
STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNATHAN LAMAR BURKS,

Defendant-Appellant.

UNPUBLISHED

May 19, 2026

11:11 AM

No. 369129

Wayne Circuit Court

LC No. 16-002935-03-FC

Before: FEENEY, P.J., and GARRETT and BAZZI, JJ.

PER CURIAM.

Defendant is once again before this Court on remand from our Supreme Court for consideration as on leave granted.¹ Defendant previously appealed as of right his convictions for (1) first-degree home invasion, MCL 750.110a(2); and (2) possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, to which he was sentenced, as a third-offense habitual offender, MCL 769.11, to consecutive prison terms of (1) 18 to 40 years, and (2) 2 years, respectively.² See *People v Burks*, unpublished per curiam opinion of the Court of Appeals, issued April 3, 2018 (Docket No. 335955) (*Burks I*). As will be discussed in greater detail, this Court affirmed defendant’s convictions and sentences. See *People v Burks*, unpublished per curiam opinion of the Court of Appeals, issued February 27, 2020 (Docket No. 335955) (*Burks III*), p 1, 3; *Burks I*, unpub op at 1. Defendant now appeals the trial court’s denial of his motion for relief from judgment under MCR 6.508(D)(2) and (3). We affirm.

I. FACTS

“Defendant was convicted for his role in aiding and abetting his two co-defendants in a shooting that was precipitated by a dispute over tennis shoes.” *Burks III*, unpub op at 1. “One of

¹ *People v Burks*, 21 NW3d 462 (Mich, 2025) (*Burks VII*).

² The jury acquitted defendant of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), two counts of assault with intent to commit murder, MCL 750.83, and discharge of a firearm at a dwelling causing death, MCL 750.234b(5).

defendant's accomplices burst into a home and shot three people. A three-year-old child died as a result of the shooting, and two adults were injured." *Id.* Leading up to the home invasion, defendant called one of his codefendants, Paul Kendall, Jr., who was described as a "violent person," and informed him of the dispute. When Kendall arrived, he stated, "I'm not going over there for no games, and if you don't have a gun, you don't need to go." Defendant and another codefendant joined Kendall; Kendall entered the home and shot the victims; and a few minutes later, a vehicle drove by and fired at the home.

Defendant was convicted and sentenced, as stated earlier. At the sentencing hearing, the prosecution requested that the trial court assign 100 points for offense variable (OV) 3. Defendant objected, arguing that "the homicide was submitted to the jury, and the jury found him not guilty . . ." The trial court denied the objection and assigned 100 points for OV 3 without further explanation. When sentencing defendant above his recommended minimum sentencing range for his first-degree home invasion conviction,³ the trial court explained as follows:

In this particular case you mobilized an angry, volatile young person that you knew to be angry and volatile, and who had a penchant for using guns to come over and rally with you because of someone's missing tennis shoes.

A three-year old child has no future. There is a heartache for that family because it was your idea. You were the one who instigated the phone call and all of the action that led to a three-year old child being murdered on Easter Sunday.

I know that your position has been that you didn't do anything, that you were just there watching.

Well, the jury didn't believe that, and I don't believe that. Nobody brings spectators to a murder. You were involved. You were there in the car with the shooter driving there, and you were there with the shooter driving away, and you were prepared to be the wheel man to drive away.

And but for your active involvement, that three-year old child would be alive today. You bear enormous responsibility.

II. PROCEDURAL HISTORY

In *Burks I*, unpub op at 1, this Court affirmed defendant's convictions and sentences. In doing so, this Court held that defendant's sentence was not based on acquitted conduct, determining "there was evidence that defendant's actions set in motion the events leading to the shooting death and injuries." *Id.* at 4. This Court explained as follows:

As noted by the trial court, defendant's behavior in being a part of the group that produced the death and injuries in retaliation for what defendant thought had been

³ Defendant's recommended minimum sentencing range was 57 to 142 months, and the trial court sentenced defendant to 18 to 40 years' imprisonment.

an assault on his brother was not adequately accounted for in the sentencing guidelines. Contacting a violent person, knowing that he is violent and utilizes firearms, immediately after learning of his brother's situation, along with participating in the retaliation, defendant properly shares the blame for the carnage, at least for purposes of a sentencing departure. The trial court's view that defendant's phone call to the gunman over stolen shoes was the catalyst for the crimes, in contrast to defendant's view that he was merely a spectator, was supported by the evidence. [*Id.* at 4-5.]

In *People v Burks*, 505 Mich 873 (2019) (*Burks II*), our Supreme Court vacated the portion of the judgment affirming defendant's sentence for home invasion and remanded for reconsideration in light of *People v Beck*, 504 Mich 605; 939 NW2d 213 (2019).

On remand, this Court again affirmed defendant's sentence, determining that the trial court did not sentence defendant as if he had aided and abetted in the child's murder. *Burks III*, unpub op at 1, 3. This Court reasoned as follows:

Although [the] trial court commented on the death that resulted from the shooting, the trial court did not equate defendant's conduct with the murder and sentence him accordingly for an acquitted murder. Rather, the trial court cited to defendant's role in the killing as a catalyst for the circumstances that were placed into motion and the individuals prone to violence that defendant brought into the fray over tennis shoes. We conclude that [the] sentencing court's rationale for imposing its sentence did not violate *Beck* and adhere to our prior rejection of defendant's contention that the sentence was improperly premised on acquitted conduct[.] [*Id.* at 3.]

Notably, this Court declined to address the scoring of OV 3, reasoning that the issue was not within the scope of the Supreme Court's remand order. *Id.* at 4. In *People v Burks*, 505 Mich 1083 (2020) (*Burks IV*), our Supreme Court denied leave to appeal, stating that it was "not persuaded that the question presented should be reviewed by this Court."

Thereafter, defendant moved *in propria persona* for relief from judgment in the trial court, under MCR 6.508(D)(2) and (3), asserting that the trial court's consideration of acquitted conduct when assigning 100 points for OV 3 violated defendant's due-process rights under *Beck*. The trial court denied relief from judgment, determining that defendant was not sentenced as if he aided and abetted in the child's death; instead, he was sentenced because of his role "as a catalyst" for her death. Thereafter, defendant filed a delayed application for leave to appeal, again raising the alleged use of acquitted conduct to score OV 3, which this Court denied. *People v Burks*, unpublished order of the Court of Appeals, entered April 29, 2024 (Docket No. 369129) (*Burks V*). In lieu of granting leave to appeal, our Supreme Court remanded this matter to this Court for consideration as on leave granted. *People v Burks*, 21 NW3d 462 (Mich, 2025) (*Burks VI*).

III. PRE-OFFENSE CATALYST OR TRANSACTIONAL CONDUCT VERSUS ACQUITTED CONDUCT

On appeal, defendant argues that he is entitled to resentencing because the trial court erroneously relied on acquitted conduct when assigning 100 points for OV 3. We disagree.

A. STANDARD OF REVIEW

“A trial court’s decision on a motion for relief from judgment is reviewed for an abuse of discretion.” *People v Christian*, 510 Mich 52, 74; 987 NW2d 29 (2022). An abuse of discretion occurs when the court makes a decision that falls outside the range of reasonable and principled outcomes or makes an error of law. *Id.* at 75. Constitutional issues are reviewed de novo. *People v Brown*, 339 Mich App 411, 419; 984 NW2d 486 (2021). “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). “Clear error is present when the reviewing court is left with a definite and firm conviction that an error occurred.” *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015) (quotation marks and citation omitted). When making these factual findings, the trial court may consider all record evidence. *Id.* “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.” *Hardy*, 494 Mich at 438.

B. ANALYSIS

OV 3 concerns “physical injury to a victim.” MCL 777.33(1). An assessment of 100 points is required “if death results from the commission of a crime and homicide is not the sentencing offense.” MCL 777.33(2)(b). The assessment of 100 points for OV 3 requires factual causation, i.e., that the victim’s death would not have occurred but for the defendant’s criminal actions. *People v Laidler*, 491 Mich 339, 345; 817 NW2d 517 (2012). The defendant’s conduct is not required to have been the exclusive cause of the death. *Id.* at 346. The assessment of points for OV 3 is to be based on a consideration of the sentencing offense alone. *People v Biddles*, 316 Mich App 148, 165; 896 NW2d 461 (2016).

In *Beck*, 504 Mich at 629, our Supreme Court held that “due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted.” Stated differently, “[o]nce acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime.” *Id.* at 609. Accordingly, “a sentencing court may not rely even in part on acquitted conduct when imposing a sentence for the defendant’s conviction.” *People v Stokes*, 333 Mich App 304, 310; 963 NW2d 643 (2020). But sentencing courts may consider “the entire res gestae of an acquitted offense” as well as “the time, place, and manner in which an offense of which a defendant has been convicted is committed.” *Id.* at 310-311. “In the absence of evidence presented by a defendant demonstrating that a sentencing court actually relied on acquitted conduct when sentencing the defendant, the defendant is not entitled to resentencing.” *Id.* at 312.

In *People v Brown*, 339 Mich App 411, 422; 984 NW2d 486 (2021), this Court discussed “the epistemological and practical problems associated with” determining what constitutes

“acquitted conduct” that a sentencing court is barred from considering under *Beck*. This Court noted that one option “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.” *Id.* This Court rejected that approach because although it would be easy to apply, it would lead to absurd results in some situations. *Id.* at 423. For example, “[i]f the categorical approach were to be 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.” *Id.*

This Court then explained that “[a] different way of identifying the facts and circumstances that are prohibited at sentencing centers on what the parties actually disputed at trial.” *Id.* This approach would not prohibit consideration of “any and all facts and circumstances related to any element of the crime” of which the defendant was acquitted of, but would “instead focus[] on the key facts and circumstances that the parties argued about during the trial.” *Id.*

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. 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 423-424 (quotation marks and citations omitted).]

This Court concluded that “[t]his rational-jury approach appears to be consistent with *Beck*.” *Id.* at 424. Accordingly, this Court specifically “look[s] at the conduct actually disputed at trial to determine the basis of the jury’s acquittal and whether the evidence the trial court considered at sentencing was consistent with that acquittal.” *People v Boukhatmi*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 363998); slip op at 6.

Applying these principles to the present case, we conclude that defendant has failed to demonstrate that the trial court relied on “acquitted conduct,” opposed to the sentencing offense alone, when assigning 100 points for OV 3. Therefore, as we will explain, the trial court did not err in assigning 100 points for OV 3.

The sentencing offense for which 100 points were assigned for OV 3 was first-degree home-invasion. Specifically, the jury found defendant guilty of aiding and abetting in a home-invasion that resulted in a child’s death. That is, but for defendant’s criminal acts of aiding and abetting in the home-invasion, the child would not have died. Defendant was therefore “a factual cause” of the child’s death, even if he was not the sole factual cause. See *Laidler*, 491 Mich at 346.

Defendant argues that because the jury acquitted him of felony murder, the jury determined that defendant was not the but-for cause or otherwise responsible for the child’s death. But the trial court did not indicate that defendant engaged in acquitted conduct. As this Court previously

held in *Burks III*, unpub up at 3, although the trial court commented on the child’s death, it “did not equate defendant’s contact with the murder and sentence him accordingly for an acquitted murder.” “Rather, the trial court cited to defendant’s role in the killing as a *catalyst for the circumstances that were placed into motion* and the individuals prone to violence that defendant brought into the fray over tennis shoes.” *Id.* (emphasis added).

Indeed, here, the trial court focused on defendant’s *pre-offense* conduct as the “catalyst” for the three-year-old child’s death; it concluded that but for defendant’s decision to “mobilize[] an angry, volatile young person that [he] knew to be angry and volatile, and who had a penchant for using guns to come over and rally with [him] because of someone’s missing tennis shoes,” the three-year-old child would still be alive. The fact that defendant was not convicted of first-degree murder, assault with intent to murder, and discharge of a firearm at or in a building causing death, is irrelevant here because the trial court focused on defendant’s role as a catalyst in bringing the “volatile” posse together; defendant even acknowledges on appeal that “[y]es, [defendant] made a phone call and was present at the scene” In *People v Barr*, unpublished per curiam opinion of the Court of Appeals, issued March 23, 2023 (Docket No. 353585), pp 34-35,⁴ a panel of this Court determined that the trial court did not err when assessing 100 points for OV 3 when the victim of an armed robbery died as a result of a conspiracy to commit armed robbery against him. The defendant was convicted of that conspiracy as well as armed robbery and felony-firearm, but he was acquitted of first-degree felony murder and several other charges. *Id.* at 1-2. The panel reasoned as follows:

[B]y finding defendant guilty of conspiracy to commit an armed robbery against [the victim], the jury found beyond a reasonable doubt that, *inter alia*, (1) defendant and at least one other person agreed to commit an armed robbery against [the victim], and (2) defendant specifically intended to accomplish the illegal objective, i.e., to commit or help to commit an armed robbery of [the victim] That is, but for defendant’s criminal acts of entering into a conspiracy to commit an armed robbery of [the victim], [the victim] would not have died. Defendant was thus “a factual cause” of the death, even if he was not the sole factual cause. [*Id.* at 34.]

Here, we agree that but for defendant inviting a weaponized Kendal to participate in Beck’s scheme to recover the missing tennis shoes, the three-year-old child would still be alive. We conclude that the assessment of 100 points for OV 3 is appropriate when “death results from the commission of a crime and homicide is not the sentencing offense,” MCL 777.33(2)(b), and the victim’s death would not have occurred but for the defendant’s conduct leading to the home invasion. See *People v McGraw*, 484 Mich 120, 129; 771 NW2d 655 (2009) (regarding OV 9, “[n]othing precludes the sentencing court from considering transactional conduct when deciding what sentence to impose” within the guidelines’ range); Cf. *Laidler*, 491 Mich at 345-346.

⁴ “Although unpublished opinions are not binding, we may consider the rationale contained in an unpublished opinion to be persuasive.” *People v Brown*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket No. 359376); slip op at 9 n 14.

IV. CONCLUSION

Because sentencing courts may consider “the entire res gestae of an acquitted offense” as well as “the time, place, and manner in which an offense of which a defendant has been convicted is committed,” *Stokes*, 333 Mich App at 310-311, the trial court did not err by considering defendant’s pre-offense role under these circumstances. Accordingly, the trial court did not err in assigning 100 points for OV 3, and the trial court did not abuse its discretion by denying defendant relief from judgment.

Affirmed.

/s/ Kathleen A. Feeney

/s/ Mariam S. Bazzi

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNATHAN LAMAR BURKS,

Defendant-Appellant.

UNPUBLISHED

May 19, 2026

11:11 AM

No. 369129

Wayne Circuit Court

LC No. 16-002935-03-FC

Before: FEENEY, P.J., and GARRETT and BAZZI, JJ.

GARRETT, J. (*dissenting*).

I disagree with the majority’s determination that the trial court did not assess 100 points under offense variable (OV 3) based on conduct regarding which defendant, Johnathan Lamar Burks, was acquitted. I would hold that the trial court sentenced Burks relying on conduct that formed the basis of the charges the jury acquitted him of committing—first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), two counts of assault with intent to commit murder, MCL 750.83, and discharge of a firearm at a dwelling causing death, MCL 750.234b(5). Accordingly, I would vacate Burks’s sentence and remand for resentencing as required under *People v Beck*, 504 Mich 605; 939 NW2d 213 (2019).

I. PROCEDURAL HURDLES

I first address Burks’s procedural hurdles for obtaining relief under MCR subchapter 6.500. MCR 6.508(D)(2) precludes relief if the defendant’s motion for relief from judgment “alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision[.]” The court rule further states, “[F]or purposes of this provision, a court is not precluded from considering previously decided claims in the context of a new claim for relief, such as in determining whether new evidence would make a different result probable on retrial, or if the previously decided claims, when considered together with the new claim for relief, create a significant possibility of actual innocence[.]” Subchapter 6.500 also precludes relief for claims of error not previously raised unless the defendant establishes “good cause” for failing to raise the grounds for relief on appeal or in a prior motion for relief from judgment, MCR

6.508(D)(3)(a), and “actual prejudice from the alleged irregularities that support the claim for relief,” MCR 6.508(D)(3)(b). A defendant may establish actual prejudice with respect to a sentence by showing that “the sentence is invalid.” MCR 6.508(D)(3)(b)(iv).

In his appeal of right, Burks argued that he was entitled to resentencing because his sentence was based on acquitted conduct. As part of that argument, he asserted that OV 3 was scored 100 points based on “conduct of which he was acquitted[.]” Although this Court addressed Burks’s argument that his sentence was not reasonable or proportionate because it was based on acquitted conduct, it did not address Burks’s claim of error as it pertained to OV 3. *People v Burks*, unpublished per curiam opinion of the Court of Appeals, issued April 3, 2018 (Docket No. 335955) (*Burks I*), pp 4-5. Moreover, after our Supreme Court vacated this Court’s sentencing determination and remanded for reconsideration in light of *Beck*, this Court expressly declined to address Burks’s argument regarding OV 3, finding it outside the scope of the remand order. *People v Burks*, unpublished per curiam opinion of the Court of Appeals, issued February 27, 2020 (Docket No. 335955) (*Burks II*), p 4.

Therefore, Burks did not fail to assert his claim of error regarding OV 3 previously as stated in MCR 6.508(D)(3), and his alleged basis for relief was not decided against him previously as stated in MCR 6.508(D)(2). In addition, although Burks’s argument is very similar to his sentencing argument that this Court previously addressed, “a court is not precluded from considering previously decided claims in the context of a new claim for relief[.]” MCR 6.508(D)(2). Accordingly, subchapter 6.500 does not preclude granting relief on Burks’s claim that the trial court erroneously scored OV 3 based on acquitted conduct.

Likewise, *People v Motten*, ___ Mich App ___; ___ NW2d ___ (2024) (Docket No. 363044), lv pending, does not preclude granting relief on Burks’s claim. In that case, the defendant filed several successive motions for relief from judgment before filing his motion seeking relief under *Beck*. *Id.* at 2. The trial court denied the motion, and this Court denied leave to appeal. *People v Motten*, unpublished order of the Court of Appeals, entered February 21, 2023 (Docket No. 363044). Our Supreme Court remanded for consideration as on leave granted, specifically directing this Court to address whether *Beck* “should apply retroactively to cases that have become final on direct review.” *People v Motten*, 511 Mich 1003 (2023). On remand, this Court held that “*Beck*’s holding is not retroactive on collateral review.” *Motten*, ___ Mich App at ___; slip op at 1. Thereafter, the defendant filed an application for leave to appeal with our Supreme Court, which granted oral argument on the application.¹ *People v Motten*, ___ Mich ___; 25 NW3d 115 (2025).

Unlike *Motten*, Burks’s direct appeal was not final when our Supreme Court decided *Beck*. In fact, our Supreme Court vacated this Court’s sentencing analysis and remanded Burks’s case to this Court for reconsideration in light of *Beck*. *People v Burks*, 505 Mich 873 (2019). As previously stated, although Burks challenged the scoring of OV 3 on the basis that the trial court considered acquitted conduct in scoring the variable, this Court declined to address that argument. *Burks II*, unpub op at 4. Because Burks’s direct appeal was not final when *Beck* was decided,

¹ Oral arguments are scheduled to be heard in May 2026.

Burks challenged the scoring of OV 3 based on the reasoning of *Beck*, and this Court declined to address his argument, *Motten* does not preclude relief.

II. SUBSTANTIVE ANALYSIS

“In reviewing a trial court’s calculation of a defendant’s sentencing guidelines score, this Court reviews factual determinations for clear error, and factual determinations must be supported by a preponderance of the evidence.” *People v Anderson*, 322 Mich App 622, 634; 912 NW2d 607 (2018). In *Beck*, our Supreme Court held that “due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted” and relying on those findings when imposing a sentence. *Beck*, 504 Mich at 629. In support of its decision, the Court relied on the presumption of innocence:

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. 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.* at 626.]

The Court further stated, “[C]onduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process.” *Id.* at 627. The Court vacated the defendant’s sentence and remanded for resentencing because the trial court found by a preponderance of the evidence at sentencing that the defendant committed a murder that the jury acquitted him of committing. *Id.* at 610-612, 630.

Both this Court and our Supreme Court have applied *Beck* in the context of OV scoring. For example, in *People v Boukhatmi*, ___ Mich App ___; ___ NW3d ___ (2024) (Docket No. 363998); slip op at 2-3, 7, this Court vacated the defendant’s sentence and remanded for resentencing when the trial court increased the defendant’s OV 13 score based on a pattern of activity but the jury convicted the defendant of only one criminal sexual conduct (CSC) charge and acquitted him of the remaining three CSC charges. This Court stated, “[T]he trial court could not find that defendant committed three or more CSC crimes against RB to increase his punishment under OV 13. Doing so was precisely what *Beck* forbade—it punished defendant as though he were convicted of four counts of CSC, when he was convicted of one count and acquitted of three.” *Id.* at 7.

In *People v Jackson*, unpublished per curiam opinion of the Court of Appeals, issued February 25, 2021 (Docket No. 344242), p 5, the trial court scored 15 points for OV 1 on the basis that the defendant used a weapon during a home invasion and sexual assault. However, the jury acquitted the defendant of felon-in-possession of a firearm and felony-firearm. *Id.* While this Court affirmed the OV 1 score, *id.* at 6, our Supreme Court vacated the defendant’s sentence and remanded for resentencing, stating as follows:

In lieu of granting leave to appeal, we REVERSE that part of the judgment of the Court of Appeals affirming the 15-point score assigned to Offense Variable (OV) 1 of the judicial sentencing guidelines, we VACATE the sentence of the Wayne

Circuit Court, and we REMAND this case to the trial court for resentencing. On remand, the trial court shall score OV 1 at 0 points because the jury acquitted the defendant of the charges alleging that he possessed a firearm, and the facts do not establish that he possessed another type of weapon. See *People v Beck*, 504 Mich 605; 939 NW2d 213 (2019). [*People v Jackson*, 509 Mich 981 (2022).]²

Because the trial court in the instant case relied on acquitted conduct in assessing 100 points for OV 3, I would vacate Burks's sentence and remand for resentencing as in *Boukhatmi* and *Jackson*. I disagree with the majority that the trial court scored OV 3 based on Burks's pre-offense conduct as opposed to his acquitted conduct. When Burks objected to scoring 100 points for OV 3, the trial court stated, "I'll note the objection. I am going to score it 100 points." The court did not provide any reasoning in support of its decision. Before sentencing Burks, the trial court stated as follows:

Well, Mr. Burks, if you have a small child, then you of all people should have known that possible harm and what possible heartache could come from gunfire being utilized in a small residential place where there was a three-year old child.

In this particular case you mobilized an angry, volatile young person that you knew to be angry and volatile, and who had a penchant for using guns to come over and rally with you because of someone's missing tennis shoes.

A three-year old child has no future. There is a heartache for that family because it was your idea. You were the one who instigated the phone call and all of the action that led to a three-year old child being murdered on Easter Sunday.

I know that your position has been that you didn't do anything, that you were just there watching.

Well, the jury didn't believe that, and I don't believe that. Nobody brings spectators to a murder. You were involved. You were there in the car with the shooter driving there, and you were there with the shooter driving away, and you were prepared to be the wheel man to drive away.

And but for your active involvement, that three-year old child would be alive today. You bear enormous responsibility.

The trial court's reasoning is similar to the trial court's reasoning in *People v Brown*, 339 Mich App 411; 984 NW2d 486 (2021). In that case, a jury convicted the defendant of felon-in-possession of a firearm and felony-firearm but acquitted him of second-degree murder and voluntary manslaughter on a self-defense theory. *Id.* at 414. The trial court upwardly departed

² I cite *Boukhatmi* and *Jackson* as examples of cases in which this Court or our Supreme Court applied *Beck* in the context of OV scoring, but they are not the only cases in which *Beck* has been applied in the context of OV scoring.

from the sentencing guidelines range, stating that the victim would still be alive if the defendant had not gone to the scene to incite violence while carrying a gun that he cocked as he approached. *Id.* at 418. The trial court also stated:

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 . . . 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. [*Id.* at 418-419 (brackets omitted; second ellipsis added).]

This Court vacated the defendant's sentence and remanded for resentencing, stating that the trial court erred by holding the defendant responsible for Johnson's death when the jury acquitted him of second-degree murder and voluntary manslaughter. *Id.* at 426-428. This Court noted that the trial court remarked "on several occasions that, but for defendant's actions, Johnson would still be alive." *Id.* at 427.

Similarly, in the instant case, the trial court repeatedly remarked that a three-year-old died because of Burks's conduct. The court further disclaimed Burks's theory that he was not involved in the shooting, stating "Nobody brings spectators to a murder. You were involved." The court also remarked that "but for" Burks's involvement, "that three-year old child would be alive today." Because the trial court assessed 100 points for OV 3 and sentenced Burks as if the jury did not acquit him of first-degree premeditated murder and first-degree felony murder, I would vacate Burks's sentence and remand for resentencing.

/s/ Kristina Robinson Garrett