IN THE SUPREME COURT OF THE STATE OF NEVADA

QUINZALE MASON, No. 67830

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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FAST TRACK RESPONSE

1. Name of party filing this Fast Track Response: The State of Nevada.

2. Name, address and phone number of attorney submitting this Fast Track Response: Joseph R. Plater, Deputy District Attorney, Washoe County District Attorney's Office, P. O. Box 11130, Reno, Nevada 89520; (775) 328-3200.[1]

3. Name, address and phone number of appellate counsel if different from trial counsel: See Number 2 above.

[1]The undersigned notes that Colton Loretz, a second-year law student at the William S. Boyd School of Law, provided considerable assistance with this fast track response.

4. Proceedings raising same issues: None.

5. Procedural history: The State accepts appellant's account.

6. Statement of facts:

Trial

This is an appeal from a judgment of conviction, following a jury verdict, finding Quinzale Mason (Mason) guilty of battery with a deadly weapon, assault with a deadly weapon, and being a felon in possession of a firearm. 1 Joint Appendix (JA) 43-45, 86-87.

Anthony Holly (Holly) lived in the same apartment complex as Mason. 2JA 179. On August, 9, 2014, Holly joined in on a game of craps with about "five or six" people, including Mason. *Id.* at 180-184. After a while, Holly got into a fight with Mason over the game. *Id.* at 140, 184-85. The fight did not get physical, and Holly left the area to continue on with his day. *Id.* at 185-86. A couple hours later, Holly was outside "playing with the neighbor's dog at the edge of the parking lot" when Mason pulled up in a car. *Id.* at 187. Mason said something like "'I got you now,'" or "'I got yo ass'" and Holly took off running. *Id.* at 187-88. Mason shot at Holly several times. *Id.* at 188-89, 190. There were several people in the area, including "two kids and their two dogs." *Id.* at 193.

Huey Paul Stanley, Jr. (Stanley) lived near Holly and Mason. *Id.* at 119-120; 126-28. Stanley was sitting outside with his wife watching Holly play with the neighbor's dog when he saw Mason park his car in the parking lot. *Id.* at 129-131. Stanley heard Mason say "'Ah-hah, I got you now'"; seconds later he heard gunshots–"'pow, pow, pow'"–coming from Mason's direction. *Id.* at 133-134, 141. Stanley saw Holly "ducking, going back and forth trying to figure out which way to get out." *Id.* at 134-35. Stanley then heard his neighbor, Delphine Martin, "screaming that her baby got shot." *Id.* at 137.

Reno Police Officer Benjamin Lancaster arrived first on scene where he found a little girl, Cecilia M., who had been shot. *Id.* at 160-61, 163, 164. He could see "what looked like a gunshot wound to . . . her lower [] calf area of her right leg." *Id.* He wrapped the leg with gauze and applied pressure until medical personnel arrived. *Id.* He also found two 9 millimeter casings on scene. *Id.* at 172-173, 176; 3JA 472.

At the hospital, Dr. Cinelli found that the "[d]istortion of the metal fragment[] [in Cecilia's leg was] typical with a ricochet." 3JA 252, 255. When police later arrested Mason, he stated he was on his way "'to the station to turn [him]self in.'" 3JA 551, 560.

Mason did not testify at trial. The jury found him guilty on all three

counts: battery with a deadly weapon, assault with a deadly weapon, and being a felon in possession of a firearm. 1JA 43-45.

Sentencing

The district court sentenced Mason to consecutive sentences of 36 to 120 months for the battery conviction and 24 to 60 months for the assault conviction in the Nevada State Prison. The district court sentenced Mason to 24 to 60 months in prison for being a felon in possession of a firearm conviction, concurrent to the assault conviction. 1JA 86-87.

7. Issues on appeal:

1. Whether the district court committed plain error by instructing the jury on transferred intent–that "if an illegal and unintended act results from the intent to commit a crime, that act is also considered illegal"–where Mason shot his gun at Holly but hit a young girl instead.

2. Whether the district court committed plain error by failing to aggregate Mason's two sentences that each have a maximum and minimum sentence.

8. Argument:

A. The district court did not err in instructing the jury on "transferred intent" in relation to the battery with a deadly weapon offense.

Mason argues the district court improperly gave Jury Instruction Number 29 because there was insufficient evidence at trial to show that he

had the specific intent to injure and/or kill Mr. Holly. He asserts that "Cecilia being struck by random fragments is too attenuated" and therefore does not give rise to criminal liability but rather tort law (Fast Track Statement, 13-14). The State disagrees.

1. Standard of Review

Generally, "[t]he district court has broad discretion to settle jury instructions, and this [C]ourt reviews the district court's decision for an abuse of discretion or judicial error." *Crawford v. State,* 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (footnote omitted). However, because Mason did not preserve this issue at trial, review is for plain error. *See* 4JA 591 (counsel did not object to Jury Instruction No. 29); *Valdez v. State,* 124 Nev. 1172, 1190, 196 P.3d 464, 477 (2008).

2. Discussion

Jury Instruction Number 29 provides:

> 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.

The State presented sufficient evidence at trial from which a rational jury could have concluded that Mason intended to injure and/or kill Holly. Several witnesses saw Mason pull up in a gold car, draw a handgun, and shoot at Holly (Huey Paul Stanley, Jr.: 2JA 133-134; Anthony Holly: 2JA 186-90, 193; Delphine Martin: 3JA 324-330). Mason was yelling, "I got you now," or "I got yo ass" and "ah-hah, I got you now" seconds before he shot at Holly. 2JA 133-134, 187-88. A reasonable jury could have concluded Mason opened fire as revenge or payback for Holly picking a fight with Mason earlier in the craps game, and that Mason therefore shot at Holly with the intent of harming Holly. *See Valdez v. State*, 124 Nev. 1172, 1197, 196 P.3d 465, 481 (2008) ("[T]he jury may infer intent to kill from the manner of the defendant's use of a deadly weapon."); *Dearman v. State*, 93 Nev. 364, 367, 566 P.2d 407, 409 (1977) (use of deadly weapon can be evidence of intent to murder). Mason's specific intent to hurt or kill Holly is thus transferred to Cecilia regardless of whether or not Holly was injured.

Mason further argues he had no intent to kill Holly, since even the State only charged him with assault with a the use of a deadly weapon, which

is not a "'specific intent to harm' crime" (Fast Track Statement, 13). However, even if Mason did not intend to kill or batter Holly, the doctrine of transferred intent still applies here. It is not limited to "bad aim" cases, "where the perpetrator misses the intended victim and accidentally hits an unintended victim"; "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." *Ochoa v. State,* 115 Nev. 194, 198, 981 P.2d 1201, 1204 (1999). Thus, even if Mason intended only to assault–and not hit–Holly with the use of a deadly weapon, the doctrine of transferred intent would still sustain Mason's conviction for assault with the use of a deadly weapon.

Moreover, assault with a deadly weapon is a specific intent crime under NRS 200.471 (1)(a)(2), where one intends to place another in fear of bodily harm by the use of a deadly weapon. *See Wilkerson v. State*, 87 Nev. 123, 126-27, 482 P.2d 314, 316 (1971).

Finally, as Jury Instruction Number 29 informed the jury, the doctrine of transferred intent requires only "the intent to use force or violence against a certain person . . . ." (1JA 35). The crime of assault with a deadly weapon includes "[i]ntentionally placing another person in reasonable apprehension

of immediate bodily harm" with the use of a deadly weapon. NRS 200.471(1)(a)(2). The crime, therefore, involves the intentional use of force or violence. *See Rhyne v. State*, 118 Nev. 1, 13, 38 P.3d 163, 171 (2002) (upholding prior-violent-felony-conviction aggravating circumstance based on conviction for attempted assault with deadly weapon). *See also*, *Burnside v. State*, ___ P.3d ___, 2015 WL 3915852 (Nev. 2015) ("We therefore conclude that attempt offenses should not be excluded from the purview of NRS 200.033(2)(b) as a matter of law); *Nunnery v. State*, 127 Nev., Adv. Op. 69, 263 P.3d 235, 260 (2011) (concluding that evidence of two attempted murder convictions and attempted robbery conviction supported prior-violent-felony-conviction aggravating circumstance); *Thomas v. State*, 122 Nev. 1361, 1375, 148 P.3d 727, 736 (2006) (concluding that prior-violent-felony-conviction aggravating circumstance under NRS 200.033(2)(b) was proved by admission of judgment of conviction for attempted robbery). Since there is sufficient evidence from which a rational jury could have found that Mason intended "to use force or violence" against Holly, the district court correctly gave an instruction on transferred intent.

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B. The Court erred by not "aggregating" the consecutive terms of imprisonment, but the error is harmless because it does not alter the sentence imposed.

1. Standard of Review

The Court in "conducting plain error review, must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." *Green v. State,* 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (footnote omitted). "The burden is on the defendant to show actual prejudice or a miscarriage of justice." *Id.* "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." NRS 178.598.

2. Discussion

Mason claims that the consecutive terms imposed are required to be aggregated because they each have minimum and maximum defined parameters and fall after July 1, 2014, the trigger date of NRS 176.035(1). The State agrees that the district court should have aggregated the sentences.

However, remand on this issue would be inefficient and expensive in order to achieve only a ministerial duty. The State submits that aggregation of the sentences can be achieved by the Department of Parole and Probation without remand and needless use of State resources. The aggregation of the minimum and maximum terms does not affect the sentence length. Thus,

the error is harmless because it does not affect Mason's substantial rights.

The State would mention the hazards of ordering a remand. Such an order may invite the notion that the sentence was altered when in fact remand will only reflect an aggregation of the consecutive sentences. This may result in a flood of appeals for basic aggregation of consecutive terms (after July 1, 2014 pursuant to the statute). This in turn will cost the taxpayers to achieve only a straightforward, ministerial duty.

The Court should affirm the judgment of conviction.

9. Preservation of Issues: Counsel did not object to Jury Instruction Number 29 or to the sentencing aggregation issue.

DATED: July 27, 2015.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JOSEPH R. PLATER
Appellate Deputy

VERIFICATION

1. I hereby certify that this fast track response 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 response has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Constantia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

2. I further certify that this fast track response complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it does not exceed 10 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, 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

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response is true and complete to the best of my knowledge, information and belief.

DATED: July 27, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on July 27, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty
Chief Deputy Public Defender

Shelly Muckel
Washoe County District Attorney's Office