STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2015
v	No. 322597 Wayne Circuit Court
MARTIN DAVID HEINZ II, Defendant-Appellant.	LC No. 13-009870-FH

Before: GLEICHER, P.J., and SAWYER and MURPHY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree child abuse, MCL 750.136b(2).[1] The trial court sentenced him to 10 ½ to 30 years' imprisonment. Defendant does not challenge the conviction, raising only a sentencing issue concerning the evidentiary support for the scoring of offense variable (OV) 7, MCL 777.37. We affirm the trial court's assessment of 50 points for OV 7; however, we sua sponte order a *Crosby*[2] remand pursuant to *People v Lockridge*, __ Mich __; __ NW2d __ (2015).

Defendant contends that the trial court erroneously assessed 50 points for OV 7, finding defendant's conduct to be excessively brutal. We disagree. Under the sentencing guidelines, this Court reviews a trial court's factual determinations for clear error, *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), which exists if this Court is "definitely and firmly convinced that [the sentencing court] made a mistake" after reviewing the entire lower court record, *People v Armstrong*, 305 Mich App 230, 242; 851 NW2d 856 (2014). The trial court's factual findings must be supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438. This Court reviews de novo "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute." *Id.* This Court also reviews de novo, as a question of law, the proper interpretation of the sentencing guidelines. *People v Gullett*, 277 Mich App 214, 217; 744 NW2d 200 (2007). "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing

[1] The jury acquitted defendant of the offense of torture, MCL 750.85.

[2] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10); see also *People v Jackson*, 487 Mich 783, 791-792; 790 NW2d 340 (2010).

In general, OV 7 concerns aggravated physical abuse. There are only two possible scores for OV 7, zero points or 50 points. *People v Cline*, 276 Mich App 634, 652; 741 NW2d 563 (2007). Fifty points is to be scored if the "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). For the purpose of OV 7, "excessive brutality" requires savagery or cruelty beyond the usual brutality of the crime. *People v Glenn*, 295 Mich App 529, 533; 814 NW2d 686 (2012), rev'd on other grounds sub nom *Hardy*, 494 Mich 430.

The trial court did not err in this case because there was sufficient evidence to assign 50 points under OV 7 on the ground of excessive brutality. First-degree child abuse is established by a showing that the defendant "knowingly or intentionally cause[d] serious physical or serious mental harm to a child." MCL 750.136b(2). The victim here is defendant's 11-month-old son. Defendant admitted that he was frustrated with the baby's crying and fussiness and that he wanted the child to "leave him alone." Defendant threw the infant to the ground multiple times. In addition, defendant admitted that he "f***ed with [the baby] all day" and "hit his head on everything." Defendant also threw the child into his crib, pushed him into a chair while he was sitting on the ground, and hit his head against a crib while rocking him. Defendant's conduct caused the infant to suffer two skull fractures, in addition to facial abrasions and excessive swelling in the area of his right eye. Because defendant spent an entire day knowingly and intentionally causing serious physical harm to his infant son, who was hospitalized for his injuries, the trial court did not err in concluding that defendant's conduct was savage or cruel beyond the usual brutality of the crime. *Glenn*, 295 Mich App at 533.

Defendant argues that assessing OV 7 at 50 points was the prosecution's way of "merely trying to place the torture charge back on [defendant] after he was acquitted of it." Again, MCL 777.37(1)(a) requires a score of 50 points if the "victim was treated with sadism, torture, *or* excessive brutality . . . ." (Emphasis added.) The Legislature's use of the word " 'or' indicates an alternative or choice between two things." *Beauregard-Bezou v Pierce*, 194 Mich App 388, 394; 487 NW2d 792 (1992). Therefore, the trial court's focus on excessive brutality in isolation was permissible under a plain reading of the statute, and the evidence reflected the exercise of excessive brutality. Moreover, regardless of the acquittal on the charged crime of torture as measured under the beyond-a-reasonable-doubt standard, had a preponderance of evidence supported a finding of torture relative to OV 7, the court would have been permitted to assess 50 points on the basis of torture. The prosecution's motivation is ultimately irrelevant; it is the evidence that governs. Our discussion, however, necessarily triggers consideration of our Supreme Court's recent opinion in *Lockridge*, given that the jury, in rendering its verdict, did not make a specific finding of excessive brutality, which is not an element of first-degree child abuse.

In *Lockridge*, our Supreme Court held:

> Because Michigan's sentencing guidelines scheme allows judges to find by a preponderance of the evidence facts that are then used to compel an increase in

> the mandatory minimum punishment a defendant receives, it violates the Sixth Amendment to the United States Constitution under *Alleyne* [*v United States*, 570 US __; 133 S Ct 2151; 186 L Ed 2d 314 (2013)]. We therefore reverse the judgment . . . . To remedy the constitutional flaw in the guidelines, we hold that they are advisory only.
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> To make a threshold showing of plain error that could require resentencing, a defendant must demonstrate that his or her OV level was calculated using facts beyond those found by the jury or admitted by the defendant and that a corresponding reduction in the defendant's OV score to account for the error would change the applicable guidelines minimum sentence range. If a defendant makes that threshold showing and was not sentenced to an upward departure sentence, he or she is entitled to a remand for [sic] the trial court for that court to determine whether plain error occurred, i.e., whether the court would have imposed the same sentence absent the unconstitutional constraint on its discretion. If the trial court determines that it would not have imposed the same sentence but for the constraint, it must resentence the defendant. [*Lockridge*, __ Mich at __; slip op at 36-37.[3]]

In the present case, the minimum sentence range as scored below was 126 to 210 months under the applicable Class A grid, with a total prior record variable (PRV) assessment of 10 points, placing defendant at PRV level C (10 to 24 point range), and a total OV assessment of 85 points, placing him at OV level V (80 to 99 point range). See MCL 777.62. Neither the jury's verdict nor any admissions by defendant supported the 50-point score for OV 7. Deducting the 50 points from defendant's total OV assessment results in a total OV score of 35 points and "change[s] the applicable guidelines minimum sentence range," *Lockridge*, __ Mich at __; slip op at 36, from 126 to 210 months to 51 to 85 months (OV level II – 20 to 39 point range). MCL 777.62. Accordingly, defendant is entitled to a *Crosby* remand under *Lockridge*, and it is so ordered.[4] We appreciate that defendant did not raise this issue on appeal and that we are acting sua sponte on the matter. We also understand the potential pitfalls, from a defendant's perspective, of resentencing under *Lockridge*, given the ability of a sentencing court to depart from the now-advisory guidelines pursuant to a reasonableness standard and not the old

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[3] The Supreme Court referred to these remands as "*Crosby* remands" after the procedures set forth in *Crosby*, 397 F3d 103. *Lockridge*, __ Mich at __; slip op at 32-36. "*Crosby* remands are warranted only in cases involving sentences imposed on or before July 29, 2015 . . . ." *Id.* at __; slip op at 34. Defendant here was sentenced before July 29, 2015. We also note that the plain-error test is equally applicable in this case, because defendant did not make an *Alleyne*-related argument at sentencing.

[4] We note that the assessment of 25 points for OV 3, MCL 777.33(1)(c) ("Life threatening or permanent incapacitating injury occurred to a victim"), and perhaps the assessment of 10 points for OV 10, MCL 777.40(1)(b) (exploitation of a victim's youth), would also constitute judicial fact-finding falling outside the scope of the jury's verdict.

substantial-and-compelling test. *Lockridge*, __ Mich at __; slip op at 29.[5] But, in accordance with *Lockridge*, our ruling does not remand for resentencing. *Id.* at __; slip op at 34-36. Rather, as part of a multi-step process "on a *Crosby* remand, a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing." *Id.* at __; slip op at 35. Thus, defendant is free to decide against resentencing should he be so inclined.

We affirm the scoring of OV 7, but order a *Crosby* remand in compliance with *Lockridge* in regard to defendant's sentence. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ William B. Murphy

[5] "[A] sentencing court must [still] determine the applicable guidelines range and take it into account when imposing a sentence." *Lockridge*, __ Mich at __; slip op at 2.