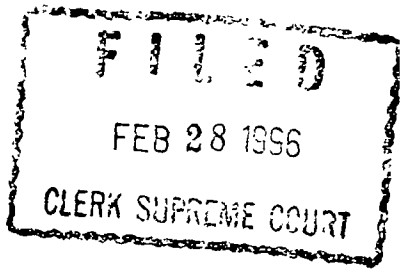
**IN THE COURT OF APPEALS OF IOWA**

001189

No. 5-713 / 95-38




**STATE OF IOWA,**

Appellee,

**vs.**

**PAUL RUSSELL SCOTT, Sr.,**

Appellant.

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Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Paul Scott, Sr., appeals his conviction and sentence for one count each of assault with intent to cause serious injury and willful injury. **REVERSED AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, John F. Fatino, and Kevin Cmelik, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and Mark Sandon, Assistant County Attorney, for appellee.

Heard by Habhab, P.J., and Cady, J., and Perkins, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

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**CADY, J.**

This appeal requires us to decide whether separate convictions for willful injury and assault with intent to commit serious injury merge because they were based on one continuing incident. We conclude the two convictions merged, and reverse and remand the case for resentencing.

Paul Scott, Jr. entered the home of his estranged wife, Lori, in the morning hours of July 1, 1994. Lori was asleep in her bedroom. Scott climbed into Lori's bed, straddled her chest and began to choke her by pressing the handle of a pool cue against her neck and collarbone. Scott exclaimed he was "O.J. Simpson" and was going to "kill" Lori.

Lori fought back. She grabbed the pool cue with her hands and pushed it away from her. Following the brief struggle in the bed, Scott and Lori found themselves standing next to the bed, where Scott began to strike Lori with the pool cue. He struck her again and again on the head, arms, chest, thighs and knees, wielding the pool cue with both hands. Scott then stopped the beating, told Lori to put a cold compress on her injuries, and eventually left the house.

Lori was bleeding profusely from her injuries. She was unable to call the police because the telephone wires had been ripped from the junction box outside the home. A neighbor eventually summoned police.

Lori was hospitalized for three days. She sustained severe lacerations on her hands, resulting in scaring and loss of some motor skills. The beating produced lacerations on other parts of her body, including her head. All the wounds left scars.

The State charged Scott by trial information with one count of attempt to commit murder and one count of willful injury. The separate counts were not factually distinguished in the trial information, and no bill of particulars was presented.

Scott waived his right to a jury trial, and the case was tried to the court. The district court found him guilty of the lesser-included attempted murder offense of assault with intent to commit serious injury and guilty of the offense of willful injury. The district court subsequently sentenced Scott to consecutive terms not to exceed ten years for the willful injury and two years for the assault with intent. No request was made to merge the two convictions at the sentencing hearing, although defense counsel requested the sentences be imposed concurrently since the charges were "a result of the same acts."

Scott appeals. He contends his convictions should have merged for the purpose of sentencing. The State argues the district court correctly imposed two separate sentences because the two convictions were based on two separate episodes. The State asserts the willful injury conviction was based on the choking which took place on the bed, while the assault conviction was based on the beating which took place next to the bed.

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The State is not limited to prosecuting a single charge from one episode when more than one criminal statute has been violated. *State v. Burton,* 231 N W 2d 577, 578 (Iowa 1975). *See State v. Perry,* 440 N.W.2d 389, 391-92 (Iowa 1989). The general test for determining whether two separate offenses can be prosecuted and punished out of a single incident is whether each offense requires proof of at least one element which the other does not. *State v. Butler,* 415 N.W.2d 634, 637 (Iowa 1987).

Willful injury is not a lesser-included offense of attempted murder and the two crimes may be prosecuted separately. *State v. Clarke,* 475 N.W.2d 193, 194-96 (Iowa 1991). We have previously held, however, the crime of assault with intent, as a lesser-included offense of willful injury, merges with the offense of willful injury when based on a single episode. *State v. Blanks,* 479 N.W.2d 601, 606 (Iowa App. 1991). The imposition of multiple punishment for the same or lesser-included offenses violates the double jeopardy clause. *State v. Wissing,* 528 N.W.2d 561, 565 (Iowa 1995). Thus, the crimes of assault with intent and willful injury must merge in this case if they were prosecuted and submitted as a single incident.

On the other hand, the State may convict a defendant of both assault with intent and willful injury if the case is presented as two separate incidents and the verdict rendered by the fact-finder is based on separate incidents. *See State v. Newman,* 326 N.W.2d 788, 793 (Iowa 1982). Defendants may not repeatedly assault their victims and claim protection by arguing their conduct constituted a single crime. *Id.* Different assaults upon different parts of a victim's body can form the basis for

finding a defendant committed separate and distinct crimes. *State v Constable*, 505 N W.2d 473, 478 (Iowa 1993). *See* Iowa R. Crim. P. 6 (1). Each assault constitutes the violation of a protected interest of the victim. Thus, our important inquiry turns to whether the case was tried, submitted, and decided as separate events or one continuing episode.[1]

Our careful review of the record shows the case was submitted to the court as one continuing event and the verdict reflected one continuing event. The district court's well-written findings of fact and conclusions of law revealed a mental process which considered the events as a whole. This was disclosed several ways. Assault with intent and willful injury share the common element of intent to cause a serious injury. The district court, however, did not consider separate facts to support the separate elements. Instead the court wrote:

> Given the number of blows inflicted upon Lori, the fact that the blows were placed to vital areas of Lori's body including her head, the force of the blows as evident from the photographs and testimony and the statements made by defendant at the time of the assault, the conclusion is inescapable that defendant intended to cause serious injury to Lori and did so.

Similarily, the district court considered all the circumstances together, from Scott's "statements during the assault" to the evidence Scott remained in the house for a period of time after the beating, to conclude Scott did not harbor an intent to kill Lori, an essential element to sustain a conviction for attempted murder. The district

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[1] Because we hold the case was tried and decided on one continuous episode, it is unnecessary to determine if the facts actually support multiple charges.

court, at no time, made any effort to distinguish between Scott's actions while on the bed and his actions while next to the bed.

Accordingly, the conviction for assault with intent must be merged with the conviction for willful injury. We vacate the conviction for assault with intent and reverse and remand for resentencing on the merged conviction of willful injury.

**REVERSED AND REMANDED FOR RESENTENCING.**