

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OTIS NORTHROP,

Defendant-Appellant.

UNPUBLISHED

June 8, 2004

No. 247545

Wayne Circuit Court

LC No. 02-012956-01

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant Otis Northrop was convicted by a jury of second-degree home invasion, MCL 750.110a. He was sentenced as an habitual offender-fourth, MCL 769.12, to life imprisonment. Defendant appeals as of right. We affirm defendant's conviction and remand for resentencing.

Defendant argues on appeal that his conviction should be overturned because there was insufficient evidence that he intended to commit a larceny inside complainant's house. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002). Uniformed police found defendant inside complainant's ransacked house, and defendant ran when they arrived. Complainant testified that food and at least one piece of jewelry were missing from the house. The evidence and reasonable inferences in this case provide ample evidence to support defendant's conviction. *Nowack, supra*.

Defendant also argues that the trial court erred in refusing to instruct the jury on the lesser included offense of entering without the owner's permission, MCL 750.115(1). Ironically, the trial court relied on *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), in denying defendant's request for the instruction, while *Cornell* specifically instructs that entering without permission is a necessarily included offense of breaking and entering. We find that the trial court erred in this regard but hold the error harmless. As in *Cornell*, the only element that distinguishes the offense of second-degree home invasion from the offense of entering without the owner's permission is the intent to commit a larceny. If the jury had found that defendant lacked that intent in this case, it would have acquitted him. Thus, the court's failure to give the misdemeanor instruction did not undermine the reliability of the verdict in this case. *Id.*

Next, defendant argues that the trial court erred in assessing ten points, over defendant's objection, for offense variable (OV) 10. This Court reviews a sentencing court's scoring decision to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). MCL 777.40(1)(b) provides for a score of ten points where "the offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." Here, although the complainant was ill, she was not at home at the time of the crime and there is no evidence to support the trial court's score. Compare *People v Witherspoon*, 257 Mich App 329, 335-336; 670 NW2d 434 (2003); *People v Phillips*, 251 Mich App 100, 109; 649 NW2d 407 (2002); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). Moreover, defendant's life sentence was outside the guidelines sentence range and, as the prosecutor concedes, the trial court did not indicate that it was departing from the guidelines, and did not offer any reasons for a departure or mention any reasons for defendant's sentence that were not already taken into consideration in scoring the guidelines. Accordingly, resentencing is required. *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003).

Finally, defendant contends that the trial court improperly considered prior convictions that arose out of the same criminal transaction. *People v Pruess*, 436 Mich 714, 717, 738; 461 NW2d 703 (1990). In light of our decision to vacate defendant's sentence and remand for further proceedings, this issue is moot and need not be addressed.

Defendant's conviction is affirmed. His sentence is vacated, and we remand for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Michael J. Talbot

/s/ Stephen L. Borrello