# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 15, 2016 |
| v | No. 325167<br>Emmet Circuit Court |
| STEPHEN ALAN FALQUET a/k/a STEPHAN ALAN FALQUET,<br><br>Defendant-Appellant. | LC No. 14-003968-FC |

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

PER CURIAM.

Defendant pleaded no contest to two counts of criminal sexual conduct involving a young child. The trial court imposed upward departure sentences for each convicted offense. Defendant now challenges the factual basis for scoring Offense Variable (OV) 9 and the proportionality of the sentences imposed. Since defendant filed his appellate brief, *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), and its progeny have transformed the legal landscape in this area. Accordingly, although defendant's scoring challenge lacks merit and his claim that no substantial and compelling reasons supported the court's decision to depart from the guidelines is now irrelevant, we remand for the trial court to consider whether resentencing is required as provided in *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

We discern no error in the scoring of OV 9. Even following *Lockridge*, trial courts must correctly score the sentencing guideline variables and scoring decisions must be supported by a preponderance of the evidence. See *People v Steanhouse*, ___ Mich App ___; ___ NW2d ___ (Docket No. 318329, issued October 22, 2015), slip op at 19.

MCL 777.39(1)(c) provides for the assessment of 10 points for OV 9 when "two to nine victims . . . were placed in danger of physical injury or death." The main victim in this case was a seven-year-old girl. At the time of the assault, the victim's four-year-old brother was in the room. Evidence suggested that defendant had already, or planned to, assault the young boy as well. The female victim indicated that defendant had inappropriately touched her brother's buttocks. The children's mother heard defendant talking to both children about "dirty butts" before she opened the bedroom door and caught defendant touching her daughter. And defendant reported to the agent preparing his presentence investigation report (PSIR) that he had

played a game with both children, whom he had just met, called "stinky butt." Given this evidence, relief simply is not warranted.

Defendant also contends that the trial court failed to state substantial and compelling reasons in support of the upward departure sentences imposed. In *Lockridge*, the Supreme Court held that those provisions of our legislative sentencing guidelines that are mandatory must be severed and eliminated as they violate the Sixth Amendment of the United States Constitution. This included that portion of MCL 769.34(3) mandating trial courts to articulate substantial and compelling reasons for imposing a departure sentence. *Lockridge*, 498 Mich at 364, 391. A court may now exercise its discretion to impose a sentence outside of the advisory minimum sentencing guidelines range, as long as the departure sentence is reasonable. *Id.* at 392. Accordingly, defendant's specific challenge is now irrelevant.

However, we cannot be certain whether the trial court would have imposed the same sentences had it been aware that the mandatory legislative sentencing guidelines were unconstitutional and that its departure sentences must be reasonable rather than based on substantial and compelling reasons. Accordingly, we must remand to the trial court to consider whether resentencing is required as provided in *Crosby*. The trial court must consider the reasonableness of the sentences before we can consider their proportionality. Further review by this Court is therefore not ripe.

We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ William B. Murphy
/s/ Donald S. Owens