Order

Michigan Supreme Court
Lansing, Michigan

October 21, 2020

161263

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 161263
COA: 339424
Ingham CC: 16-000384-FC

TERRELL MARCUS ROBERTS,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the March 24, 2020 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals, VACATE the sentence for felon in possession of a firearm, and REMAND this case to the Ingham Circuit Court for resentencing. As argued by both the prosecution and defense at trial, the factual issue facing the jury in determining the defendant's guilt or innocence of the assault with intent to murder charge was whether he passed a gun to another individual, who it is undisputed then fired the gun into a crowd on a city street. The jury acquitted the defendant of this charge. As such, when the trial court assigned 25 points to Offense Variable 9, MCL 777.39(1)(b), for endangering the crowd, and when it departed upward from the recommended guidelines range in order to deter gun violence on the city's streets, it improperly sentenced the defendant based on acquitted conduct. *People v Beck*, 504 Mich 605 (2019).

s1014

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 21, 2020

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v TERRELL MARCUS ROBERTS, Defendant-Appellant.	FOR PUBLICATION March 24, 2020 9:05 a.m. No. 339424 Ingham Circuit Court LC No. 16-000384-FC

ON REMAND

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

RONAYNE KRAUSE, J.

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 ___; ___ NW2d ___ (2019) (Docket No. 152934). We again affirm.

I. BACKGROUND

[1] *People v Roberts*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2018 (Docket No. 339424).

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.

* * *

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.

> 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 NW2d 502 (2015); *People v Steanhouse*, 500 Mich 453, 474-475; 902 NW2d 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 NW2d 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 NW2d 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 NW2d 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 US 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 NW2d 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 US 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

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 NW2d 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 NW2d 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 NW2d 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.
>
> 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 NW2d 41 (2004); *People v*

[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.

Robinson, 475 Mich 1, 15; 715 NW2d 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.

/s/ Amy Ronayne Krause
/s/ Michael J. Riordan

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ON REMAND

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

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 __, __; __ NW2d __ (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.

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 US 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.

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 US 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 US 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 NC 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 US 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.

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.

/s/ Brock A. Swartzle