STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs **Michigan Supreme Court No. 156406**

JOEL EUSEVIO DAVIS,
Defendant-Appellee.

Court of Appeals No.	**332081**
Circuit Court No.	**15-005481-01-FH**

On Appeal from the Court of Appeals
Gleicher, P.J., and M.J. Kelly and Shapiro, JJ.

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

KYM WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research, Training,
and Appeals

AMANDA MORRIS SMITH (P73127)
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-5787

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Case **Page**

Federal Court Cases

State Court Cases

Constitutions

Statutory Authorities

State Rules and Regulations

Additional Citing References

STATEMENT OF JURISDICTION

Plaintiff-appellant appeals from the July 13, 2017 published per curiam opinion of the Court of Appeals affirming defendant's conviction for assault with intent to do great bodily harm less than murder, but vacating his conviction for aggravated domestic assault. On August 31, 2017, the People filed a timely application for leave to appeal, which this Court granted on May 4, 2018. This Court has jurisdiction over this appeal pursuant to MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

I

Under the abstract legal elements test, two convictions arising out of the same incident do not violate double jeopardy if each crime requires proof of an element the other does not. Here, defendant was found guilty of aggravated domestic assault, which required proof beyond a reasonable doubt that defendant assaulted a domestic partner causing serious physical injury, elements that were not required to be proven for his conviction of assault with intent to do great bodily harm less than murder. Did defendant's convictions offend double jeopardy?

The People answer, "No."

Defendant would answer, "Yes."

The circuit court was not asked this question.

The Court of Appeals answered, "No."

II

When the Legislature states that a defendant may be convicted under multiple statutes for crimes arising out of the same conduct, the Court must abide by the plain language of the statute, not on some imagined "legislative purpose" lurking behind the language. Here, MCL 750.84(3) expressly states that a defendant may be charged with *any other violation of law* arising out of the same conduct. Did the Legislature intend for defendant to be convicted under both MCL 750.84 and MCL 750.81a and must an interpretation of these statutes that attempts to divine the "true" legislative purpose behind same fail?

The People answer, "Yes."

Defendant would answer, "No."

The circuit court was not asked this question.

The Court of Appeals would answer, "No."

III

A court errs when it *sua sponte* adopts a minority rule that has thus far only been applied in out-of-state jurisdictions and then proceeds to misapply same to the case before it. Here, the Court of Appeals declared—without notice to the parties and without the issue being raised on appeal—that it would adopt and apply the rule against mutually exclusive verdicts to the instant case, despite the fact that the rule is only recognized in a handful of states and despite the fact that the rule conflicts with Michigan jurisprudence. Did the Court of Appeals reversibly err when it recognized this rule in Michigan?

The People answer, "Yes."

Defendant would answer, "No."

The circuit court was not asked this question.

The Court of Appeals would answer, "No."

IV

Offenses are mutually exclusive when a guilty verdict on one offense necessarily excludes a finding of guilt on another. Here, after defendant repeatedly assaulted the victim, he was charged with and convicted of assault with intent to do great bodily harm less than murder and aggravated domestic assault, crimes which are comprised of different elements, including distinct mental states. Because defendant's convictions were not mutually exclusive, did the Court of Appeals reversibly err when it found to the contrary?

The People answer, "Yes."

Defendant would answer, "No."

The circuit court was not asked this question.

The Court of Appeals would answer, "No."

STATEMENT OF FACTS

This case arises from defendant Joel Davis' conviction by jury of assault with intent to do great bodily harm less than murder[1] and aggravated domestic assault.[2] The facts are as follows:

At around 4:00 a.m. on June 10, 2015, 29-year-old Shawna Shelton lay sleeping in bed when defendant, her live-in boyfriend, suddenly burst into the room and asked where the ashtray was. (1a-3a). Shelton, who avoided making eye contact with defendant, responded that she did not know. Defendant began yelling that Shelton was being disrespectful by not looking at him, grabbed her shirt, yanked her off of the bed, and "threw" her onto the floor. (5a). Defendant hit Shelton—hard—two or three times in the face and head while she yelled at him to stop. (4a-5a). The force of the physical assault was such that Shelton later testified that she had "never felt that much pain" before. (5a).

Shelton got up and ran into the nearby living room, whereupon defendant charged her and hit her "very hard" two times in the face. (6a). Shelton felt blood "draining" after defendant hit her nose, felt her mouth filling with blood, and could not see out of her left eye, which had swollen shut. (6a-7a). Shelton screamed for defendant to stop hitting her and yelled for help. (17a-18a). Defendant yelled at Shelton to shut up, telling her that she was going to make him have to kill her. (7a). Shelton, who stood only 5'1 compared to defendant, who was 6'2 or taller, was scared for her life. (8a).

After defendant calmed down, Shelton ran to the bathroom, opened her mouth, and saw blood come out. When Shelton exited the bathroom, defendant was gone, as was her 2001 black Jeep Cherokee, which she had not given him permission to take. Missing from Shelton's purse

[1] MCL 750.84.
[2] MCL 750.81a.

were her cellular telephone, $400.00 in cash, and her keys. (9a-10a). Shelton put on a clean shirt and knocked on the doors of multiple neighbors until she found one willing to allow her to use the telephone to call the police. (12a).

Officer Jordan Dotter of the Dearborn Heights Police Department responded to the area and came into contact with Shelton, who was still bleeding, and observed her extensive injuries: her "face was almost unrecognizable," both of her "eyes were swelled almost shut," "[h]er lip was severely swollen, and she had a pretty significant bruise on her nose." (19a). An evidence technician took photographs of Shelton's "significant" injuries,[3] and then Officer Dotter escorted Shelton back to her house. (20a). Although EMS offered to take Shelton to the hospital, she initially declined because she wanted to leave the area since she did not know where defendant had gone to. (13a, 22a). Instead, Shelton went to the police station, where she was later picked up by her mother who took her directly to Southshore Hospital's emergency room. Once at the hospital, Shelton had a CAT scan and x-rays done, was given pain medication, and was put in a neck brace, which a doctor told her to continue to wear even after she left the hospital. Following the assault, Shelton reported suffering from "extreme pain" in her neck, face, and head. (14a-15a).

On June 12, 2015, defendant stood mute at the arraignment on the warrant on the charge of aggravated domestic assault.[4] On July 1, 2015, following the preliminary examination, defendant was bound over for trial on that charge, along with the additional charges of assault

[3] 23a (Sergeant Gary Voiles testifying that it appeared to him that Shelton had been "severely beaten about the face.").

[4] Defendant was charged under MCL 750.81a(3), which elevates the crime of aggravated domestic assault from a 1-year misdemeanor to a five-year felony if there is a previous conviction for assault or assault and battery perpetrated against a domestic partner.

with intent to do great bodily harm less than murder, unlawful driving away of a motor vehicle,[5] and larceny of personal property $200.00 to $1,000.00.[6]

On July 8, 2015, defendant stood mute at the arraignment on the information and a not guilty plea was entered on his behalf. The following year, after a two-day jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder and aggravated domestic assault.[7] On March 9, 2016, the court ordered defendant to serve an above-the-guidelines sentence of 69 months to 10 years of imprisonment in the Michigan Department of Corrections for the crime of assault with intent to do great bodily harm less than murder, to be served concurrently with a sentence of 1 to 5 years of imprisonment for the crime of aggravated domestic assault. (29a-31a).

On March 21, 2016, defendant filed a claim of appeal in the Court of Appeals. On November 28, 2016, defendant filed his brief on appeal contending that he was entitled to have his convictions vacated because: (1) the trial court abused its discretion when it allowed the People to admit, at trial, two photographs of the victim wearing a neck brace; and (2) since the crimes of assault with intent to do great bodily harm less than murder and aggravated domestic assault contain conflicting mental states, his convictions for both offenses offended double jeopardy.

On June 14, 2017, the People filed their brief on appeal, contending: (1) that the court had not abused its discretion when it allowed the admission of relevant, probative, photographs of the injured victim at trial; and (2) that, under the *Blockburger*[8] "same elements" test,

---

[5] MCL 750.413.
[6] MCL 750.356(4)(a).
[7] The jury acquitted defendant of the remaining charges. (27a-28a).
[8] *Blockburger v United States*, 284 US 299; 52 SCt 180; 76 LEd2d 306 (1932).

defendant's convictions did not implicate double jeopardy. As part of their second argument section, the People made the following observation in a footnote:

> To the extent that defendant intimates that he is entitled to relief because the jury's verdict was inconsistent, that issue is not properly before this Court because it was not raised in defendant's statement of the questions involved. MCR 7.212(C)(5). And if that is, in fact, an argument defendant desired to pursue on appeal, he completely failed to brief it for this Court. "A party who seeks to raise an issue on appeal but who fails to brief it may properly be considered to have abandoned the issue." *People v Smith*, 439 Mich 954; 480 NW2d 908 (1992), citing *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). This Court must decline to address this veiled argument for that reason. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999) (refusing to consider the defendant's constitutional claim that he failed to present in his statement of questions presented). Nonetheless, it is well-recognized that inconsistent verdicts within a single jury trial do not require reversal. *People v Vaughn*, 409 Mich 463, 466-467; 295 NW2d 354 (1980) ("Juries are not held to any rules of logic nor are they required to explain their decisions). And, in any case, the People disagree that the verdicts in this case were inconsistent: an intent to inflict great bodily harm less than murder merely *distinguishes* the two crimes defendant was convicted of here; it does not prevent the jury from convicting defendant of both offenses. See, e.g., *Doss*, 406 Mich at 99.[9]

On July 13, 2017, the Court of Appeals issued a published per curiam opinion finding defendant's arguments regarding the admission of certain photographs at trial to be "meritless." (39a). But the Court of Appeals reframed defendant's second issue on appeal, stating: "We agree that defendant was improperly convicted for a single act under two statutes with contradictory and mutually exclusive provisions. However, the issue is more nuanced than expressed by the defense and double jeopardy is not the proper initial focus." (41a). The Court of Appeals then looked at Michigan jurisprudence regarding inconsistent jury verdicts, but concluded that the instant case did not fit within the confines of that legal analysis. After looking to out-of-state legal authority, the Court of Appeals held that defendant's convictions were such that "a guilty verdict on one count necessarily excludes a finding of guilt on another, rendering the two 'mutually exclusive.'" (43a). Due to the "error" of defendant being convicted of two

[9] 32a.

mutually exclusive offenses, the Court of Appeals vacated his conviction for aggravated domestic assault. (44a).

On August 31, 2017, the People filed an application for leave from the Court of Appeals' decision, contending that MCL 750.81a and MCL 750.84 did not contain statutorily mutually exclusive provisions. The People further argued that, even if the statutes were mutually exclusive, defendant's convictions under both were proper because of the particular facts of this case. Defendant did not file a response to the application. On May 4, 2018, this Court granted the People's application and directed the parties to address:

> (1) whether the defendant's convictions under MCL 750.81a(3) and MCL 750.84 violate double jeopardy; (2) whether MCL 750.81a and MCL 750.84 contain contradictory and mutually exclusive provisions such that the Legislature did not intend a defendant to be convicted of both crimes for the same conduct, compare *People v Miller*, 498 Mich 13, 18-26 (2015) with *People v Doss*, 406 Mich 90, 96-99 (1979); (3) whether the Court of Appeals erred in recognizing a rule against mutually exclusive verdicts in Michigan, see generally *United States v Powell*, 469 US 57, 69 n 8 (1984); *State v Davis*, 466 SW3d 49 (Tenn, 2015); and (4) whether the Court of Appeals erred in applying this rule to the facts of this case.[10]

The People now proceed on leave granted. Additional facts may be provided *infra*.

[10] *People v Davis*, 910 NW2d 301 (2018).

ARGUMENT

I.

Under the abstract legal elements test, two convictions arising out of the same incident do not violate double jeopardy if each crime requires proof of an element the other does not. Here, defendant was found guilty of aggravated domestic assault, which required proof beyond a reasonable doubt that defendant assaulted a domestic partner causing serious physical injury, elements that were not required to be proven for his conviction of assault with intent to do great bodily harm less than murder. Defendant's convictions did not offend double jeopardy.

Standard of Review

A double jeopardy challenge normally presents a question of constitutional law which this Court reviews de novo. *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). But defendant did not preserve this issue by raising it in the trial court, thereby limiting appellate review to plain error. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e. clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e. that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (internal citation and citing reference omitted).

Discussion

The Michigan and Federal constitutions are analogous in their prohibition that "[n]o person shall be subject for the same offense to be twice put in jeopardy." Const. 1963, art. 1,

§15; U.S. Const., Am. V.[11] "The prohibition against double jeopardy protects individuals in three ways: '(1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense.'" *People v Miller*, 498 Mich 13, 19; 869 NW2d 204 (2015), quoting *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). Because defendant here was not subject to multiple prosecutions, the multiple punishment strand of double jeopardy is at issue in this case.

"The multiple punishment strand of double jeopardy 'is designed to ensure that courts confine their sentences to the limits established by the Legislature' and therefore acts as a 'restraint on the prosecutor and the Courts.'" *Id.* at 17-18, quoting *People v Mitchell*, 456 Mich 693, 695; 575 NW2d 283 (1998); see also *Brown v Ohio*, 432 US 161, 165; 97 SCt 2221; 53 LEd2d 187 (1977) ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense[.]"). This Court "must first determine whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments. If the legislative intent is clear, courts are required to abide by this intent." *Miller*, 498 Mich at 19, citing *Mitchell*, 456 Mich at 695-696 (explaining that where the legislative intent is clear, "a court's task of statutory construction is at an end[.]") (quotation and citing reference omitted). When, however, "legislative intent is not clear, Michigan courts apply the 'abstract legal elements' test articulated in *Ream*[12] to ascertain whether the Legislature intended to classify two

[11] This Court has "been persuaded in the past that interpretations of the Double Jeopardy Clause of the Fifth Amendment have accurately conveyed the meaning of Const. 1963, art. 1, §15[.]" *People v Smith*, 478 Mich 292, 302 n 7; 733 NW2d 351 (2007).
[12] *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008).

offenses as the 'same offense' for double jeopardy purposes. *Id.*; see also *Smith*, 478 Mich at 315-316 (overruling *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984) and concluding "that the 'same elements' test set forth in *Blockburger* best gives effect to the intentions of the ratifiers of our constitution.").

A. Because MCL 750.81a and MCL 750.84 evince a clear legislative intent with regard to the permissibility of multiple punishments, the Court must abide by this intent and find that defendant's convictions under both statutes do not offend double jeopardy.

Defendant was charged with, convicted by jury of, and sentenced for violating MCL 750.81a, aggravated domestic assault, which is set forth in the statute as follows:

> (2) Except as provided in subsection (3), an individual who assaults his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of the same household without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.[13]

Defendant was also charged with, convicted by jury of, and sentenced for violating MCL 750.84, assault with intent to do great bodily harm less than murder, which is set forth in the statute as follows:

> (1) A person who does…the following is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $5,000.00, or both:
>
> (a) Assaults another person with intent to do great bodily harm, less than the crime of murder.
>
> […]

[13] MCL 750.81a(2). Defendant's conviction was enhanced under MCL 750.81a(3), because he had a previous qualifying conviction for domestic assault. As a form of short-hand, the People, throughout this brief, will refer to the required domestic relationships described in MCL 750.81a(2) as crimes committed against a "domestic partner" or involving a "domestic relationship."

> (3) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same conduct as the violation of this section.[14]

Review of the plain language of MCL 750.84 reveals a legislative intent to impose multiple punishments. MCL 750.84(3) expressly provides that a defendant may be charged with, convicted of, and punished for *any other violation of law* arising out of the same conduct that gave rise to the charges brought under MCL 750.84. In *Miller*, 498 Mich at 23-24, this Court held that comparable language, found in MCL 257.625(7)(d), was a "specific authorization [by the Legislature] for multiple punishments[.]"[15] Likewise, in *People v Shipley*, 256 Mich App 367, 378; 662 NW2d 856 (2003), the Court of Appeals held that similar language found in MCL 750.110a(9) was "a clear indication of legislative intent to allow multiple punishment[s]" and, thus, found no violation of double jeopardy for the defendant's convictions stemming from the larceny of a firearm during a home invasion.[16] See also *People v Conley*, 270 Mich App 301, 311; 715 NW2d 377 (2006) (finding, for the same reason espoused in *Shipley*, that "the Legislature clearly expressed an intent to allow multiple punishments" for a violation of MCL 750.110a(9) and another crime arising out of the same incident); cf *People v Martin*, 271 Mich App 280, 295-296; 721 NW2d 815 (2006) (holding that comparable language in MCL 750.159j(13)[17] "clearly indicate[d] that the Legislature intended racketeering to be a separate and distinct offense, the violation of which may be punished separately from and cumulatively with

---

[14] MCL 750.84(1)(a), (3).
[15] See MCL 257.625(7)(d): "This subsection does not prohibit a person from being charged with, convicted of, or punished for a violation of subsection (4) or (5) that is committed by the person while violating this subsection."
[16] MCL 750.110a(9): "Imposition of a penalty under this section does not bar imposition of a penalty under any other applicable law."
[17] MCL 750.159j(13): "Criminal penalties under this section are not mutually exclusive and do not preclude the application of any other criminal or civil remedy under this section or any other provision of law."

the underlying predicate offenses."). Further, the fact that the language contained in MCL 750.84(3) is not repeated in the body of MCL 750.81a does not detract from this conclusion. In *Ream*, this Court explained that the Legislature is under no obligation to "expressly state[] that multiple punishments for specific offenses are permitted[,]" as "neither this Court nor the United States Supreme Court has ever adopted such a rule[.]" *Ream*, 481 Mich 238 n 16.

Moreover, neither MCL 750.81a nor MCL 750.84 contains any language restricting the charging, convicting, and sentencing of a defendant simultaneously under both statutes. When the Legislature *does* intend to preclude prosecution under multiple statutes, it "has shown its capability at clearly and expressly" making this intention known. *People v Chambers*, 277 Mich App 1, 9 n 9; 742 NW2d 610 (2007). For example, MCL 750.356c(5) states that a person who commits first-degree retail fraud "shall not be prosecuted under section 218(5) or 356(2)." Likewise, MCL 750.356d(3) and MCL 750.356d(5) bar the People from prosecuting a defendant "under section 360" if he commits second or third-degree retail fraud. Similarly, if a defendant brings a controlled substance to a jail in violation of MCL 801.263(1), he may not also be prosecuted under MCL 801.265 if his actions under MCL 801.263(1) constituted "the delivery, possession with intent to deliver, or possession of or other action involving a controlled substance that is punishable by imprisonment for more than 5 years under" MCL 333.7401 to MCL 333.7461. See MCL 801.265(2).

"Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecution may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." *Missouri v Hunter*, 459 US 359, 368-369; 103 SCt 673; 74 LEd2d 535 (1983); see also

Miller, 498 Mich at 19. Accordingly, defendant's convictions under MCL 750.81a and MCL 750.84 did not offend double jeopardy.

B. Assuming, arguendo, that the Legislature's intent was unclear with regard to multiple punishments, convictions under both MCL 750.81a and MCL 750.84 do not constitute the "same offense" under the abstract legal elements test articulated in People v Ream.

"[T]he 'abstract legal elements' test articulated in *Ream* [is used to] ascertain whether the Legislature intended to classify two offenses as the 'same offense' for double jeopardy purposes." *Miller*, 498 Mich at 19. Under this test, "it is not a violation of double jeopardy to convict a defendant of multiple offenses if 'each of the offenses for which defendant was convicted has an element that the other does not[.]'" *Id.*, quoting *Ream*, 481 Mich at 225-226; see also *Blockburger*, 284 US at 304 ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.") (citing reference omitted). "This means that, under the *Ream* test, two offenses will only be considered the 'same offense' where it is impossible to commit the greater offense without also committing the lesser offense." *Miller*, 498 Mich at 19, citing *Ream*, 481 Mich at 241.

The People begin by noting that, just like in *Blockburger*, 284 US at 182, defendant here was convicted under two separate and distinct statutes that target and punish different offensive conduct by their plain language. MCL 750.81a punishes person for inflicting serious or aggravated injury upon another with whom he or she has a qualifying domestic relationship. In contrast, MCL 750.84 punishes a person for assaulting another with the intent to do great bodily harm less than murder. That these are separate crimes is also reinforced by the fact that MCL 750.81a and MCL 750.84 each call for proof of a fact not required in the other offense. The

elements of aggravated domestic assault are: (1) an assault; (2) committed against an individual with whom defendant has or had a qualifying domestic relationship; and (3) that the assault caused serious or aggravated injury.[18] See *People v Brown*, 97 Mich App 606, 610-611; 296 NW2d 121 (1980); *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). "The elements of assault with intent to do great bodily harm less than murder are (1) an assault, i.e. 'an attempt or offer with force or violence to do corporal hurt to another' coupled with (2) a specific intent to do great bodily harm less than murder." *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996), citing *People v Smith*, 217 Mich 669, 673; 187 NW2d 304 (1922).

Thus, in order to convict a defendant of aggravated domestic assault, the People must prove, beyond a reasonable doubt, that the defendant inflicted a serious or aggravated injury upon a person with whom he has a qualifying domestic relationship. In contrast, the People need not prove either of these elements at trial in order to convict a defendant of assault with intent to do great bodily harm less than murder.[19] Likewise, in order to convict a defendant under MCL 750.84, the People must prove that the defendant acted with the specific intent to do great bodily harm less than murder, while a conviction under MCL 750.81a requires only proof that the defendant intended to commit an assault. Compare *Harrington*, 194 Mich App at 429-430 with *Johnson*, 407 Mich at 210. Because these crimes have different elements, "these offenses are not

[18] The trial court instructed the jury on the elements of the offense by combining Michigan Criminal Jury Instruction (M Crim JI) 17.2a (domestic assault) with M Crim JI 17.6 (aggravated assault). See 24a-25a; see also MCR 2.512(D)(2) and MCR 6.001(D). Both the assistant prosecuting attorney and defense counsel expressed their satisfaction with the instruction read to the jury. See 26a. And in its opinion, the Court of Appeals did not quibble with the accuracy of the trial court's jury instruction. See 44a.

[19] See, e.g., *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992) ("No actual physical injury is required for the elements of the crime to be established.") (citing references omitted).

the ‘same offense’ under either the Fifth Amendment or Const. 1963, art 1, §15 and therefore defendant may be punished separately for each offense.” *Smith*, 478 Mich at 319.

II.

When the Legislature states that a defendant may be convicted under multiple statutes for crimes arising out of the same conduct, the Court must focus on the plain language of the statute, not on some imagined "legislative purpose" lurking behind the language. Here, MCL 750.84(3) expressly states that a defendant may be charged with *any other violation of law* arising out of the same conduct. The Legislature therefore plainly intended for defendant to be convicted under both MCL 750.84 and MCL 750.81a and any interpretation of these statutes that attempts to divine the "true" legislative purpose behind same must fail.

Standard of Review

This Court reviews de novo questions of statutory interpretation. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008), citing *People v Buehler*, 477 Mich 18, 23; 727 NW2d 127 (2007).

Discussion

When the text of MCL 750.81a(1)-(2) and MCL 750.84(1)(a) are reviewed side-by-side, it is clear that each contains a description of a seemingly contradictory mental state.[20] That is, a person is guilty of violating MCL 750.81a if he assaults another[21] "without a weapon and inflicts serious or aggravated injury upon that individual *without intending to commit murder or to inflict great bodily harm less than murder*[,]" while a person is guilty of violating MCL 750.84(1)(a) if he assaults another "*with intent to do great bodily harm, less than the crime of murder*."

[20] See *supra* at pages 8-9 for the statutory language.
[21] MCL 750.81a(1) punishes a defendant who assaults "an individual," while MCL 750.81a(2) prohibits a defendant from assaulting a domestic partner or a person with whom he or she has a domestic relationship. Defendant in this case was convicted under MCL 750.81a(2).

(emphasis added).[22] This Court now asks whether these two statutes "contain contradictory and mutually exclusive provisions such that the Legislature did not intend a defendant to be convicted of both crimes for the same conduct, compare *People v Miller*, 498 Mich 13, 18-26 (2015) with *People v Doss*, 406 Mich 90, 96-99 (1979)[.]" *Davis*, 910 NW2d at 302.

A. The plain language of MCL 750.84(3) allows a defendant to be convicted of multiple crimes arising out of the same conduct, thereby expressly sanctioning this defendant's convictions under both MCL 750.84 and MCL 750.81a.

"[T]he purpose of statutory construction is to discern and give effect to the intent of the Legislature." *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009). To discern Legislative intent, this Court "consistently look[s] to and enforce[s] the plain language of statutes rather than some imagined 'legislative purpose' supposedly lurking behind that language." *People v Houston*, 473 Mich 399, 409; 702 NW2d 530 (2005), citing *Sotelo v Grant Twp.*, 470 Mich 95, 100; 680 NW2d 381 (2004). "Moreover, when considering the correct interpretation, the statute must be read as a whole." *Potter*, 484 Mich at 411 (citing reference omitted).

Accordingly, this Court need not look further than MCL 750.84(3), which states that a person may be charged with, convicted of, and punished for "*any other violation of law* arising out of the same conduct as the violation of" MCL 750.84. (emphasis added). So as to not belabor the point, the People rely upon the argument made *supra* at pages 9-11 regarding the legislative intention of MCL 750.84(3). There are two additional important points to be made about this section of the statute: first, when subsection (3) was added to MCL 750.84 via an amendment in 2013, the Legislature was fully aware of the so-called "negative intent" language

[22] Although this Court asked the parties to address MCL 750.84 in this second issue, the Court must have intended briefing only on MCL 750.84(1)(a), as this is the only portion of the statute that requires a specific intent, i.e. the intent to do great bodily harm less than murder. The other provisions of this statute pertain to assaults committed by strangulation or suffocation—no specific intent is named in this portion of the statute. See MCL 750.84(1)(b).

contained in MCL 750.81a, as that phraseology has been in place since that statute's enactment in 1939.[23] "It is an elementary rule of statutory construction that laws are assumed to be enacted by the legislative body with some knowledge of, and regard to, existing laws upon the same subject." *People v Buckley*, 302 Mich 12, 21; 4 NW2d 448 (1942) (internal quotation and citing reference omitted); see also *Capps v Michigan Dept of Social Services*, 115 Mich App 10, 14-15; 320 NW2d 272 (1982) (stating that "[w]here a conflict exists between two statutory provisions the last expression of the Legislature will control."). Thus, if the Legislature had wanted to preclude a defendant from being charged under both MCL 750.84 and MCL 750.81a, it could have included such language in one or both of the statutes. For example, the Legislature could have included language in MCL 750.84 indicating that a person may be convicted under that statute for committing the described offense "by any means not constituting the crime of" aggravated assault, or vice versa. Our appellate courts have held that similar language—"or by any means not constituting the crime of assault with intent to murder"—makes the crimes of attempted murder (MCL 750.91) and assault with intent to murder (MCL 750.83) statutorily mutually exclusive. See *People v Smith*, 89 Mich App 478, 483; 280 NW2d 862 (1979); *People v Long*, 246 Mich App 582, 589; 633 NW2d 843 (2001). But as is plain from the face of the statutes, the Legislature did not add this type of language to either MCL 750.81a or MCL 750.84.

Second, by MCL 750.84(3)'s use of the expansive phrase "any other violation of law," the Legislature expressly sanctioned charging a defendant with *any other crime* stemming from the same conduct that forms the basis of the charge grounded in MCL 750.84. Compare *Miller*, 498 Mich at 24 (noting that the Legislature limited multiple punishments only to certain

[23] See Am. 2012, Act 367, Eff. April 1, 2013. MCL 750.81a(2)-(3) were added to the statute in 1994. See Am. 1994, Act 65, Eff. July 1, 1994.

circumstances described in the statute). As discussed *supra* at pages 9-11, if the Legislature wanted to bar a defendant from prosecution under both MCL 750.84 and MCL 750.81a, it knew how to write that language into the statute, but it did not do so here. The United States Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v Germain*, 503 US 249, 253-254; 112 SCt 1146; 117 LEd2d 391 (1992) (citing references omitted). This Court must therefore conclude that any further review into the imagined "'legislative purpose' supposedly lurking behind" MCL 750.81a(1)-(2) and MCL 750.84(1)(a) is impermissible given the plain language of MCL 750.84(3) and answer the question it has posed here in issue two in the negative. *Houston*, 473 Mich at 409.

B. MCL 750.81a and MCL 750.84 do not contain mutually exclusive provisions because—as this Court held in a comparable case nearly 40 years ago—the "negative" intent language set forth in MCL 750.81a merely distinguishes that crime from other similar crimes in our statutory scheme.

The People are well aware that some judges in our appellate courts, along with defendant himself, have not treated MCL 750.84(3) as a barrier to engaging in additional statutory analysis on the question of whether the Legislature intended for a defendant to be charged under both MCL 750.81a(1)-(2) and MCL 750.84(1)(a). The crux of the argument is that, because courts must avoid reading a statute in such a way that would render any part of it surplusage or nugatory,[24] the phrase "without intending to commit murder or to inflict great bodily harm less than murder" found in MCL 750.81a must mean that the Legislature did not intend for a person to be convicted of both this crime and another crime which requires proof of that intent, i.e. assault with intent to murder (MCL 750.83) or assault with intent to do great bodily harm less

[24] See *People v Moreno*, 491 Mich 38, 45; 814 NW2d 624 (2012) (citing references omitted). But "[t]he canon against surplusage is not an absolute rule." *People v Pinkney*, ___ NW2d ___; 2018 WL 2025819, *12 (2018).

than murder (MCL 750.84(1)(a)). This was the central premise of the Court of Appeals' holding in the instant case. (41a). In his brief on appeal in the Court of Appeals, defendant concurred with this statutory interpretation and declared that, because MCL 750.81a and MCL 750.84 contain mutually exclusive and/or contradictory mental states, it was improper for him to have been convicted under both statutes.[25] What the Court of Appeals' reasoning, as well as defendant's argument, have in common is a misunderstanding and misinterpretation of how to read the so-called "negative intent" language found in MCL 750.81a(1)-(2). If it was the year 1873 and not 2018, this Court might likewise find itself in agreement.

In *People v Chappell*, 27 Mich 486 (1873), the defendant was charged with the crime of maiming another "by discharging a loaded pistol, pointed and aimed intentionally, but without malice." *Id.* at 487. The facts at trial established that the defendant had used a gun "either in self defense (which was indicated by strong proofs), or with a criminal intent, and maliciously." *Id.* The trial court was asked to instruct "that if the act was done with malice, the defendant could not be convicted under the information." *Id.* The court refused, explaining that "'in a case of this kind, and in this case, [I] cannot ask an acquittal because he is shown to have been guilty of a crime of a higher grade than that charged. It is fortunate for him, if he is guilty, that the people have not charged him with as high a grade of crime as they might have done.'" *Id.* On appeal, this Court, after reviewing the statutory language of the charged offense, determined that "[t]he absence of malice is a necessary ingredient in the statutory definition as the use of fire-arms." *Id.* at 487-488. The Court explained this was so because "it is manifestly impossible for an act to be at the same time malicious and free from malice. The statute…was aimed at acts where no harm was designed, and proof of malice is not merely proof of something beyond the statute. It

[25] Defendant, however, asserted that this "error" constituted a double jeopardy violation.

is inconsistent with the statute in its chief design." *Id.* at 487-488. Since the facts of the case "had no tendency to make out the statutory charge," the Court held that defendant should have been acquitted and, thus, vacated his conviction. *Id.* at 488.

In the decades following *Chappell*, this Court continued to grant relief under the belief that it was error for a jury not to be instructed that the absence of malice was an "essential ingredient of the offense[.]" *People v McCully*, 107 Mich 343, 344; 65 NW2d 234 (1895) (affirming that the jury should have been "instructed to find a verdict for the respondent, on the ground that the evidence of the prosecution tended to show that there was malice."); see also *People v Peterson*, 166 Mich 10, 13; 131 NW2d 153 (1911) (agreeing that a motion to discharge the defendant should have been granted where "[t]he evidence all tended to show malice[.]").

Over one hundred years after *Chappell*, Detroit Police Officer Willie Doss was charged with manslaughter[26] after he shot and killed a suspect at the scene of a crime. When his motion to quash was denied in the trial court, the defendant appealed. The Court of Appeals, relying upon *Chappell* (among other authority), ruled that the defendant was entitled to relief because "[a]n essential element of the statute under which defendant is charged is the absence of malice, or intent to kill," and the defendant's intentional actions in this case failed to establish this "negative" intent. *People v Doss*, 78 Mich App 541, 544; 260 NW2d 880 (1977).

This Court granted the People's application for leave to appeal and held that the Court of Appeals erred in finding that the absence of malice was an essential element of the crime of manslaughter, MCL 750.329. Although acknowledging that the Court of Appeals had reached

[26] MCL 750.329: "Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally *but without malice*, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter." (emphasis added).

its decision by relying upon *Chappell*, the Court determined that the reasoning espoused in that case, as well as the others that followed, had "been seriously undermined by this Court's decision in *People v Chamblis*, 395 Mich 408, 424; 236 NW2d 473 (1975)," and quoted favorably from that opinion as follows:

> Part of the confusion concerning lesser included offenses appears to result from analysis which treats as positive elements of a crime such negative concepts as 'unarmed.' Considered in the context of lesser included offenses, 'unarmed' is the Absence [sic] of the element of the use of a weapon. It is not a distinct, separate element. Elements are, by definition, positive. A negative element of a crime is a contradiction in terms. Adding the description 'unarmed' to robbery adds nothing. 'Robbery' and 'unarmed robbery' are the same offense.[27]

In holding that the term "'without malice' [in MCL 750.329] is the absence of an element, rather than an additional element which the people must prove beyond a reasonable doubt[,]" this Court explained that malice "is that quality which *distinguishes* murder from manslaughter[.]" *Doss*, 406 Mich at 99 (emphasis added). Thus, "[w]hile the absence of malice is fundamental to manslaughter in a general definition sense, it is not an actual element of the crime itself which the people must establish beyond a reasonable doubt." *Id*.

This Court's understanding in *Doss*—that this so-called "negative element" language in the manslaughter statute is meant to distinguish one crime from another—did not come out of left field. In *People v Doud*, 223 Mich 120, 122; 193 NW2d 884 (1923), the Court examined section 15228, C.L. 1915, the statutory predecessor to MCL 750.82, which provided: "'Whoever shall assault another, with a gun…*but without intending to commit the crime of murder, and without intending to inflict great bodily harm less than the crime of murder*, shall be deemed guilty of a felonious assault.'" *Doud*, 223 Mich at 122, quoting section 15228, C.L. 1915

[27] *Doss*, 406 Mich at 98-99, quoting *Chamblis*, 395 Mich at 424 (emphasis changed). *Chamblis* was overruled on other grounds by *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).

(emphasis added).[28] The Court noted that the "statute expressly negatives certain felonious intents, the purpose being to save the declared crime from falling within other defined felonies." *Id.* That a statute may include "negative" felonious intents in order to distinguish one from another was also recognized in *People v Van Diver*, 80 Mich App 352, 356; 263 NW2d 370 (1977). In that case, the Court of Appeals observed that MCL 750.81a was merely one of 10 statutes that spoke to assaults perpetrated "upon private persons," with MCL 750.81 ("Assault and simple assault") and MCL 750.81a ("Assault and infliction of serious injury") both being misdemeanors and others listed within the same statutory sequence, i.e. MCL 750.83 ("Assault with intent to commit murder") and MCL 750.84 ("Assault with intent to do great bodily harm less than murder"), being felonies. *Id.* "What distinguishes the misdemeanors, simple assault and aggravated assault, from the felonies, assault with intent to do great bodily harm less than murder and assault with intent to murder [the Court noted], is the actor's intended result." *Id.*

A modern review of the statutes which cover assaultive conduct reflects the understanding espoused in *Van Diver*—that a defendant may be charged with assault or aggravated assault[29] (both misdemeanors) or, upon proof of a specific intent or upon proof of the use of a weapon to effectuate the assault, may be charged with a felony.[30] Thus, when MCL

---

[28] As set forth *supra* at pages 8-9, this statute contained language similar to modern-day MCL 750.81a.

[29] See MCL 750.81, MCL 750.81a, MCL 750.81c-e. Although aggravated assaults—such as those found in MCL 750.81a— "are codified…the definition of assault is left to the common law." *People v Reeves*, 458 Mich 236, 239; 580 NW2d 433 (1998). "[A] simple criminal assault is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Gardner*, 402 Mich 460, 479; 265 NW2d 1 (1978) (internal quotation marks omitted).

[30] See MCL 750.82 (felonious assault); MCL 750.83 (assault with intent to murder); MCL 750.84 (assault with intent to do great bodily harm less than murder); MCL 750.85 (torture), MCL 750.86 (assault with intent to maim); MCL 750.87 (assault with intent to commit a felony);

750.81a is viewed in light of MCL 750.81-MCL 750.89, this Court's reasoning in *Chamblis* and *Doss* reaffirms reading the intent language contained in MCL 750.81a as simply distinguishing this 1-year misdemeanor offense from other felony offenses which require proof of a specific intent. See also *Potter*, 484 Mich at 411 (affirming, for purposes of statutory interpretation, that "[a] statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained" and that "the statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme.") (citing references omitted).

C. Because interpreting the language set forth in MCL 750.81a as indicating that no greater intent is necessary to convict, the language has meaning and is not rendered surplusage or nugatory.

Not only is the "negative intent" language used in statutory construction in order to distinguish one crime from another, it has also historically been read as indicating that a person may be convicted of a crime despite the fact that he does not harbor a more malevolent intent. For example, in *People v Crosby*, 82 Mich App 1, 3; 266 NW2d 465 (1978), the Court of Appeals compared the elements of the offense of unlawfully driving away an automobile, MCL 750.413, with the elements of unlawful use of an automobile, MCL 750.414. The court noted, however, that the text of MCL 750.414 states that the crime is accomplished by a person who takes a motor vehicle without authority and "without intent to steal the same." But this latter language, the court explained, "is not an element that the people must show beyond a reasonable doubt. This language merely indicates that the statute applies even though there is no intent to steal." *Crosby*, 82 Mich App at 3. The court supported its reasoning by citing to *Chamblis*, 395 Mich at 424, and emphasized the confusion that "often results from an analysis which treats the absence of an element as a positive element of a crime." *Id.*; see also *People v Laur*, 128 Mich

---

MCL 750.88 (assault with intent to rob and steal, unarmed); MCL 750.89 (assault with intent to rob and steal, armed).

App 453, 456; 340 NW2d 655 (1983) (reviewing MCL 750.414 and concluding that, as a general intent crime, "no intent is required beyond that to do the act itself[.]"); *Van Diver*, 80 Mich App at 372-373 (stating that, under MCL 750.82—which contains the same "negative intent" language as is found in MCL 750.81a—"an assault with bare hands without a specifically intended result is to be treated as one without a weapon and is to be prosecuted as either a simple assault and battery or as an aggravated assault.").

Based upon the foregoing, the error inherent in the Court of Appeals' opinion in the instant case becomes clear: reading these statutes in the manner discussed in subsections B-C does not render any part of the statute surplusage (i.e. meaningless)[31] or nugatory. To the contrary: the language *has* meaning, just not the meaning ascribed to it by the Court of Appeals. Because the language contained in MCL 750.81a simply distinguishes that crime from others, and establishes that defendant need not possess a more malevolent intent to be convicted of this crime, MCL 750.81a and MCL 750.84 do not contain mutually exclusive provisions such that the Legislature did not intend for defendant to be convicted under both statutes.

D. In People v Strawther*, this Court concluded that the Legislature intended for a defendant to be convicted under two statutes for the same conduct, despite the fact that the statutes—MCL 750.84 and MCL 750.82—facially contain "mutually exclusive" language like in the instant case.*

Finally, the People's conclusion is in accord with *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007). In that case, this Court reversed the Court of Appeals and held that the defendant's convictions for assault with intent to commit great bodily harm (MCL 750.84) and felonious assault (MCL 750.82) did not violate the multiple punishments strand of the double

[31] See *Pinkney*, 2018 WL 2025819 at *12.

jeopardy clause.[32] The People note that, just like MCL 750.81a, the text of MCL 750.82 facially "conflicts" with the text of MCL 750.84: the former states that the crime is committed *without intending* to commit murder or to inflict great bodily harm less than murder while the latter states that the crime is committed *with the intent* to do great bodily harm. Nonetheless, the *Strawther* Court held that the Legislature *did* intend for a defendant to be punished under each statute because, under *Smith*, 478 Mich 292, the crimes require proof of different elements at trial.[33]

Although *Strawther* was decided on constitutional grounds, its reasoning should apply with equal force to the question posed by the Court in this second issue: the key inquiry on the question of legislative intent is on the elements *that the People are required to prove at trial*. In the instant case, the People were not required to prove that defendant acted both with and without the intent to commit great bodily harm less than murder.[34] This Court must therefore conclude that the Legislature intended for defendant to be punished under both statutes.

[32] The Court cited to *Smith*, 478 Mich 292, which, as discussed *supra*, reaffirmed the *Blockburger* "same elements" test to divine legislative intent.

[33] Compare *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999) ("The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.") (citing reference omitted) with the elements of assault with intent to do great bodily harm less than murder, set forth *supra* at page 12.

[34] See *supra* at page 12 for the elements of these offenses.

III.

A court errs when it *sua sponte* adopts a minority rule that has thus far only been applied in out-of-state jurisdictions and then proceeds to misapply same to the case before it. Here, the Court of Appeals declared—without notice to the parties and without the issue being raised on appeal—that it would adopt and apply the rule against mutually exclusive verdicts to the instant case, despite the fact that the rule is only recognized in a handful of states and despite the fact that the rule conflicts with Michigan jurisprudence. The Court of Appeals reversibly erred when it recognized this rule in Michigan.

Standard of Review

"Questions of law, such as the applicability of legal doctrines to a given set of facts, are reviewed de novo." *People v Randolph*, __ NW2d __; 2018 WL 3013973 (2018) (citing references omitted).

Discussion

As a threshold matter, the Court of Appeals fundamentally erred when it applied a rule against mutually exclusive verdicts because, as set forth *infra* in this brief's last argument section, neither party asked for or claimed entitlement to relief on this basis: the Court of Appeals simply, after minimal analysis, *sua sponte* granted relief under this rule, which had never been previously applied in Michigan. The Court of Appeals further erred when it granted defendant relief despite expressly acknowledging that the facts of this case do not fit within the confines of the rule. (See 43a, "However, a unique wrinkle exists in this case because the jury did not actually make contrary findings in reaching two mutually exclusive verdicts."). Despite these procedural and legal errors, this Court has asked the parties to brief whether, in light of two cases—*United States v Powell*, 469 US 57, 69 n 8; 105 SCt 471; 83 LEd2d 461 (1984) and *State v Davis*, 466 SW3d 49 (Tenn, 2015)—the Court of Appeals erred in recognizing this rule in Michigan. See *Davis*, 910 NW2d at 302.

A. An inconsistent jury verdict is immune from appellate review, but the United States Supreme Court has not addressed whether the same may be said for a "mutually exclusive" verdict.

In *Powell*, the United States Supreme Court reaffirmed the principle that inconsistent jury verdicts, i.e. when the jury acquits a defendant of a predicate offense, but convicts him of another offense that requires proof of the predicate, may not be disturbed on appeal. "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Powell*, 469 US at 63, quoting *Dunn v United States*, 284 US 390, 393; 52 SCt 189; 76 LEd2d 356 (1932). In reaching this conclusion, the Court expressly rejected "as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them." *Id.* at 66. This is so, the Court explained, because "[s]uch an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquires into the jury's deliberations that courts generally will not undertake." *Id*. "Courts have always resisted inquiring into a jury's thought processes; through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Id.* at 67 (internal citations and parenthetical omitted).

But the *Powell* Court remarked that its holding was not "intended to decide the proper resolution of a situation where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other." *Id.* at 69 n 8, citing *United States v Daigle*, 149 FSupp 409 (D.C., 1957), aff'd per curiam, 248 F2d 608 (1957), cert den, 355 US 913; 78 SCt 344; 2 LEd2d 274 (1958). The United States Supreme Court has not revisited or

addressed footnote 8 of *Powell* since it disposed of that case. Thus, interpretation of this footnote should begin with a review of *Daigle*.

In *Daigle*, the defendant was charged with multiple counts including, in counts 1 and 2, embezzlement and larceny.[35] The trial court instructed the jury that if it determined that the defendant was guilty of embezzlement, it "need not consider the larceny count dealing with the same transaction, and the court repeated that the jury might not find defendant guilty of both embezzlement and larceny as to the same transaction." *Daigle*, 149 FSupp at 411. In contravention of the trial court's instruction, the jury returned a guilty verdict on both embezzlement and larceny. In response, the trial court, on its own motion, set aside the larceny verdict and directed "entry of a verdict of not guilty." *Id.* Defendant filed a motion for a new trial, claiming, in part, that the court erred when it denied her motion to require the People to elect between the embezzlement and larceny counts and that the jury's verdict was both inconsistent and contrary to the trial court's instructions. *Id.*

As to the first claim of error, the court ruled that the People are "seldom, if ever...required to elect upon which of several counts charging the same offense in various ways it will stand." *Id.* at 412 (citing reference omitted). The court explained that there was no error in the method used by the People to charge the defendant because "[t]he two counts charged the taking of the same money in different ways, and there was evidence on which the jury might have found the defendant guilty under either count, depending on its view of the evidence." *Id.* As to the second claim of error, the court, citing to *Dunn*, 284 US 390, acknowledged "that rational consistency in a verdict is not necessary, and that each count in the indictment is to be regarded

[35] The People have taken the time to summarize the facts and holding of *Daigle* because the Court of Appeals below misconstrued the holding of this case. See *infra* at FN 36.

as if it were a separate indictment." *Id.* at 413. The court, however, distinguished *Dunn* and cited to two other within-circuit cases in support of the proposition that "where a guilty verdict on one count negatives some fact essential to a finding of guilty on a second count, two guilty verdicts may not stand." *Id.* at 414, citing *Fulton v United States*, 45 AppDC 27, 41 (D.C., 1916) and *Davis v United States*, 37 AppDC 126, 133 (D.C., 1911). In *Daigle*, the inconsistency stemmed from the fact that the trial court had expressly instructed the jury to elect between the embezzlement and larceny counts, but the jury disregarded same and returned a verdict on both.[36] Because the trial court had the right, under the federal rules of criminal procedure, to direct a verdict of acquittal for the larceny count once it became clear that the jury had disregarded the trial court's express instructions to elect between counts, the court denied defendant's motion and refused to grant relief. *Id.*

B. In choosing to adopt and apply the rule against mutually exclusive verdicts in Michigan, the Court of Appeals turned its back on the majority of states in this country—which will not grant relief on this basis—and arbitrarily decided to follow the Georgia Supreme Court's lead on this issue without engaging in any meaningful review of same.

Powell was not decided on constitutional grounds[37] and *Daigle* is merely an opinion from a lower federal court; thus, neither is binding upon this Court. See *People v Finley*, 431 Mich 506, 514; 431 NW2d 19 (1988); *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Thus, the question is whether the Court wants to "open the door to the increased confusion and increased litigation that arises from trying to parse a jury's inconsistent verdicts"

[36] Interestingly, the *Daigle* court noted that the instruction "may have been more favorable to the defendant than the facts of this case warranted," given that the specific facts suggested that a guilty verdict on both embezzlement and larceny was supported by both the record and each associated statute. See *Daigle*, 149 FSupp at 414. This portion of the opinion makes clear that the court did *not* find that the offenses of embezzlement and larceny were mutually exclusive, contrary to the Court of Appeals' opinion. (See 43a).

[37] See *Powell*, 469 US at 65 ("[W]e therefore address the problem only under our supervisory powers over the federal criminal process.").

by adopting the "so-called mutually exclusive verdicts" rule facially referred to in footnote 8 of the *Powell* opinion. *Davis*, 466 SW3d at 73, 77. In the instant case, the Court of Appeals decided to adopt this rule after a cursory review of *Powell*, *Daigle*, and *United States v Randolph*, 794 F3d 602 (CA 6, 2015),[38] claiming that this decision was supported by "[o]ur sister states[.]" (43a). Although the Court of Appeals' original slip opinion relied upon authority from both Georgia and Tennessee, the final opinion now only references *Dumas v State*, 266 Ga 797; 471 SE2d 508 (1996).[39] In that case, the defendant was convicted of malice murder and vehicular homicide: malice murder required a showing of malice, while vehicular homicide required a showing of the *absence* of malice. The Georgia Supreme Court reversed defendant's convictions and ordered a new trial after finding that the verdicts were legally and logically impossible, because the defendant could not kill both with and without the intention to do so. *Id.* at 799.

The Court of Appeals in this case, however, did not explain why it found the opinion in *Dumas* to be so persuasive as to justify the adoption of a rule that, as will be discussed *infra*, is

[38] In *Randolph*, the 6th Circuit Court recognized two exceptions to the rule that inconsistent verdicts are not reviewable on appeal: a defendant may challenge a verdict that is "marked by such inconsistency as to indicate arbitrariness or irrationality" or if a guilty verdict on one count necessarily excludes a finding of guilt on another. 794 F3d at 610-611. The Court of Appeals in this case, however, only mentioned the latter avenue of relief and failed to address the fact that Michigan courts will not grant relief on the former. See *id.* at 610, citing *United States v Lawrence*, 555 F3d 254, 563 (6th Cir., 2009).

[39] In the original slip opinion, the Court of Appeals cited to two cases from "[o]ur sister states" in support of its holding: *Dumas*, 266 Ga 797 and *State v Davis*, 2013 Tenn Crim App LEXIS 431 (2013). Inexplicably, the paragraph discussing *Davis* in the Court of Appeals' slip opinion is now missing from the advance sheets version of the opinion (although the latter opinion still states that the court relies upon authority from our sister *states*). Compare 37a with 43a. The People acknowledge that it is the language contained in the advance sheet version of the opinion that controls, *In re Conservatorship of Brody*, 911 NW2d 194 (2018), but still question the Court of Appeals' ability to make a substantive change to its opinion without notice to the parties and after the People filed their application for leave to appeal (which specifically cited to and critically parsed the Court of Appeals' reliance upon *Davis*, 2013 Tenn Crim App LEXIS 431).

recognized in only a minority of states. It also appears that the Court of Appeals failed to Shepardize *Dumas*, as the Georgia Supreme Court fine-tuned its rule against mutually exclusive verdicts just three years ago, thereby undercutting the legal reasoning relied upon in the instant case. In *State v Springer*, 297 Ga 376, 381; 774 SE2d 106 (2015), the Court held "that multiple guilty verdicts for the same conduct that are based on varying levels of mens rea are not mutually exclusive." *Id.* at 382. In reaching this conclusion, the Court quoted favorably from the Court of Special Appeals of Maryland: "In such cases, and especially where the lesser included crime does not require proof of the *absence* of a greater mens rea, the greater proof of a defendant's intent 'does not negate or contradict the lesser proof but only subsumes it.'" *Id.* at 381, quoting *Williams v State*, 100 MdApp 468, 478; 641 A2d 990 (1994) (emphasis in the original). Because the essential distinction between the two crimes the defendant was convicted of in *Springer* was "the level of mental culpability[,]" with the mental state for one being established by proof of the other, the Georgia Supreme Court affirmed that defendant's convictions were not mutually exclusive and refused to vacate same. *Id.* at 381-382.

Had the Court of Appeals panel in the instant case read or acknowledged the existence of *Springer*, we likely would not be here, as *Springer* negates the core reasoning of the lower court's opinion. Moreover, just as the Court of Appeals here relied almost entirely upon *Dumas* in support of its conclusion that a "mutually exclusive" verdict may not stand, so too could the People cite to and rely upon legal authority from our sister state of Tennessee, which found to the contrary.

In *Davis*, 466 SW3d 49, the Tennessee Supreme Court engaged in a detailed analysis of how states throughout the country dispose of "mutually exclusive" verdict claims. The People rely upon the thorough summary provided in that opinion, which describes the "small minority

of states" that have granted criminal defendants relief on the basis of mutually exclusive verdicts. *Id.* at 74-75. When it ultimately refused to adopt this rule, the Tennessee Supreme Court looked to its own jurisprudence, which had, for over 40 years, rejected the argument that reversible error occurs when a jury returns inconsistent convictions on a multiple count indictment. *Id.* at 76 (citing to *Wiggins v State*, 498 SW2d 92 (1973), a case involving inconsistent acquittals and convictions, akin to *Powell*). Whether the verdict was deemed "mutually exclusive" or merely "inconsistent," the Tennessee Supreme Court found no reason to alter its "longstanding position of honoring and respecting a jury's verdicts, even when they are inconsistent." *Id.* at 77. The Court explained its reasoning as follows:

> We emphasize that '[t]he validly accorded to [inconsistent] verdicts recognizes the sanctity of the jury's deliberations and the strong policy probing into its logic or reasoning, which would open the door to interminable speculation.' *United States v Zane*, 495 F2d 683, 690 (2nd Cir., 1974); see also *Commonwealth v Thomas*, 65 A3d 939, 944-45 (PA.Super.Ct.2013) (recognizing that 'the rationale for allowing inconsistent verdicts is that it is the jury's sole prerogative to decide on which counts to convict in order to provide a defendant with sufficient punishment") (quoting *Commonwealth v Stokes*, 38 A3d 846, 855 (Pa.Super.Ct.2011)). […] Moreover…the few jurisdictions that grant relief on the basis of 'mutually exclusive' verdicts appear to struggle with both defining and applying the concept. We are disinclined to open the door to the increased confusion and increased litigation that arises from trying to parse a jury's inconsistent verdicts. Therefore, we hold that the Defendant is not entitled to any relief based on this argument.[40]

Also left unaddressed by the Court of Appeals' decision in the instant case was any review or discussion of whether relief was warranted in light of the fact that defendant did not object to the verdicts in the trial court. In Oregon and Maryland, for example, a defendant is procedurally barred from obtaining relief on appeal on the basis of a "mutually exclusive" verdict, unless he objects to the verdicts prior to the discharge of the jury. See *State v Zweigart*, 344 Or 619, 630-631; 188 P3d 242 (2008) (declining to grant relief where the defendant failed to

[40] *Davis*, 466 SW3d at 77.

object to the verdicts before the jury was discharged, ruminating that defendant may not have objected "because it was obvious that either verdict, standing alone, was sufficient to support a conviction for aggravated murder[.]"); *Givens v State*, 449 Md 433, 479; 144 A3d 717 (2016) ("We would not want to adopt a rule permitting a defendant to object to allegedly inconsistent verdicts after the verdicts become final and the trial court discharges the jury, as such a rule would result in all allegedly inconsistent verdicts being stricken as a matter of course."). Further, the Court of Appeals—in finding that the jury's verdicts in this case were mutually exclusive and summarily vacating defendant's conviction for aggravated domestic assault—did not seriously parse whether this remedy was the correct one, as the very legal authority upon which it relied holds that, when a jury returns a mutually exclusive verdict, the case must be remanded for a new trial.[41] See *Dumas*, 266 Ga at 799 ("[W]here there are mutually exclusive convictions, it is insufficient for an appellate court merely to set aside the lesser verdict, because to do so is to speculate about what the jury might have done if properly instructed, and to usurp the functions of both the jury and the trial court.").

C. Michigan courts have consistently refused to disturb inconsistent jury verdicts and declining to adopt a rule against mutually exclusive verdicts will be in accordance with our past precedent.

Just like the Tennessee Supreme Court, this Court has long recognized that "the jury is the sole judge of [a]ll the facts, it can choose, without any apparent logical basis, what to believe and what to disbelieve. What may appeal to the judge as 'undisputed' need not be believed by a jury." *Chamblis*, 395 Mich at 420. With respect to the jury's ability to return an inconsistent verdict, this Court has noted that, before 1980, the law was that "inconsistent verdicts in this

[41] But as is discussed extensively *infra* in issue 4, the People maintain that the Court of Appeals erred when it determined that the jury returned a mutually exclusive verdict in this case. Thus, the proper remedy is for defendant's conviction to be reinstated, not for the case to be remanded for a new trial.

jurisdiction could not stand unless explainable on a rational basis." *People v Garcia*, 448 Mich 442, 461; 531 NW2d 683 (1995). But this understanding changed with *People v Vaughn*, 409 Mich 463; 295 NW2d 354 (1980), in which the Court acknowledged that "[f]ederal courts and many state courts follow the principle that jury verdicts rendered on several counts of a multicount indictment need not necessarily be consistent." *Id.* at 465, citing *Dunn*, 284 US at 393 ("Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment."); accord *United States v Zane*, 495 F2d 683, 690 (2nd Cir., 1974) (recognizing that "the rule against disturbing inconsistent verdicts runs deeper than the principle of compromise. The validity accorded to such verdicts recognizes the sanctity of the jury's deliberations and the strong policy against probing into its logic or reasoning, which would open the door to interminable speculation."). For that reason, the Court held that it need not set aside the jury's inconsistent verdict (acquittal on one count, guilty on another) and refused to vacate the defendant's conviction. *Vaughn*, 409 Mich at 464.

Since *Vaughn*, this Court has continued to recognize the jury's power to return a facially inconsistent verdict. See *People v Lewis*, 415 Mich 443; 330 NW2d 16 (1982) (explaining that "[w]hen a jury responds to a multi-count indictment, lawyers and judges are often tempted to reconcile the verdicts, to strive for some rational compatibility. But to do so imposes an artificial gloss on the jury verdicts."); *People v Goss (After Remand)*, 446 Mich 587, 599; 521 NW2d 312 (1994) (affirming that "[t]he jury's decision regarding the predicate offense does not preclude it from reaching a different conclusion in the context of the compound offense."); *Garcia*, 448 Mich at 466 and at 463 n 29 (explaining that "in its attempt to analyze the jury's verdict, the Court of Appeals failed to consider that this state recognizes a jury's power to render inconsistent verdicts" and stating that, on the basis of *Lewis* and *Powell*, "we would not be able

to retool the jury's verdict merely because the verdicts were inconsistent."). This Court has also cautioned against post-hoc analysis of a jury's verdict, as doing so requires a court to engage in speculation. "While it is an appellate court's duty to review jury verdicts, it may not speculate regarding a jury's conclusions." *Id.* at 460 n 25 (citing references omitted).

As this state has, for nearly 40 years, refused to grant relief on a claim of an inconsistent verdict, this Court, like the Tennessee Supreme Court in *Davis*, 466 SW3d 49, should find that the weight of our case law on this issue cuts against the adoption of a rule against mutually exclusive verdicts in Michigan. This determination is further strengthened when one considers the states that *will* grant relief on a mutually exclusive verdict—Maryland, Alaska, and Florida for example—do so for the reason that an inconsistent jury verdict may not stand in their jurisdiction. See *Price v State*, 405 Md 10, 29; 949 A2d 619 (2008) (holding that inconsistent verdicts are no longer allowed in that state); *DeSacia v State*, 469 P2d 369 (Alaska 1970); *Eaton v State*, 438 So2d 822 (Fla. 1983); but see *Stephens v State*, 279 Ga 43, 45; 609 SE2d 344 (2005). As set forth above, courts in our state would hold otherwise.

D. Refusing to adopt a rule against mutually exclusive verdicts will not mean that defendants are without a remedy should they wish to challenge their convictions.

As a few states have recognized, the "problem" of potentially mutually exclusive guilty verdicts is "relatively rare." *Davis*, 466 SW3d at 76. Should this Court decline to adopt a rule that is recognized in only a handful of states, criminal defendants in Michigan will not be left without a remedy should they choose to challenge a multi-count indictment. For example, because a defendant has a constitutional right to have a jury find him guilty beyond a reasonable doubt of every element of every charged offense, a trial court may declare a mistrial when a jury is unable to reach unanimity on one or more counts. *United States v Gaudin*, 515 US 506, 510;

115 SCt 2310; 132 LEd2d 444 (1995); *People v Thompson*, 424 Mich 118, 128-129; 379 NW2d 49 (1985); *Garcia*, 531 Mich at 462-463.

If a jury returns multiple guilty verdicts on one indictment, a defendant may then challenge his convictions as of right on appeal. For instance, a defendant could claim that there was insufficient evidence to sustain one or both of the convictions. This review would require an appellate court to determine "whether the evidence adducted at trial could support any rational determination of guilty beyond a reasonable doubt." *Powell*, 469 US at 67. This claim serves to protect a defendant's right to due process of law. See *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992) ("The sufficient evidence requirement is a part of every criminal defendant's due process rights. It is an attempt to give 'concrete substance' to those rights, by precluding irrational jury verdicts.") (citing reference omitted). A defendant could also appeal based on a potential violation of his constitutional right not to suffer multiple punishments for the same offense. See *Miller*, 498 Mich at 17-18. Likewise, because a defendant is entitled to a properly instructed jury, instructional error may also serve as a basis for appeal. See *People v Kowalski*, 489 Mich 488, 501-502; 803 NW2d 200 (2011) (discussing instructional error with respect to the elements of the offense and emphasizing that "[a] criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense."). Review and resolution on appeal of these potential claims of error ensures that a defendant's convictions were obtained after a fair trial. But if a multi-count guilty verdict survives these appellate attacks, it is improper for a defendant to seek appellate relief on the theory that, although the jury returned a verdict finding him guilty of each element of each offense beyond a reasonable doubt, an inconsistency between the verdicts must indicate that the jury was confused or that the jury convicted him "not because he was found to have committed

the charged offenses but because the jury thought that he deserved to be punished[.]" *Lewis*, 415 Mich at 450 n 9. This Court has recognized that this possibility exists in every criminal case and that "few if any convictions would be sustained" if a defendant could secure relief on this basis on appeal. *Id.*

Finally, the People emphasize that, after an exhaustive search of Michigan case law, the number of cases that speak to the issue of mutually exclusive offenses are very few and far between, thereby making the issue discussed in this section of this brief one akin to an interesting thought exercise, with little real-world application. See, e.g., *People v Kyllonen*, 402 Mich 135, 145; 262 NW2d 2 (1978), superseded by statute as stated in *People v Hastings*, 422 Mich 267, 268; 373 NW2d 533 (1985) (finding that under then-existing MCL 750.535, a defendant could not be convicted of both stealing and aiding in the concealment of stolen property, but without labeling the offenses as "mutually exclusive"); *People v Lipski*, 328 Mich 194, 199; 43 NW2d 325 (1950) (stating that the crimes of rape and incest were "mutually exclusive crimes, as the lack of consent essential to rape is repugnant to the concurrence necessary for incest."); see also MCL 750.91 and MCL 750.83 (discussed *supra* at page 16). And although there have now been two published opinions from our Court of Appeals on the subject of mutually exclusive verdicts, both cases were wildly off the mark. As discussed *infra*, the charged offenses and resulting verdicts in the instant case were *not* mutually exclusive, because in order for the jury to convict defendant under MCL 750.81a, it was not required to make a finding that "negative[d] some fact essential to" determining defendant's guilt under MCL 750.84. *Daigle*, 149 FSupp at 414. The same goes for the only other published legal authority in this area, *People v Williams*, __ NW2d __; 2018 WL 1020616 (2018), *lv pending*. The Court of Appeals in that case erred when it erroneously declared that larceny from a person (MCL 750.357) and larceny in a building (MCL

750.360) were mutually exclusive crimes, despite the fact that the elements that prove the former offense in no way negate any of the elements required to prove the latter. Compare *People v Anderson*, 197 Mich App 321, 324; 495 NW2d 177 (1992) with *People v March*, 499 Mich 389, 401; 886 NW2d 396 (2016). It therefore appears that, short of the Court of Appeals' recent ham-fisted attempts to apply the rule against mutually exclusive verdicts to two cases in which the rule plainly does not apply, this is not a legal issue that occurs with any sort of frequency in this state.

In sum, the Court of Appeals erred when it adopted and applied the minority rule against mutually exclusive verdicts without engaging in sufficient analysis of the propriety of same and without conducting a review of and considering relevant Michigan case law. The Court of Appeals compounded the error by applying this rule *sua sponte* to a case that, as explained *infra*, does not fall within the ambit of mutually exclusive verdicts. For these reasons, this Court must decline to use the instant case as a vehicle to promulgate this rule in Michigan.

IV.

Offenses are mutually exclusive when a guilty verdict on one offense necessarily excludes a finding of guilt on another. Here, after defendant repeatedly assaulted the victim, he was charged with and convicted of assault with intent to do great bodily harm less than murder and aggravated domestic assault, crimes which are comprised of different elements, including distinct mental states. Defendant's convictions were not mutually exclusive and the Court of Appeals reversibly erred when it found to the contrary.

Standard of Review

Questions of law are reviewed de novo. *People v Phillips*, 246 Mich App 201, 202; 632 NW2d 154 (2001), citing *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). The Court of Appeals' exercise of authority under MCR 7.216(A) may be reviewed for an abuse of discretion. See *Spruytte v Michigan Department of Corrections*, 431 Mich 898; 432 NW2d 171 (1988).

Discussion

The Court of Appeals reversibly erred in applying the rule against mutually exclusive verdicts to this case not only because it granted relief *sua sponte* on an issue that had not been raised or briefed by either party, but also because it failed to recognize that this rule is wholly inapplicable to the facts of this case. Justice requires that the Court reverse the Court of Appeals and reinstate defendant's conviction for aggravated domestic assault.

A. The Court of Appeals erred when it rejected the issue defendant presented on appeal and, instead, **sua sponte** *granted relief on a legal theory neither party had briefed.*

As set forth *supra* in this brief's statement of facts, defendant never argued in the trial court or in his direct appeal that he was entitled to relief because the jury had returned mutually exclusive verdicts, nor did he argue that MCL 750.81a and MCL 750.84 were mutually exclusive

offenses. Instead, defendant argued on appeal that his convictions should be vacated because of a double jeopardy violation[42] and this is the issue the People responded to in their brief on appeal. In their opinion, however, the Court of Appeals determined that "the issue is more nuanced than expressed by the defense" and that double jeopardy was "not the proper initial focus." (41a). The Court of Appeals went on to hold "that defendant was improperly convicted for a single act under two statutes with contradictory and mutually exclusive provisions[,]" an issue that had been neither raised nor briefed by either party. *Id.* This was an error.

While the Court of Appeals "*may* review issues not properly raised or addressed by a party 'if a miscarriage will result from a failure to pass on them, or if the question is one of law and all the facts necessary for its resolution have been presented, or where necessary for a proper determination of the case,'" doing so here disregarded "the primary principle of our adversarial system by denying each party a full and fair opportunity to be heard." *People v Smart*, 304 Mich App 244, 252; 850 NW2d 579 (2014), quoting *Heydon v MediaOne of Southeast Mich., Inc.*, 275 Mich App 267, 278; 739 NW2d 373 (2007) (emphasis in the original). If the Court of Appeals wanted to address the rule of mutually exclusive verdicts, despite the fact that this issue had not been raised by anyone on appeal, the court should have, at a minimum, ordered additional briefing on that question. See, e.g., *Williams*, __ NW2d __ ; 2018 WL 1020616 (granting relief on the theory of mutually exclusive convictions, but only after the Court of Appeals directed the parties to brief the issue of whether defendant's convictions were inconsistent. The defendant in that case had raised only one issue on appeal: whether there was sufficient evidence to support

[42] Defendant failed to preserve the double jeopardy argument by raising it in the trial court. "Issues raised for the first time on appeal, even those relating to constitutional claims, are not ordinarily subject to appellate review." *Michigan Up & Out of Poverty Now Coalition v State*, 210 Mich App 162, 167; 533 NW2d 339 (1995) (citing references omitted).

her convictions.); see, e.g., MCR 7.216(A)(3) (authorizing the Court of Appeals to, in its discretion, permit amendment or additions to the grounds for appeal).[43]

The Court of Appeals further erred by granting relief on a legal theory that was never raised in the trial court, nor raised on appeal by defendant, without giving any consideration to the applicable standard of review. See, e.g., *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) ("An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground.") (citing reference omitted). This Court "has long recognized the importance of preserving issues for appellate review" and "disfavors consideration of unpreserved claims of error." *Carines*, 460 Mich at 761-762. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e. clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763. As to the second element, "the legal error must be clear or obvious, rather than subject to reasonable dispute." *Puckett v United States*, 556 US 129, 135; 129 SCt 1423; 173 LEd2d 266 (2009). An error is plain "where a trial court's ruling contravenes clearly established precedent." *United States v Brown*, 352 F3d 654, 665 n 10 (2nd Cir., 2003). In the rare case, "[e]rror is plain if it is so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *Id.* at 664-665 (internal quotation and citation omitted).

Here, the Court of Appeals relied upon out-of-state authority that is only recognized in a minority of jurisdictions to grant defendant relief on a legal theory that was not raised by either party. Consequently, the "error" identified by the Court of Appeals was anything other than

[43] The People presume that the Court of Appeals believed that it had the authority to address an issue not raised or briefed by the appellant because of the language found in MCR 7.216, even though the court did not cite to that rule in its published opinion.

plain. Further, as discussed *infra*, the Court of Appeals failed to recognize that the very legal authority it relied upon would find that the rule against mutually exclusive verdicts is inapposite to the facts of this case.[44] The Court of Appeals therefore abused its discretion when it *sua sponte* granted relief—without any consideration of the standard of review—on an inapposite legal theory. See also *Givens*, 449 Md at 482 (declining to find that plain error review was satisfied where the defendant failed to object on the record once the jury returned an allegedly mutually exclusive verdict).

B. By its very definition, the rule against mutually exclusive verdicts does not apply unless an element of one offense negates an element of the other offense, a situation that is plainly not present in the instant case.

Even assuming that the Court of Appeals did not abuse its discretion when it decided, *sua sponte*, to apply the rule against mutually exclusive verdicts, its application of that rule to the facts of this case was deeply flawed. The central premise of the Court of Appeals' holding was that defendant should not have been charged with or convicted "for a single act under two statutes with contradictory and mutually exclusive provisions." (41a). But, as discussed extensively *supra*, defendant was neither charged with nor convicted under two statutes with mutually exclusive provisions, nor did the jury return verdicts that were mutually irreconcilable.[45] Instead, the jury was properly instructed on the legal elements of both crimes—each of which had different elements and required proof of a different level of intent in order to sustain a conviction—and found defendant guilty of each element beyond a reasonable doubt. Because it was not "legally impossible for the State to prove the elements of" both assault with

[44] The Court of Appeals should have therefore realized that—notwithstanding a plain error analysis—the instant case was not suitable for adoption and application of this rule.

[45] The Court of Appeals acknowledged as much in its published opinion. See 43a ("[A] unique wrinkle exists in this case because the jury did not actually make contradictory findings in reaching two mutually exclusive guilty verdicts.").

intent to do great bodily harm less than murder and aggravated domestic assault, and because none of the required elements necessarily negated an element of the other crime, the verdicts were not mutually exclusive. *Heard v State*, 999 So2d 992, 1004-1005 (2007) (reaffirming that mutually exclusive verdicts "are the result of two positive findings of fact that cannot logically coexist."); *Daigle*, 149 FSupp at 414; see also *United States v Maury*, 695 F3d 227, 266; 75 ERC 1321 (3rd Cir., 2012) ("[A] conviction as to one of the crimes must negate an element of the other."); compare *Dumas*, 266 Ga at 799 (finding that a conviction for malice murder and vehicular homicide were mutually exclusive because the latter offense required a showing of the *absence* of malice) with *Masoner v Thurman*, 996 F2d 1003, 1005-1006 (9th Cir., 1993) (explaining that the absence of malice for the crime of gross vehicular manslaughter "results from the offense having a less culpable mental state, not from a requirement that the defendant act nonmaliciously[,]" and holding that a conviction for that offense was not mutually exclusive with second-degree murder because the jury was not required to make necessarily inconsistent findings to convict the defendant of both crimes).

In *Heard*, the question was whether the defendant's conviction for both capital murder and felony murder were mutually exclusive. The Alabama Supreme Court observed that, although capital murder required proof of an intent to kill, felony murder "does not require the specific intent to kill; it requires only the intent to commit the underlying felony. *The absence of an intent to kill*…is not necessarily an element of felony murder, as contrasted with the intent to kill, which is an element of capital murder." *Heard*, 999 So2d at 1005 (internal citations omitted, emphasis in the original). Because it was "possible that a defendant intended to kill the victim (the element necessary for the capital conviction) while at the same time intending to commit an underlying felony (the element necessary for the felony-murder conviction)[,]" the

Court held that the most that could be said about the verdicts is that they were inconsistent.[46] *Id.* The verdicts, however, were not mutually exclusive because they did "not contain mutually exclusive essential elements." *Id.*; see also *Buehl v Vaughn*, 166 F3d 163, 180 (3rd Cir., 1999) ("[M]ultiple guilty verdicts for the same conduct that are based on varying levels of mens rea are not mutually exclusive."); accord *Springer*, 297 Ga at 382; *Gomez v State*, 301 Ga 445, 468; 801 SE2d 847 (2017).

The Court of Appeals could have also learned that it was on the wrong track if it had looked to our neighbor to the south. In *State v Tanner*, 90 Ohio App 3d 761; 630 NW2d 751 (1993), the 10th District Court of Appeals in Franklin County, Ohio reviewed its prior decision granting the defendant a new trial, which was based upon a determination that the defendant's convictions for both involuntary manslaughter and aggravated murder were logically and rationally inconsistent because it was impossible for the defendant to have killed the victim while purposefully intending to do so, and yet at the same time lack the intent to cause the victim's death. Upon a second review of the case, the *Tanner II* court stated that its previous opinion was "predicated on an erroneous assumption, for 'lack of intent' is not an element of involuntary manslaughter." *Id.* at 768. Because the defendant's convictions did not involve mental states that were "mutually inconsistent," the court held that it was "not inconsistent for a trier of fact to find a defendant guilty of involuntary manslaughter and aggravated murder on the same indictment arising from a single killing." *Id.* at 769.

In sum, because neither of defendant's convictions required proof of an element that negated an element of the other offense, the verdicts were not mutually exclusive.

[46] "Federal courts and many state courts follow the principle that jury verdicts rendered on several counts of a multicount indictment need not necessarily be consistent." *Vaughn*, 409 Mich at 465.

C. Because defendant committed multiple assaultive acts, the rule against mutually exclusive verdicts is flatly inapplicable to the facts of this case.

Finally, contrary to the Court of Appeals' opinion, defendant was not charged with or convicted of committing "a *single act* under two statutes." (41a) (emphasis added). Although the Court of Appeals did not define the term "single act," case law cited by the court does discuss the meaning of this term. For example, in *Davis*, 2013 Tenn Crim App LEXIS at 22, the Tennessee Court of Criminal Appeals quoted favorably from *Waits v State*, 282 Ga 1, 3; 644 SE2d 127 (2007),[47] which cautioned that "'[t]he rule against mutually exclusive verdicts applies only where the convictions result from the same act involving the same victim at the same instant. Where the victim sustains several injuries, convictions for both intentional and negligent crimes are not mutually exclusive.'" The Tennessee Court of Appeals also reviewed prior authority from that jurisdiction and quoted favorably from same: "even if the doctrine of mutually exclusive verdicts were to apply in Tennessee, it did not apply under the facts presented therein because the defendant's convictions were the result of three different acts, against three different victims, and, while occurring in rapid succession, that occurred at three different times." *Id.* (internal quotation and citing reference omitted).

That the term "single act" means the same conduct committed by the same defendant against the same victim at the same moment in time is also supported by the other cases referenced by the Court of Appeals. See *Daigle*, 149 FSupp at 414 (discussing the concept of mutually exclusive offenses in the context of a defendant charged with embezzlement and larceny stemming from the same financial transaction); *Dumas*, 266 Ga at 797 (same, with respect to the charges of malice murder and vehicular homicide stemming from the death of one

[47] See *supra* at FN 39. Although *Davis* is no longer included in the advance sheets version of the Court of Appeals' opinion, the court stated that it was relying upon authority from Georgia.

victim); *Davis*, 2013 Tenn Crim App LEXIS at 19 (same, with respect to the charges of reckless homicide and second-degree murder stemming from the death of one victim).

Accordingly, if this defendant had committed a single assaultive act (i.e. striking the victim once in the head) and then was charged with and convicted of two assaultive crimes that required *proof at trial* of mutually exclusive elements, the People would more reasonably understand the allure of applying the rule against mutually exclusive verdicts to those facts. But the instant case is completely different from the cases relied upon by the Court of Appeals, because it did not involve a single assaultive act committed by defendant at one moment in time. At trial, the victim testified that defendant woke her up in the middle of the night, "yanked" her out of bed, threw her to the floor, and hit her—hard—two or three times in the face and head. (4a-5a). The force of the physical assault was such that the victim later testified that she had "never felt that much pain" before. (5a). The victim got up and ran into the nearby living room, whereupon defendant charged her and hit her "very hard" two times in the face. (6a). The victim felt blood "draining" after defendant hit her nose, felt her mouth filling with blood, and could not see out of her left eye, which had swollen shut. (6a-7a). The victim screamed for defendant to stop hitting her and yelled for help. (17a-18a). Defendant yelled at the victim to shut up, telling her that she was going to make him have to kill her. (6a-7a). The victim, who stood only 5'1 compared to defendant, who was 6'2 or taller, was scared for her life. (8a). The prolonged assault left the victim with "[e]xtreme pain" in her neck, face, and head. (15a). Afterwards, the victim was ordered to wear a neck brace and experienced five seizures, which required her to go on medication. (15a-16a).

Despite the trial record, the Court of Appeals badly misconstrued the underlying facts of this case and summarized defendant's assault of the victim as follows:

> Defendant and SS were romantically involved and lived together in Dearborn Heights. At around 4:00 a.m. on June 10, 2015, defendant woke SS to ask her where their ashtray was. Defendant took offense at SS's displeasure over being roused. He pulled SS to the floor by her shirt collar and struck her about the face with his fist and open hand. SS begged defendant to stop, but he told her to "shut up" and threatened, "you're gonna make me have to kill you."[48]

As outlined above, this truncated summary does not fairly depict what happened between defendant and the victim in this case. Instead, the trial evidence demonstrated that the charges here stemmed from defendant engaging in a sustained assault of the victim during which he threw her onto the floor, hit her multiple times in the face and head, chased her into a different room when she tried to escape, and then hit her again repeatedly in the face, causing her mouth to fill with blood, while threatening her life.

Defendant, therefore, was plainly not charged with—nor did he commit—only a single assaultive act against the victim. Thus, even if this Court assumed that MCL 750.81a and MCL 750.84 contain mutually exclusive mental states (which they do not), the prosecutor acted well within her broad discretion when she charged defendant—for the numerous assaultive acts he perpetrated against the victim—with violating both statutes. See *People v Williams*, 186 Mich App 606, 609; 465 NW2d 376 (1990); *Daigle*, 149 FSupp at 412.[49] The jury, having heard all of the evidence admitted at trial, returned a verdict finding defendant guilty beyond a reasonable doubt of both offenses. The Court of Appeals therefore erred when it vacated defendant's conviction for aggravated domestic assault. This Court must reinstate defendant's conviction.

---

[48] (39a).

[49] For that reason, the Court of Appeals' conclusion—that one of the errors in the instant case came from the prosecution charging "defendant under two statutes with irreconcilable provisions stemming from one assault"—is completely erroneous. (44a).

RELIEF

THEREFORE, the People request that this Honorable Court reverse the Court of Appeals' decision and reinstate defendant's conviction for aggravated domestic assault.

Respectfully submitted,

KYM WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research, Training,
and Appeals

/s/ *Amanda Morris Smith*

AMANDA MORRIS SMITH (P73127)
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-5787

Dated: June 28, 2018