STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MICHAEL RIETHMEIER,

Defendant-Appellant.

UNPUBLISHED
April 28, 1998

No. 196874
Otsego Circuit Court
LC No. 95-002053-FH

Before: Hood, P.J., and Markman and Talbot, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of conspiracy to commit arson of a dwelling house, MCL 750.157a; MSA 28.354(1)[1]. He was sentenced to four to twenty years' imprisonment, and appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion when it assessed ten points under offense variable (OV) 8 for property destruction. The Supreme Court recently addressed appellate court review of claims relative to the application of the sentencing guidelines. *People v Mitchell,* 454 Mich 145, 173-178; 560 NW2d 600 (1997). In *Mitchell,* the Supreme Court stated:

> Appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied. Guidelines are tools to aid the trial court in the exercise of its authority and a framework for the appellate courts' inquiry into the question whether the sentence is disproportionate and, hence, an abuse of the trial court's discretion. [*Id.* at 178.]

The Court ruled that a cognizable challenge to the application of the guidelines arises on appeal only when:

> (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. [*Id*. at 177.]

Appellate review is not available for mere scoring errors or errors with regard to misinterpretation. *Id.* at 176; *People v Raby*, 456 Mich 487, 497-499; ___ NW2d ___ (1998).

Under OV 8, ten points may be scored against the defendant if:

> The offense is a part of a pattern of criminal activities over a period of time from which the offender derives a substantial portion of his or her income and/or the offense is directly related to membership in an organized criminal group.

If either prong is found to be true, then the trial court may properly assess the full point value under OV 8. See *People v Emma Johnson*, 144 Mich App 497, 501; 376 NW2d 122 (1985).

Defendant argues that the factual predicate upon which OV 8 was scored is false, i.e. that defendant did not derive a substantial portion of his income from a pattern of criminal activities over a period of time and that there were no facts to support that defendant was a member in an organized criminal group. Defendant does not state a cognizable claim for appellate review because he has not demonstrated that the factual predicate is wholly unsupported; that the factual predicate is materially false; *and* that his sentence was disproportionate.

> The scoring of the sentencing guidelines is not an end in itself but rather a means to achieve a proportionate sentence. Where . . . the sentence is not disproportionate, there is no basis for relief on appeal. [*Raby, supra* at 496. (citations omitted).]

See also *People v Peerenboom*, 224 Mich App 195, 201-202; 568 NW2d 153 (1997), lv pending. Where defendant has failed to offer any evidence that his sentence was disproportionate, there is no basis for relief.

Even if we were to review whether the factual basis for the score was unsupported, defendant's challenge fails. There was evidence that defendant conspired to commit the arson during several pre-fire meetings and that, after the fire, defendant and his co-defendant attempted to keep witnesses from cooperating with the investigation of the crime. Thus, there was evidence to support the conclusion that the arson was part of a pattern of criminal activities over a period of time. Moreover, there was evidence that defendant derived a substantial portion of his income from these criminal activities. He collected approximately $80,000 in insurance proceeds for the arson at issue. Although he was also employed, it appears that defendant's employment income did not meet his needs and that he had previously borrowed money. The receipt of $80,000 in insurance proceeds supported a conclusion that defendant derived a significant portion of his income from the criminal activities at issue, regardless of how the actual proceeds were allocated or spent[2].

Defendant next argues that the trial court abused its discretion by admitting into evidence a letter, which was authored by defendant. Defendant argues that the letter was not relevant to any issues at trial, specifically the portions of the letter containing a fabricated sexual situation involving "Hillary Clinton". Defendant did not object to admission of the letter at trial and therefore, the issue has not been preserved for appeal. MRE 103(a)(1). Thus, we review only for plain error. MRE 103(d);

People v Grant, 445 Mich 535, 553; 520 NW2d 123 (1994). Plain error is an error that affects the substantial rights of the defendant, or otherwise stated, an error that is prejudicial in that it affects the outcome of the case. *Id*. at 553.

> [A] plain, *unpreserved* error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic. [*Id.* (emphasis in original).]

Portions of the letter were relevant to whether defendant participated in a conspiracy to burn his house down and collect insurance. For example, defendant specifically wrote that his ex-wife received $17,500 for what "she knew." Defendant's suggestion that she had been paid off in return for her silence gave rise to an inference that he was involved in the crime. While some portions of the letter were relevant, other portions, specifically the portions referencing the First Lady, were not relevant. These statements did not relate in any way to defendant's involvement in a conspiracy to burn his home and did not have "any tendency to make the existence of any fact that [was] of consequence to the determination of the action more probable or less probable that it would" have been if the letter had not been admitted. MRE 401.

Although portions of the letter were irrelevant at defendant's criminal trial, defendant has failed to demonstrate that introducing the letter in its entirety affected the outcome of his case. We do not find that the patently irrelevant statements reflected on defendant in such a manner that the jury would have convicted defendant without finding all of the essential elements of the crime proved beyond a reasonable doubt. The error was not outcome decisive and thus, defendant has failed to establish that this error was prejudicial to the extent that this Court should provide relief. See *In the Matter of Snyder*, 223 Mich App 85, 92-93; 566 NW2d 18 (1997), where this Court indicated that in the absence of the requisite level of prejudice, an unpreserved error involving the admissibility of evidence fails to provide a basis for appellate relief.

Finally, defendant argues that his conviction was against the great weight of the evidence. Because defendant failed to make a motion for new trial on this issue, he failed to preserve it for appellate review. *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988). Therefore, we will only consider defendant's claim that the verdict was against the great weight of the evidence if failure to do so would result in a miscarriage of justice. *Richmond Twp v Erbes*, 195 Mich App 210, 218; 489 NW2d 504 (1992), overruled on other grounds, see *People v Herrera (On Remand)*, 204 Mich App 333; 514 NW2d 543 (1994).

We find that no miscarriage of justice would result by our failure to consider this unpreserved issue. Defendant bases his claim that the verdict was unsupported on the fact that the damaging testimony given by David Barber was unreliable. He claims the testimony was not credible because Barber was admittedly under the influence of narcotics on the day of the arson, had "bad feelings" toward defendant, and because Barber's testimony was contradicted by two other witnesses. These allegations go directly to Barber's credibility and that of the other two witnesses. "[T]he task of determining the credibility of witnesses is for the jurors." *People v Herbert*, 444 Mich 466, 475; 511

NW2d 654 (1993). Unless the verdict was perverse, a new trial should not be granted. *Id*. at 475-476. There is no indication that the verdict was perverse in this case where the jury judged the credibility of the witnesses, including David Barber, and convicted

defendant based on all the evidence presented. Defendant has not demonstrated that failure to review this issue would result in a miscarriage of justice.

Affirmed.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Michael J. Talbot

[1] The judgment of sentence incorrectly identifies defendant as being convicted under MCL 750.72; MSA 28.267, which is actually the underlying felony of arson of a dwelling house. Defendant was convicted of conspiring to violate MCL 750.72; MSA 28.267 contrary to MCL 750.157a; MSA 28.354(1).

[2] We express no opinion as to whether the evidence demonstrated that defendant was a member of an organized criminal group.