IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 67830

REPLY TO FAST TRACK RESPONSE

Transferred intent

The State charged Mr. Mason with assault with a deadly weapon. 1JA 2 (Count II).[1] On appeal, the State argues that it "presented sufficient evidence … from which a rational jury could have concluded that Mason intended to injure and/or kill Holly." Fast Track Response at 6 FTR). And that "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." *Id.* (citing "intent to kill" cases—*Valdez v. State*, 124 Nev. 1172, 196 P.3d 465 (2008) and *Dearman v. State*, 93

[1] In Nevada criminal assault is either the "[u]nlawful[] attempt[] to use physical force against a person; or [i]ntentionally placing another person in reasonable apprehension of immediate bodily harm." NRS 200.471(1)(a)-(b).

Nev. 364, 566 P.2d 407 (1977)—in support). And concludes, "Mason's specific intent to hurt or kill Holly is thus transferred to Cecilia regardless of whether or not Holly was injured." *Id.* But this conclusion can be reached only by reliance on Justice Becker's theoretical contained in (but unnecessary to the holding of[2]) *Ochoa v. State*, 115 Nev. 194, 981 P.2d 1201 (1999), and quoted by the State at page 7 of the Fast Track Response ("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.") (internal quotation marks omitted, ellipsis in the original).[3]

In criminal law "if transferred intent is not employed, culpability is determined in accordance with the defendant's actual intent toward each victim." *People v. Calderon*, 232 Cal.App. 3d 930, 936 (Cal. Ct. App. 1991). Here, a non-homicide case, the transferred intent doctrine

---

[2] See *Black's Law Dictionary* 1102 (8th ed. 2004) (defining "obiter dictum" as "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential"); and *Barapind v.* Enomoto, 400 F.3d 744, 759 (9th Cir. 2005) (Rymer, J., dissenting in part) ("I would stick with the traditional understanding of dictum as a statement that is not necessary to the decision.").

[3] This broad language is also found in Jury Instruction No. 29.

was inapplicable. The State should have been required to prove its allegation of battery with a deadly weapon upon Cecelia without use of the doctrine. That is, the intent to cause Holly "apprehension," cannot be the intent to "use force or violence," NRS 200.281(1(a), upon an accidental bystander and perforce, is not the same "transferred" intent.

Aggregated sentencing

The State agrees with Mr. Mason that Judge Sattler erred in not aggregating the consecutive terms of imprisonment he imposed. See FTR at 9 ("The State agrees that the district court should have aggregated the sentences."). But submits that "aggregation of the sentences can be achieved by the Department of Parole and Probation without remand and without needless use of State resources." *Id.* The problem with the State's suggested fix is that it is contrary to the statute, assumes (without explaining how or why) that the Division of Parole and Probation will take on this task, and fails to provide instruction to the district court for future cases—*i.e.,* for all of the "offenses committed on or after July 1, 2014."

First, NRS 176.035(1) places the duty to aggregate sentences on the district court judge, not the Division of Parole and Probation: "[T]he

court must pronounce the minimum and maximum aggregate terms of imprisonment ... ." (Italics added.) The statutory command "must" places an obligation on the district court judge that is beyond a mere "ministerial duty"; it is a sentencing function. Second, nowhere does the State explain how (or why) the Division of Parole and Probation would assume the task of aggregating consecutive sentences or even have notice of it—after sentencing. Indeed, the probation officer present in court at sentencing in this matter did not speak to aggregating Mr. Mason's sentences. Finally third, to alleviate the State's worry that a remand *may* cause "a flood of appeals for basic aggregation of consecutive terms," FTR at 10, we submit that one just remand (in a published opinion) will alert the bench and bar to this statutory obligation. That course is a far better one than hoping the Division of Parole and Probation will catch the error sometime after sentencing (and do something about it).

VERIFICATION

1. I hereby certify that this Reply to 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 Reply has been prepared in a proportionally spaced typeface using Century Schoolbook in 14-point font.

2. I further certify that this fast track brief 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 uses a total of 981 words.

DATED this 30th day of July, 2015.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy
Nevada Bar No. 10
jpetty@washoecounty.us.

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of July, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Joseph R. Plater, Appellate Deputy,
Washoe County District Attorney's Office

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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

John Reese Petty
Washoe County Public Defender's Office