STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs **Michigan Supreme Court No. 156606**

ALONZO CARTER,
Defendant-Appellant.

Court of Appeals No.	**331142**
Circuit Court No.	**15-000831-01-FC**

On Appeal from the Court of Appeals
Jansen, P.J., and Murphy and Borrello, JJ.

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF
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

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I

OV 12 should be scored at 10 points when the defendant commits two contemporaneous felonious criminal acts against a person and those acts have not and will not result in a separate conviction. Here, defendant shot three times into the living room of an apartment and was subsequently convicted of assaulting an adult male who was in the living room; defendant, however, was not charged with or convicted of the crimes of felonious assault or assault with intent to do great bodily harm less than murder against two additional victims, even though a mother and her baby were also in the living room at the time defendant fired the gun. Did the trial court err when it scored OV 12 at 10 points?

The People answer, "No."

Defendant would answer, "Yes."

The circuit court was not asked this question.

The Court of Appeals answered, "No."

COUNTERSTATEMENT OF FACTS

The charges in this case arose from a shooting that occurred on January 11, 2015 at an apartment building in the City of Detroit. (146a) Early that morning, Lawrence Sewell was waiting in the fourth-floor hallway for transportation to a medical appointment when he observed defendant, Alonzo Carter, walking towards him. (172a-174a) Defendant started "cussin'" at Sewell, telling him to "stay outa' [defendant's] motherfuckin' business" before defendant "fuck[ed] one a 'ya all up." (179a) Sewell knew defendant only as a neighbor who lived two doors down the hall from him—they had never previously argued or had an altercation. (150a 177a, 194a) After "cussin'" Sewell out, defendant left the building.

Around 8:30 or 9:00 that night, Sewell was in his apartment with a woman, Dymond Wilson,[1] and her two-or three-month-old infant child when someone began pounding on the door. It was unusual for someone to knock on the apartment door without calling first. (184a-186a) Sewell called out, asking the person to identify himself—a man's voice called back that it was "Mike." Sewell, having known Mike, the building's maintenance man, for over 20 years, knew the voice did not belong to Mike. (156a) Sewell cautiously walked across the apartment to the far wall and then along the wall to the apartment's front door and looked out of the peephole. (188a) Sewell observed defendant holding a pistol in his right hand with a mask pushed up on his head like a hat. (159a) Sewell watched defendant pull the mask down over his face; defendant told Sewell to open the door. Sewell, seeing the gun, put his back against the wall and hit the door's latch. As Sewell moved away from the door, defendant shot through it three times at chest-level. (162a-163a) Two of the bullets skipped across the apartment's floor

[1] Although Sewell testified that he thought Dymond's last name was Washington, she was referred to at trial as "Dymond Wilson." See 147a, 166a.

and exited through a window, while the third bullet nearly struck the infant who was lying on an air mattress on the floor. The bullet caused the mattress to deflate. (164a, 167a) Wilson began screaming for her child and rushed to protect her baby from the gunfire. (166a-168a) After the shooting, as he called 911, Sewell heard defendant running away. (162a-167a)

Darlene Romero, the apartment building manager who lived on the first floor, heard the gunshots and, shortly thereafter, the sound of someone running. (206a, 210a) Romero went into the hallway and encountered defendant running down the stairway wearing a ski mask. While the mask covered most of defendant's face, it did not cover his eyes. Romero recognized defendant and asked him what happened. Defendant, who appeared to be scared and out of breath, responded that it sounded "like someone was shootin'" on the second floor. (212a) Defendant left the apartment building and Romero went up the stairs to begin looking for signs of the shooting. Once Romero reached the fourth floor, she found several shell casings in front of Sewell's door. Sewell opened the door to his apartment and Romero observed bullet holes in the door itself and in the apartment's floor and window. (211a-215a)

On January 12, 2015, the day after the shooting, Detroit Police Detective Noe Garcia prepared and showed Sewell a photographic array. Within five seconds of reviewing the array, Sewell chose defendant's photograph and told Det. Garcia: "He shot through my door." (230a, 232a) That same day, Detroit Police Detective Matthew Bolden went to Sewell's apartment and observed three bullet holes in the apartment's front door, bullet holes in the apartment's window, a mark on the floor that appeared to have been created by a bullet, and a deflated air mattress that appeared to have been struck by a bullet. (247a-248a)

Defendant was charged, as a habitual fourth offender,[2] with assault with intent to murder;[3] assault with intent to do great bodily harm less than murder;[4] felon in possession of a firearm; discharge of a firearm in or at a building;[5] felonious assault;[6] and possession of a firearm during the commission of a felony (felony-firearm).[7] After a two-day jury trial, defendant was found guilty of assault with intent to do great bodily harm less than murder; felon in possession of a firearm; discharging a firearm in or at a building; felonious assault; and felony-firearm. The jury acquitted defendant of assault with intent to murder. (307a-308a)

On May 26, 2015, the trial court held a sentencing hearing. Defense counsel indicated on the record that he had had an opportunity to review the presentence report and that no corrections needed to be made. The prosecutor noted that defendant's habitual fourth offender status had not been properly indicated on the sentencing information report, at which time the trial court made a handwritten correction to the report. At no time during the hearing did anyone discuss the proposed scoring of the offense and prior record variables, or the trial court's intentions with regard to scoring those variables. After hearing allocution from defendant, the trial court sentenced defendant as a habitual fourth offender to concurrent terms of 60 months to 10 years of imprisonment for assault with intent to do great bodily harm less than murder, one to five years of imprisonment for felon in possession of a firearm, 1 to 10 years of imprisonment for discharging a firearm in or at a building, and one to four years of imprisonment for felonious

[2] MCL 769.12.
[3] MCL 750.83.
[4] MCL 750.84. This was the lesser-included offense of assault with intent to murder. The complainant for these assaultive offenses was Lawrence Sewell.
[5] MCL 750.234b(1).
[6] MCL 750.82.
[7] MCL 750.227b.

assault, with the counts to be served consecutive to a two-year prison term for felony-firearm. (3b-5b)

On June 12, 2015, the parties appeared before the trial court and stipulated on the record that defendant had been improperly sentenced on the felony-firearm conviction because he had originally been charged as a second offender for that offense. The court resentenced defendant, only on that count, to serve a consecutive five-year prison term.

On January 13, 2016, defendant filed a claim of appeal. On April 29, 2016, defendant filed his brief on appeal and a motion to remand, arguing that he was entitled to resentencing because the trial court had improperly scored prior record variable (PRV) 1, as well as offense variables (OVs) 4 and 12. On May 17, 2016, the People filed an answer opposing the motion to remand. On June 2, 2016, the Court of Appeals entered an order denying the motion. On June 28, 2016, the People filed their brief on appeal in which they argued that, although the trial court made scoring errors in PRV 1 and OV 4, OV 12 was scored correctly and correction of the scoring errors did not change defendant's sentencing guidelines, thereby not entitling him to resentencing.

On June 27, 2017, the Court of Appeals issued an unpublished per curiam opinion affirming defendant's convictions and affirming the scoring of OV 12. (9a-11a) Specifically, the Court of Appeals found that each time defendant pulled the trigger on the gun, he committed "a separate act, and only one was needed to convict him. Thus, the other two acts of pulling the trigger would be contemporaneous felonious criminal act[s], because defendant's actions would not result in separate convictions and the acts occurred within 24 hours of the sentencing offense." (11a) On July 18, 2017, defendant filed a motion for reconsideration. On July 24,

2017, the People filed an answer opposing the motion. On August 15, 2017, the Court of Appeals entered an order denying the motion.

On October 10, 2017, defendant filed an application for leave to appeal. On October 18, 2017, the People filed an answer opposing defendant's application. On June 1, 2018, this Court granted oral argument on defendant's application and ordered the parties to file supplemental briefs "addressing whether the defendant was properly assigned 10 points under Offense Variable 12 (OV 12), MCL 777.42. See *People v Light*, 290 Mich App 717 (2010)." *People v Carter*, __ Mich __; 911 NW2d 803 (2018).

On August 10, 2018, defendant filed his supplemental brief in accordance with this Court's order of June 1, 2018. The People's supplemental brief is timely-submitted within 21 days of receipt of defendant's brief. The People have also filed their own appendix. See MCR 7.312(D)(4).

Additional facts may be provided *infra*.

ARGUMENT

I.

OV 12 should be scored at 10 points when the defendant commits two contemporaneous felonious criminal acts against a person and those acts have not and will not result in a separate conviction. Here, defendant shot three times into the living room of an apartment and was subsequently convicted of assaulting an adult male who was in the living room; defendant, however, was not charged with or convicted of the crimes of felonious assault or assault with intent to do great bodily harm less than murder against two additional victims, even though a mother and her baby were also in the living room at the time defendant fired the gun. The trial court did not err when it scored OV 12 at 10 points.

Standard of Review

Determining whether a trial court properly scored sentencing variables is a two-step process. *People v Rhodes*, 495 Mich 938; 843 NW2d 214 (2014). First, the trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), citing *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Second, the Court considers de novo "whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute." *Hardy*, 494 Mich at 438.

Defendant's objection to the scoring of offense variable (OV) 12 was properly preserved by way of his April 29, 2016 motion to remand.[8] MCL 769.34(10); MCR 6.429(C).

Discussion

In its order of June 1, 2018, this Court asked "whether the defendant was properly assigned 10 points under Offense Variable 12 (OV 12), MCL 777.42. See *People v Light*, 290

[8] On June 2, 2016, the Court of Appeals entered an order denying defendant's motion to remand for failure to persuade the Court of the necessity of a remand.

Mich App 717 (2010)." *Carter*, 911 NW2d 803. OV 12 is scored for all felony offenses and considers whether a defendant committed any contemporaneous felonious criminal acts. MCL 777.22; MCL 777.42. Here, although OV 12 was scored at 10 points, neither the trial court, the assistant prosecuting attorney, nor defense counsel specifically addressed why this, or any other, OV was so scored.[9] Despite the lack of explanation on the record justifying this score, 10 points is appropriate if either of the following occurred in this case: "[t]wo contemporaneous felonious criminal acts involving crimes against a person were committed" by defendant, MCL 777.42(1)(b), or "[t]hree or more contemporaneous felonious criminal acts involving other crimes were committed" by defendant, MCL 777.42(1)(c). On appeal, defendant has consistently maintained that OV 12 should have been scored at zero points because no contemporaneous felonious criminal acts occurred,[10] while the People have argued that 10 points was the correct score because, under MCL 777.42(1)(b), defendant committed two contemporaneous felonious criminal acts against a person. The difference of opinion between the defense and the prosecution comes down to defining what, exactly, constitutes a contemporaneous felonious criminal act.

Questions of statutory interpretation are reviewed de novo by this Court. *Osantowski*, 481 Mich at 107. "[T]he primary goal of statutory construction is to give effect to the Legislature's intent." *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). "To ascertain that intent, this Court begins with the statute's language. When that language is unambiguous, no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed." *Id.* Here, the temporal requirement—the

[9] On August 10, 2018, defendant separately filed, with this Court, the presentence investigation report, which included the sentencing information report. See also 3b.
[10] MCL 777.42(1)(g).

meaning of the term "contemporaneous"—is set forth in MCL 777.42(2)(a) as follows: "[a] felonious criminal act is contemporaneous if both of the following circumstances exist: (i) The act occurred within 24 hours of the sentencing offense[, and] (ii) The act has not and will not result in a separate conviction." MCL 777.42(2)(a)(i)-(ii). But the definition of "felonious criminal act" is not contained in MCL 777.42—the statute only provides two qualifications setting forth what may *not* be considered for purposes of scoring OV 12.[11] "When interpreting a statute, all undefined 'words and phrases shall be construed and understood according to the common and approved usage of the language[.]'" *People v Laidler*, 491 Mich 339, 347; 817 NW2d 517 (2012), quoting MCL 8.3a. "To determine the ordinary meaning of undefined words in the statute, a court may consult a dictionary." *People v Tennyson*, 487 Mich 730, 738; 790 NW2d 354 (2010), citing *Stone*, 463 Mich at 563. Black's Law Dictionary (2nd ed) defines "felonious" as "[m]alignant; malicious; done with intent to commit a crime; having the grade or quality of a felony." The dictionary further defines "criminal act" as "[a] term which is equivalent to crime; or is sometimes used with a slight softening or glossing of the meaning, or as importing a possible question of the legal guilt of the deed." *Id.*; see also Black's Law Dictionary (5th ed) (defining "criminal act" as the "[c]omission of a crime."). Based upon the foregoing, one may conclude that the Legislature intended that a felony committed by defendant within 24 hours of the sentencing offense that has not and will not result in a separate conviction be counted as a "contemporaneous felonious criminal act" for purposes of OV 12.

[11] See MCL 777.42(2)(b) (explaining that a defendant's violation of MCL 750.227b "should not be considered for scoring this variable."); MCL 777.42(2)(c) (explaining that any conduct scored under OV 11 may not be scored under OV 12). OV 11 pertains to the number of criminal sexual penetrations that occurred (MCL 777.41) and, in this case, OV 11 was scored at zero points.

In *People v Light*, 290 Mich App 717; 803 NW2d 720 (2010), the Court of Appeals scrutinized OV 12, but did not define the term "felonious criminal act." Instead, the Court of Appeals examined MCL 777.42 and then looked to two cases—*People v McGraw*[12] and *People v Sargent*[13]—which briefly mentioned OV 12 while discussing a different offense variable. In those cases, this Court stated that, for purposes of OV 12, "the Legislature unambiguously made it known" that "behavior outside the offense being scored" is to be taken into account when scoring that offense variable.[14] *McGraw*, 484 Mich at 125 and *Sargent*, 481 Mich at 349. The *Light* Court found it significant that "OV 12 distinguishes within the same sentence between the 'act' that occurred and the 'sentencing offense.' This indicates that the Legislature specifically intended to draw a distinction between the two words." *Light*, 290 Mich App at 724. After examining language found in OV 11 and OV 13, the Court of Appeals concluded that, "when scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense." *Id.* at 724-725. The Court of Appeals further clarified that the contemporaneous felonious criminal acts counted under OV 12 must "be acts other than the sentencing offense and not just other methods of classifying the sentencing offense." *Id.* at 726.

In the instant case, the jury convicted defendant of committing the crime of assault with intent to do great bodily harm less than murder against Lawrence Sewell and this felony was the sentencing offense for purposes of OV 12. The elements of this offense are an assault, coupled with the specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich

[12] *People v McGraw*, 484 Mich 120, 125; 771 NW2d 655 (2009).
[13] *People v Sargent*, 481 Mich 346, 349; 750 NW2d 161 (2008).
[14] The People note that MCL 777.42 does not contain the word "behavior"—it considers contemporaneous *felonious criminal acts*, i.e. contemporaneous felonious crimes. See *supra* at page 8.

657, 669; 549 NW2d 325 (1996), *amended* 453 Mich 1204 (1996). "A defendant commits an assault when he or she takes some 'unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013), quoting *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). "The intentional discharge of a firearm within range is an assault." *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974). The intent to cause great bodily harm may be inferred from defendant's actions, including his use of a dangerous weapon. See *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Finally, "[n]o actual physical injury is required for the elements of the crime to be established." *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). At trial, Sewell's uncontroverted testimony established that defendant fired three gunshots into an apartment while Sewell stood on the other side of the front door.[15] Firing a gun once into an occupied apartment while Sewell stood just on the other side of the door constituted the crime of assault with intent to do great bodily harm less than murder.[16]

After the first gunshot, each additional time that defendant pulled the trigger on the gun constituted a separate act beyond the sentencing offense. Since *Light*, three Court of Appeals panels have reached this same conclusion. See *People v Carter*, unpublished per curiam opinion, issued June 27, 2017, 2017 WL 2791036 (Docket No. 331142); *People v Lawrence*, unpublished per curiam opinion, issued June 20, 2017, 2017 WL 2664788 (Docket No. 330762) (finding that "[o]nly the first gunshot was required to establish defendant's underlying conviction" and that

[15] The trial evidence indicated that defendant knew the apartment was occupied, as Sewell testified that he had asked who was pounding on the door and defendant answered that it was "Mike." (156a)

[16] In his supplemental brief, defendant concedes that a single gunshot "might hypothetically have been enough to convict" defendant of assault with intent to do great bodily harm less than murder." See defendant's brief, 7; but see 7-8 (defendant attempting to distinguish this point).

"each additional gunshot was a unique assault on each additional person."); *People v Day*, unpublished per curiam opinion, issued December 19, 2012, 2012 WL 6604704 (Docket No. 306104) (finding that "the victim was shot at six times. Each time defendant pulled the trigger was a separate act, and only one was needed to convict her. Thus, the other five acts of pulling the trigger would be contemporaneous felonious criminal act[.]"),[17] citing *People v Wakeford*, 418 Mich 95, 111-112; 341 NW2d 68 (1983). The fact that defendant pulled the trigger on the gun two additional times distinguishes this case from *Light*, in which the Court of Appeals held that *the same single act* could not establish both the sentencing offense and a defendant's contemporaneous felonious criminal act for purposes of scoring OV 12. See *Light*, 290 Mich App at 726.

Although neither of the two additional bullets fired by defendant struck anyone inside the apartment, the bullets entered Sewell's living room—one struck and deflated an air mattress upon which a two- or three-month-old infant rested and the bullet came so close that Sewell thought that the baby had been hit. (164a, 167a) The act of firing a gun and nearly striking an infant constitutes the crimes of assault with intent to do great bodily harm less than murder[18] and felonious assault.[19] The intent element for these crimes may be proven, by a preponderance of the evidence, under the doctrine of transferred intent. Defendant's intent—to cause great bodily

[17] The People acknowledge that unpublished opinions of the Court of Appeals are not binding legal authority, but cite to these three cases nonetheless, due to the relative lack of published opinions interpreting *Light* since its issuance on November 23, 2010—as of the date of the writing of this brief, *Light* has only 4 published citing references, out of 46 case citing references. *Carter* is included in defendant's appendix at 9a-11a. The People have included *Lawrence* and *Day* in their appendix. See 7b-15b.

[18] MCL 750.84; see also *supra* at page 9 for the elements of this offense.

[19] MCL 750.82; see also *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999) (setting for the elements of felonious assault as an assault, with a dangerous weapon, "with the intent to injure or place the victim in reasonable apprehension of an immediate battery.").

harm less than murder or to injure or place a person in reasonable apprehension of immediate battery—transferred from Sewell, his intended victim, to the infant inside the apartment.[20] See *People v Hodge*, 196 Mich 546; 162 NW2d 966 (1917) (affirming the doctrine of transferred intent as follows: "[I]f the charge is of shooting with intent to kill A., the crime will be made out by proof of unlawfully shooting and injuring A., and it will be immaterial that defendant actually intended to kill B. and hit A. by mistake.") (quotation and citing reference omitted); *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979) (explaining, for purposes of the defendant's conviction for assault with intent to do great bodily harm less than murder, that "it must first be shown that he had the intention to cause great bodily harm to someone. Merely because he shot the wrong person makes his crime no less heinous. It is only necessary that the state of mind exist, not that it be directed at a particular person.") (citing references omitted).

This same reasoning and analysis holds true for the baby's mother, Dymond Wilson,[21] who was also in the living room at the time defendant fired these two additional gunshots.[22] Defendant's actions—firing a gun into a room occupied by Wilson—constituted the crimes of assault with intent to do great bodily harm less than murder and felonious assault under the doctrine of transferred intent. See *People v Raher*, 92 Mich 165, 166; 52 NW2d 625 (1892) (explaining that "[i] has been held that where a prisoner fired a gun in the direction of a crowd he was guilty of assault upon each.") (citing references omitted). Thus, defendant's conduct

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[20] Unlike at trial, factual findings at sentencing need only be proven by a preponderance of the evidence. *Hardy*, 494 Mich at 438. Moreover, at sentencing, the court is permitted to review the entire record and consider materials from many sources, including evidence inadmissible at trial, such as the presentence investigation report. See *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985); see also MRE 1101(b)(3). Accordingly, defendant's argument—that the People, at trial, "did not contend or provide any evidence to show" that defendant intended to assault anyone other than Sewell—is of no moment. Defendant's brief, 8.

[21] See *supra* at FN 1.

[22] See 167a.

(pulling the trigger on the gun two additional times) constituted at least two felonious criminal acts (assault with intent to do great bodily harm less than murder and felonious assault) committed against a person (the baby and Wilson), that occurred within 24 hours of the sentencing offense, that have not and will not result in separate convictions.[23] MCL 777.42(2)(a)(i)-(ii). In addition, these contemporaneous felonious criminal acts are "not just other methods of classifying the sentencing offense" because they involve (1) separate acts by defendant (i.e. pulling the trigger on the gun twice) and (2) separate victims that defendant was never convicted of assaulting. *Light*, 290 Mich App at 276; see also *Lovett*, 90 Mich App at 174 (concluding that, "where two persons are assaulted, there are two separate offenses.").[24] Based upon the foregoing, this record is sufficient to affirm, by a preponderance of the evidence and under *Light*, the scoring of OV 12 at 10 points.

Defendant's arguments to the contrary are unavailing. It is true that it was the People's theory at trial that defendant's actions—shooting a handgun three times at chest-level into an occupied apartment—provided evidence, beyond a reasonable doubt, that should result in the jury convicting him of the crime of assault with intent to murder or assault with intent to do great bodily harm less than murder against Sewell, and the People argued as much in their closing.[25] After hearing all of the trial evidence, the People's closing argument, defendant's closing

[23] Cf *Wakeford*, 418 Mich at 112 (explaining that, for purposes of armed robbery, "the appropriate 'unit of prosecution'…is the person assaulted and robbed.").
[24] For the reasons set forth *supra*, the prosecutor—in addition to the charges initially filed against defendant in this case—could have charged defendant for assaulting both Wilson and her child. If defendant had gone to trial on these charges and received an acquittal, defendant's conduct underlying the acquitted charges could have been considered for purposes of scoring the offense variables, including OV 12. See *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007) (citing references omitted). This is so because the burden of proof at sentencing is lower (by a preponderance of the evidence) than at trial (beyond a reasonable doubt). See *Osantowski*, 481 Mich at 111.
[25] See 261a-262a, 264a-266a.

argument, the People's rebuttal, and after receiving the trial court's final jury instructions, the jury acquitted defendant of the higher charge (assault with intent to murder) and convicted him of the lesser-included offense (assault with intent to do great bodily harm less than murder).[26] Defendant contends that, based upon the People's closing argument and the jury's verdict, defendant "was charged with and convicted for *all three*" gunshots; that "all three gunshots were part of the body of evidence against [defendant] and all three contributed to his conviction[;]" and that all three gunshots were "part of" or used to "establish the sentencing offense."[27] Defendant therefore argues that, under *Light*, all of the gunshots fired by him resulted in his conviction for assault with intent to do great bodily harm less than murder, which precludes their consideration under OV 12.

Defendant's argument wrongly presupposes that he knows what facts the jury used to convict him of the sentencing offense. "[T]he 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." *People v Chamblis*, 395 Mich 408, 420; 236 NW2d 473 (1975), overruled on other grounds by *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002); see also *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980) ("Juries are not held to any rules of logic nor are they required to explain their decisions."). For that reason, an attempt to interpret the jury's verdict is impermissible because such interpretation must rely upon speculation. "While it is an appellate court's duty to review jury verdicts, it may not speculate regarding a jury's conclusions." *People v Garcia*, 448 Mich

[26] See 307a-308a (verdict).
[27] Defendant's brief, 7-8 (emphasis in the original).

442, 460 n 25; 531 NW2d 683 (1995).[28] Thus, defendant's argument—that the jury used all three gunshots to convict him of assault with intent to do great bodily harm less than murder—is simply an improper speculative interpretation of the jury's verdict. In any event, the jury was not required to view the case in the same way as the People did at trial. Although the People argued in their closing that all three gunshots fired by defendant should be considered for purposes of establishing defendant's intent to kill or his intent to cause great bodily harm to Sewell,[29] the jury did not have to believe the People's theory in order to convict him.[30] Instead, the jury only had to find—for whatever reasons satisfactory to them—that the People proved each element of the offense beyond a reasonable doubt.[31]

Likewise, defendant cites no case law standing for the proposition that a trial court or an appellate court is required to believe or adhere to the People's trial theory when issuing or reviewing a defendant's sentence. As set forth above, because defendant fired a weapon three times into an occupied apartment, he committed three separate acts: one could properly be used by the trial court at sentencing to establish the sentencing offense of assault with intent to do

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[28] In both *Garcia* and *Chamblis* this Court has recognized that a jury may decide to convict a defendant of only the lesser offense, even if he is guilty of the greater offense, or may acquit the defendant all together "'for reasons satisfactory [only] to them.'" *Garcia*, 448 Mich at 460 n 25, quoting *Chamblis*, 395 Mich at 426.

[29] The People therefore argued that these gunshots could be used by the jury to establish the *mens rea* (i.e. the specific intent to kill or to do great bodily harm less than murder) of the charged crimes, not that the multiple gunshots were necessary to establish the *acus reus* (i.e. the assault) of the felonies defendant was charged with committing against Sewell.

[30] See, e.g., 285a-286a (trial court instructing the jury that "[t]he lawyers' statements and arguments are not evidence; they are only meant to help you understand the evidence and each side's legal theory."); see also 270a (defense counsel beginning his closing argument by telling the jury that they just heard the People's "recitation of *what they think the facts are in this case*.") (emphasis added).

[31] As set forth *supra* at page 9, the elements of the crime of assault with intent to do great bodily harm less than murder do not require that defendant commit a specific number of assaultive acts against the victim in order to be found guilty of that offense.

great bodily harm less than murder against Sewell, while the others could be used to establish defendant's assault (under MCL 750.82 and MCL 750.84) of Wilson and her baby inside the apartment for purposes of scoring OV 12. For these reasons, the Court should deny defendant's application because the record amply supports scoring OV 12 at 10 points and this score does not run afoul of *Light*.

Finally, the People submit that even if defendant had fired only one gunshot through Sewell's apartment door, OV 12 would still properly be scored at least 10 points.[32] As set forth *supra* at page 8, the statutory language set forth in OV 12 indicates that the Legislature intended for each *felony committed by defendant* within 24 hours of the sentencing offense that has not and will not result in a separate conviction be counted as a "contemporaneous felonious criminal act"[33] for purposes of scoring OV 12. "[A] person, by a single act, can violate more than one criminal statute." *Lovett*, 90 Mich App at 172. Accordingly, defendant—firing only a single bullet into an occupied apartment—could be charged with violating both MCL 750.82 and MCL 750.84 for each assaulted victim. See *id.* at 174; *Raher*, 92 Mich at 166. The ability to charge these crimes for each assaulted victim is within the prosecutor's broad charging discretion and

[32] Because of the multiple assaultive felonies perpetrated by defendant against Wilson and her baby, there is an argument that OV 12 should actually have been scored at 25 points. See MCL 777.42(1)(a). The People, however, did not advance this theory in the trial court or the Court of Appeals, so they do not now ask for this higher score to be considered by this Court.

[33] Black's Law Dictionary (5th ed) defines "criminal act" as the "[c]omission of a crime." Again, MCL 777.42 does not use the term "behavior" when it directs trial courts to score OV 12 for "contemporaneous felonious criminal acts." See MCL 777.42(1). Instead, the statute repeatedly makes reference to defendant's commission of other *crimes*. See MCL 777.42(1)(a)-(f). For that reason, the People disagree with the *Light* Court's statement that it could only consider "*behavior outside the offense* being scored" for purposes of scoring OV 12. *Light*, 290 Mich App at 722, 724-725 (emphasis in the original). While the People disagree with some of the wording found in the *Light* opinion, this Court has not asked for briefing on whether *Light* was correctly decided. Moreover, as set forth *supra* at pages 9-13 and 16, the record in this case amply supports scoring OV 12 at 10 points and this score falls within the parameters set forth in *Light*.

would not violate double jeopardy principles. See *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007); *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007); see also MCL 750.84(3) (expressly allowing a person to be "charged with, convicted of, or punished for any other violation of law arising out of the same conduct as the violation of this section."). Thus, had defendant only shot the gun once into the living room and was charged with and convicted of only assaulting Sewell, defendant still would have committed the crimes of assault with intent to do great bodily harm and felonious assault against both Wilson and her baby. These offenses constitute contemporaneous felonious criminal acts perpetrated by defendant against two additional victims that have not and will not result in separate convictions, which makes them available for scoring under OV 12. MCL 777.42(2)(a). Defendant is therefore not entitled to relief and his application must be denied.

RELIEF

THEREFORE, the People request that this Honorable Court DENY defendant's October 10, 2017 application for leave to appeal.

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

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