IN THE SUPREME COURT OF THE STATE OF NEVADA

QUINZALE MASON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67830

FAST TRACK STATEMENT

1. Appellant, Quinzale Mason.

2. John Reese Petty, Chief Deputy, Washoe County Public Defender's Office, 350 South Center Street, 5th Floor, Reno, Nevada 89501; (775) 337-4827.

3. Same as above.

4. Second Judicial District Court in and for the County of Washoe, in District Court Case Number CR14-1830, Department No. 10.

5. The Honorable Elliott A. Sattler, district judge.

6. Trial in this matter took four days.

7. One count of battery with a deadly weapon, a violation of NRS 200.481(2)(e), one count of assault with a deadly weapon, a violation of NRS 200.471, and one count of being a felon in possession of a firearm, a violation of NRS 202.360, as charged in an amended information.

8. Judge Sattler sentenced Mr. Mason to a term of 36 to 120 months in the Nevada Department of Corrections on Count I, with credit for 218 days time served. On Counts II and III Judge Sattler imposed concurrent terms of 24 to 60 months in the Nevada Department of Corrections with zero credit for time served. Judge Sattler ordered Count II be served consecutively to Count I. Additionally, Judge Sattler ordered Mr. Mason to pay required fees and assessments and to reimburse Washoe County $1000.00 for legal representation. 1JA 86-87 (Judgment).[1]

9. March 17, 2015.

10. March 17, 2015.

11. Not applicable.

12. Not applicable.

13. On April 15, 2015, at Mr. Mason's request, the Washoe County Public Defender's Office filed a notice of appeal. 1JA 88-89 (Notice of Appeal).

14. NRAP 4(b).

15. NRS 177.015(3).

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[1] "JA" stands for the Joint Appendix (comprising four volumes).

16. Judgment after jury verdicts. 1JA 43, 44, 45 (Verdicts).

17. Not applicable.

18. Not applicable.

19. Not applicable.

20. The State charged Mr. Mason with three felony counts one of which was possession of a firearm by a felon. 1JA 1-4 (Amended Information). Trial was bifurcated pursuant to *Morales v. State*, 122 Nev. 966, 143 P.3d 463 (2006), with Mr. Mason tried by the same jury first for battery and assault with a deadly weapon and then (after conviction on these counts) for possession of a firearm by a felon. The jury convicted Mr. Mason on each of the three counts. 1JA 43, 44, 45 (Verdicts). Thereafter, Judge Sattler sentenced Mr. Mason to prison, 1JA 86-87 (Judgment), and he appeals. 1JA 88-89 (Notice of Appeal).

21. Facts[2]

Trial

Huey Paul Stanley, Jr. (Mr. Stanley) lived in an upstairs apartment with his wife, Glorietta, and three of his sons located at 2397 Patton Drive. 2JA 119, 124. On August 9, 2014, he was sitting outside

[2] Additional facts specific to the legal arguments are contained in the argument section.

of his apartment with his wife. He could see some of his neighbors downstairs by the parking lot. 2JA 128-29. As he watched one of his neighbors—Anthony Holly (Anthony)—petting and playing with a dog he saw Mr. Mason park a car in the parking lot. 2JA 130-31. He did not see anyone else in the car. 2JA 131. Mr. Stanley saw Mr. Mason get out of the car and put one hand on the roof of the car "for about a second, then he walked around to the front and disappeared." 2JA 131-32, 133 ("Once he went to the front of the car, I wasn't able to see him no more."), 134 (same), 147 (acknowledging he "couldn't actually see what was going on."). Mr. Stanley "didn't see nothing," but heard "Ah-hah, I got you now," and then seconds later heard a gun: "pow, pow, pow." 2JA 133, 141. The shots came from downstairs. 2JA 134. He saw Anthony start to run for cover or find a way to get out. 2JA 134-35. Around that time Mr. Stanley "fell sideways out of [his] chair," and crawled into his apartment. He told his wife to call 911, but he spoke to them because "she didn't see anything." 2JA 136-37. While he was speaking to the 911 operator he heard a neighbor—Delphine Martin—yell that "her baby got shot." 2JA 137. When the police arrived Mr. Stanley pointed out where Mr. Mason lived (in the same complex). 2JA 138-39 and see 2JA

165-66 (Reno Police Officer Benjamin Lancaster making same point). Finally, Mr. Stanley added that earlier that morning he heard some people gambling outside (playing dice). 2JA 139. They were "screaming and yelling, [and] hollering." He heard Anthony's voice and heard talk about "somebody was cheatin' and they wasn't throwin' the dice right." 2JA 140. Excepting Anthony, Mr. Stanley did not know who else was playing dice. 2JA 149-50, 152.

Anthony Holly lived in the same apartment complex. 2JA 179. On August 9, 2014 he woke up and went outside. He saw some people he knew gambling and he joined the game at their invitation. 2JA 180-81. There were about "five or six" people playing dice. 2JA 183. He played for a while and then got into an argument with Mr. Mason. 2JA 181-82, 183-84. It was a brief argument and Anthony went on about his day. A couple of hours later he was outside "playing with the neighbor's dog," and "someone was shooting at me." 2JA 182, 184-85, and 187 (identifying Mr. Mason as the shooter).[3] Anthony testified that Mr. Mason said something like "I got you now," or "I got your ass," before

[3] Delphine Martin, who was sitting outside with her children, testified that she heard Mr. Mason say something and then saw him shoot at Anthony. 3JA 313, 320, 323-25. Afterward she saw Mr. Mason leave in his car. *Id.* at 329.

shooting in his direction. 2JA 187. When he heard a click, Anthony took off running. 2JA 188-89. He got a friend to give him a ride to his wife's workplace. 2JA 191. Anthony said that when the shots were fired there were other people around him including "two kids and their two dogs." 2JA 193.

Reno Police Officer Benjamin Lancaster arrived at the Patton Street location around noon. He was the first officer to arrive on scene. 2JA 160-61, 162-63. His attention was immediately directed to a little girl that had been struck. He could see "what looked like a gunshot wound to [the lower] calf of her right leg." Officer Lancaster wrapped her leg with gauze and applied pressure until medical personnel arrived. 2JA 164. Later, the officer found two shell casings on scene. 2JA 172-73, 176.[4]

The little girl—four-year-old Cecilia—went to Renown Medical Center by ambulance, 3JA 232-33, 315, and was treated by Dr. Scott Cinelli, a trauma surgeon. 3JA 240-41, 243-44, 246. Cecilia "presented with a wound to her leg" and x-rays showed "metallic fragments lodged between the bones of her leg." 3JA 246. Dr. Cinelli testified that the

[4] The gun was not found, 3JA 423, but the casings had 9 millimeter markings. 3JA 472. No bullets were found at the scene. 3JA 473-74.

"[d]istortion of the metal fragments [was] typical with a ricochet." 3JA 252, and 255 (stating that fragment is a ricochet). Cecelia had some swelling of the leg and so was admitted for overnight observation. Cecelia was discharged from Renown the next day. 3JA 255.

The police focused on finding Mr. Mason. It was determined that Mr. Mason's mother—Valerie Stewart—was flying to Reno from her home in Arizona. 3JA 476-77.[5] Police officers arrived at the Reno-Tahoe International Airport to conduct surveillance. 3JA 380-81. After she landed in Reno she was followed to an address in Sun Valley. 3JA 381-82. After about an hour three females (Ms. Stewart, Ms. Spurlock, and Ms. Spurlock's mother (Stephanie Neal)) and one male came out of the house and got into a car. 3JA 389, 460, 481. Police followed the car until a traffic stop of the car was made on North McCarran Boulevard. 3JA 390-91, 480. Mr. Mason was the sole male occupant of the car. 3JA 391, 392-93. Because Mr. Mason is aggressively diabetic the officers requested REMSA to respond and render some medical assistance. And Mr. Mason was taken to Renown for medical clearance before being

[5] Eboni Spurlock, Mr. Mason's girlfriend, explained Ms. Stewart came because "of what [Mr. Mason] was being accused of and ... she needed to find out what was going on before we took him to turn himself in." 3JA 446, 459.

booked into the Washoe County Jail. 3JA 394, 481-82. According to Reno Police Officer Ryan Koger, Mr. Mason stated that he was on his way "to the station to turn myself in." 3JA 551, 560.

Based on these facts and other facts in the record not pertinent to the central issue on appeal, the jury found Mr. Mason guilty of battery with a deadly weapon and assault with a deadly weapon. 1JA 43, 44 (Verdicts); 4JA 711. Mr. Mason stipulated that he was a felon, 4JA 706-08, and the jury was so instructed. 1JA 42 (Jury Instruction No. 36); 4JA 715. The jury found Mr. Mason guilty of being a felon in possession of a firearm. 1 JA 45 (Verdict); 4JA 716.

Sentencing

Judge Sattler imposed a sentence of 36 to 120 months in the Nevada Department of Corrections for Count 1. On both Counts 2 and 3 Judge Sattler sentenced Mr. Mason to a term of 24 to 60 months in the Nevada Department of Corrections. Judge Sattler added, "the sentence in Count 2 is consecutive to, and not concurrent with, the sentence imposed in Count No. 1." And that "the sentence in Count 3 is concurrent with, and not consecutive to, the sentence in Count 2 and, therefore, the sentences in Counts 2 and 3 will be served concurrently,

but they will be consecutive to the sentence imposed in Count 1." 1JA 82. Mr. Mason appeals.

22. Issues

1. Did Judge Sattler err in instructing on "transferred intent" in relation to battery with a deadly weapon?

2. Did Judge Sattler abused his discretion by not aggregating the consecutive terms of imprisonment as required by NRS 176.035(1)?

23. Argument:

1. Judge Sattler erred in instructing on transferred intent in relation to the count of battery with a deadly weapon

Standard of Review and Discussion

"The district court has broad discretion to settle jury instructions, and ... the district court's decision [is reviewed for] an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (footnote omitted). Where a defendant fails to preserve an issue, review is for plain error. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

Here Judge Sattler instructed the jury on "transferred intent." Specifically, he instructed:

> If an illegal and unintended act results from the intent to commit a crime, that act is also considered illegal. The doctrine of transferred

> intent is a theory of imputed liability. The intent to use force or violence against a certain person is transferred or imputed to a different person where the different person is hit; this is so even where the different person is hit by mistake or inadvertence. The doctrine applies in any case where there is intent to commit a criminal act and the only difference between the actual result and the contemplated result is the nature of the personal injuries sustained.
>
> The doctrine of transferred intent is applicable to all crimes where an unintended victim is harmed as a result of the intent to harm an intended victim, whether or not the intended victim is injured.

1JA 35 (Jury Instruction No. 29). Defense counsel did not object to this instruction, 4JA 591, and the prosecution referenced the doctrine several time in argument supporting a guilty verdict for battery (of Cecelia) with a deadly weapon. See 4JA 603-04 (arguing that that instruction means the State "is not required to prove that the defendant had any intent to strike Cecelia. The evidence certainly shows that Cecelia just happened to be in the wrong place at the wrong time. I'm not required to prove that he had any intent against Cecelia."); 626 ("Mr. Mason shot a handgun; it struck Cecelia—a bullet struck Cecelia or at least a ricochet. The transferred intent shows that you can find

him guilty of battery with a deadly weapon.); and 684-85 (returning to transferred intent as to Count I).

"In its classic form, the doctrine of transferred intent applies when the defendant intends to kill one person but mistakenly kills another. The intent to kill the intended target is deemed to transfer to the unintended victim so that the defendant is guilty of murder." *People v. Bland*, 48 P.3d 1107, 1109 (Cal. 2002) (citation omitted); *State v. Brady*, 903 A.2d 870, 875 (Md. Ct. App. 2004) (the doctrine of transferred intent "acts as a substitute for the willfulness, deliberation, and premeditation requited to make out a case of murder in the first degree"); *Ramsey v. State*, 56 P.3d 675, 681 (Alaska. Ct. App. 2002) ("transferred intent is a misleading half-truth because at common law the requisite mental state was 'malice aforethought,' which included the intent to kill *anyone*") (footnote omitted, italics in the original); *Ochoa v. State*, 115 Nev. 194, 197, 981 P.2d 1201, 1203 (1999) (noting that the doctrine of transferred intent "was developed to address situations where a defendant, intending to kill A, misses A and instead accidentally kills B. Without the doctrine, the individual responsible for

B's death could not be charged with murder because there was never an intent to kill B.").

In *Ochoa*, the defendant shot and killed his intended victim (Ortiz) but also shot and injured a bystander (Smith) with one of the bullets intended for the victim. 115 Nev. at 195-96, 981 P.2d at 1202. *Ochoa* was charged with murder (Ortiz) and attempted murder (Smith) and argued that the doctrine of transferred intent did not apply because since he killed his intended victim his intent to kill the victim was met and could not be transferred to the unintended victim (Smith). This Court disagreed and held: "[T]he doctrine of transferred intent is applicable to all crimes where an unintended victim is harmed *as a result of the specific intent to harm* an intended victim whether or not the intended victim is injured." 115 Nev. at 200, 981 P.2d at 1205 (italics added). This Court then said, "[s]ince there was sufficient evidence that Ochoa intended to kill Ortiz, that intent may be transferred to the unintended victim, Smith. As Smith did not die, the appropriate charge was attempted murder." *Ibid.*

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No evidence of intent to kill

In the instant case, there was no evidence presented that Mr. Mason intended to kill Mr. Holly. Indeed, as to Mr. Holly the State charged Mr. Mason with assault with a deadly weapon. 1JA 2 (Count II) (Amended Information). NRS 200.471(1)(a) defines "assault" as either "[u]nlawfully attempting to use physical force against another person," or "[i]ntentionally placing another person in reasonable apprehension of immediate bodily harm." It does not define "assault" as a "specific intent to harm" crime. Thus *Ochoa's* actual holding is inapplicable here.[6]

Ricochet

The evidence established, and the State conceded that Cecelia was simply in the wrong place at the wrong time when she was struck by ricochet fragments. NRS 200.481(1)(a) defines "battery" as "any willful and unlawful use of force or violence upon the person of another." The fact that Cecelia was struck by random fragments is too

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[6] Responding to Ochoa's claim that his was not a "bad aim" case this Court, in dictum, did say, "[theoretically, the doctrine applies in any case where there is intent to commit a criminal act and the only difference between the actual result and the contemplated result is the nature of the personal or property injuries sustained." 115 Nev. at 198, 981 P.2d at 1204. The Court's "theoretical" language was not necessary to the Court's holding and invites, as here, an expansive application of the doctrine of transferred intent.

attenuated to constitute "willful and unlawful use of force" for purposes of the battery statute. Her injury sounds in tort; not criminal law, and the doctrine of transferred intent did not apply.

Because the jury was mistakenly instructed on the doctrine of transferred intent, Mr. Mason was denied a fair trial as to the charge of battery with a deadly weapon. Accordingly, this Court should reverse the conviction on this Count and remand for a new trial with instructions to not give the jury a "transferred intent" instruction.

2. Judge Sattler abused his discretion by not aggregating the consecutive terms of imprisonment as required by NRS 176.035(1)

Standard of Review and Discussion

District court sentencing decisions are reviewed under an abuse of discretion standard. *Silks v. State*, 92 Nev. 91, 545 P.2d 1149 (1976); *Renard v. State*, 94 Nev. 368, 580 P.2d 470 (1978); *Parrish v. State*, 116 Nev. 982, 12 P.3d 953 (2000). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (footnote omitted) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). An abuse of discretion exists where the district court judge does not correctly apply controlling legal

authority. *Cf. Gonzales v. Eighth Judicial Dist. Court*, 129 Nev. ____, ____, 298 P.3d 448, 450 (2013) (finding court's failure to apply controlling legal authority a manifest abuse of discretion and issuing extraordinary writ).

NRS 176.035(1) states in relevant part: "For offenses committed on or after July 1, 2014, if the [district] court imposes the sentences to run consecutively, the court must pronounce the minimum and maximum aggregate terms of imprisonment pursuant to subsection 2, unless the defendant is sentenced to life imprisonment without the possibility of parole or death." NRS 176.035(2)(b) states: "If all the sentences impose a minimum and maximum term of imprisonment, the court must aggregate the minimum terms of imprisonment to determine the minimum aggregate term of imprisonment and must aggregate the maximum terms of imprisonment to determine the maximum aggregate term of imprisonment."

Here the offenses occurred on August 9, 2014, after the July 1st trigger date. And each offense received a minimum and maximum term of imprisonment. Thus the mandatory language of the statute requires aggregate sentencing. See NRS 0.025(c); *Fourchier v. McNeill Const.*

Co., 68 Nev. 109, 122, 227 P.2d 429, 435 (1951) ("must" as used in statute is a mandatory term).

Although neither counsel for the parties nor the representative of the Division of Parole and Probation, nor Judge Sattler even mentioned aggregate sentencing, this Court should reverse for plain error and remand to provide Judge Sattler the opportunity to aggregate Mr. Mason's consecutive sentences while leaving the concurrent sentences as is.

24. Counsel did not object.

25. This appeal does present an issue of first impression or public interest.

26. Routing Statement "The Supreme Court shall hear and decide" questions of statewide public importance. NRAP 17(a)(14). This appeal suggests that the doctrine of transferred intent as established in *Ochoa v. State*, 115 Nev. 194, 981 P.2d 1201 (1999) is being applied beyond the limits of the Court's holding in that case. Additionally, this appeal presents the Court an opportunity to address mandatory, but apparently ignored, language in the sentencing statute, NRS 176.035(1),(2).

VERIFICATION

1. I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This fast track statement has been prepared in a proportionally spaced typeface using Century Storybook in 14-point font.

2. I further certify that this fast track statement complies with the page—or type-volume limitations of NRAP 3C(h)(2) because it is: Proportionately spaced, has a typeface of 14 points and contains 3,315 words.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of

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my knowledge, information and belief.

DATED this 6th day of July 2015.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy
Nevada State Bar No. 10
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 6th day of July 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Terrence P. McCarthy, Chief Appellate Deputy,
Washoe County District Attorney's Office

I further certify that I deposited a true and correct copy of the foregoing in the United States Mail, postage prepaid, and addressed to:

Mr. Quinzale Mason (#1135809)
Northern Nevada Correctional Center
P.O. Box 7000
Carson City, Nevada 89702

John Reese Petty
Washoe County Public Defender's Office