



and imposed probation terms and conditions on the suspended ten year term on Count 2. Spencer raises seven issues on appeal, one of which challenges the court's instruction on transferred intent. Because we find that there was indeed reversible error in the jury instructions, we address only that claim and find Spencer's other claims are moot.

### **Standard of Review**

Spencer admits that he did not challenge the court's transferred intent instruction below and that our review is for plain error only. *Runnels v. State*, 2018 OK CR 27, ¶ 18, 426 P.3d 614, 619. He has the burden in plain error review to demonstrate: 1) the existence of an error (i.e., deviation from a legal rule); 2) that the error was plain or obvious; and 3) that the error affected his substantial rights, meaning the error affected the outcome of the proceeding. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. Even where this showing is made, this Court will correct plain error only where the error seriously affected the fairness, integrity or public reputation of the judicial proceedings or represented a miscarriage of justice. *Id.*; 20 O.S.2011, § 3001.1. We examine each prong in turn.

## Analysis

Spencer claims the court mistakenly failed to edit the uniform transferred intent instruction to conform to the offenses charged in his case.<sup>2</sup>

The district court's transferred intent instruction read:

If you find that the defendant intended to **kill/injure/assault** Alvonte Morton, and by mistake or accident **injured/assaulted Mikayla Cooper and or Laylani Allen**, the element of intent is satisfied even though the defendant did not intend to **kill/injure/assault Mikayla Cooper and or Laylani Allen**. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

We need not dwell on the first two prongs of the plain error test. The State admits that the district court committed obvious error when it failed to choose "kill" and omit "injure" and "assault" from the list of intent options in the uniform transferred intent instruction.

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<sup>2</sup> The uniform instruction on transferred intent provides:

If you find that the defendant intended to **kill/injure/assault [Name of Intended Victim]**, and by mistake or accident **injured/assaulted [Name of Actual Victim]**, the element of intent is satisfied even though the defendant did not intend to **kill/injure/assault [Name of Actual Victim]**. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

*See Runnels*, 2018 OK CR 27, ¶ 19, 426 P.3d at 619 (finding district court’s failure to select applicable *mens rea* element in transferred intent instruction was error that was obvious). We explained in *Runnels* “that the bolded language within the instruction is intended to signal to the trial court that the instruction must be modified before given to the jury.” *Id.* 2018 OK CR 27, ¶ 20, 426 P.3d at 619. The slash symbol directs the district court to select the alternative(s) that most accurately fits the offenses being tried. *Id.* Because the transferred intent doctrine directly relates to the relevant *mens rea* element of this charged offense, shooting with intent to kill, the district court should have chosen “kill” from the alternatives of “kill/injure/assault.” The district court’s transferred intent instruction here failed to accurately state the applicable law.

We turn now to the third prong, namely whether the error affected Spencer’s substantial rights. The Court in *Runnels* held this same instructional error did not affect the defendant’s substantial rights because the evidence in that case showed that the victim’s death resulted from mistaken identity rather than transferred intent. *Id.* 2018 OK CR 27, ¶¶ 22-23, 426 P.3d at 619-20. Because the

doctrine of transferred intent was inapplicable in that case, we held error in the transferred intent instruction did not affect the defendant's substantial rights and was otherwise harmless given the strong evidence of intent to kill. *Id.* 2018 OK CR 27, ¶ 24, 426 P.3d at 620. That is not the case here.

Unlike *Runnels*, Spencer's case falls squarely within the doctrine of transferred intent. Under the prosecution's theory, Spencer acted with intent to kill Alvontey Morton, but because of bad aim he instead shot two bystanders. The district court's transferred intent instruction mistakenly allowed the jury to find that Spencer had the intent to kill the bystanders based only upon a pre-existing intent to injure or assault Morton. In other words, the jury could have found that an intent to injure or assault Morton transferred to and became an intent to kill the two bystanders. Because the instruction allowed the jury to convict on lesser proof than required, we find that the error affected Spencer's substantial rights. *Id.* 2018 OK CR 27, ¶ 22, 426 P.3d at 619 ("A 'substantial right' is a matter of substance as distinguished from a matter of mere form.")

Although Spencer has established the commission of a plain error, the State maintains reversal is not required because the evidence of intent to kill was so overwhelming and strong that lowering the bar for proving the same was harmless and did not result in a miscarriage of justice. We disagree for four reasons.

First, the record shows not all jurors readily agreed about the proof. The jury sent out four questions during deliberations, including one asking what to do if eleven jurors had made up their minds and one remained undecided. Conviction was not the foregone conclusion the State asserts.

Second, the evidence showed that Spencer was armed, that he was arguing with Morton, and that he threatened to open fire before in fact opening fire in the direction of a number of bystanders. He fired numerous times and continued to fire as bystanders ran for cover and the car he was in drove away. The State points to two witnesses, whose credibility was dubious, who testified that Morton fired first and that Spencer was acting in self-defense. In the State's view, this evidence supports a finding that Spencer surely intended to kill Morton, a lethal threat, rather than merely scare or injure him.

While a jury could certainly find that Spencer possessed an intent to kill from this evidence, it is not the only logical inference one might draw. As we have noted, shooting into a crowd is not necessarily synonymous with intent to kill and, in homicide cases, such conduct is often cited as an example of depraved mind second degree murder rather than malice aforethought murder in the first degree. *Bench v. State*, 2018 OK CR 31, ¶ 76, 431 P.3d 929, 954-55, *cert. denied*, 140 S.Ct. 56 (2019).

Third, we observe that the error was compounded in this case by the State. The prosecutor highlighted the erroneous instruction and argued its erroneous possibilities regarding intent during closing argument:

But the doctrine of transferred intent is clear, clear, clear. He doesn't have to want to kill anyone else. He just has to want to shoot. And my proposition to you is the minute you're shooting that gun, you're intending to kill someone.

Isn't that – why else are you shooting a gun at someone, unless you want to kill them? And the doctrine of transferred intent is absolutely clear. If you find the defendant intended to kill, injure, or assault Alvontey or Mikayla, by the mistake or accident – and by mistake or accident injured/assaulted Mikayla Cooper and/or Laylayni Allen, the element of intent is satisfied, even though the defendant didn't intend to kill, injure, assault Mikayla Cooper. Injure, assault. So even if he didn't intend

to injure Mikayla, he wanted to injure or assault Alvontey, the element is met. In such a case the law regards the intent as transferred from the original intended victim to the actual victim. It's clear. Real well settled.

And lastly, while the district court accurately instructed the jury on the elements of shooting with intent to kill, that instruction did nothing to cure the erroneous transferred intent instruction. For these reasons, we cannot find the instruction error, especially when considered in light of the prosecutor's argument, was harmless in this case. 20 O.S.2011, § 3001.1. To hold otherwise would represent an improvident and unwarranted expansion of *Runnels*.

### **DECISION**

The Judgment and Sentence of the district court is **VACATED** and the case **REMANDED** to the district court for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE  
COUNTY, THE HONORABLE BRET SMITH,  
DISTRICT JUDGE**

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**OPINION BY: ROWLAND, V.P.J.**

KUEHN, P.J.: Specially Concur  
LUMPKIN, J.: Dissent  
LEWIS, J.: Concur  
HUDSON, J.: Concur

**KUEHN, P.J., SPECIALLY CONCURRING:**

I agree this case must be remanded for a new trial. Given the wording of the trial court's "transferred intent" instruction and the prosecutor's comments on the topic, this Court cannot be confident that the jury understood the State's burden to prove an intent to kill as to each count.

The doctrine of "transferred intent" is interesting for armchair discussion, but I wish to point out that under Oklahoma law, no special instruction on the topic is absolutely necessary. The concept is already baked into Oklahoma's specific-intent crimes of physical harm. When a person acts with the intent to kill or harm, the fact that he may, by mistake or accident, end up killing or harming someone other than the person he planned to – assuming he even had a particular person in mind – is never dispositive.<sup>1</sup> In fact, for the crime of Shooting with Intent to Kill (21 O.S.Supp.2007, § 652(A)) – which Appellant was charged with – the State is not required to

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<sup>1</sup> 21 O.S.Supp.2012, § 701.7(A); 21 O.S.Supp.2006, § 645; 21 O.S.Supp.2007, § 652.

prove either that the defendant had a particular person in mind, or that he actually caused harm to anyone at all.

Jurors might erroneously conclude that a defendant cannot be guilty of intending to kill or harm if his force somehow fell on an “unintended” victim. An instruction to disabuse them of this fallacy is not error, so long as it is drafted carefully. *See Runnels v. State*, 2018 OK CR 27, 426 P.3d 614, 627 (Kuehn, J., dissenting at ¶¶ 4-8). But as this case demonstrates, imprecise drafting coupled with erroneous comments by the prosecutor may do more harm than good.

I would suggest that the trial court consider avoiding OUJI-CR 4-11 entirely on retrial, because I do not believe it is essential for the jurors to understand the applicable law.

## **LUMPKIN, JUDGE: DISSENT**

I dissent to reversing this case as the error did not constitute plain error; error which “affected the outcome” of the trial. See *Levering v. State*, 2013 OK CR 19, ¶ 6, 315 P.3d 392, 395 (“[t]his Court will only correct plain error if the error seriously affects the fairness, integrity or public reputation of the judicial proceedings or otherwise represents a miscarriage of justice”).

I find *Runnels v. State*, 2018 OK CR 27, 426 P.3d 614 controlling and find the misinstruction of the jury in this case does not rise to plain error as Appellant failed to show that the error seriously affected the fairness, integrity or public reputation of the judicial proceedings or otherwise represented a miscarriage of justice.

In the present case, there is no challenge to the sufficiency of the evidence. The elements of an intent to kill were clearly established by Appellant’s act of firing many rounds from his automatic weapon into a crowd of approximately 30 people, which included Mr. Morton and Ms. Cooper. Appellant’s act showed his intent was to “kill any person”. While the jury was inadvertently given the ability to convict on a lesser intent than intent to kill, because the greater intent was established

beyond a reasonable doubt, there is nothing about the added words “injure/assault” that renders the verdict suspect. I find the erroneous instruction did not affect the outcome of the trial and Appellant has not meet his burden of proving plain error.