

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRADLEY ALLEN SKINNER,

Defendant-Appellant.

UNPUBLISHED

November 28, 2006

No. 263741

Branch Circuit Court

LC No. 04-017995-FH

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant pleaded no contest to second-degree home invasion, MCL 750.110a(3), and burning real property, MCL 750.72. The trial court sentenced defendant to serve concurrent terms of 36 to 180 months in prison for home invasion, and 26 to 120 months for arson. Defendant appeals by delayed leave granted, challenging only his sentence for home invasion, asserting that the recommended range for his minimum sentence for that offense was tainted by an incorrect score for Offense Variable (OV) 17. We agree, vacate defendant's sentence for home invasion, and remand for resentencing on that conviction only. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

Offense Variable 17 concerns the degree of negligence exhibited. MCL 777.47(1). The trial court scored ten points, which is what MCL 777.47(1)(a) prescribes where the offender "showed a wanton or reckless disregard for the life or property of another person." However, MCL 777.22(1) authorizes the scoring of OV 17 only where "an element of the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive." The elements of home invasion, and the theory underlying the instant prosecution, do not involve such instrumentality. Defense counsel raised this objection at sentencing. The prosecutor responded that the burning of a residential dwelling showed a reckless disregard for the life or property of others, and asked that the score be left at ten. The trial court declined to change the score.

On appeal, plaintiff concedes that OV 17 should have been scored at zero, but argues that the trial court erroneously refused to retain ten points under a different offense variable, OV 9, and, thus, that the errors cancel each other out, leaving defendant with a valid sentence. However, this argument is not properly before this Court.

Where this Court grants leave to appeal, the appeal is limited to the issues raised in the application. MCR 7.205(D)(4). An appellee is limited to the issues raised by the appellant unless the appellee cross appeals as provided in MCR 7.207. See also *Barnell v Taubman Co*, 203 Mich App 110, 123; 512 NW2d 13 (1993). When arguing issues raised in the application, however, an appellee need not cross appeal in order to argue an alternative basis for affirmance. See *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999).

In this case, this Court granted leave exclusively to review the trial court's scoring of OV 17. Accordingly, we would consider alternative arguments to support the scoring of that variable, if offered, but we will not consider the scoring of a variable not placed in issue in the application for leave on the ground that a second error could cancel the first. Moreover, plaintiff's argument lacks merit.¹

Defendant's minimum sentence for home invasion is outside the recommended range under the guidelines, properly scored.²

We vacate defendant's sentence for home invasion, and remand this case to the trial court for resentencing, with instructions to leave the scoring of the guidelines' variables unchanged but for changing the score of OV 17 from ten to zero.

We vacate defendant's sentence for home invasion, and remand for resentencing on that conviction only. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly

¹ Offense Variable 9, concerning the number of victims, calls for counting "each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a). Plaintiff urges the assessment of points for that variable on the ground that "injury" need not be physical. But this Court recently held otherwise. *People v Melton*, 271 Mich App 590, 592; 722 NW2d 698 (2006).

² Second-degree home invasion is a class C offense. MCL 777.16f. Defendant's Prior Record Variable score of 45 placed him at prior record level D. As scored by the trial court, his OV total of 15 placed him at offense level II, resulting in a recommended minimum sentence range of 19 to 38 months' imprisonment. MCL 777.64. Rescoring OV 17 at zero reduces defendant's OV total to five, for an offense level of I. That score, coupled with defendant's prior record level of D, results in a recommended minimum sentence of between 12 and 24 months' imprisonment.