

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELLIS MILLS, III,

Defendant-Appellant.

UNPUBLISHED

January 22, 2013

No. 293378

Kent Circuit Court

LC No. 08-011617-FC

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

PER CURIAM.

A jury convicted defendant Ellis Mills of second-degree murder,¹ carrying a concealed weapon (CCW),² and possession of a firearm during the commission of a felony (felony-firearm).³ Mills appeals as of right. More specifically, he appeals the trial court's denial of his motions for a new trial and an evidentiary hearing on grounds of newly discovered evidence and on grounds of ineffective assistance of counsel. Mills also appeals the trial court's scoring of offense variables (OV) 6 and 9. We affirm.

I. FACTS

A. THE PARTIES INVOLVED

This case arises from a dispute between individuals who are affiliated with the street gang known as the Gangster Disciples (Disciples) and individuals who are affiliated with the street gang known as the Tres Manos Gangsters (Tres Manos).

For ease of reference, the parties are affiliated as follows:

¹ MCL 750.317.

² MCL 750.227.

³ MCL 750.227b.

Parties affiliated with defendant, Mills, and their gang affiliation (present at Ovalle residence).

Ellis Mills	.....	Defendant	Tres Manos
Pablo Ovalle	.....	Mills' best friend	Tres Manos
Isidro Ovalle	.....	Pablo's father	
Tina Ovalle	.....	Pablo's mother	
Alexandra Vandevender	.....	Pablo's girlfriend	
Pablo, Jr.	.....	Pablo / Alexandra's son	
Chelsea Schondelmayer-Hoffman	..	Mills' girlfriend / fiancé	
Sam Otterén	.....	Mills' / Pablo's friend	
Antonio Delgado	.....	Mills' / Pablo's friend	Tres Manos
Christine Vandevender	.....	Alexandra's sister	

Parties affiliated with victim, Jordan Clark, and their gang affiliation (present at Ruiz residence).

Jordan Clark	.....	Victim / decedent	Disciples
Evelio Ruiz	.....	Jordan's associate	Disciples
Jenna Ruiz	.....	Evelio's wife	
Sam Lopez	.....	Evelio's friend	Disciples
Melissa Cook	.....	Lopez's girlfriend	
Jeromy Clark	.....	Cousin of victim	Disciples
Tom Dille	.....	Jeromy / Jordan's friend	Disciples
Nick Johnston	.....	Jeromy / Jordan / Tom's friend	

Mills, who claimed to be a former member of the Tres Manos, was engaged to Chelsea Schondelmayer-Hoffman at the time trial commenced. Mills purchased a .40 caliber handgun in March 2008, which he registered with the Kentwood police.

Mills' best friend was Pablo Ovalle. Pablo Ovalle's girlfriend, Alexandra Vandevender, and their son, Pablo, Jr., lived on Stafford Avenue with Pablo Ovalle's parents, Isidro and Tina Ovalle. At trial, Pablo Ovalle also claimed to be a former member of the Tres Manos.

On June 9, 2008, Evelio and Jenna Ruiz and their two children moved into a residence on Stafford Avenue, across the street from the Ovalle residence. Evelio Ruiz's friend, Sam Lopez, also resided at the Ruiz residence. Evelio Ruiz and Lopez were members of the Disciples.

Jenna Ruiz and Alexandra Vandevender were old classmates. They became reacquainted with one another when they became neighbors.

B. THE UNDERLYING EVENT

On June 12, 2008, Evelio and Jenna Ruiz, Lopez, Melissa Cook (Lopez's girlfriend), and Alexandra Vandevender were playing cards at the Ruiz residence. According to Evelio Ruiz, they were celebrating the Ruizes' moving to a new residence. Meanwhile, also on June 12, Mills planned on visiting a shooting range but changed his mind when Pablo Ovalle invited him to the Ovalle residence. At approximately 7:00 p.m., Pablo Ovalle picked up Mills and Schondelmayer-Hoffman and drove to the Ovalle residence. Mills, having planned on visiting

the shooting range, had his handgun with him, which he stated he kept in a box. Mills claimed that when he arrived at the Ovalle residence, he placed the box containing the handgun on a shelf in the Ovalles' garage. Isidro, Tina, and Pablo Ovalle; Alexandra Vandevender; Pablo, Jr.; Schondelmayer-Hoffman; and Mills then had dinner at the Ovalle residence.

Throughout the course of the evening, the individuals at both the Ruiz residence and Ovalle residence spent time on their respective porches. Several individuals consumed alcohol, including Lopez and Evelio Ruiz, who were drinking alcohol on the porch of the Ruiz residence. Lopez observed that two men at the Ovalle residence, one of whom was Mills, were staring at them. Lopez returned their stares. According to Evelio Ruiz, Mills then crossed Stafford Avenue and asked, "[w]hat are you looking at . . . you got a problem?" Evelio Ruiz asked Mills to identify himself, to which Mills responded, "[n]one of your business," and the following colloquy ensued between Lopez and Mills:

Lopez: [I]t is his business because it's our crib and you're over here disrespecting us.

Mills: This our house [sic] because we live on . . . this block.

Lopez: [F]*** your block . . . this is our block now.

Mills: No, this is TMG hood.

Lopez: F*** TMG, this GD's hood now.

Mills then essentially challenged Lopez to a fight. Evelio Ruiz and Pablo Ovalle, having seen the verbal exchange, crossed the street and tried to resolve the matter. Mills and Pablo Ovalle eventually returned to the Ovalle residence. Lopez testified that, as Mills left, Mills placed a call on his cellular phone. Lopez presumed that Mills had called other gang members. Pablo Ovalle testified that he heard Lopez yell, "F*** that Evelio, get my burner [gun] out the safe, get my cell phone." Evelio Ruiz testified that neither he nor Lopez actually had guns and that Lopez was merely bluffing. Also at this time, other members of the Disciples, Jeromy Clark, his cousin Jordan Clark, Tom Dilley, and Nick Johnston were at a party at a friend's residence approximately two to three miles from the Ruiz and Ovalle residences.

At this point, Dilley called Lopez to invite him to the party at the friend's residence. Lopez informed Dilley of the altercation with Mills, and Dilley told Lopez that he and some friends would join Lopez at the Ruiz residence.

When Mills returned to the Ovalle residence, he told Alexandra Vandevender and Schondelmayer-Hoffman to go into the house because there may be a fight. Pablo Ovalle's friend and neighbor, Sam Otteren, who was not affiliated with either gang, then arrived at the Ovalle residence. Mills and Pablo Ovalle then went into the Ovalles' garage. They next called Antonio Delgado, who was a member of Tres Manos and also resided on Stafford Avenue. Delgado testified that Mills and Pablo Ovalle had called him because there was going to be a fight at the Ovalle residence.

Next, according to Evelio Ruiz, Tina Ovalle yelled to him and Lopez, “You guys don’t want no problems, because you know, we live here longer than y’all. Y’all just moved in, you know, ain’t no sense, you know, going through this.” Evelio Ruiz testified that Lopez responded disrespectfully to Tina Ovalle. Tina Ovalle then went inside to awaken Isidro Ovalle, who had already gone to bed.

Isidro Ovalle told Mills and Pablo Ovalle that he did not want any trouble, and he then crossed the street where Lopez met him in Ruiz’s driveway. Isidro Ovalle claimed that he tried to resolve the matter, but Lopez was belligerent. Evelio Ruiz claimed that he tried to get Lopez to calm down, but Lopez refused. Isidro Ovalle testified that he pleaded with Lopez and Evelio Ruiz for more than 10 minutes to end the confrontation with Mills and Pablo Ovalle.

At this point, Tina Ovalle went into the garage and informed Pablo Ovalle and Mills that Isidro Ovalle was surrounded. She later testified at trial that she thought they were “stabbing him.” Isidro Ovalle testified that there were ten people around the Ruiz residence, and that he did not see Evelio Ruiz or Lopez with weapons. Delgado, who also claimed to be in the Ovalles’ garage when Tina Ovalle entered, claimed that Tina Ovalle told them that the Ovalle residence was going to get “shot up.” Delgado claimed that Mills and Pablo Ovalle responded to Tina Ovalle, saying, “We got this, you have nothing to worry about.”

Mills, Pablo Ovalle, Delgado and Otteran all walked to the edge of the Ovalles’ driveway. At this time, Jeromy and Jordan Clark, Dilley, and Johnston arrived on bicycles. When they arrived, there were three to five people in front of the Ovalle residence. Isidro Ovalle, Evelio Ruiz, and Lopez were talking at the Ruiz residence. Jeromy and Jordan Clark, Dilley, and Johnston greeted Evelio Ruiz and Lopez. Evelio Ruiz claimed that Isidro Ovalle returned to the Ovalle residence.

Evelio Ruiz and the other Disciples walked onto the street towards the Ovalle residence. At trial, Evelio Ruiz, Jeromy Clark, Johnston, and Delgado testified that they believed a fistfight would ensue. As Jordan Clark walked onto the street, he lifted up his shirt. At trial, Johnston explained that Jordan Clark lifted his shirt to indicate that he was not armed. Otteran testified that Jordan Clark raised both his hands in the air, essentially saying, “[b]ring it,” as he crossed the street. Otteran did not see Jordan Clark with a weapon.

Evelio Ruiz testified, “I see [Mills] coming out of the dark, and when I looked, and I see him looking down and I see somethin’ silver and I see him cock it back, that’s when I realized he’s got a gun.” According to Evelio Ruiz, Mills fired a couple shots into the air, and everyone stood still. Evelio Ruiz then testified that Mills pointed the gun just over the top of Lopez’s head and fired one shot. Mills then pointed the gun at Jordan Clark and fired one shot. Evelio Ruiz testified that he was next to Jordan Clark when Mills pointed the gun at Jordan Clark, and Evelio Ruiz then ducked behind a nearby van. When the shooting stopped, Evelio Ruiz saw Mills and Pablo Ovalle run towards the Ovalles’ backyard.

According to Delgado, after the shooting, he, Mills, and Pablo Ovalle ran into the Ovalles’ backyard and scaled a fence in order to flee. Delgado testified that, at one point while fleeing, Pablo Ovalle asked Mills why he did it. Mills responded that he did not know. Delgado

claimed that Mills was crying and appeared to be scared and sad. The three boys apparently separated when they encountered police after a few blocks.

Evelio Ruiz testified that he saw Jordan Clark lying on the ground in the middle of Stafford Avenue. He was not sure if Jordan Clark was dead, “but he was . . . just cold like he was gone.” Tina Ovalle and Lopez administered cardiopulmonary resuscitation to Jordan Clark. Paramedics and police arrived moments later. The paramedics pronounced Jordan Clark dead at the scene, and police located seven spent .40 caliber shell casings at the scene.

At some point later, Pablo Ovalle returned to the Ovalle residence, and the police arrested him. Evelio and Jenna Ruiz initially misidentified Pablo Ovalle as the shooter when he returned to the scene. But they later both identified Mills as the shooter from a photographic lineup. At trial, Evelio Ruiz explained that Pablo Ovalle and Mills shared a resemblance to one another, but Evelio Ruiz was able to subsequently identify Mills from a tattoo he had. Jenna Ruiz testified at trial that she had confused Pablo Ovalle and Mills’ names.

The record suggests that Mills surrendered to police three months after the shooting.

C. THE TRIAL

At trial, Mills admitted that he shot Jordan Clark but claimed that he did so in self-defense because Jordan Clark had pointed a gun at him. Mills testified that before the shooting occurred, he saw several individuals in front of the Ruiz residence. He claimed that he tried to seek refuge in the Ovalle residence through the back door, but it was locked. He stated he wanted to go inside the house to protect Schondelmayer-Hoffman and Pablo, Jr. Mills then went into the Ovalles’ garage, retrieved his gun, and walked to the end of the Ovalles’ driveway. Mills claimed that a number of individuals from the Ruiz residence walked towards him, and he yelled, “Stop, stop, I don’t want to shoot but I will if I have to.” He said that he fired three shots into the air, but the individuals continued to approach him. Mills claimed Jordan Clark then pointed a gun at him, and Mills fired twice at Jordan Clark. Although Mills’ testimony was unclear, he apparently fired two more shots. Mills testified that he had seven rounds in the gun’s magazine, and he had no more ammunition when he fled the scene.

Tina Ovalle and Schondelmayer-Hoffman testified in support of Mills’ self-defense claim. Tina Ovalle claimed that, although she did not see anyone with a gun, Jordan Clark acted as if he had a gun concealed in his pants. Schondelmayer-Hoffman also claimed that Jordan Clark gestured as if he was going to pull a gun from his pants when he was in the street. Tina Ovalle claimed that, after the shooting, someone on a bicycle approached Jordan Clark’s body, took something, and then rode away. Similarly, Schondelmayer-Hoffman claimed that “this blond kid with a rag over his face . . . ran up to [Jordan Clark] and grabbed his gun and took off on a bike.” Tina Ovalle admitted that she did not mention that Jordan Clark had a gun until she testified at the trial. She claimed that she had forgotten about the individual who took Jordan Clark’s gun when she testified at her investigative subpoena hearing. Interestingly, at the scene, Schondelmayer-Hoffman told the police she did not see what happened.

The jury found Mills guilty of second-degree murder, CCW, and felony-firearm. Mills appeals as of right.

II. NEW TRIAL

A. STANDARD OF REVIEW

Mills argues that the trial court's denial of his motion for a new trial based on new evidence was an error that requires reversal. Mills also argues that the trial court erred when it denied his motion for a new trial based on ineffective assistance of counsel. This Court reviews a trial court's decision regarding a new trial for an abuse of discretion.⁴ An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes.⁵

B. NEWLY DISCOVERED EVIDENCE

1. OVERVIEW

Mills moved for a new trial based on newly discovered evidence in the form of a witness, Christine Vandevender. Christine Vandevender is Alexandra Vandevender's sister. Mills claims that Christine Vandevender would have testified that she saw Jordan Clark with a gun and that Jordan Clark was instructing others to get their guns as well.

2. LEGAL STANDARDS

A trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice."⁶ For the trial court to grant a new trial based on newly discovered evidence, Mills must show that: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial."⁷

3. EVIDENCE MUST BE NEWLY DISCOVERED

For the trial court to grant a new trial based on newly discovered evidence, Mills must first show the evidence itself was newly discovered.⁸ In this case, Mills claims that appellate

⁴ *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

⁵ *Id.*

⁶ MCR 6.431(B).

⁷ *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal quotations and citations omitted).

⁸ *Id.*

counsel first interviewed Christine Vandevender on December 11, 2009, six months after his conviction, and Mills did not know that she was an eyewitness to the incident before that. When Mills found out about Christine Vandevender, she became a newly discovered witness. Thus, Mills satisfies the first prong.

4. NOT CUMULATIVE

To satisfy the second prong, Mills must show that the newly discovered evidence is not cumulative.⁹ At trial, Mills, Schondelmayer-Hoffman, and Tina Ovalle all testified that they believed that Jordan Clark had a gun. In her affidavit, Christine Vandevender stated that when Jordan Clark approached the Ovalle residence, she saw him “reach into his pocket and pull out an object that looked like a black and silver gun.” Mills argues that Christine Vandevender’s testimony is the best evidence consistent with his self-defense theory. “[C]umulative evidence which rebuts the prosecutor’s case should be admissible if it assists the defendant.”¹⁰ In this case, Christine Vandevender’s testimony could have helped Mills because it supported his account of what happened, and it may have enhanced his credibility with the jury. Although cumulative, the testimony could have assisted Mills. Thus, Mills satisfies the second prong.

5. INABILITY TO DISCOVER USING REASONABLE DILIGENCE

Mills must next show that, by using reasonable diligence, he could not discover and produce the evidence at trial.¹¹ Mills conceded in his brief in support of his motion for a new trial that one of the investigative detective’s notes referred to the “sister” of Alexandra Vandevender. Further, at Mills’ preliminary examination, eight months before trial, Alexandra Vandevender identified Christine Vandevender by name and provided her address. Alexandra Vandevender testified that Christine Vandevender went to the Ovalle residence after the shooting to take Pablo, Jr., to Christine Vandevender’s house. Alexandra Vandevender also claimed that Christine Vandevender had introduced Alexandra Vandevender to Mills’ girlfriend, Schondelmayer-Hoffman. It is clear that Christine Vandevender was acquainted with Pablo Ovalle, Alexandra Vandevender, and Mills. There is no indication or reason that Mills could not have located Christine Vandevender before the trial began. There is no indication that she fled after the incident. Christine Vandevender was discoverable to Mills before and during the trial. Thus, Mills cannot satisfy the third prong.

⁹ *Id.*

¹⁰ *People v Norwood*, 123 Mich App 287, 293; 333 NW2d 255 (1983).

¹¹ *Cress*, 468 Mich at 692.

6. OUTCOME DETERMINATIVE

Finally, Mills must show that Christine Vandevender's testimony would likely result in a different outcome on retrial.¹² At the trial, there were 12 eyewitnesses, including five associated with Mills, who testified that Jordan Clark did not have a gun on him when he was shot. Only the mother of Mills' best friend (Tina Ovalle) and Mills' girlfriend (Schondelmayer-Hoffman) testified in support of Mills' theory of self-defense. Ultimately, a jury found Mills guilty of second-degree murder after the trial court instructed them on first-degree murder, second-degree murder, voluntary manslaughter, self defense, and defense of others. In the face of a substantial amount of conflicting testimony, it is improbable that Christine Vandevender's additional testimony would have resulted in a different outcome. Thus, Mills cannot satisfy the fourth prong.

7. CONCLUSION

Mills cannot show that the trial court abused its discretion when it refused his motion for a new trial based on the discovery of Christine Vandevender's testimony. At best, he can only satisfy two of the prongs required to merit a new trial. Further, the jury returned a verdict that was among those that the trial court provided at jury instructions. The evidence was sufficient to support the jury's verdict. Mills cannot show that the verdict resulted in a miscarriage of justice.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

1. STANDARD OF REVIEW

Mills claims that his trial counsel committed several errors, all of which constituted ineffective assistance of counsel. The trial court did not hold an evidentiary hearing regarding the ineffective assistance of counsel claim; therefore, this Court's review is limited to facts that are apparent on the record.¹³

2. LEGAL STANDARDS

A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law.¹⁴ “[C]ounsel is presumed effective, and the defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is

¹² *Id.*

¹³ *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

¹⁴ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

reasonably probable that the results of the proceeding would have been different had it not been for counsel's error."¹⁵

3. FAILURE TO INTERVIEW AND CALL REBUTTAL WITNESSES

Mills argues that his defense counsel erred by failing to interview and call three witnesses that could have rebutted the neighbor, Sam Otteran's, testimony. It is presumed to be trial strategy if counsel declines to call a witness at trial.¹⁶ "This Court will not substitute its judgment for that of trial counsel in matters of trial strategy."¹⁷

At trial, Otteran testified that Jordan Clark did *not* have a gun when Mills shot him. Mills claims that these three witnesses would have testified that Otteran had told them, before the trial, that Jordan Clark *did* have a gun when Mills shot him.

The testimony of the three witnesses who were not called would only be useful to impeach Otteran's testimony at trial. When the sole utility of newly discovered evidence is to impeach a witness, such evidence is cumulative.¹⁸ Even if Mills could have successfully used the witnesses to impeach Otteran, there was still substantial testimony supporting Otteran's testimony at trial that Jordan Clark was not armed at the time of the shooting. Otteran was one of 12 witnesses who testified that Jordan Clark was unarmed at the time of the shooting.

Moreover, anything that the witnesses would have claimed that Otteran told them would have been objected to on the grounds of hearsay,¹⁹ and hearsay is generally inadmissible unless an exception applies.²⁰ The only logical hearsay exception would be that Otteran's statements qualified as excited utterance.²¹ But in this case, Otteran did not make the statements until just before trial, which was 11–12 months after the incident. Excited utterance would fail as an exception to hearsay.

Further, Mills and Schondelmayer-Hoffman both testified that Jordan Clark did have a gun at the time of the shooting, effectively supporting Mills' claim of self-defense. The three witnesses not testifying did not deprive Mills of a defense. It is feasible and necessary to

¹⁵ *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

¹⁶ *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

¹⁷ *Id.*

¹⁸ *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977).

¹⁹ MRE 801(c).

²⁰ MRE 802.

²¹ MRE 803(2).

presume Mills' counsel's refusal to call the witnesses was trial strategy, and Mills has not effectively rebutted this presumption.

4. FAILURE TO CALL OR INTERVIEW EXPERT WITNESSES

a. GANG EXPERT

Mills argues that his defense counsel was ineffective by failing to call or interview an expert on gangs. At trial, the prosecution called a Grand Rapids police officer to testify as an expert in youth gangs. Mills claims that his counsel should have investigated an expert "in rebuttal to the officer's testimony." He claims that expert testimony "would have likely helped to educate the jury which probably had little experiences [sic] with gangs and gang members." However, Mills does not mention how the lack of a rebutting gang expert prejudiced him. He has not shown that an expert witness would have testified in support of his defense. He also does not state or claim that the outcome would have been different had his counsel called such an expert. Mills fails to state exactly what a gang expert, called by his counsel, would have testified to that would have benefited his defense. Also, as previously noted, counsel's decision whether to call a witness is presumed to be trial strategy.²² Mills cannot rebut that presumption, nor can he meet his burden of showing that his counsel's failure to call an expert in gang lifestyle fell below an objective standard of reasonableness.

b. GUNSHOT RESIDUE EXPERT

Mills argues that his counsel was ineffective for failing to call a gunshot residue expert. However, he merely claims that an expert could have "helped" at trial. Mills must prove that a different outcome was probable, and merely arguing that an expert would have "helped" at trial falls far short of this burden. Further, Mills admitted to shooting Jordan Clark. We are unaware of any assistance a gunshot residue expert could have provided Mills at trial.

c. PHOTOGRAPHY EXPERT

Mills argues that his defense counsel was deficient because he did not call or interview an expert in photographs. At trial, defense counsel tried to introduce photographs of Jordan Clark with various guns, but the introduction was denied because the photographs could not be authenticated. Mills nevertheless claims that defense counsel should have consulted with someone to try to authenticate the photos. Again, defense counsel's failure to consult an expert falls far below the burden that Mills must prove. Mills does not explain how the photographs would have been used to aid his defense. Also, a photograph expert would be unfamiliar with the path or origin of the photos, so it is uncertain how he could have authenticated them at trial.

²² *Avant*, 235 Mich at 508.

5. FAILURE TO PERFORM VOIR DIRE

Mills argues that his defense counsel was deficient because counsel failed to perform voir dire. In making this argument, Mills essentially claims that counsel was ineffective in the manner he performed voir dire. Mills claims that defense counsel failed to “talk with prospective jurors regarding the issue of self defense,” failed to ask jurors about their knowledge and experiences with gangs, and failed to ask jurors about witness credibility.

“The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury.”²³ In other words, the purpose of voir dire is to excuse those jurors who would be biased in their decision-making abilities. “[T]here is no right to any specific procedure for engaging in voir dire. There is simply a right to a jury whose fairness and impartiality are assured by procedures generally within the discretion of the trial court.”²⁴ In this case, Mills asserts that his defense counsel did not mention self-defense to potential jurors. But his failure to mention self-defense does not show that the jurors were biased as a result. Further, it is at trial where jurors will be educated on the laws of self-defense, not during voir dire. Similarly, defense counsel not asking potential jurors how they would gauge witness credibility does not show that the potential jurors were biased in their decision-making abilities. Thus, we find no merit to Mills’ contention.

6. FAILURE TO OBJECT DURING PROSECUTION’S VOIR DIRE

Mills argues that his defense counsel was deficient for not objecting to the prosecutor’s comments during voir dire. Mills claims that the prosecutor made statements regarding Christianity that left the jury with a “certain feeling.” Mills takes the statements out of context. During voir dire, a potential juror stated, “I’m a devoted Christian, and its [sic] against my religious beliefs to judge another man.” The juror, when questioned, explained, “I feel that God should judge, not me.” The prosecutor then told the potential juror that he too was Christian, but that he was only concerned with the juror’s ability to fairly judge in Mills’ case. Mills’ defense counsel also questioned the prospective juror about religion, and the prospective juror was removed for cause. Mills’ defense counsel may not have objected to the questioning as a matter of trial strategy. He may have thought an objection to a “Christianity” question could damage his reputation with the jury. Further, Mills fails to show any harm that occurred as a result of the prosecutor’s questioning. The prospective juror was ultimately removed. Mills fails to show his defense counsel was ineffective during voir dire.

²³ *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994).

²⁴ *People v Sawyer*, 215 Mich App 183, 191; 545 NW2d 6 (1996).

7. FAILURE TO CROSS-EXAMINE WITNESSES

a. CROSS-EXAMINATION REGARDING CRIMINAL HISTORY

Mills argues that his defense counsel was ineffective because he failed to cross-examine two of the prosecution's witnesses with questions about their criminal history. Evidence that a witness was involved in a prior crime may be used to impeach that witness if the prior crime contained 1) an element of dishonesty or false statement, or 2) an element of theft.²⁵ Mills claims that his current appellate counsel has conducted an investigation into the criminal history of Delgado and Lopez. Mills claims that both have "criminal histories that would allow for impeachment under MRE 609." However, Mills fails to explain these "criminal histories," state how they could be used to impeach, or argue why previous defense counsel was ineffective for not cross-examining the witnesses regarding this issue. As such, Mills cannot show that his trial counsel's performance fell below objective standards of reasonableness. He also has not shown that a different result would have been likely had his defense counsel attempted to impeach the witnesses under MRE 609.

b. CROSS-EXAMINATION OF MEDICAL EXPERT

Mills also contends that his defense counsel's failure to cross-examine a medical expert regarding a prior gunshot Jordan Clark had sustained contributed to his counsel being ineffective. Mills simply states that his trial counsel "failed to inquire." Again, Mills offers no proof that would allow him to carry his burden of showing that his defense counsel was ineffective. He states no questions that his defense counsel should have asked or even what he hoped to achieve from cross-examining the medical expert about a prior injury that Jordan Clark suffered. Mills falls far short of meeting his burden to show ineffective assistance of counsel.

c. CROSS-EXAMINATION OF JENNA RUIZ

Similarly, Mills contends that his defense counsel was ineffective because he failed to cross-examine Jenna Ruiz regarding a statement that she made before she took the stand. Mills claims that she allegedly asked Evelio Ruiz why he lied by saying that Jordan Clark did not have a gun. But Jenna Ruiz, herself, testified that she saw no one with a weapon except for Mills. This Court is restricted to ruling only on facts that are part of the record.²⁶ This statement is not part of the record. Regardless, defense counsel's decisions on how to cross-examine a witness are a matter of trial strategy.²⁷

²⁵ MRE 609(a).

²⁶ *Wilson*, 242 Mich App at 352.

²⁷ *In re Ayers*, 239 Mich App 8, 23; 608 NW2d 132 (1999).

8. FAILURE TO FILE PRETRIAL MOTIONS

Mills argues that his defense counsel was ineffective because counsel failed to file certain pretrial motions.

a. MOTION FOR BILL OF PARTICULARS

Mills first argues that his defense counsel failed to file a motion for a bill of particulars. Mills does not state why his counsel's failure to file a bill of particular renders his counsel ineffective. Mills also does not state why a bill of particulars should have been filed or what it would have accomplished. A bill of particulars is not necessary when the prosecution has fully informed Mills of the nature and elements of the crime that he is being prosecuted for.²⁸ In this case, Mills was convicted of second-degree murder under MCL 750.317; carrying a concealed weapon under MCL 750.227; and possession of a firearm during the commission of a felony (felony-firearm) under MCL 750.227b. All of these convictions were derived from Mills' violation of the corresponding statute. There is no indication that Mills did not have adequate information on the statute, charges, or elements against which he was defending. There is no indication of how a bill of particulars would have aided Mills' defense of these statutes. Further, "defense counsel is not required to make motions that have no merit."²⁹ Regardless, Mills only mentions this issue in passing, and this Court is not obligated to rule on the issue because an issue that is insufficiently briefed is deemed to be abandoned on appeal.³⁰ Mills cannot meet his burden of showing that his counsel's failure to file a motion for a bill of particulars fell below reasonable standards or would have affected the outcome.

b. MOTION REQUESTING INDEPENDENT TESTING

Mills also argues that his defense counsel was ineffective because counsel did not file a pre-trial motion requesting independent testing of the victim's clothing. Mills argues that "an examination of the victim's clothing may have revealed gunshot residue." No one is claiming that Jordan Clark fired a weapon. At most, to support his self-defense claim, Mills asserts only that Jordan Clark was armed. None of the 15 witnesses reported hearing or seeing Jordan Clark fire a gun, and most testified he did not even have a gun. Moreover, even if an expert had tested for gunshot residue, it could only show that Jordan Clark had recently fired a weapon, not that he fired at Mills. There is no reason to believe that if Mills' attorney had filed a motion, it would have made any difference or even been relevant. Again, "defense counsel is not required to

²⁸ *People v Earl*, 299 Mich 579, 581; 300 NW2d 890 (1941).

²⁹ *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

³⁰ *Greater Bethesda Healing Springs Ministry v Evangel Builders & Construction Managers*, 282 Mich App 410, 413; 766 NW2d 874 (2009).

make motions that have no merit.”³¹ Mills cannot carry his burden of showing that his counsel was ineffective for not filing a motion to have the victim’s clothing tested for gunshot residue.

9. FAILURE TO HIRE A PRIVATE INVESTIGATOR

Mills argues that his defense counsel was ineffective because counsel failed to hire a private investigator in order to get criminal histories of the prosecution witnesses. Mills claims that if his counsel had obtained an investigator, it would have allowed his counsel more time to interview witnesses and bring them forward at trial. He cites *People v Grant*, which states, “Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”³² However, Mills’ case is easily distinguishable from *Grant*. In *Grant*, defense counsel failed to investigate a possible defense to a sexual conduct claim.³³ But Mills is arguing that his counsel was ineffective for failing to hire an *investigator*, not for failing to conduct an *investigation*. Mills also fails to show what, if any, benefit that more time to interview the witnesses would have created. Mills cannot carry the burden of showing his counsel’s failure to hire an investigator rendered his counsel ineffective.

10. REQUEST FOR EVIDENTIARY HEARING

a. STANDARD OF REVIEW

Mills argues that the trial court erred when it denied his motion for an evidentiary hearing based on ineffective assistance of counsel. “A trial court’s decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion.”³⁴ An abuse of discretion occurs when the trial court’s ruling falls outside the range of principled and reasonable outcomes.³⁵

b. LEGAL STANDARDS

The trial court has discretion in deciding whether an evidentiary hearing is necessary.

After reviewing the motion and response, the record, and the expanded record, if any, the court shall determine whether an evidentiary hearing is required. If the

³¹ *Ish*, 252 Mich App at 118-119.

³² *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004), quoting *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

³³ *Grant*, 470 Mich at 479.

³⁴ *People v Unger*, 278 Mich 210, 217; 749 NW2d 272 (2008).

³⁵ *Id.*

court decides that an evidentiary hearing is not required, it may rule on the motion or, in its discretion, afford the parties an opportunity for oral argument.^{36]}

c. APPLICATION OF THE LEGAL STANDARDS

The trial court heard and decided Mills' motion for a new trial and his motion for an evidentiary hearing based on Mills' claim that his counsel was ineffective. Mills' claim for ineffective assistance of counsel was based on the numerous accusations that we have addressed above. The trial court reviewed the motion and noted that he had observed defense counsel at trial and concluded that defense counsel was not ineffective. The trial court reviewed the motion, the response, and the record, and the court decided that an evidentiary hearing was not necessary.

Especially in light of our analysis of Mills' claims, it was certainly within the range of reasonable and principled outcomes for the trial court to deny his motion for an evidentiary hearing.

11. CONCLUSION

Mills cannot show that his defense counsel was ineffective. The presumption is that trial counsel was effective. Mills must rebut that presumption by showing that his counsel performed at a level lower than a reasonably objective standard, and then he must show that had it not been for his ineffective counsel there would have been a different outcome.³⁷ In this case, Mills cannot show either one of the requirements; therefore, he cannot carry his burden.

III. RIGHT TO PRESENT A DEFENSE

A. STANDARD OF REVIEW

Mills argues that the trial court violated his constitutional right to present a defense when it denied his motion to admit photographs and denied his motion to have the jury visit the crime scene. This Court reviews a trial court's decision whether to admit evidence for an abuse of discretion.³⁸ More specifically, "[a] decision whether to admit photographs is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion."³⁹

³⁶ MRE 6.508(B).

³⁷ *Frazier*, 478 Mich at 243.

³⁸ *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006).

³⁹ *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009).

An abuse of discretion occurs when the trial court's ruling falls outside the range of principled and reasonable outcomes.⁴⁰

B. ADMITTING PHOTOGRAPHS

1. LEGAL STANDARDS

Mills claims that the trial court erred when it excluded “several photographs of the victim’s Myspace page (a social networking site) that depicted [the victim] holding a black and silver gun and various guns.” The trial court decides whether photographs should be admitted.⁴¹ A defendant may admit evidence of a homicide victim’s character for aggression.⁴² Mills can prove the character of Jordan Clark by reputation or opinion or specific instances of conduct.⁴³ MRE 405 states:

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person’s conduct.^[44]

A victim’s character generally “may not be shown by specific instances of conduct unless those instances are independently admissible to show some matter apart from character as circumstantial evidence of the conduct of the victim on a particular occasion.”⁴⁵

2. APPLYING THE LEGAL STANDARDS

We agree with the trial court that the photographs are specific acts rather than character evidence. “[A] party’s ability to present evidence of a person’s character is quite limited; the party may only call witnesses to offer testimony concerning their personal opinion of that

⁴⁰ *Unger*, 278 Mich App 217.

⁴¹ *Gayheart*, 285 Mich App at 227.

⁴² MRE 404(a)(2).

⁴³ MRE 405.

⁴⁴ *Id.*

⁴⁵ *People v Harris*, 458 Mich 310, 319; 583 NW2d 680 (1998).

person's character or to testify about that person's reputation."⁴⁶ The Michigan Supreme Court held that specific acts may not be shown to establish that the victim was the aggressor, but they may be shown to establish the defendant's reasonable apprehension of harm, if the defendant was aware of them.

In this case, there is no indication that Mills saw the photos or was aware of them at the time of the incident. Mills claims that the violent character of Jordan Clark is admissible even if Mills was unaware of the character. However, this is only true if Mills is using the evidence to show that Jordan Clark was the aggressor.⁴⁷ If Mills is using the evidence to show that he had a reasonable belief that he was in immediate danger of being killed or seriously injured, then Mills must have knowledge of Jordan Clark's violent character.⁴⁸ "The purpose of this evidence is to show the defendant's state of mind; therefore, it is obvious that the victim's character, as affecting the defendant's apprehensions, must have become known to him, otherwise it is irrelevant."⁴⁹

Also, in order to be admitted, Mills must authenticate the photographs.⁵⁰ The party wishing to introduce demonstrative evidence at trial bears the burden of showing the evidence has been properly authenticated and identified.⁵¹ A party can properly authenticate evidence if it can show that the matter in question is what the party claims it to be.⁵² In this case, Mills does not know who took the photographs of Jordan Clark. Mills does not know who posted the photographs of Jordan Clark on MySpace. Mills has no way of knowing if the photos were altered in any way. Mills cannot even prove that the guns in the photos are real because he does not have any of this information. Accordingly, the trial court did not abuse its discretion in excluding the photographs.

⁴⁶ *Roper*, 286 Mich App at 97.

⁴⁷ *Harris*, 458 Mich at 315.

⁴⁸ *Id.* at 316.

⁴⁹ *Id.* at 317.

⁵⁰ MRE 901(a).

⁵¹ *People v Jambor*, 271 Mich App 1, 4-5; 717 NW2d 889 (2006).

⁵² *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 73; 577 NW2d 150 (1998).

C. JURY VISITING CRIME SCENE

1. LEGAL STANDARDS

Mills argues that the trial court abused its discretion when it denied his motion for the jury to view the crime scene. “It is within the trial court’s discretion to order a jury view of the crime scene.”⁵³

2. APPLYING THE LEGAL STANDARDS

Mills claims that the jury would have had a better idea of the events that transpired had it been allowed to view the scene of the incident. “Where . . . a judge finds that photographs in conjunction with a diagram accurately depict the scene of a crime, that there is no factual dispute concerning the accuracy of the photographs, and that a view would not help decide the facts in this case, an abuse of discretion cannot be said to have occurred.”⁵⁴ In this case, there were numerous photographs of the crime scene. There was also a diagram that depicted the relevant area with precise measurements and landmarks. Mills vaguely states that there is a dispute about the distance between Mills and Jordan Clark at the time of the shooting. Mills contends that if a jury could look at the crime scene, it would better understand the distance between Mills and Jordan Clark. Mills does not state how or why this would help the jury understand the case.

Accordingly, we conclude that Mills cannot show that the trial court abused its discretion when it denied his motion to have the jury view the crime scene.

IV. OFFENSE VARIABLE SCORING

A. STANDARD OF REVIEW

Mills argues that the trial court erroneously scored offense variables (OV) 6 and 9 of the sentencing guidelines. “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.”⁵⁵ A scoring decision “for which there is any evidence in support will be upheld.”⁵⁶

⁵³ *Unger*, 278 Mich App at 255.

⁵⁴ *People v Anderson*, 112 Mich App 640, 648; 317 NW2d 205 (1981).

⁵⁵ *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

⁵⁶ *Id.* (citation omitted).

B. OV 6

A trial court should score 25 points for OV 6 if “the offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result.”⁵⁷ Conversely, a trial court should score 10 points for OV 6 if “a killing is intentional within the definition of second-degree murder or voluntary manslaughter, but the death occurred in a combative situation or in response to victimization of the offender by the decedent.”⁵⁸ The trial court should determine which variables apply, and it should apply the highest number of points.⁵⁹

Here, the trial court scored Mills 25 points for OV 6. But Mills asserts that he *must* be scored 10 points because he was convicted of second-degree murder. Mills misinterprets the statute. A further reading states that Mills must be in a “combative situation” for the trial court to automatically score 10 points for the second-degree murder.⁶⁰ Mills’ contention is inconsistent with the jury’s verdict. The jury rejected Mills’ claim of self-defense and found him guilty of second-degree murder. The jury did not find that Mills was in a confrontational situation that warranted his shooting of Jordan Clark.

The trial judge may have considered the jury verdict and thought that a combative situation did not exist at the time of the incident. A score will be upheld if there is any evidence on the record that supports it. The trial court did not err in scoring 25 points for OV 6.

C. OV 9

A trial court should score 10 points for OV 9 if “[t]here were 2 to 9 victims who were placed in danger of physical injury or death”⁶¹ A trial court should score zero points for OV 9 if “[t]here were fewer than 2 victims who were placed in danger of physical injury or death”⁶² The trial court should determine which of variables apply, and it should apply the highest number of points.⁶³

⁵⁷ MCL 777.36(1)(b).

⁵⁸ MCL 777.36(2)(b).

⁵⁹ MCL 777.36(1).

⁶⁰ MCL 777.36(2)(b).

⁶¹ MCL 777.39(1)(c).

⁶² MCL 777.39(1)(d).

⁶³ MCL 777.39(1).

Mills challenges the trial court scoring 10 points for OV 9. Mills contends that there was only one victim in this case; thus, OV 9 should have been scored at zero points. “[W]hen scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered.”⁶⁴ A bystander who was not actually the subject of a criminal offense but standing nearby is “placed in danger of injury or loss of life” for purposes of OV 9.⁶⁵ The record demonstrates that 13 people, including Mills’ companions, were placed in danger of physical death or injury. OV 9 states to “[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim.”⁶⁶ Mills admitted that he fired three shots in the air as warning shots, and even a rudimentary knowledge of physics provides that the bullets must come down somewhere. Thus, everyone in the vicinity of Mills was placed in danger. Further, Mills testified that he fired two shots at the actual murder victim, and his testimony suggests that he fired two more shots above the heads of other individuals. In firing the aforementioned shots, Mills placed more than 10 people in danger of physical injury or loss of life. We uphold the trial court’s scoring decision with respect to OV 9 because the record supports that decision.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ William C. Whitbeck
/s/ Donald S. Owens

⁶⁴ *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008).

⁶⁵ *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004).

⁶⁶ MCL 777.39(2)(a).