a criminal undertaking—the defendant's acts in furtherance of the crime may constitute attempted murder, but not assault.
>
> [. . .]
>
> The Model Penal Code's treatment of inchoate crimes illustrates the wide range of acts that would be sufficient to establish an attempt but would not be assaultive. Section 5.01(2) of the Code lists seven different actions as potential "substantial steps" that can qualify as attempts. These include lying in wait, enticing the victim to go to the planned site of the crime, reconnoitering, unlawful entry, possession of materials and soliciting an agent. . . . None of these activities involves an assault.

Hardy v. State, 482 A.2d 474, 477–78 (Md. 1984) (citations omitted). Put simply, "not all attempted murders are accomplished by assaults." Jeffrey F. Ghent, Annotation, *What Constitutes Attempted Murder*, 54 A.L.R.3d 612 § 11[a] (published 1973, updated weekly).

It is possible to commit attempted murder without committing an assault. That establishes that *Braggs* is wrong, and that assault is not a lesser included offense of attempted murder. This Court should overrule *Braggs* and hold that a conviction for assault does not merge into a conviction for attempted murder, under any circumstances.

CONCLUSION

The State respectfully requests that this Court reject each of Greenland's challenges and affirm his convictions and sentences.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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