

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON L. BARTON,

Defendant-Appellant.

UNPUBLISHED

July 30, 1999

No. 200888

Recorder's Court

LC No. 96-002651

Before: White, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83; MSA 28.278, felonious assault, MCL 750.82; MSA 28.277, first-degree home invasion, MCL 750.110a; MSA 28.305(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The jury convicted defendant of first-degree home invasion, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, a lesser included offense of assault with intent to commit murder, and felonious assault, but it acquitted defendant of felony-firearm. The trial court sentenced defendant as a second habitual offender to seventeen to thirty years in prison, with credit for 235 days. Defendant appeals by right his convictions. We affirm.

The charges arose out of an incident in which defendant broke into the home of Kenniqua Bonner, his former girlfriend. Defendant expressed anger over the demise of their relationship and threatened to kill her, struggled with Bonner's mother, and fired shots at Bonner as she fled the house. Defendant testified that he had been drinking heavily prior to the incident. He claimed that he would not have harmed anyone and denied firing shots.

Defendant argues that the trial court abused its discretion by admitting evidence that a personal protection order (PPO) had been entered and served upon him while he was incarcerated. We disagree. The decision whether to admit evidence is within the discretion of the trial court. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Generally, relevant evidence is admissible, and irrelevant evidence is inadmissible. MRE 402; *Starr*, *supra* at 497. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 387-388; 582

NW2d 785 (1998). A general denial of guilt puts at issue all elements of a charged offense, regardless of whether any elements are disputed. The credibility of witnesses is a material issue. *People v Mills*, 450 Mich 61, 69-70, 72; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995).

The evidence that in the past defendant had expressed extreme anger about the end of his relationship with Bonner and had acted in such a manner that Bonner felt compelled to secure a PPO was relevant to the intent elements of assault with intent to commit murder, *People v Johnson*, 215 Mich App 658, 672; 547 NW2d 65 (1996), and felonious assault, *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). Indeed, this evidence had the tendency to make it more likely that defendant intended to kill or injure her when he entered the residence. Also, the evidence was not unduly prejudicial. MCR 403. Counsel's failure to object to the evidence that the PPO was served while defendant was incarcerated could be considered trial strategy. We will not substitute our judgment for that of trial counsel in matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). Defendant was not denied the effective assistance of counsel. See *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Finally, defendant argues that he is entitled to resentencing because Offense Variable (OV) 2, physical attack and/or injury, was improperly scored at twenty-five points on the ground that Bonner was subjected to terrorism. We disagree. Appellate review of challenges to the sentencing guidelines is limited. Application of the guidelines presents a cognizable claim only if (1) a factual predicate is wholly unsupported; (2) a factual predicate is materially false; and (3) the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). If the sentence is proportionate, an error in the calculation of the guidelines provides no basis for relief. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998). The factual predicate for the scoring of OV 2 at twenty-five points, i.e., that defendant fired shots at Bonner as she ran from her home carrying her child, is not wholly unsupported or materially false. The scoring of OV 2 was supported by the evidence. Defendant has not presented a cognizable claim. *Mitchell, supra*.

We affirm.

/s/ Helene N. White

/s/ Jane E. Markey

/s/ Kurtis T. Wilder