FILED, Clerk of the Supreme Court, 14 Apr 2020, **083298**

In the Supreme Court of New Jersey

STATE OF NEW JERSEY, Plaintiff-Respondent, v. MARK MELVIN, Defendant-Petitioner.	Docket No. 083298 CRIMINAL ACTION On Certification from a Judgment of the Superior Court of New Jersey, Appellate Division, Docket No. A-4632-17. Sat Below: Hon. Carmen Messano, P.J.A.D. Hon. Douglas M. Fasciale, J.A.D. Hon. Lisa Rose, J.A.D.

Brief and Appendix on behalf of the State of New Jersey

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Preliminary Statement

A jury convicted the defendant of unlawful possession of a handgun, a second-degree crime. The defendant was eligible for an extended term as a persistent offender, making the range of his sentence between 5 and 20 years of incarceration. He was sentenced to 16 years. The defendant was not sentenced for crimes he didn't commit. Rather, he was properly sentenced for the crime for which a jury found him guilty after the sentencing judge considered the competent, credible evidence presented at his two trials, and used that evidence to find the proper aggravating and mitigating circumstances.

Nothing about the defendant's sentence is illegal or unfair. The sentencing judge properly recognized what is undoubtedly true: not all cases of second-degree possession of a weapon are equal. A defendant who passively possesses a handgun in his waistband is not the same as one who uses that weapon to gun down other people. So long as the evidence considered by the sentencing court is competent, credible, and found in the record, and the sentence imposed is within the legal range, no basis exists to second-guess that court's determination. This Court should therefore affirm the judgment of the Appellate Division, which affirmed defendant's legal and appropriate sentence.

Counter-statement of Procedural History

On May 31, 2013, an Essex County Grand Jury indicted the defendant for the following: 1) the murder of Fuquan Mosely, a first-degree crime under N.J.S.A. 2C:11-3(a); 2) unlawful possession of a handgun, a second-degree crime under N.J.S.A. 2C:39-5(b); 3) possession of a handgun for an unlawful purpose, a second-degree crime under N.J.S.A. 2C:39-4(a); 4) the attempted murder of Jason Chavis, a first-degree crime under N.J.S.A. 2C:5-1 and 2C:11-3(a); 5) the murder of Jason Chavis, a first-degree crime under N.J.S.A. 2C:11-3(a); 6) the aggravated assault of Bertha Lynn, a second-degree crime under N.J.S.A. 2C:12-1(b)(1); 7) possession of heroin, a third-degree crime under N.J.S.A. 2C:35-10(a)(1); 8) possession of heroin with intent to distribute, a third-degree crime under N.J.S.A. 2C:35-5(a)(1) and (b)(3); and 9) possession of heroin with intent to distribute within 1,000 feet of school property, a third-degree crime under N.J.S.A. 2C:35-7. (Dsa 1–11).[1] The prosecutor dismissed count 4 prior to trial. (Dsa 12).

After a jury trial, the defendant was convicted of count 2, unlawful possession of a handgun, but the jury was unable to

[1] The State adopts the defendant's transcript designation codes, see (Db 3 n.3), and adds that "Pca" refers to the appendix to defendant's petition for certification, and "Psa" refers to the appendix to this supplemental brief.

reach a verdict on the remaining counts. (Dsa 12). On October 27, 2014, the trial court sentenced defendant to 20 years of incarceration with 10 years of parole ineligibility on count 2. (Dsa 12).

The defendant appealed his sentence as excessive. The Appellate Division held that the sentencing judge inappropriately considered the charges against the defendant upon which the jury was hung because a new trial would occur on those charges. (Dsa 36-37). The case was remanded for resentencing.

After a second jury trial, the defendant was found not guilty on counts 1, 3, 5, and 6, and the prosecutor dismissed counts 7, 8, and 9. (Dsa 38).

On June 7, 2018, the trial court resentenced defendant to 16 years of incarceration with 8 years of parole ineligibility on count 2. (Dsa 38). This chart shows the outcome of every count of the indictment:

Count	**Charge**	**Trial 1 result**	**Trial 2 result**
1	Murder of Fuquan Mosley	Hung	Not guilty
2	Unlawful Poss. Handgun	Guilty	
3	Poss. Weapon for an Unlawful Purpose -Handgun	Hung	Not guilty
4	Attempted Murder of Jason Chavis	Dismissed by prosecutor before trial	
5	Murder of Jason	Hung	Not guilty

	Chavis		
6	Agg. Assault of Bertha Lynn	Hung	Not guilty
7	Possession of Heroin	Hung	Dismissed by prosecutor after trial
8	Possession of Heroin with Intent to Distribute	Hung	Dismissed by prosecutor after trial
9	Possession of Heroin with Intent to Distribute – School Zone	Hung	Dismissed by prosecutor after trial

The defendant appealed his sentence again. On July 19, 2018, the Appellate Division affirmed the defendant's sentence. (Pca 1-10). The Appellate Division held that the Supreme Court's recent decision in State v. Tillery, 238 N.J. 293, 326 (2019), "dispose[d] of defendant's argument." (Pca 8). This Court subsequently granted certification. (Dsa 47).

Counter-statement of Facts

According to the trial and sentencing judge's recollection, testimony at trial revealed that on September 27, 2012, a masked man entered Elsie's Place restaurant and shot Fuquan Mosley and Jason Chavis. (1T 36:9-17). The cook and owner, Bertha Linn, was struck by a stray bullet. (1T 36:9-17). A witness testified that the defendant picked him up in a car that day and parked near Elsie's Place. (1T 36:18-25). The witness said that the defendant briefly got out of the car, at which time the

witness heard multiple gun shots. (1T 36:18-25). The witness then saw the defendant return to the car with a gun in his waist band. (1T 37:1-8). The defendant drove the vehicle away from the scene, but it ran out of gas and the police stopped behind the vehicle. (1T 37:1-8). The defendant fled on foot from the car but was apprehended after a brief foot chase. (1T 37:22 to 38:4). While running from police, the defendant attempted to discard a sweatshirt; DNA evidence taken from the sweatshirt revealed Mr. Mosley's DNA. (1T 37:22 to 38:4). The witness was arrested as he sat in the car. (1T 37:13-21). The police recovered approximately 100 decks of heroin and an automatic handgun from the car. (1T 37:13-21).

Legal Argument

Point I

Consideration of all relevant information, including acquitted charges, is lawful and appropriate when sentencing a defendant.

The Code of Criminal Justice's sentencing scheme is designed to to eliminate arbitrary and idiosyncratic sentencing so that similarly situated defendants receive comparable sentences. State v. Case, 220 N.J. 49, 63, (2014). "[T]he Code has established a framework of structured discretion within which judges exercise their sentencing authority." Id. Crimes are classified by degree and each degree contains a range within

which a defendant may be sentenced. N.J.S.A. 2C:43-6. In determining the appropriate sentence to impose within that range, judges first must identify relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) that apply to the case. Id. at 64. "The finding of any factor must be supported by competent, credible evidence in the record." Id. (citing State v. Roth, 95 N.J. 334, 363 (1984), which uses the phrase, "competent, reasonably credible evidence."). "Speculation and suspicion must not infect the sentencing process; simply put, the finding of aggravating or mitigating factors must be based on evidence." Id.

In the present case, the prosecutor asked the sentencing judge, who was also the trial judge for both of defendant's trials, to consider the evidence submitted during trial relating to the charges upon which the defendant was acquitted. The same fact pattern emerged in Tillery, 238 N.J. at 326, in which this Court recently held:

> If a jury is unable to return a verdict as to some offenses and convicts the defendant of others, and the State requests that the court consider evidence presented as to offenses on which the jury deadlocked, such information may constitute competent, credible evidence on which the court may rely in assessing the aggravating and mitigating factors. See Case, 220 N.J. at 63-65.... No Sixth Amendment or other constitutional principle, or statutory provision, generally bars a court from considering such evidence.

The Court went on to emphasize that it was proper to consider such evidence only when the related charges were no longer pending. Id. at 326-327.

The Tillery Court also referred to the federal standard for relying on acquitted conduct during sentencing, which is set forth in United States v. Watts, 519 U.S. 148 (1997). Watts was acquitted of a firearms count, but the "District Court found by a preponderance of the evidence that Watts had possessed the guns in connection with the drug offense" and considered that in sentencing him on the drug offense. Id. at 150. The Supreme Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Id. at 157.

Watts dispenses of the defendant's due process claim. The defendant claims that his sentence violates due process and fundamental fairness by infringing on his right to be presumed innocent. Watts points out that the Federal Sentencing Guidelines state that it is "appropriate" that facts relevant to sentencing be proved by a preponderance of the evidence, "and we[, the United States Supreme Court, has] held that application of the preponderance standard at sentencing generally satisfies due process." Id. at 157.

The defendant was not subjected to double jeopardy in this case for the charges for which he was acquitted. Double jeopardy occurs when a defendant is subject to punishment twice for the same charges. In the present case, the defendant was punished once, solely for one charge.

Because the burden of proof for conviction is higher than the burden of proof for relevant evidence to be considered at sentencing, double jeopardy is not implicated. The jury's finding of not guilty was not a finding of innocence. "Without the determination of an ultimate fact that can rationally foreclose some other issue from consideration, double-jeopardy principles do not apply." State v. Kelly, 201 N.J. 471, 488 (2010).

An analogy can be drawn to the consideration of arrests that did not result in conviction. "Judges may consider arrests and the actual circumstances of the offense when assessing the threat that a defendant poses to society during imposition of a sentence." State v. Jones, 179 N.J. 377, 407 (2004). "Sentencing judges must fully assess the totality of circumstances surrounding a defendant's actual criminal offense." Id. Consideration of arrests that did not result in conviction does not raise double jeopardy concerns, just as considering acquitted conduct does not raise double jeopardy concerns.

The defendant's fundamental fairness argument also fails. The defendant was convicted of unlawful possession of a handgun, a second-degree crime. He was sentenced as a persistent offender based on his criminal history: he had been arrested 13 times as an adult, had 4 prior indictable convictions, and 2 federal convictions. Even putting aside any consideration of the facts of the defendant's trials, defendant's sentence is entirely reasonable and fair considering the crime for which he was convicted and the defendant's prior criminal history.

The defendant's reliance on People v. Beck, 939 N.W.2d 213 (Mich. 2019), is misplaced, as it is neither binding nor persuasive in this case. Beck was convicted of being a felon in possession of a firearm but acquitted of murder. The sentencing judge sentenced Beck outside the guideline range for being a felon in possession of a firearm based on a finding, by a preponderance of the evidence, that the defendant had committed the murder. Id. at 610-12.

This is where Beck is factually distinguishable from the present case: the sentencing court in Beck sentenced the defendant outside of the guideline range for the crime for which a jury found him guilty. The defendant in the present case was sentenced within the range for the crime for which a jury found him guilty. The acquitted conduct in the present case was only

considered to determine where in that range the defendant was sentenced, not to go beyond it.

If anything, the sentence in Beck violated the holding of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), which held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added). The holding of Apprendi does not apply here because the defendant was not sentenced "beyond the prescribed statutory maximum" for his crime. This clear distinguishing point is why the Appellate Division did not cite or rely on the holding of Apprendi in its decision overturning the defendant's original sentence.

A recent decision from Michigan further limits Beck. In People v. Roberts, 2020 WL 1445414, at *5 (Mich. Ct. App. Mar. 24, 2020) (attached as Psa 1-7), the Michigan Court of Appeals stated that they "do not understand Beck to preclude all consideration of the entire res gestae of an acquitted offense."

Blakely v. Washington, 542 U.S. 296 (2004), upon which defendant relies, is also factually distinguishable. After Blakely pleaded guilty, the sentencing judge found that the defendant had acted with deliberate cruelty, and sentenced Blakely "beyond the standard maximum" for the crime to which he pleaded guilty. Id. at 300. The sentence was overturned because it violated the holding of Apprendi; that is, the

sentencing judge in Blakely "could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea." Id. at 304. This is not the same situation as the case at hand. Here, the defendant was sentenced to 16 years, which was within the range for the crime for which the jury convicted him. "So long as the defendant receives a sentence at or below the statutory ceiling set by the jury's verdict, the district court does not abridge the defendant's right to a jury trial by looking to other facts, including acquitted conduct, when selecting a sentence within that statutory range." United States v. White, 551 F.3d 381, 385 (6th Cir. 2008).

The defendant implores this Court to move further than Watts and prevent New Jersey courts from considering acquitted, yet proven by a preponderance, conduct at sentencing. But this contradicts the long-held belief that sentencing judges should consider all relevant information, including hearsay, unrestrained by the rules of evidence. State v. Palma, 219 N.J. 584, 596-97 (2014). Sentencing judges should consider the "whole person" at sentencing, which authorizes the sentencing court to consider a wide range of information that might otherwise be excluded by evidentiary norms. Id.

The California Supreme Court analyzed a factually similar case in People v. Towne, 186 P.3d 10 (Cal. 2008). In that case,

Towne was charged with multiple offenses including kidnapping and robbery but was convicted only of joyriding. Towne was sentenced to the maximum for joyriding. On appeal, he asserted that the sentencing judge violated his constitutional rights by considering the acquitted charges during sentencing. Id. at 12.

The California Supreme Court held that the consideration of acquitted charges did not violate constitutional principles concerning double jeopardy, due process, or the right to a jury trial because the jury's verdict determined "the maximum authorized sentence." Id. at 24. "Even if the trial court in the present case did sentence defendant based upon a view of the evidence that would have justified a guilty verdict on one or more of the crimes of violence of which defendant was acquitted, the court would not thereby have been 'correcting' any perceived error in the jury's verdict" because the court "was limited by the jury's verdict to imposing a sentence authorized for the crime of which the defendant was convicted." Id.

In addition to the federal standard, many other states permit the consideration of acquitted conduct at sentencing. Consider:

- Pennsylvania ("A judge may consider unadjudicated arrests in sentencing a defendant, so long as the arrests are not regarded as establishing criminal conduct, and even arrests that result in acquittals, if the judge is aware of the acquittal." Com. v.

Bowers, 25 A.3d 349, 356 (Pa. Super. 2011), app. denied, 51 A.3d 837 (Pa. 2012));

- Connecticut ("'To arrive at a just sentence, a sentencing judge may consider ... evidence of crimes for which the defendant was indicted but neither tried nor convicted ... evidence bearing on charges for which the defendant was acquitted ... and evidence of counts of an indictment which has been dismissed by the government.'" State v. Ruffin, 71 A.3d 695 (Conn. App. 2013) (quoting State v. Huey, 505 A.2d 1242, 1245 (Conn. 1986));

- Illinois ("Evidence of other criminal conduct is admissible at sentencing, even though a defendant has previously been acquitted of that conduct." People v. Robinson, 676 N.E.2d 1368, 1373 (Ill. App. Ct. 1997));

- Missouri (Since the defendant's sentence was within the original unenhanced range of punishment, "any facts that would have tended to assess her punishment within that range were not required to be found beyond a reasonable doubt by a jury." State v. Jaco, 156 S.W.3d 775, 780 (Mo.), cert. denied, 546 U.S. 819 (2005)); and

- Alaska ("The reason why double jeopardy and due process are not implicated when a person who has been acquitted of certain conduct is sentenced on the basis that the conduct occurred, rests on the differing burdens of proof." Brakes v. State, 796 P.2d 1368, 1372 (Alaska Ct. App. 1990)).

Consistent with these jurisdictions, Watts, and this Court's own recent decision in Tillery, this Court should hold that even if a jury returns a verdict of not guilty as to some offenses and convicts the defendant of others, and the State requests that the court consider evidence presented as to offenses on which the jury acquitted, such information may

constitute competent, credible evidence on which the court may rely in assessing the aggravating and mitigating factors. "No Sixth Amendment or other constitutional principle, or statutory provision, generally bars a court from considering such evidence." Tillery, 238 N.J. at 326.

Moreover, even if this Court rejects the argument that a sentencing court may consider evidence related to acquitted conduct, it still must affirm the sentence imposed in this case. What must be emphasized is that if the defendant in this case had been before a different sentencing judge, and that judge had not even considered any evidence introduced during his trials, *he still could have been sentenced to 16 years of imprisonment*. Defendant's sentence is within the range prescribed for his conviction and is entirely reasonable considering the nature of his conviction in light of his criminal history. His sentence must therefore be affirmed.[2]

At bottom, the sentencing judge, who sat through both of defendant's trials and heard all of the evidence marshalled against him, imposed a sentence based on conduct which he found,

[2] Notably, defendant does not claim that, if a sentencing court can consider evidence related to acquitted conduct, that his sentence is excessive. In other words, his argument is purely a legal one, and if that argument is rejected his sentence must stand. But, if sentencing courts cannot consider such evidence, this Court may still affirm the Appellate Division's judgment on the alternative basis of there being sufficient credible evidence in the record, even absent the evidence related to the acquitted counts.

by a preponderance of the evidence, occurred. Using those fact-findings, the judge imposed a sentence within the lawful range for a persistent offender. Nothing about doing so violated defendant's constitutional rights, as the Appellate Division found. This Court should therefore affirm the judgment affirming defendant's sentence.

Conclusion

For all the aforementioned reasons, the State respectfully requests that this Court affirm the judgment of the Appellate Division, which affirmed defendant's legal, appropriate sentence.

Respectfully submitted,

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Filed: April 14, 2020

2020 WL 1445414
Only the Westlaw citation is currently available.
Court of Appeals of Michigan.

PEOPLE of the State of Michigan,
Plaintiff-Appellee,
v.
Terrell Marcus ROBERTS, Defendant-Appellant.

No. 339424
|
March 24, 2020, 9:05 a.m.

Ingham Circuit Court, LC No. 16-000384-FC

Before: Riordan, P.J., and Ronayne Krause and Swartzle, JJ.

ON REMAND

Ronayne Krause, J.

***1** Defendant was convicted by a jury of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, and of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The jury found defendant not guilty of assault with intent to commit murder (AWIM), MCL 750.83, on an aiding and abetting theory, MCL 767.39. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to 48 to 90 months' imprisonment, an upward departure from his minimum sentencing guidelines range of 14 to 36 months, consecutive to a mandatory 2 years' imprisonment for felony-firearm. Defendant previously appealed his convictions and sentences, and we affirmed.[1] Our Supreme Court vacated in part our opinion regarding defendant's departure sentence and remanded for reconsideration in light of *People v. Beck*, 504 Mich. ——; —— N.W.2d —— (2019)—— N.W.2d —— (2019) (Docket No. 152934). We again affirm.

I. BACKGROUND

In our previous opinion, we provided the following summary of the facts:

> This case arises out of a shooting that occurred at Secrets Nightclub (Secrets) in downtown Lansing in the early morning hours of May 24, 2015. At approximately 12:30 a.m., a Secrets patron was shot while inside of the nightclub. Defendant was inside Secrets when the shooting occurred, and he, along with other patrons, fled the club. Sergeant Brian Curtis of the Lansing Police Department and several other officers were parked in their patrol vehicles monitoring the club. Sergeant Curtis observed several patrons leave the club "in a panic." Shortly after, dispatch informed Sergeant Curtis of the shooting, and he activated the mobile vehicle recording device ("MVR") on the front of his patrol car.
>
> Sergeant Curtis heard gunshots and simultaneously observed two individuals, later identified as defendant and LaDon Jackson, advancing towards a group of people outside the club. Sergeant Curtis later reviewed the MVR video and observed that it was Jackson who fired these shots. The MVR video, which was admitted into evidence and played for the jury at trial, also showed defendant and Jackson make contact with each other. Sergeant Curtis testified at trial that he believed that, during this contact, defendant passed a gun to Jackson, who then fired the shots and returned the gun to defendant.
>
> After Jackson fired the shots, Sergeant Curtis observed both defendant and Jackson run south, and another officer informed Sergeant Curtis that these individuals might be in possession of a firearm. Sergeant Curtis pursued defendant and Jackson in his patrol vehicle and commanded them to stop, but they refused to comply. Jackson executed a "button hook" maneuver to evade police, but defendant continued running south alone. Sergeant Curtis pursued defendant and observed him pass by a red Impala and make certain movements that, in Sergeant Curtis's training and experience, led him to believe that defendant had discarded a firearm in that area. After passing the red Impala, defendant continued along the sidewalk, and he was arrested shortly thereafter. Police found no firearm in either Jackson's or defendant's possession. However, a canine unit trained to detect firearms located a firearm next to the red Impala that defendant had passed.

***2**

* * *

> As the jury was shown the MVR video, Sergeant Curtis testified:
>
> [Y]ou're going to see a transaction what I believed [sic] where LaDon Jackson receives the firearm from the Defendant. LaDon Jackson advances at the crowd, does the shooting, comes back and exchanges the firearm back to the Defendant.
>
> * * *
>
> It is my belief that they're exchanging a firearm right there.
>
> * * *
>
> And here is LaDon Jackson advancing, firing his gun.
>
> * * *
>
> Here [defendant's] reaching into his upper torso.
>
> * * *
>
> And now here he goes right here to the passenger side. I believe he discretely tossed the gun right there.

Sergeant Curtis explained that, in his experience and training, weapons often "change hands" on the streets. He further explained "that people do not hold onto firearms. They trade them off with one another, especially during an event like this." Sergeant Curtis testified that after he heard the gunshots, he observed defendant and Jackson both "run back in a south direction after they advanced on a group to the north." Sergeant Curtis stated that he observed defendant reach "into his upper torso." ... Additionally, Sergeant Curtis commanded defendant to stop, but he refused to comply, "continued to evade," and passed "directly near the passenger side of this red Impala," which is where the gun was eventually found. In contrast, Sergeant Curtis testified that Jackson was never in the vicinity of the red Impala. [*People v. Roberts*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2018 (Docket No. 339424), unpub. op. at pp. 1-4 (footnotes omitted).]

Additionally, we now set forth in full the trial court's stated reasoning for imposing its departure sentence:

> Well, Mr. Roberts, your attorney said something about your [sic] very capable of being a highly functioning member of the community and I 100% agree with that. I think you are very capable of that. Your actions have definitely not demonstrated that. Not only for this offense that you've been convicted of, these offenses, but you were on probation out of Eaton County for 2nd Degree Home Invasion, another very serious offense, at the time that you committed this offense. So, you are taking whatever potential that you have to be a highly functioning and contributing member of society and you're making decisions consciously and intentionally that are destroying that. And when it comes to gun violence, I agree that this is the scourge of this community. It is something that tears families apart, no matter what side of this they are on. It tears families apart. It destroys lives. And that's speaking again from both sides, it destroys lives. It has to be stopped and I don't know how to stop it other than to send a strong message that running around the streets of Lansing with a gun is not tolerated, not acceptable and will be significantly punished. And I do consider this to be different than the person who possesses a firearm while convicted of a felony under different circumstances. I see people convicted of that when they've possessed a gun in their own home but, they've been convicted of a felony and they may not have a possession of a gun.
>
> ***3** That's one thing. This is much higher up on the scale as far as I'm concerned than that. And I hold you not one bit accountable for what happened in the night club, not part of the charge, not part of the conviction. But what I hold you accountable for is possessing a firearm on the streets of Lansing under these circumstances where a shooting had just taken place by someone else. And I consider that to be at the highest end of the scale as far as seriousness of the offense goes for possession of a firearm by a felon.
>
> So, I have considered the guidelines of 14 to 36 months and they are presumptively reasonable in my mind but, I also consider then [sic] somewhat inadequate for the circumstances of this particular case.

II. STANDARDS OF REVIEW

Sentencing courts are required to properly score the statutory sentencing guidelines and take the resulting minimum sentence range into account when crafting a particular sentence. *People v. Lockridge*, 498 Mich. 358, 391-392; 870 N.W.2d 502 (2015); *People v. Steanhouse*, 500 Mich. 453, 474-475; 902 N.W.2d 327 (2017). However, sentencing courts are not otherwise bound by the sentencing guidelines. *Lockridge*, 498

Mich. at 392; *Steanhouse*, 500 Mich. at 468-470. The sentencing court may, in its discretion, depart from that range if it explains how that departure is reasonable and proportionate. *Lockridge*, 498 Mich. at 392; *Steanhouse*, 500 Mich. at 473-475. We review the trial court's ultimate sentence for reasonableness under an abuse of discretion standard, to determine whether it is proportionate to the offender and the circumstances of the offense. *Steanhouse*, 500 Mich. 459-460, 473-474. A minimum sentence that falls within the properly-calculated guidelines range is presumptively reasonable and proportionate. See *People v. Carpenter*, 322 Mich. App. 523, 532; 912 N.W.2d 579 (2018).

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v. Hardy*, 494 Mich. 430, 438; 835 N.W.2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.* The sentencing court may consider "facts not admitted by the defendant or found beyond a reasonable doubt by the jury." *Lockridge*, 498 Mich. at 392. "Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *People v. McGraw*, 484 Mich. 120, 135; 771 N.W.2d 655 (2009).

III. *BECK*

It has long been understood that failure to persuade a jury beyond a reasonable doubt is not conclusive as to proofs under the less stringent preponderance of the evidence standard. *Stone v. United States*, 167 U.S. 178, 188-189; 167 S. Ct. 778; 42 L Ed 127 (1897); *Martucci v. Detroit Comm'r of Police*, 322 Mich. 270, 273-274; 33 N.W.2d 789 (1948). Nevertheless, our Supreme Court has recently taught us that sentencing courts may not consider any "acquitted conduct" in crafting their sentences, although they remain free to consider "uncharged conduct." *Beck*, 504 Mich. at —— (slip op. at pp. 18-19). "Acquitted conduct" means any "conduct ... underlying charges of which [the defendant] had been acquitted." *United States v. Watts*, 519 U.S. 148, 149; 117 S. Ct. 633; 136 L. Ed. 2d 554 (1997), cited by *Beck*, 504 Mich. at —— n. 1 (slip op. at p. 2 n. 1). We infer from this broad definition that under *Beck*, a sentencing court must consider a defendant as having undertaken no act or omission that a jury could have relied upon in finding the essential elements of any acquitted offense proved beyond a reasonable doubt. Nevertheless, as we will discuss in more detail below, *Beck* expressly permits trial courts to consider uncharged conduct and any other circumstances or context surrounding the defendant or the sentencing offense.

IV. OFFENSE VARIABLE 9

***4** As we explained previously, "[o]ffense variable 9 is number of victims." MCL 777.39(1). The trial court assessed 25 points for OV 9, which is required if "[t]here were 10 or more victims who were placed in danger of physical injury or death, or 20 or more victims who were placed in danger of property loss ..." MCL 777.39(1)(b). "[E]ach person who was placed in danger of physical injury or loss of life or property" is to be counted as a victim. MCL 777.39(2)(a). However, "only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *People v. Sargent*, 481 Mich. 346, 350; 750 N.W.2d 161 (2008). Defendant's sentencing offense was felon-in-possession, which "in and of itself, simply did not place anyone in danger of physical injury or death." *People v. Biddles*, 316 Mich. App. 148, 167; 896 N.W.2d 461 (2016).

The trial court explicitly declined to hold defendant responsible for "what happened in the night club," implicitly meaning the trial court did not consider any victims placed in danger *by the shooting* of which defendant was acquitted. Nevertheless, we agree with the trial court that a substantial and qualitative difference exists between possessing contraband in one's own home, and unlawfully possessing and passing around a concealed firearm in a crowded bar during a shooting. Nothing in *Beck* precludes a sentencing court from generally considering the time, place, and manner in which an offense is committed. We conclude that *Beck* does not exclude from consideration the contextual fact that the acquitted conduct was committed by someone, so long as that conduct is not actually attributed to the defendant. Irrespective of whether defendant participated in the shooting, the context within which he committed the offense of felon-in-possession intrinsically placed

people in grave danger. We therefore reiterate our previous conclusion that the trial court was justified in finding that defendant's actions placed at least 10 victims in danger of physical injury or death. The trial court therefore did not err in assigning 25 points under OV 9.

V. DEPARTURE SENTENCE

In our previous opinion, we set forth the following reasoning:

> In this case, the trial court stated that it had considered the guidelines and found them to be "somewhat inadequate for the circumstances of this particular case." The factors the trial court identified in support of the departure were the danger of gun violence to the local community, the seriousness of the particular offense, and defendant's poor potential for rehabilitation. Although some of the factors the court stated as reasons for departure were somewhat considered by the guidelines, those guidelines were not adequately tailored for this specific type of offense, and therefore departure was appropriate. As the trial court noted, felon in possession of a firearm can take many forms, some more dangerous than others. The trial court properly noted that the conduct in the present case, where defendant supplied a weapon for use in an indiscriminate shooting on a busy street, was vastly different than the case of a felon being found in possession of a firearm in their home.
>
> The trial court noted the danger that gun violence presented to the local community and the seriousness of this particular offense. The trial court stated that it held defendant "accountable for ... possessing a firearm on the streets of Lansing *under these circumstances where a shooting had just taken place by someone else*" (emphasis added). It reasoned that defendant's possession of the firearm under these circumstances was more serious than was ordinarily the case with a felon-in-possession offense. Further, defendant's potential for rehabilitation has been held to be a valid consideration for departure, see [*People v. Dixon-Bey*, 321 Mich. App. 490, 525 n. 9; 909 N.W.2d 458 (2017)]. The fact that defendant was on probation, while accounted for in the guidelines, is further proof of the seriousness of the specific offense and lack of potential for rehabilitation. Defendant was not merely a felon, but was currently being punished for a serious felony offense in a neighboring county. The fact that he proceeded to bring a concealed handgun to a crowded night club and then allow that weapon to be fired into a crowd in an indiscriminate manner is not something that can be adequately captured by the guidelines system. This is precisely the type of situation where the ability to consider all of the evidence and the factors involved in the commission of a crime is more valuable than the rote, mathematical system conceived in a purely determinant sentencing system.
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> ***5** In summary, the trial court, presented with a crime and defendant that do not neatly fit within the sentencing guidelines, properly applied its discretion and articulated valid reasons for doing so and exceeding guidelines by 12 months. Defendant did not fit in to the more benign categories of a felon in possession and, based on the risk of his actions and his apparent lack of rehabilitation, the trial court found departure to be necessary. Therefore, we affirm defendant's sentence.

Beck requires us to clarify our reasoning in small part, but we find no basis for revisiting our prior conclusion.

As discussed, the definition of "acquitted conduct" covers a broad range of conduct. Nevertheless, we do not understand *Beck* to preclude all consideration of the entire *res gestae* of an acquitted offense.[2] As noted, defendant was acquitted of AWIM under an aiding and abetting theory. "Aiding and abetting" requires *intentionally* assisting another person in the commission of a *particular* crime. See *People v. Moore*, 470 Mich. 56, 70-71; 679 N.W.2d 41 (2004); *People v. Robinson*, 475 Mich. 1, 15; 715 N.W.2d 44 (2006). We conclude that even under *Beck*, a sentencing court may consider, for example, the fact that a felon on probation bringing a concealed gun into a crowded nightclub demonstrates—at a minimum—an appallingly reckless disregard for the predictable outcome. Defendant may not be deemed to have provided a weapon for the purpose of shooting it into a crowd, nor can defendant be deemed to have "allowed" the shooting. Nevertheless, defendant can certainly be deemed to have knowingly acted in a manner that drastically increased the likelihood that such a tragedy, whether or not this particular tragedy, would occur. As discussed above, the trial court appropriately observed that it is "one thing" to illegally possess a gun in one's own home, but quite another to introduce an illegally possessed and concealed gun into an environment that was already chaotic and unstable.

Consequently, even though defendant may not be considered to have engaged in any conduct that aided and abetted the shooting, the trial court nevertheless reasonably concluded that the manner in which defendant committed the offense of felon-in-possession, particularly

in light of defendant's apparent intelligence and own history, warranted a significant departure from the guidelines range. We reiterate our previous conclusion.

Affirmed.

Swartzle, J. (concurring).

Typically, a judge who writes a separate opinion does so with a certain confidence in the correctness of the position stated. This is not one of those opinions. In this appeal on remand, we are presented with the facially benign question, what is "acquitted conduct"? The majority in *People v. Beck*, —— Mich. ——, ——; —— N.W.2d —— (2019) (Docket No. 152934); slip op. at 13, provided a description of acquitted conduct, but Justice CLEMENT in her dissent identified several problems with this description, *id.* at —— (CLEMENT, J., dissenting); slip op. at 2-4. Since then, panels of this Court have had occasion to apply *Beck*, but I believe that they have done so with some inaccuracy in what precisely is acquitted conduct. While I have a couple of minor quibbles with the majority's analysis in this case, the state of the law is such that I cannot fully concur or even partially dissent. Accordingly, for the reasons provided below, I concur dubitante in the judgment.

***6** In *Beck*, the majority described acquitted conduct as conduct that "has been formally charged and specifically adjudicated [not guilty] by a jury." *Id.*, slip op. at 13. In some circumstances, identifying the acquitted conduct might be relatively straightforward. For example, if a defendant is acquitted by a jury using a special-verdict form, then the sentencing court should be able to isolate the particular aspect or element on which the jury acquitted the defendant without much difficulty. Similarly, if a jury acquits a defendant of a particular crime but convicts of a lesser-included crime, then, again, it may be easy to isolate the specific aspect or element that the prosecutor did not prove beyond a reasonable doubt. Finally, if a defendant stipulates to a particular element, and the jury still acquits, a process of elimination might point to the particular aspect or element that the jury found not to have been proven beyond a reasonable doubt. Even taken together, however, these will likely not be the majority of cases when acquitted conduct must be identified and excluded for purposes of sentencing.

In a not-insubstantial number of cases, when a jury renders its verdict by a general-verdict form and acquits on some charge but convicts on another, isolating the acquitted conduct that cannot be considered at sentencing will present several epistemological challenges. Fundamentally, these challenges will arise because, as the U.S. Supreme Court recognized in *United States v. Watts*, 519 U.S. 148, 155; 117 S. Ct. 633; 136 L. Ed. 2d 554 (1997) (cleaned up), "An acquittal is not a finding of any fact. An acquittal can only be an acknowledgement that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences ...." Yet, after *Beck*, our sentencing courts will now have to draw "factual finding inferences" based on the jury's acquittal.

As Justice CLEMENT observed in dissent, much in *Beck* was left unexplained with respect to the "parameters of what constitutes acquitted conduct." *Beck*, —— Mich. at —— (CLEMENT, J., dissenting); slip op. at 12. As Justice CLEMENT asked, "Is acquitted conduct defined only as the exact conclusion that the defendant committed the acquitted charge?" *Id.* "But does acquitted conduct extend beyond this ultimate conclusion to all facts that supported a charge for which a defendant was acquitted?" *Id.* "What if it is unclear why the jury acquitted the defendant of a particular crime?" *Id.* And, "If there is no indication as to which element the jury found lacking, is the sentencing court prohibited from considering the facts underlying either element?" *Id.* These questions were left unanswered by the majority—maybe appropriately so given the record in the case—but all will need to be addressed at some point.

Panels of this Court have started to address these questions, though I am not confident of all of our answers. For example, in *People v. Parker*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2020 (Docket No. 335165), the Court framed the inquiry as a categorical one: "Once a defendant is acquitted of a certain crime, it violates due process to sentence the defendant using an essential element of the acquitted offense as an aggravating factor." *Id.* at 4. This cannot, however, be the proper approach.

Take, for example, someone acquitted of felon-in-possession but convicted of another crime. There are only two elements of felon-in-possession—(1) defendant is a felon, and (2) defendant possessed a firearm. MCL 750.224f. If the defendant in this hypothetical did not concede at trial that he was a felon but instead left the prosecution to its proofs, then does the jury's acquittal on the felon-in-possession charge preclude the sentencing court from considering evidence that defendant did, in fact, have a prior felony conviction when scoring the guidelines and fashioning an appropriate sentence? It is theoretically possible, after all, that one of the jurors simply did not trust the prosecutor's evidence of a prior felony and voted to acquit on that basis. But yet,

it seems absurd to suggest that the sentencing court cannot consider the defendant's actual criminal background when sentencing on the unrelated conviction.

***7** As another example, in a felony-murder case involving a robbery, if a defendant was acquitted of both felony murder and robbery, but was convicted of a third unrelated charge, then would the sentencing court have to ignore evidence that a person was, in fact, killed and before he was killed, the person was, in fact, robbed? Arguably under a pure "elements-based" approach, the sentencing court would have to ignore this evidence, but this again seems quite absurd. Rather, under my reading of *Beck*, the sentencing court could not consider evidence that this particular defendant did the robbing or killing, but it need not ignore that a robbery and killing occurred.

As a final example, assume that a defendant was charged with two separate crimes, each crime had four total elements, and the two crimes shared three elements in common. The jury convicted the defendant on one charge and acquitted on the other. Under the categorical approach stated in *Parker*, a sentencing court could not consider the four elements of the acquitted charge, which would also necessarily mean that the sentencing court could not consider three of the elements of the convicted charge. I cannot conclude that this is what *Beck* requires. Similar issues arise with respect to inconsistent verdicts. A categorical "elements-based" approach is simply unworkable as a general principle of law.

At the other extreme, one could take a "I know it when I see it" approach. Cf *Jacobellis v. Ohio*, 378 U.S. 184; 84 S. Ct. 1676; 12 L. Ed. 2d 793 (1964). Merely stating the approach, however, highlights its unworkability. Whatever merit it has in distinguishing erotic art from obscenity, it has little merit in the criminal-sentencing context, where due process requires fair notice and clear standards.

So where does this leave a sentencing court when having to identify *precisely* the acquitted conduct in a particularly thorny case? It is unclear to me, although one possible approach could be something similar to the collateral-estoppel rule set out in *Ashe v. Swenson*, 397 U.S. 436; 90 S. Ct. 1189; 25 L. Ed. 2d 469 (1970). See Johnson, *If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. Rev. 153, 157 n. 14 (1996). In the double-jeopardy context, a court might have to determine whether a defendant had been acquitted of a particular crime in a prior proceeding. When faced with this issue, the Supreme Court in *Ashe* explained that a court should "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a *rational jury* could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe*, 397 U.S. at 444 (quotation marks and citation omitted; emphasis added).

The salient feature of this approach is the "rational jury" standard. A rational jury would not, for example, close its collective eyes to uncontroverted evidence of a prior felony conviction. Nor would a rational jury close its collective eyes to uncontroverted evidence of a murder or robbery victim. Nor would a rational jury, when faced with two separate four-element charges that share three common elements, conclude that the prosecutor had satisfied all four elements of one charge but none of the elements of the other charge. While it might not answer every question raised by the *Beck* dissent, *Ashe*'s rational-jury standard would seem to provide a workable model for a sentencing court to use when having to identify acquitted conduct in a difficult case, one that satisfies the due-process concerns noted above and discussed in detail by the *Beck* majority.

***8** With these matters in mind, I turn to the present appeal on remand. I agree with much of the majority's analysis and my disagreements are relatively minor. First, in its statement of what *Beck* requires, the majority appears to come close to a categorical "elements-based" approach, when it states, "We infer from this broad definition that under *Beck*, a sentencing court must consider a defendant as having undertaken no act or omission that a jury could have relied upon in finding the essential elements of any acquitted offense proved beyond a reasonable doubt." As I have explained, I think a categorical approach is generally not advisable, though admittedly this might be what the *Beck* majority intended. Second, I do not read the sentencing court as relying on defendant having passed around a firearm or that defendant's firearm was, in fact, "use[d] in an indiscriminate shooting" as justifications for the upward departure. Had the sentencing court relied on such evidence, then the resulting departure sentence would likely be in violation of *Beck.* But this was not the case, and, based on my reading of *Beck* and related case law, defendant's sentence does not violate due process.

For these reasons, I concur dubitante in the judgment.

All Citations

--- N.W.2d ----, 2020 WL 1445414

Footnotes

[1] *People v. Roberts*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2018 (Docket No. 339424).

[2] We wholeheartedly agree with our concurring colleague's discussion regarding the implementation concerns left by *Beck*, as well as our concurring colleague's thoughts on how best to address those concerns, and we adopt them as our own. We further note that "I know it when I see it" is literally no standard at all.