STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS DAJIUONE BROWN,

Defendant-Appellant.

FOR PUBLICATION
November 23, 2021
9:05 a.m.

No. 352001
Macomb Circuit Court
LC No. 2018-003845-FC

Before: MARKEY, P.J., and M. J. KELLY and SWARTZLE, JJ.

SWARTZLE, J.

Defendant shot and killed a man. Defendant brought a firearm to the scene knowing that violence was a distinct, even likely risk, and he brought the firearm to the scene illegally, as he was a felon on probation at the time. Defendant even admitted using deadly force with the intent to injure the man. On these facts, a jury convicted defendant of being a felon in possession and felony firearm. A second jury, however, acquitted defendant of second-degree murder and voluntary manslaughter based on a self-defense theory. At sentencing, the trial court imposed the mandatory minimum of five years on the felony-firearm conviction (second offense), and, on the felon-in-possession conviction, the trial court departed upward from the guidelines range and sentenced defendant to 84 to 240 months of imprisonment. The question on appeal is this—under our Supreme Court's decision in *People v Beck*, 504 Mich 605; 939 NW2d 213 (2019), what factual circumstances involving the shooting could the trial court consider, if any, when sentencing defendant on the felon-in-possession conviction?

Had the prosecutor decided not to retry defendant on the murder charge, defendant's sentence might well have survived appeal. The circumstances surrounding the shooting would not have been shielded under *Beck*, and, given this, the trial court could have taken into account the undisputed observation that the decedent would still have been alive had defendant not violated the law and taken a firearm to the scene, especially knowing the substantial risk of serious violence. And yet, because defendant was charged with and acquitted on a self-defense theory, the shooting and resulting death fell under *Beck*'s conception of "acquitted conduct" and, therefore, should have been off-limits at sentencing. Accordingly, as explained in more detail below, our Supreme

Court's precedent requires that we vacate defendant's felon-in-possession sentence and remand for resentencing.

I. BACKGROUND

This case concerns a shooting outside of a barber shop in Warren, Michigan. Earlier on the day of the shooting, Raymond Jones and Lawrence Lewis went to the barber shop, but, because the line was too long, they decided to leave. On the way back to Lewis' vehicle, a group of individuals called out to Jones, asking if he had "a problem" with someone they knew. The group of individuals wanted to fight, and when Jones indicated a willingness to do so, the individuals surrounded him. At some point, Jones got into Lewis' vehicle. Lewis saw one of the individuals "flash[] a bag" at him and believed it may have contained a firearm; Lewis then drove away.

As Lewis drove away, he called several friends and family members, including his brother—defendant—to help him fight the group of individuals from the barber shop. Lewis and Jones subsequently picked up four other individuals, including defendant. Defendant had a firearm in his possession when he joined the group.

The group drove back to the barber shop. During the drive, it was mentioned that there was a fight between Jones and some other individuals and that one of the individuals may have "flashed" a firearm. When they arrived at the parking lot behind the barber shop, the group exited the vehicle, and there was evidence that defendant chambered a round in his firearm.

As they approached the front of the barber shop, Jones yelled to the individuals inside. Immediately, Byron Johnson came out brandishing a firearm. Johnson waved the firearm in the air, pointed it at the group, and said, "[W]hat's good, who want it?" Johnson pushed several people, and then he turned and pointed his firearm at defendant. Johnson became distracted by another person, and as he turned away, defendant shot him in the head. Johnson died almost instantly.

Defendant had two criminal jury trials related to the shooting. He was originally charged with first-degree murder, MCL 750.316; felon-in-possession, MCL 750.224f; and felony firearm (second offense), MCL 750.227b. The jury in the first trial found defendant guilty of the two firearm charges. The jury, however, could not reach a verdict on the first-degree murder charge, which resulted in the trial court declaring a mistrial.

The prosecutor subsequently filed an amended felony information charging defendant with second-degree murder, MCL 750.317. A second trial was held on the charge of second-degree murder and the lesser-included offense of voluntary manslaughter, MCL 750.321. Defendant relied on a self-defense theory under the Self-Defense Act, MCL 780.971 *et seq*.

During closing, defense counsel told the jury that defendant had been asked to go to the barber shop because he used to be a boxer and therefore knew how to fight. Counsel further explained: "At no point in this trial did I ever say that Curtis Brown did not shoot Byron Johnson. I wouldn't. It wouldn't be true. He did. At no point in this trial did I ever say that he didn't intend to hurt Byron Johnson when he shot him. I wouldn't. It's not true. He did. He did it because he

thought he was going to get shot." The jury in the second trial acquitted defendant of second-degree murder and voluntary manslaughter.

At sentencing on defendant's firearm convictions, the parties agreed that the conviction for felony firearm (second offense) required a sentence of five years of imprisonment, to be served consecutive to defendant's sentence on the felon-in-possession conviction. On the latter conviction, the parties further agreed that the advisory sentencing guidelines range was nine to 46 months of imprisonment. The prosecutor, however, asked for an upward departure on the felon-in-possession conviction, arguing that the trial court should consider the facts and circumstances surrounding Johnson's death.

In response, defense counsel argued that the trial court should not impose an upward departure. Counsel relied primarily on our Supreme Court's decision in *Beck*, 504 Mich 605, and argued that the trial court could not consider any "acquitted conduct." During the colloquy, the trial court asked defense counsel whether it could consider circumstances that were common to the felon-in-possession conviction and the murder acquittal: "[H]ow is this Court going to parse what is acquitted conduct and what is convicted conduct? How can I do that when they overlap?" Defense counsel answered that the trial court could not consider any of the circumstances involving defendant's role in Johnson's death.

The trial court concluded that defense counsel's position was too broad. The trial court believed that it could "certainly . . . consider the circumstances that led up to the taking of a life," and further explained:

> I'm not considering the fact . . . that he was acquitted . . . of this offense and . . . that he should be guilty because he plainly should not be guilty of this offense. It was a reasoned decision by the members of the jury to acquit [defendant]. But had [defendant] not gone to that scene, the fact is Mr. Johnson would still be alive today, and [defendant] had no reason to go to that scene to incite any violence whatsoever, and yet he still proceeded to go to the barber shop armed with a weapon despite being on parole and violating his parole by having a weapon, . . . and it's not as if he didn't just go to the barber shop without knowing that the use of that weapon might occur, he cocked that weapon in the parking lot. He knew very well that his weapon could be used and for good reason, a weapon was displayed earlier. Now, there was testimony that [defendant] never knew . . . there was a weapon that was displayed, and that may be the case, but the fact is . . . that–as he was approaching the barber shop . . . he cocked that weapon. The Court can consider, as the prosecutor pointed out, this isn't a search warrant being conducted by a parole officer and finding a gun in the house with a parolee that was a felon, this is nothing akin to that. The fact is that he was going to look for at least a fight while armed with a firearm, and he had . . . a firearm of which he had no business, no lawful right to be possessing.

Additionally, the trial court noted defendant's criminal history, stating defendant spent "some of . . . his juvenile life," and "most of his adult life," committing crimes and either being on supervised release or incarcerated, and "despite being a victim of gun violence," he also "perpetrat[ed] gun violence." The trial court concluded:

> This Court's sentence has to be proportional, it has to be reasonable, and the Court does not believe that the guidelines really encompass . . . the entire picture of [defendant's] life and what he's done. Certainly, as you had indicated that he's done . . . some things perhaps on parole that are commendable . . . in taking care of him and his family, but that doesn't absolve him of his history and it doesn't absolve him of the fact that had he not chose . . . to bring this weapon, Mr. Johnson would still be alive. And again, and I can't emphasize it enough, he was acquitted of murder. He doesn't deserve to be sentenced as a murderer, and the Court is not finding in any way, shape or form that is the case, but the Court has to put this crime in context and fashion an appropriate sentence.

The trial court sentenced defendant to 84 to 240 months of imprisonments for his felon-in-possession conviction, to be served consecutively to 60 months of imprisonment for his felony-firearm conviction.

This appeal followed.

II. ANALYSIS

On appeal, defendant challenges only his sentence for his felon-in-possession conviction. He argues that the trial court considered "acquitted conduct" in violation of his constitutional right to due process as announced in *Beck*. We review constitutional claims under a de novo standard. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). If the claim involves factual findings by the trial court, then we review those findings under a clear-error standard. *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016).

A. *BECK* AND ITS PROGENY

In *Beck*, our Supreme Court held that the use of "acquitted conduct" at sentencing violates a defendant's constitutional right to due process. *Beck*, 504 Mich at 629. In reaching this determination, the *Beck* majority distinguished between "uncharged conduct" on the one hand and "acquitted conduct" on the other: "When a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard." *Id.* at 626. But, "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent." *Id*. The *Beck* Court extended this presumption of innocence to sentencing, where the presumption shields the defendant from being held criminally responsible for the conduct upon which the jury acquitted the defendant. *Id.* Prior to trial, the presumption of innocence is a rebuttable one; at sentencing, the presumption is irrebuttable—the trial court cannot sentence the defendant based on any fact or circumstance that would pierce the acquitted-conduct shield. See *id.* at 626-627, 629. This makes the prohibition on the use of acquitted conduct at sentencing somewhat akin to the prohibition on being placed in double jeopardy in a subsequent trial. Cf *People v Nutt*, 469 Mich 565, 574-575; 677 NW2d 1 (2004).

Although a minority position, some other states have similarly restricted or prohibited the use of acquitted conduct at sentencing. See, e.g., *State v Melvin*, 248 NJ 321, 352; 258 A3d 1075

(2021); *State v Koch*, 107 Hawaii 215, 225; 112 P3d 69 (2005). And when he was on the D.C. Circuit Court, now-Justice KAVANAUGH wrote in dissent on this issue: "[T]here are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a *matter of appearance* and as a *matter of fairness* . . . ." *United States v Brown*, 892 F3d 385, 415 (DC Cir, 2018) (KAVANAUGH, J, dissenting) (emphasis added). From the perspective of fundamental fairness, this minority position concludes that a jury's verdict of not guilty on one charge restricts what the trial court can consider at sentencing on a jury's verdict of guilty on another charge. Under *Beck*, this position is now the law of this state.

While saying that a trial court cannot use "acquitted conduct" at sentencing seems straightforward, identifying the specific facts and circumstances that are off limits can sometimes be anything but. The *Beck* majority described "acquitted conduct" as conduct that "has been formally charged and specifically adjudicated [not guilty] by a jury." *Beck*, 504 Mich at 620. But Justice CLEMENT identified several epistemological and practical problems with this definition in her dissent in *Beck*, *id.* at 659-660, 668-669 (CLEMENT, J, dissenting), and these problems were further explored by one of the undersigned in a separate opinion concurring dubitante in *People v Roberts (On Remand)*, 331 Mich App 680, 692-697; 954 NW2d 221 (2020) (SWARTZLE, J, concurring dubitante), *rev'd* 506 Mich 938; 949 NW2d 455 (2020). It has not gone unnoticed that courts have subsequently struggled with the implementation of *Beck*'s holding. See *People v Stokes*, ___ Mich ___, ___; 957 NW2d 824 (2021) (MCCORMACK, CJ, concurring) ("Cases such as this one and *Roberts* make plain that the Court of Appeals is struggling with the boundaries of our holding in *Beck*.").

The basic quandary flows from the point that, except in rare circumstances not relevant here, the jury does not make an affirmative finding of innocence when it acquits a defendant of a particular charge. As the United States 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 acknowledgment 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 . . . ." In other words, when a jury acquits a defendant on a particular charge, the jury does not conclude that the defendant is factually innocent of that charge; rather, it simply finds that the prosecutor failed to prove one or more of the elements beyond a reasonable doubt. Some courts have taken issue with this observation, see, e.g., *State v Paden-Battle*, 464 NJ Super 125, 147; 234 A3d 332 (2020), but with due respect, simply as a matter of logic applied to an evidentiary burden, the observation is unassailable.

Thus, a jury's acquittal is not an affirmative factual finding that something did or did not actually occur. Rather, it is a determination that the prosecutor failed to prove the hypothesis of guilt. "Acquitted conduct," therefore, is a concept based not on the existence of sufficient evidence, but rather one based on the absence of such evidence; it is a concept borne not of logical deduction nor evidentiary inference, but rather it is a legal term of art based on evidentiary absence or negation.

One straightforward way of dealing with the epistemological and practical problems associated with identifying "acquitted conduct" would be to adopt a categorical approach based on the elements of the crime. Under this standard, *any evidence* that relates to *any element* of the crime of which the defendant was acquitted would have to be discarded at sentencing. This is a

rather mechanical exercise that, because of its sweeping nature, has the virtue of being relatively easy to apply. Some support for this approach can, in fact, be found in *Beck*. At the beginning of its opinion, for example, the *Beck* majority frames the question before it as follows: "[W]hether a sentencing judge can sentence a defendant for a *crime* of which the defendant was acquitted." *Beck*, 504 Mich at 608 (opinion of the Court) (emphasis added). The *Beck* majority repeats this focus on the "*crime* of which the defendant was acquitted" in several places. *Id.* (emphasis added); see also *id*. at 609. One could infer from these references that any fact or circumstance related to any element of the crime must be jettisoned at sentencing.

But a categorical approach would lead to absurd results in some situations, as explained elsewhere. See *id.* at 659-660, 668-669 (CLEMENT, J, dissenting); *Roberts (On Remand)*, 331 Mich App at 692-697 (SWARTZLE, J, concurring dubitante). In fact, the trial court in this case raised a related concern when it wondered aloud about circumstances involving the acquitted charge that overlapped with circumstances involving the convicted charge. If the categorical approach was adopted, then this would mean that any fact or circumstance related to any element of the acquitted crime would be off-limits at sentencing, even if the same fact or circumstance was also related to the convicted crime. The trial court appropriately rejected this approach.

A different way of identifying the facts and circumstances that are prohibited at sentencing centers on what the parties actually disputed at trial. This approach moves away from prohibiting any and all facts and circumstances related to any element of the crime, and instead focuses on the key facts and circumstances that the parties argued about during the trial. This approach is similar to the "rational jury" standard used in the double-jeopardy context, which requires examining the record to determine the ground or grounds upon which a rational jury could have acquitted the defendant. *Roberts (On Remand)*, 331 Mich App at 696-697 (SWARTZLE, J, concurring dubitante) (citing *Ashe v Swenson*, 397 US 436; 90 S Ct 1189; 25 L Ed 2d 469 (1970)). Rather than focus on all of the conceivable grounds upon which a jury could have theoretically acquitted the defendant—even those grounds, for example, that were conceded by the defense or otherwise uncontested by the parties—the focus would be on the grounds that the parties actually put in dispute at trial. "The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id.* at 697 (internal quotation marks omitted).

This rational-jury approach appears to be consistent with *Beck*. Although the *Beck* majority did make broad reference to "the crime" on several occasions, a fair reading of its opinion suggests that the majority had a narrower understanding of its holding. As it explained near the end of its analysis, the majority held that a trial court is prohibited from relying at sentencing on "evidence that a defendant engaged in conduct of which he was acquitted," i.e., "acquitted conduct." *Beck*, 504 Mich at 629 (opinion of the Court). This narrower reading is further confirmed by considering the Supreme Court's recent remand order in *Roberts*. In that case, the prosecutor and defense counsel argued about whether the defendant had passed a firearm to another individual, the latter who then shot into a crowd on a city street. The jury acquitted the defendant of aiding and abetting an assault with intent to murder, but convicted him of being a felon in possession of a firearm. In

its brief order,[1] our Supreme Court made clear that it was focused on what the parties actually put at issue before the jury when it remanded for resentencing. See *Roberts*, 506 Mich at 938 ("As argued by both the prosecution and defense at trial . . . .").

While the distinction drawn between these two approaches might be one without a difference in the mine-run of cases, there will be cases where the distinction makes a difference. Under the categorical approach, any fact or circumstance related to any element—even an element not put in dispute by the parties—would be off limits at sentencing. In contrast, under the rational-jury approach, the sentencing court could consider facts and circumstances that were not, in a practical sense, put in dispute at trial, as long as those facts and circumstances were otherwise consistent with the jury's acquittal on a particular charge. Moreover, if a specific fact or circumstance was relevant to both the acquitted charge and the convicted charge—i.e., if there was an overlap of relevant conduct—then the trial court could consider that fact or circumstance when sentencing on the convicted charge. This rational-jury standard appears to be consistent with *Beck* and its progeny, and it is a workable standard that trial courts can use when sentencing a defendant who was convicted of a particular charge but also acquitted of another related charge.

B. THE SHOOTING AND RESULTING DEATH ARE "ACQUITTED CONDUCT"

Applying this standard here, we must vacate defendant's sentence on the felon-in-possession conviction. At the conclusion of the first trial, the jury convicted defendant of being a felon in possession of a firearm and felony firearm. There is no question that defendant knew that, under the law and as a condition of his probation, it was unlawful for him to carry a firearm. Michigan law prohibits felons like defendant from carrying firearms because of the perceived increased risk to society that these individuals pose when armed. *People v Dillard*, 246 Mich App 163, 170; 631 NW2d 755 (2001); *People v Swint*, 225 Mich App 353, 374; 572 NW2d 666 (1997). Then, during the second trial, defense counsel conceded that defendant went to the barber shop looking for a fight. Defendant had a boxing background, and when his younger brother asked him to go to the barber shop to fight, defendant willingly went. There is no question that defendant was carrying a firearm, and there is evidence in the record that he even chambered a round before approaching the barber shop.

When sentencing defendant for the felon-in-possession conviction, the trial court could take into consideration any of these facts and circumstances. Thus, the trial court did not err, for example, by noting that defendant should have been aware of the increased risk of serious violence associated with bringing a firearm to a fistfight. Nor did the trial court err by noting that defendant was not convicted for possessing the firearm in his home, but rather for bringing the firearm to a public place where violence was expected. The trial court could consider any of the relevant facts

[1] Peremptory orders from our Supreme Court are precedentially binding "to the extent they can theoretically be understood, even if doing so requires one to seek out other opinions." See *Woodring v Phoenix Ins Co*, 325 Mich App 108, 115; 923 NW2d 607 (2018); see also *People v Edgett*, 220 Mich App 686, 693 n 6; 560 NW2d 360 (1996).

and circumstances leading up to the confrontation outside of the barber shop when sentencing defendant on the felon-in-possession conviction.

The trial court erred, however, when it held defendant responsible for Johnson's death. The jury acquitted defendant of second-degree murder and voluntary manslaughter on a theory of self defense. On this theory, although defendant caused Johnson's death, defendant was not criminally responsible for the death. Even though, ceteris paribus, Johnson would not have died outside of the barber shop but-for defendant's act of shooting him, the jury concluded that defendant was lawfully justified in committing that act. Once Johnson brandished his own firearm, defendant had the right to defend himself and could not be held criminally responsible for the act of shooting Johnson or Johnson's resulting death. Although the trial court took pains to make clear that it was not holding defendant "accountable" for Johnson's death, the court did mention on several occasions that, but-for defendant's actions, Johnson would still be alive. The jury determined that defendant was not criminally responsible for Johnson's death, and, as a result, the trial court could not consider the actual shooting and death when sentencing on the felon-in-possession conviction.

It is the case that defense counsel conceded at trial that his client intentionally shot Johnson. Typically, it would be proper for a sentencing court to consider a fact conceded by a defendant, even in the wake of *Beck*. But here, viewing the acquittal through the lens of the rational-jury standard, it is clear that the jury concluded that defendant was justified in shooting Johnson. Under *Beck*, defendant simply cannot be held criminally responsible for Johnson's death in any way, including at sentencing.

In sum, the line to be drawn in this case lies where Johnson brandished his weapon. All of the relevant facts and circumstances leading up to that point can be considered by the trial court when sentencing defendant on the felon-in-possession conviction. Defendant's conduct after that point and Johnson's resulting death fall under *Beck*'s concept of "acquitted conduct" and are off-limits for purposes of sentencing.

Finally, defendant also argues that his felon-in-possession sentence was disproportionate. We decline to address this issue because the trial court impermissibly considered acquitted conduct at sentencing. Given this, the trial court must readdress sentencing on remand, and, thus, any proportionality analysis at this point would be premature.

III. CONCLUSION

For the reasons set forth above, we vacate defendant's sentence for being a felon in possession, and we remand to the trial court for resentencing on this conviction. We take no position on whether the facts and circumstances of this offender and this offense warrant a departure from the advisory sentencing guidelines. We do not vacate defendant's felony-firearm sentence because the trial court properly sentenced defendant to 60 months in prison as required by statute. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Jane E. Markey
/s/ Michael J. Kelly