STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 18, 2013
v	No. 307028 Calhoun Circuit Court
LEVON LEE BYNUM, Defendant-Appellant.	LC No. 2011-001705-FC

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant Levon Lee Bynum appeals by right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), two counts of assault with intent to murder, MCL 750.83, carrying a concealed weapon, MCL 750.227, and carrying or possessing a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced Bynum to serve life in prison without the possibility of parole for the murder conviction. It also sentenced him to serve 100 to 240 months in prison for each assault conviction, 57 to 120 months in prison for the concealed weapon conviction, and to two years in prison for the felony-firearm conviction. On appeal, Bynum argues that a police officer's expert testimony violated his right to a fair trial on a variety of grounds. We agree that the expert's testimony was improper and deprived Bynum of a fair trial. For that reason, we reverse his convictions and remand for a new trial.

I. BASIC FACTS

This case has its origins in a late night shooting at a party store in August 2010. During the day leading up to the shooting, Brandon Davis, Larry Carter, Josh Mitchell, and Darese Smith were partying together. Mitchell testified that they had been drinking alcohol and smoking marijuana since "[w]ay earlier"; "Like bird-chirpin time."

Davis testified that it was between 11 and 12 that night when they decided to drive to Davis' brother's house. He drove his friends in a blue Cadillac and was following his brother when he decided to stop at the party store and get some "Swisher's" to use for rolling more marijuana. Davis explained that his brother lived "right around the corner" from the party store and that he thought it might be best to give his brother a "minute in the house . . . and then by the time I get there, he'll be ready to go again." So he braked, backed up, and swung into the party store's parking lot.

After swinging into the lot, Davis pulled up to the entrance and parked. He saw a crowd of 10 to 15 people hanging around by the corner of the store. Davis stated that the whole crowd directed their attention to them and he got the impression that there was going to be trouble: "It was lookin like it was fixin to be a altercation." He agreed that he had previously described being in a state of "high alert" or in "battle mode." This was because some of the people from the crowd began to walk up to the car and the others were "directin their attention towards us."

Davis testified that one man—later identified as Bynum—approached and had words with Carter, who was Davis' cousin. Davis heard Carter ask, "Fuck you lookin at?" Carter then "hit [the] dude . . . and knocked him over . . . ." Mitchell testified that he got out because he heard some yelling then heard "'pow, pow, pow, pow, pow, pow'. Just some shit like that or something." Mitchell said he ducked and went "towards the store." Davis too heard "like four—four to six" gunshots. He saw a man pointing a gun at him and "immediately ran into the entrance of the store."

After he got into the store, Davis saw Mitchell and the store clerk. He did not at first see Smith. Davis said he was bleeding from his wrist and Mitchell said that Davis told him he was hit in the back as well. Mitchell also found that he had been shot; he "found a little hole in my leg . . . ." Davis said Carter came into the store and lay down at the front entrance—"he was bleeding in his—in his stomach." Mitchell related the same thing: "He wasn't talking or nothing. He just laid down." Mitchell pulled up Carter's shirt and saw a hole in his side. Carter was taken to the hospital, but died of his injuries.

Mitchell called his brother and then went out into the lot to speak with someone in a white car. He stated that it was just someone who knew him and asked him if he needed a ride. Mitchell denied that he or any of his friends were armed and denied having taken any weapons from his friends. Mitchell stated that he did not see Smith take any weapons from anyone. Davis also testified that no one from his group had any weapons and he denied that he was a member of a gang, although he admitted that he knew about the "MOB" gang.

Officer Jim Bailey testified that he helped investigate the shooting at the party store. He became involved with the investigation because he was a member of the Battle Creek Police Department's Gang Suppression Unit and was told that the shooting involved known members of a local street gang, the Boardman Boys. Bailey noted that the party store was located on the border of the territory claimed by the Boardman Boys and a rival gang, MOB, which he testified stands for "Money Over Bitches."

Bailey went over video evidence taken from the party store and identified Bynum on the video, who, he stated, was a known member of the Boardman Boys gang. He also identified other members of the gang that appear on the video: Breon Williams, Theodore Brooks, Brandon Fields, and Dominique Young. Bailey stated that the video showed Fields and Young approaching Davis' car and showed Fields with a revolver.

Bailey testified that he later interviewed Bynum at the station and the prosecutor played a video of the interview for the jury. Bynum agreed that some guys were driving by the party store when they stopped, came back, and drove into the parking lot:

> Right. I don't—I don't know—I don't know what was what. All I know is they came off Dickman. One of them came off of Dickman and they ride on Carl and they throw it in reverse so I'm (inaudible) I get to—I get to movin out the way like "boom".
>
> And they hopped out the car like, "Oh, fuck you niggas," this, that and (inaudible) I don't know (inaudible) so I'm trying—I'm like no (inaudible) "Come on, come on." And then after that, I just heard shootin.

Bynum said he was scared for his life and was just trying to leave. Bailey suggested that Bynum only had a gun because of past shootings and other crazy events and Bynum agreed that "It—it just—shit be goin crazy. Like it's not safe to walk nowhere . . . ." After Bailey again suggested that Bynum only had a gun for protection, Bynum stated: "Pretty much." Bynum related that he just heard shots and then "took off." He admitted that he fired his gun, but stated that he "was shootin in the air"; "I was shootin like trying to scare em off and tryin to back up." Bynum said he felt bad for the family, but he was "just defendin myself. I left off a couple warning shots and then I left."

When the video evidence was considered in conjunction with shell casings recovered from the parking lot, it appeared that three guns were fired during the altercation: Fields' revolver, a .380 caliber automatic, and a 9mm automatic. Bailey testified that he could "clearly see Brandon Fields" with the revolver on the video and could see Young with a smaller automatic. He also stated that, at a second interview, Bynum admitted to him and other officers that he had a 9mm automatic at the shooting. He also admitted that he recognized Davis—who he identified by his street name, "Be Real", when Davis pulled up in the Cadillac. Bynum also told him that Carter had threatened to "'blast on them'" when he got out of the car. But Bailey explained that the phrase was sometimes used as slang for 'punch.' Bailey said he asked Bynum whether he thought any of his shots might have hit Carter and Bynum responded: "'Maybe. Bullets don't have names.'"

Bailey testified that he could not state that Davis, Mitchell, Carter and Smith had a "direct affiliation" with a Battle Creek gang. He did, however, admit that they hung out in MOB territory and that MOB and Boardman Boys had been involved in several incidents leading up to the shooting at the party store. These incidents included retaliatory shootings.

At trial, Bynum's lawyer never explicitly conceded that Bynum possessed a gun, but he did argue that the shooting was justified as self-defense under the circumstances. He emphasized the evidence that Davis and his friends pulled into the parking lot suddenly and engaged in other behaviors that were threatening or aggressive. Moreover, he implied that Davis and his friends might have been armed and that Smith, Mitchell, or both men, might have removed weapons from the scene. Bynum's lawyer particularly emphasized that, before the police officers arrived at the scene, Smith disappeared from the camera's view for a time and Mitchell spoke with individuals in a white car that left.

The jury, however, rejected the self-defense argument and found Bynum guilty as stated above. Bynum now appeals.

II. EXPERT TESTIMONY

A. STANDARDS OF REVIEW

On appeal, Bynum argues that he was deprived of a fair trial by officer Tyler Sutherland's expert testimony on gangs. Specifically, he argues that the trial court erred when it permitted Sutherland to testify that Bynum was a violent gang member on the basis of anonymous tips and police reports, permitted Sutherland to offer his opinion that Bynum was guilty, and permitted him to offer improper propensity evidence. This Court reviews a trial court's decision to admit testimony for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). However, this Court reviews de novo whether the trial court correctly selected, interpreted, and applied the laws applicable to the admission of evidence. *Gay v Select Specialty Hosp*, 295 Mich App 284, 291; 813 NW2d 354 (2012). When a trial court admits or excludes evidence on the basis of an erroneous application of law, it necessarily abuses its discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

B. EXPERT TESTIMONY

A trial court may permit a witness who is qualified "by knowledge, skill, experience, training, or education" to testify as an expert, if it determines that "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." MRE 702. However, trial courts must be vigilant to ensure that the expert's testimony remains within proper bounds:

> There is always the concern that jurors will disregard their own common sense and give inordinate or dispositive weight to an expert's testimony. See *People v Peterson*, 450 Mich 349, 374; 537 NW2d 857 (1995) (noting the potential that a jury might defer to an expert's seemingly objective view of the evidence). For that reason, trial courts must—at every stage of the litigation—serve as the gatekeepers who ensure that the expert and his or her proposed testimony meet the threshold requirements. *Gilbert v DaimlerChrysler Corp*, 470 Mich. 749, 782; 685 NW2d 391 (2004). [*Gay*, 295 Mich App at 291.]

A trial court errs when it abandons its duty to ensure the integrity of the expert's testimony or performs its gatekeeper function inadequately. *Gilbert*, 470 Mich at 780. Where the proffered testimony is not relevant or not helpful because it does not involve matters beyond the common understanding of jurors, it is inadmissible under MRE 702. *People v Kowalski*, 492 Mich 106, 121-122; 821 NW2d 14 (2012) (opinion by MARY BETH KELLY, J.).

In addition to the requirements provided under MRE 702, trial courts must ensure that an expert's testimony complies with the general rules of admissibility. See MRE 401, MRE 402, and MRE 403. Applying all these rules, courts have developed specific limitations on expert testimony that implicate a defendant's right to have an impartial jury find the facts. As Justice Brickley explained in the context of a criminal sexual conduct case, because of the danger that jurors might be tempted to defer to an expert on the issue of guilt, courts have established "appropriate safeguards" to accommodate the need for expert testimony in specific

circumstances while avoiding the possibility that a jury might unduly rely on the expert's testimony:

> Given the nature of the offense and the terrible consequences of a miscalculation—the consequences when an individual, on many occasions a family member, is falsely accused of one of society's most heinous offenses, or, conversely, when one who commits such a crime would go unpunished and a possible reoccurrence of the act would go unprevented—appropriate safeguards are necessary. To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat. [*People v Beckley*, 434 Mich 691, 721-722; 456 NW2d 391 (1990) (opinion by BRICKLEY, J.).]

Thus, an expert may testify regarding the characteristics of sexually abused children, but only for the purpose of explaining potentially unusual behaviors. *Peterson*, 450 Mich at 365. The expert may not offer an opinion as to whether the victim was actually abused. *Id.* Similarly, a prosecutor may not present expert testimony on the characteristics of drug dealers—commonly referred to as profile evidence—in order to establish that the defendant was in fact a drug dealer. *People v Hubbard*, 209 Mich App 234, 241-242; 530 NW2d 130 (1995). The prosecutor may, however, present such evidence as background or modus operandi evidence, but the trial court and the parties must be careful to ensure that the testimony is not offered as substantive evidence of guilt and the expert should not be permitted to opine that the defendant is guilty or otherwise testify in such a way as to imply that the defendant is guilty. *People v Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000). And, although an expert's testimony may "embrace" ultimate issues to be decided by the jury, see MRE 704, the expert may not generally offer an opinion on fault, guilt, or a witness' truthfulness. See *Kowalski*, 492 Mich at 129 (opinion by MARY BETH KELLY, J.) (stating that an expert may testify about the phenomena of false confessions and interrogation techniques, but may not comment on the truthfulness of a defendant's confession); *People v McGillen*, 392 Mich 278, 285-286; 220 NW2d 689 (1974) (stating that a medical doctor cannot offer expert testimony that the victim was actually raped or that she is truthful); *O'Dowd v Linehan*, 385 Mich 491, 513; 189 NW2d 333 (1971) (holding that it was error to allow the expert to "fix the blame for the accident" because there was nothing exceptional about the evidence that required an expert opinion on the ultimate issue).

With regard to evidence concerning gang membership and gang culture, there are no published Michigan authorities that specifically address its permissible scope. Nevertheless, other courts have held that such testimony can be helpful to jurors. See *People v Memory*, 182 Cal App 4th 835, 858 (2010) (stating that evidence of gang membership is admissible to prove motive); *New Jersey v Torres*, 183 NJ 554, 569; 874 A2d 1084 (2005) (listing cases where courts have determined that expert testimony about gangs and gang culture is relevant and helpful to the jury); *United States v Mansoori*, 304 F3d 635, 654 (CA 7, 2002) (holding that the police expert's testimony on the history, structure, and involvement of the Travelling Vice Lords gang was useful to the jury); *United States v Lemon*, 239 F3d 968, 971 (CA 8, 2001) ("Evidence of gang membership is admissible if relevant to a disputed issue."); *United States v Hankey*, 203 F3d 1160 (CA 9, 2000) (stating that a police expert could testify about the defendants' gang affiliations and general tenets of gang culture to impeach testimony). Nevertheless, courts have recognized the high potential that such evidence will be unduly prejudicial.

In *United States v Garcia*, 151 F3d 1243 (CA 9, 1998), the court reversed a defendant's conviction for conspiracy because the only evidence that the prosecutor presented in support of the conspiracy was evidence that the defendant was in a gang:

> Recent authority in this circuit establishes that "[m]embership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting." *Mitchell v Prunty*, 107 F3d 1337, 1342 (CA 9, 1997), cert denied, 522 US 913, 118 S Ct. 295; 139 L Ed 2d 227 (1997), overruled in part on other grounds, *Santamaria v Horsley*, 133 F3d 1242 (CA 9, 1998) (*en banc*). In overturning the state conviction of a gang member that rested on the theory that the defendant aided and abetted a murder by "fanning the fires of gang warfare," the *Mitchell* [court] expressed concern that allowing a conviction on this basis would "smack[ ] of guilt by association." *Id.* at 1342. The same concern is implicated when a conspiracy conviction is based on evidence that an individual is affiliated with a gang which has a general rivalry with other gangs, and that this rivalry sometimes escalates into violent confrontations. [*Id.* at 1246.]

The court went on to note that, although there may be evidence that gang members are generally looking for trouble or prepared for violence, that evidence does not itself establish that they have actually *made* plans to initiate it and, for that reason, it is not evidence of a criminal conspiracy. *Id.* Further, the court warned that allowing evidence of gang membership to serve as evidence of aiding and abetting or conspiracy would invite absurd results: "Any gang member could be held liable for any other gang member's act at any time so long as the act was predicated on the common purpose of fighting the enemy." *Id.* (internal quotations and citation omitted). Accordingly, expert testimony that a defendant is in a gang and that the gang members have a basic agreement to back one another up in fights is insufficient to establish a conspiracy to commit assault or other illegal acts. *Id.* at 1245-1246.

Where an expert testifies about gang membership and culture, trial courts must be certain to ensure that the jury does not get the impression that gang membership alone equates to guilt. Evidence regarding the beliefs and practices of an organization may be relevant to explain a member's conduct on a particular occasion, but only with an appropriate foundation and limitations. *Memory*, 182 Cal App 4th at 862. When admitted without a proper foundation and an appropriate limiting instruction, there is a danger that the jury will make an improper inference:

> Although couched in terms of motive and intent, the People offered evidence of the Jus Brothers [in an attempt] to show defendants had a criminal disposition to fight with deadly force when confronted, but there was no evidence of this disposition. Apart from the prosecutor's questions and argument, there was no testimony that defendants had a disposition to fight with deadly force when confronted. The trial court abused its discretion in admitting this evidence. "Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion. Hence, the evidence was not relevant. It allowed, on the contrary, unreasonable inferences to be made by the

> trier of fact that the [defendant] was guilty of the offense on the theory of 'guilt by association.'" [*Id.* at 859 (citation omitted).]

See also *Kennedy v Lockyer*, 379 F3d 1041, 1055-1056 (CA 9, 2004) (stating that evidence of gang membership cannot be introduced to prove a substantive element of the crime, such as intent, because it amounts to guilt by association); *Mansoori*, 304 F3d at 654 (noting that the expert testified that membership is not a crime and that membership in the gang does not necessarily indicate that the member is involved in illegal activities and that the trial court instructed the jury that it is not illegal to be a member of, or associated with, a gang); *United States v Roark*, 924 F2d 1426 (CA 8, 1991) (ordering a new trial because the government's witnesses' testimony about the Hell's Angels organization unfairly introduced improper propensity evidence and transformed the theme of the trial into one of guilt by association). With these limits in mind, we shall now address the testimony at issue here.

C. SUTHERLAND'S TESTIMONY

The trial court determined, over Bynum's lawyer's objections premised on relevance and prejudice, that the prosecutor could present expert testimony on the background and nature of the Boardman Boys gang as well as Bynum's affiliation with it. It concluded that this evidence would be relevant to prove Bynum's motive for responding the way he did when Davis and his friends pulled into the party store's parking lot. The court, however, stated that it would be careful to ensure that the evidence was not presented to show that Bynum was a "bad person" by virtue of his membership in the gang. The court then determined that Sutherland was qualified by experience and training and for that reason, permitted him to testify generally about the gangs in Battle Creek and specifically on the Boardman Boys.

After examining the record, we conclude that the trial court did not abuse its discretion when it permitted Sutherland to testify as an expert on gangs and gang culture in Battle Creek. The record shows that he was sufficiently qualified by experience and training to testify on that subject. MRE 702. Moreover, we agree that much of his testimony was relevant and helpful to the jury. *Mansoori*, 304 F3d at 654. Sutherland testified generally about gangs and gang culture: how gangs are categorized, how they form, how the members select identifying symbols, how the gang's members and territory might be identified, and the organizational structure of gangs. He also discussed gang culture; specifically, he addressed the concepts of respect and turf. He described how gang members have a strong motive to respond to disrespectful acts in order to maintain status and protect the integrity of their turf. Finally, he provided relevant and helpful testimony on the structure of the Boardman Boys gang, its history—including its rivalry with the neighboring MOB gang—and identified its territory and members. And, had Sutherland limited his testimony to those matters, his testimony would have been unobjectionable. See *id.* However, Sutherland's testimony went far beyond these limits.

Sutherland presented extensive testimony that can only be characterized as improper propensity evidence. See *People v Roper*, 286 Mich App 77, 91-93; 777 NW2d 483 (2009) (discussing the limits on the admission of character evidence). He repeatedly testified that gang members in general, and the Boardman Boys in particular, are prone to use violence—including killing—to gain respect and further their criminal enterprise:

> [The] [d]riving force behind a gang, is "How do we gain respect?" Through power and fear. The best was to do that is to use a weapon, usually a gun. Because that sends the—the—the best message of how powerful you are, how—how fearful people should be of you . . . . Because the gun's the best way to, you know, get your message across of, "Hey, we'll kill you, basically, if—if you don't respect us."

He clarified that gang violence is not always directed at rival gang members, but is also often directed at innocent people. The gang members, he reiterated, will take "every opportunity to show how powerful they are." He stated that gang members must respond to every act of disrespect and must respond disproportionately to the perceived insult. That is, not only do gang members have a propensity to act out violently, they will respond to non-lethal acts with lethal force. Indeed, in the power-point presentation that accompanied his testimony, he hammered the point that every perceived sign of disrespect—however slight—must be responded to and must be responded to with violence.

After establishing that gang members have a propensity to commit violent acts, Sutherland connected the testimony with Bynum and the events at issue. He did not just state that Bynum was a member of the Boardman Boys, he testified that Bynum's gang affiliation was generational: his father started a gang and his brother was a gang member. And, in case the jury did not yet understand the implications, he stated that Bynum was a "hardcore" member of the Boardman Boys, which was not just his personal opinion, it was fact:

> So we have Dominique Young, Levon Bynum, and Brandon Fields all falling in this hardcore member [category] because they are the ones in the police reports—it's not just my opinion—police reports, people in the neighborhood, that continue to say these three, especially Levon [Bynum], is out here committing the most violent crime out of all the members in this gang.

Finally, after informing the jury that these undisclosed police reports and witnesses firmly established that Bynum had a propensity to lash out violently, he summarized his belief that, under the facts of this case, Bynum not only fired at Carter and his friends, but that he did so with premeditation:

> Yes. Because not only is this store in Boardman Boys turf, but because it borders a rival turf, they're on extra alert to protect this turf. Because they have had so many problems with MOB leading up to this homicide of this back and forth shooting, so they're on even extra alert. They're just waiting for anyone, not just MOB to show up and give them a chance, give them an opportunity to show, "This is our turf, this is how violent we can be, don't test us."
>
> So *when I see that incident, when I watch the video*, they are all posted up at the store with a purpose. When they went to that store that day, *they didn't know who they were going to beat up or shoot, but they went up there waiting for someone to give them the chance*. "Make us—give me a reason to—to shoot to, to fight you, to show how tough we are, the Boardman Boys, on our turf." (emphasis added).

Sutherland's testimony clearly exceeded the grounds of permissible expert testimony. Although couched in the guise of testimony on motive, Sutherland's testimony plainly went beyond a hypothetical gang member's motive to protect his reputation or his gang's turf; he unequivocally testified that gang members—especially hardcore members like Bynum—had a strong propensity to commit violent acts and that this propensity could be triggered by mundane and innocuous activities. See *Memory*, 182 Cal App 4th at 859 (stating that gang evidence is not admissible for the sole purpose of showing criminal disposition or bad character as a means of creating an inference that the defendant committed the charged offense). He also opined that Bynum and his cohorts went to the party store that night with the intent to commit a violent act—that is, that they previously agreed to act in concert and intended to shoot someone. This amounted to improper testimony on an essential element of first-degree murder: premeditation. See *Garcia*, 151 F3d at 1246.

D. PREJUDICE

There is some question as to whether Bynum's lawyer forfeited any claim that Sutherland's testimony was improper by failing to object to the specific instances of improper testimony. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (explaining the difference between forfeiting an error and waiving an error). Bynum's lawyer did object to Sutherland's proposed testimony and the accompanying power-point presentation before Sutherland testified, but he objected on the grounds that the testimony was generally irrelevant, prejudicial, and cumulative. He did not object on the grounds that it was improper propensity evidence or because it improperly encroached on the jury's right to determine premeditation. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) (stating that an objection made on the basis of one ground is "insufficient to preserve an appellate attack based on a different ground."). Nevertheless, even if Bynum's lawyer forfeited this claim of error, we are convinced that the trial court plainly erred by allowing this testimony and that the error warrants relief. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

As noted above, an expert may not testify that the defendant is guilty, or offer an opinion that a disputed act actually occurred. *Peterson*, 450 Mich at 365; *McGillen*, 392 Mich at 285-286. Similarly, although evidence that a defendant is a member of a gang implicates improper propensity evidence, when the evidence is admitted for a relevant purpose and the jury is properly instructed on the limits of evidence, it may be admissible under MRE 404. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993); *Memory*, 182 Cal App 4th at 862. Here, however, the trial court permitted Sutherland to go far beyond merely identifying the motive—defending turf and reputation—and identifying Bynum's membership, it allowed Sutherland to characterize Bynum as particularly prone to violence as a hardcore member with a long and violent police record. This too was plain error.

We cannot conclude that this improper testimony was harmless. *Carines*, 460 Mich at 763. We agree that there was overwhelming evidence that Bynum participated in the shooting that led to Carter's death and that his self-defense theory was not particularly persuasive. And, had Bynum been convicted of second-degree murder, we might readily conclude that this testimony did not affect the outcome of the proceedings. But the jury did not convict Bynum of second-degree murder; it convicted him of premeditated murder. The evidence of premeditation was threadbare, at best.

The evidence showed that Davis pulled into the parking lot rather suddenly and at a time when Bynum and his associates were wary of the possibility that they might be attacked. There was also evidence that Davis and his friends were at least marginally associated with a rival gang. Given this evidence and the evidence that Carter punched Bynum, it is likely that, had the jury not heard the propensity evidence or been told by an expert that Bynum and his friends went to the store with the intent to shoot someone, that it would have found that the prosecutor did not prove that Bynum premeditated beyond a reasonable doubt. As such, we must conclude that this improper evidence prejudiced Bynum's trial. *Id.*

Finally, we believe that this error warrants relief; to allow a verdict to stand on such testimony would undermine the integrity of the judicial system and the public's faith in the truth-seeking process. Accordingly, Bynum is entitled to a new trial. *Id.* Given our resolution of this issue, we decline to address Bynum's alternate bases for granting relief.

III. CONCLUSION

The trial court erred when it permitted Sutherland to offer expert testimony on gangs that amounted to improper propensity testimony and erred when it permitted him to testify that Bynum and his accomplices acted with premeditation. Because these errors warrant relief, we reverse Bynum's convictions and remand for a new trial.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Michael J. Kelly

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 18, 2013
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Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

BOONSTRA, J. (*dissenting*).

Defendant appeals by right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), two counts of assault with intent to murder, MCL 750.83, carrying a concealed weapon, MCL 750.227, and carrying or possessing a firearm during the commission of a felony, MCL 750.227b. Based on what it finds to be evidentiary errors in the admission of certain expert testimony, the majority reverses those convictions and remands for a new trial. Because I disagree that there were evidentiary errors warranting relief, I would affirm the convictions. Therefore, I respectfully dissent.

The majority finds error in the expert testimony of Officer Sutherland in two separate, although related, respects. First, it ascribes error to the admission of what it calls "improper propensity evidence." Second, it concludes that Sutherland improperly opined "on an essential element of first-degree murder: premeditation." For the reasons stated below, I disagree with those findings.

I. STANDARD OF REVIEW

I begin by noting that defendant did not object below to Sutherland's testimony either as improper propensity evidence or as improperly expressing an opinion as to defendant's premeditation. I therefore consider these issues unpreserved. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.") This Court reviews unpreserved claims of evidentiary error, including claimed constitutional error, for plain error affecting the defendant's substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003), lv den 469 Mich 1029 (2004). Plain error, which is error that is obvious or clear, affects a defendant's substantial rights when it affects the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999). If a defendant

demonstrates outcome-determinative plain error, this Court must then exercise its discretion whether to reverse. *Id.* "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* (quotation and alteration omitted).

II. EVIDENTIARY ERROR

A. "Propensity" Evidence

The majority does not take issue with Sutherland's expert testimony up to a point. Specifically, the majority acknowledges that Sutherland properly testified generally about gangs and gang culture, including how gangs are categorized, how they form, how the members select identifying symbols, how a gang's members and territory might be identified, the organizational structure of gangs, the concepts of respect and turf, and "how gang members have a strong motive to respond to disrespectful acts in order to maintain status and protect the integrity of their turf." The majority further has no quarrel with Sutherland's expert testimony specifically about the Boardman Boys gang, its history, its rivalry with the neighboring MOB gang, and its territory and members. The majority characterizes that testimony as "relevant and helpful" to the jury, and "unobjectionable."[1]

Yet the majority maintains that Sutherland's testimony went too far when it addressed that, in order to gain the respect that is the "[d]riving force behind a gang," gang members employ power and fear, often through violence and weapons, and that in responding to perceived disrespect, gang members respond disproportionately, and sometimes direct their response toward innocent people.

I am cognizant of the fact that evidence of gang affiliation sometimes has been treated cautiously because of its inherently prejudicial nature. *People v Wells*, 102 Mich App 122, 129; 302 NW2d 196 (1981). Defendants obviously should not be convicted of crimes due solely to their gang membership, but rather based on evidence of their commission of the charged crime, and trial courts and prosecutors should be ever vigilant in ensuring that prosecutions proceed accordingly.

However, I am unable to perceive the line that the majority purports to draw here between admissible and inadmissible testimony. If it is relevant, helpful, and unobjectionable for an expert to testify, for example, about gang members' "strong motive to respond to disrespectful acts in order to maintain status and protect the integrity of their turf," then the expert's testimony does not, in my view, become objectionable simply because the expert opined further that those responses are often, or even typically, violent, disproportionate, or sometimes directed at innocent persons. Those additional components of the expert's testimony are equally admissible, and do not convert it into improper "propensity" evidence.

[1] Defendant objects to the entirety of Sutherland's testimony.

Similarly, if it is relevant, helpful, and unobjectionable for an expert to testify about gang culture generally, and particularly about the Boardman Boys gang and its structure, history, rivalries, territory, and members (including defendant), then the expert's testimony does not, in my view, become objectionable "propensity" evidence simply because the expert opined further that defendant was not only a "member" of the Boardman Boys, but a "hardcore member."[2] Nor does it become objectionable because the expert described that defendant was raised in a culture where his father and brother also were gang members.

For these reasons, I am unable to derive from the majority opinion a meaningful distinction, or to identify a line of demarcation, between admissible and inadmissible expert testimony. I would hold that this testimony was permissible testimony by an expert qualified in the area of gang activity and intelligence, an area in which lay people usually do not possess the requisite knowledge. See *People v Smith*, 428 Mich 98, 106; 387 NW2d 814 (1986).

Further, since defendant was charged with first-degree premeditated murder, evidence of the underlying behavior patterns of gangs, the concept of "turf," and their response to perceived "disrespect," was directly related to defendant's motive for the killing. Evidence of defendant's membership in a gang and his previous involvement with the gang was thus relevant to his motive, intent, and premeditation in shooting the victim. See *People v Morehouse*, 328 Mich 689, 696; 44 NW2d 830 (1950); MRE 404(b).

MRE 404(b) provides as follows:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing that defendant had a propensity to commit the offense. *People v Starr*, 457 Mich 490, 495-496; 577 NW2d 673 (1998).

[2] Sutherland testified that defendant's status as a "hardcore member" of the Boardman Boys was not just his opinion; rather, police reports and people in the neighborhood supported this characterization. Because this aspect of Sutherland's testimony referenced police reports and the statements of other persons, defendant argues that the testimony was inadmissible hearsay and violated his rights under the Confrontation Clause. Although the majority does not address these arguments, I will address them *infra*.

Proof of motive is relevant to a prosecution for first-degree murder. *Wells*, 102 Mich App at 128; *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987). "This is particularly true where the accused does not deny participation to some extent or being present at the scene of the crime but claims lack of intent." *Wells*, 102 Mich App at 128-129. Evidence of motive is also relevant in proving premeditation. *Id.* at 129. Here, because defendant denied deliberately shooting anyone, but rather claimed that he fired his gun into the air to scare off attackers, intent and premeditation were at issue. See *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). I therefore do not agree that Sutherland's testimony was "couched in the guise of testimony on motive," but rather would hold that Sutherland's testimony concerning defendant's membership and role in the gang was relevant to motive, intent, and premeditation.

In determining that the testimony of Sutherland was impermissible propensity evidence, the majority relies heavily on a case from the often-reversed 9th Circuit, *United States v Garcia*, 151 F3d 1243 (CA 9, 1998). Apart from the lack of precedential value in this case, see *People v Gillam*, 479 Mich 253, 261; 734 NW2d 585 (2007), it is factually and legally distinguishable. Although *Garcia* states that "[r]ecent authority *in this circuit* establishes that "[m]embership in a gang cannot serve as proof of intent…," 151 F3d at 1246 (emphasis added), no such authority exists in our state. In fact, this Court has stated, quite to the contrary, albeit in unpublished opinions, that evidence of gang membership is relevant if it relates to motive, that it is not unduly prejudicial, and that its admission is not an abuse of discretion or plain error. See *People v Hernandez-Diaz*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2007 (Docket Nos. 273179, 273180); *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued July 26, 2002 (Docket No. 229926); *People v Trice*, unpublished opinion per curiam of the Court of Appeals, issued October 19, 2001 (Docket No. 223177); *People v Zitz*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2000 (Docket No. 215305); *People v Cameron*, unpublished opinion per curiam of the Court of Appeals, issued November 3, 1998 (Docket Nos. 197202, 197601); *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued May 15, 1998 (Docket No. 197751); cf. *People v Horne*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2001 (Docket No. 221050) (stating that evidence of gang membership was correctly excluded because it could not be tied to motive).

Further, as the majority acknowledges, the 9th Circuit in *Garcia* reversed the defendant's conviction because *the only evidence of conspiracy* was gang membership. *Garcia*, 151 F3d at 1246. Thus, gang membership was used as the sole proof of a crime, rather than as relevant evidence of an element of a crime. The court in Garcia further noted, as the majority correctly states, that "allowing evidence of gang membership to serve as evidence *of aiding and abetting or conspiracy* would invite absurd results." (Emphasis added). This is so because it would allow a person to be convicted of conspiracy or aiding and abetting merely for being part of a gang, absent any other illegal activity. *Id.* Nothing in *Garcia* stands for the proposition that, under the circumstances of this case, evidence of defendant's gang membership is irrelevant, unduly prejudicial, or improper "propensity" evidence, or that its admission constitutes an abuse of discretion or plain error.

B. Opinion on Premeditation

The majority also ascribes error to the following testimony of Sutherland:

> So *when I see that incident, when I watch the video*, they are all posted up at the store with a purpose. When they went to that store that day, *they didn't know who they were going to beat up or shoot, but they went up there waiting for someone to give them the chance*. "Make us—give me a reason to—to shoot to, to fight you, to show how tough we are, the Boardman Boys, on our turf." [Emphases added.]

The majority claims that this testimony amounts to improper expert testimony on the element of premeditation. I disagree. Although "a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense," *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985), an expert witness is permitted to offer an opinion or inference that "embraces an ultimate issue to be decided by the trier of fact." MRE 704. Here, Sutherland opined as to the mental state of defendant (and the other members of the Boardman Boys who were depicted in the video) when they went to the Party Store. However, Sutherland did not opine on defendant's claim of self-defense, indicate whether defendant's self-defense claim was believable, or state that defendant actually shot the victim with premeditation. Although his opinion that prior to the incident defendant and his friends were looking for someone "to beat up or shoot" may have "embraced" the issue of premeditation, I would not hold that it amounted to improper testimony on an element of first-degree murder, and would find no plain error in its admission. *Coy*, 258 Mich App at 12.

I further note that this case is distinguishable from cases cited by the majority in support of the proposition that an expert may not opine on a defendant's guilt. In contrast to cases cited by the majority, Sutherland's testimony, for example, did not involve drug profiles (*People v Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000)), or sexual abuse (*People v Peterson*, 450 Mich 349, 374; 537 NW2d 857 (1995)), or explicit legal conclusions (*People v McGillen*, 392 Mich 278, 285-286; 220 NW2d 689 (1974)).

Drug profile testimony carries a high risk of unfair prejudice because it is "a compilation of otherwise innocuous characteristics that many drug dealers exhibit." *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). By contrast, Sutherland's opinion on defendant's state of mind was not based on a list of innocuous characteristics, but rather on his experience with gangs in general and the Boardman Boys and defendant in particular, which included interviews with members of the Boardman Boys, as well as with victims and witnesses of gang violence.

Additionally, our Supreme Court in *Peterson* was quite clear that "[*t*]*he use of expert testimony in the prosecution of criminal sexual conduct cases is not an ordinary situation.*" 450 Mich at 374 (emphasis added). Thus, our Supreme Court, mindful of the risk of undue prejudice in cases which often amount to a credibility contest between a child and the defendant, has taken steps to insure that expert testimony is not in that circumstance given undue weight. *Id.* Notably, this Court has cautioned against reading *Peterson* too broadly. In *People v Ackerman*, 257 Mich App 434, 444; 669 NW2d 818 (2003), this Court stated that

> the emphasized language [from *Peterson*] reflects that testimony about "symptoms" of child abuse is limited. The language plainly pertains to any symptoms of abuse a child victim would exhibit. The *Peterson* court simply did

> not address the admissibility of expert testimony concerning typical patterns of behaviors by adults who perpetuate child sexual abuse. Thus, *Peterson* is not directly controlling on the question of admission of the expert testimony in this case.

Here, as in *Ackerman*, the expert testimony concerned the behavior of adult perpetrators, not child abuse victims. Thus I would conclude that *Peterson* is of limited applicability to the instant case.[3]

Finally, unlike the physician in *McGillen*, Sutherland did not explicitly testify to a legal conclusion, *i.e.*, that defendant had the premeditated intent to kill. 392 Mich at 285.

For all of these reasons, I would hold that Sutherland did not improperly opine on the element of premeditation.

III. PREJUDICE

Further, although I would not find error in the admission of Sutherland's testimony, if one were to assume that Sutherland's testimony did include impermissible testimony on the element of premeditation, such an error would not warrant reversal. Sufficient evidence existed of premeditation outside of Sutherland's contested testimony. In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim. *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008). Intent to kill may be inferred from any facts in evidence. *Id.*

A defendant's conduct after a killing is relevant to a determination of premeditation. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Here, defendant initially told Detective Betts that he was not even at the party store the night of the shooting. When that story would no longer pass muster, defendant alternatively told police that he had fired his gun

[3] Although not directly addressed by the majority or the trial court, I note it could be argued that aspects of Sutherland's testimony concerning Bynum's gang membership and Sutherland's perceptions of the video could be considered lay testimony, not expert testimony. See *People v Fomby*, ___ Mich App ___; ___ NW2d ___ (2013), slip op at 3. In *Fomby*, this Court found that an officer's identification of the defendants, made from extensive scrutiny of surveillance videos, could be admitted as lay opinion testimony pursuant to MRE 701 because it was "rationally based on his perception" and helpful for the jury to determine a disputed issue in the case. *Id.*, slip op at 3-4. Additionally, a police officer is permitted to testify to opinions rationally based on his experience and perception. See *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988). As I would in any event conclude that Sutherland's testimony was permissible expert testimony, and because both lay and expert witness testimony must still be analyzed in light of MRE 704, *Fomby*, slip op at 4, neither characterization substantially changes my analysis; however, if portions of Sutherland's testimony were to be considered lay testimony, then the "specific limitations on expert testimony" that the majority endeavors to apply from *Peterson* and *Williams* would not, for that additional reason, apply to those portions of his testimony.

into the air out of fear for his life. When asked whether a bullet from his gun could have hit the victim, defendant callously responded "Maybe. Bullets don't have names." A defendant's lack of remorse following a killing is relevant to the element of premeditation. *Id.* Here defendant attempted to mislead police as to his whereabouts, attempted to dispose of his weapon, and expressed no remorse at the death of the victim.

Additionally, evidence was presented that defendant fired his gun more than once. The time required for premeditation "need only be long enough 'to allow the defendant to take a second look.'" *Id.* at 229, quoting *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). One bullet was found in the victim's abdomen or chest. The nature of a victim's wounds, including their location, may support a finding of premeditation and deliberation. *Coy*, 243 Mich App at 315-316. Here, despite defendant's claim that he fired his gun into the air to scare the victim and his friends, defendant's bullet struck the victim in the torso. Combined with the fact that defendant fired multiple shots, this evidence supports the inference that defendant intended that his shots kill the victim.

Finally, the evidence shows that defendant and his friends aggressively approached the car, and that defendant initiated the encounter between himself and the unarmed victim. Combined with evidence of defendant's motive for protecting "turf," this evidence supports the conclusion that defendant intended to provoke a confrontation and was willing to escalate any such confrontation to lethal levels. Given the totality of the evidence that is not in dispute, I find sufficient evidence to support the jury's finding of premeditation, and would not remove that determination from the province of the jury.

Therefore, I would conclude that the admission of Sutherland's testimony, even if erroneous in part (which I do not find it to be), did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Carines*, 460 Mich at 763.

IV. DEFENDANT'S CONFRONTATION CLAUSE AND HEARSAY ARGUMENTS

As noted, the majority, having decided the matter in defendant's favor on other grounds, does not address defendant's Confrontation Clause and hearsay arguments. Because I find the grounds relied on by the majority unpersuasive, I briefly address defendant's remaining arguments.

Defendant claims that Sutherland's testimony about what police reports and people in the neighborhood said about defendant violated the Confrontation Clause and the hearsay rule. Because defendant did not object to the challenged portions of Sutherland's testimony on either ground, the claim of error is unpreserved. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.")

As a threshold matter, the testimony from Sutherland that he had "a stack of 53 police reports," concerning shootings in which defendant was involved, was elicited on cross-examination. "Under the doctrine of invited error, a party waives the right to seek appellate review when the party's own conduct directly causes the error." *People v McPherson*, 263 Mich

App 124, 139; 687 NW2d 370 (2004). A "[d]efendant cannot complain of admission of testimony which defendant invited or instigated." *People v Whetstone*, 119 Mich App 546, 554; 326 NW2d 552 (1982), on reh on other grounds 131 Mich App 669 (1984). Because defendant, through cross-examination, invited Sutherland's testimony, he cannot now complain of that testimony.

Defendant gives only cursory treatment to his remaining Confrontation Clause and hearsay arguments, which focus on Sutherland's opinion that defendant was a "hardcore member" of the Boardman Boys; nonetheless, I will address them briefly. Under the Confrontation Clause, US Const, Am VI, a defendant has the right to be confronted with the witnesses against him. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). Specifically, the Confrontation Clause bars the admission of testimonial statements of a witness who does not testify at trial unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006), lv den 477 Mich 1087 (2007). "The [United States] Supreme Court has not provided a definitive definition of 'testimonial,' but a statement 'procured with a primary purpose of creating an out-of-court substitute for trial testimony' is the quintessential example of testimonial hearsay." *United States v Palacios*, 677 F3d 234, 243 (CA 4, 2012), cert den ___ US ___, 133 S Ct 124; 184 L Ed 2d 59 (2012), quoting *Michigan v Bryant*, ___ US ___; 131 S Ct 1143, 1155; 179 L Ed 2d 93 (2011).

It is difficult to determine whether the out-of-court statements testified to by Sutherland were testimonial statements. The circumstances under which the statements were given are simply unknown. For the purposes of this section, I assume the statements referenced by Sutherland were testimonial. Statements by informants to the authorities generally constitute testimonial statements. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007), citing *United States v Cromer*, 389 F3d 662, 675 (CA 6, 2004). However, even assuming the statements were testimonial, I would find no error in the admission of Sutherland's testimony. "[T]he Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 10-11.

Further, an expert may rely on hearsay in formulating an opinion. MRE 703; *People v Dobben*, 440 Mich 679, 695; 488 NW2d 726 (1992). In *United States v Johnson*, 587 F3d 625, 635 (CA 4, 2009) the court stated that "[a]n expert witness's reliance on evidence that *Crawford* would bar if offered directly only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation." Further, "it is permissible for an expert witness to form an opinion by applying her expertise to otherwise inadmissible evidence because, in that limited instance, the evidence is not being presented for the truth of the matter asserted . . . ." *United States v Lombardozzi*, 491 F3d 61, 72 (CA 2, 2007) (emphasis added). In *Palacios*, 677 F3d at 243, the Fourth Circuit also explained as follows:

> Although "*Crawford* forbids the introduction of testimonial hearsay as evidence in itself," we have recognized that "it in no way prevents expert witnesses from offering their independent judgments merely because those judgments were in some part informed by their exposure to otherwise inadmissible evidence."

> *Johnson*, 587 F.3d at 635. The touchstone for determining whether an expert is "giving an independent judgment or merely acting as a transmitter for testimonial hearsay" is whether an expert "is applying his training and expertise to the sources before him," thereby producing "an original product that can be tested through cross-examination." *Id.*

Here, Sutherland did not act as a mere conduit or transmitter of any testimonial statements. Sutherland did not state the specifics of what any person in the neighborhood had said or what had been written in any police report. Rather, when Sutherland's testimony is read in context, it appears that he applied his expertise in Battle Creek gangs, including the structure and history of the Boardman Boys gang, to the statements of people in the neighborhood and in police reports, in reaching the opinion that defendant was a hardcore member of the Boardman Boys.

Further, it is not clear that Sutherland *based* his opinion that defendant was a hardcore member on the alleged hearsay statements; Sutherland stated, "[T]hey are the ones in the police reports—it's not *just* my opinion—police reports, people in the neighborhood, that continue to say these three, especially [defendant], is out here committing the most violent crime out of all the members in this gang." (Emphasis added). This statement implies that Sutherland's opinion would be *supported* by statements in police reports and people in the neighborhood, not that these statements formed the basis for his opinion. MRE 703 requires only that the facts or data "upon which an expert bases an opinion or inference shall be in evidence." Thus, even assuming that there was error in Sutherland's reference to out-of-court statements, I would conclude that there was no error in the admission of his opinion that defendant was a hardcore member of the Boardman Boys. Any error in admitting references within Sutherland's testimony to circumstances or considerations that may have contributed to or been consistent with that opinion would not have affected the outcome of defendant's trial. *Carines*, 460 Mich at 763.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

I will also briefly address defendant's ineffective assistance of counsel claim, as it was not addressed by the majority. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different." *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008), lv den 482 Mich 990 (2008), cert den ___ US ___; 129 S Ct 1670; 173 L Ed 2d 1039 (2009).

Defense counsel was not ineffective for failing to object to specific portions of Sutherland's testimony on Confrontation Clause or hearsay grounds. First, even assuming that Sutherland's testimony regarding what had been said by people in the neighborhood or had been written in police reports about defendant's crimes violated defendant's right of confrontation or the hearsay rule, defendant has not shown that, but for defense counsel's deficient performance, the result of the proceedings would have been different. *Uphaus (On Remand)*, 278 Mich App at 185. Absent this evidence, the result of defendant's trial would not have been different where other testimony by Sutherland provided an inference that defendant, as a member of the Boardman Boys, engaged in the charged criminal activity.

Further, Sutherland's testimony that he had a stack of 53 police reports indicating that defendant had been involved in several shootings was elicited on cross-examination. The cross-examination of witnesses involves matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). Defendant makes no argument that defense counsel's cross-examination of Sutherland was not sound trial strategy. He has therefore failed to overcome the strong presumption that defense counsel engaged in sound trial strategy while cross-examining Sutherland. See *People v Horn*, 279 Mich App 31, 37-38 n 5; 755 NW2d 212 (2008), lv den 482 Mich 1033 (2008).

Defense counsel also was not ineffective for failing to object to Sutherland's testimony on the basis that Sutherland gave an opinion on defendant's guilt. As I have noted, Sutherland offered no opinion whether he believed defendant's claim of self-defense or whether he believed that defendant shot the victims with the intent to kill them. Similarly, defense counsel also was not ineffective for failing to object to the entirety of Sutherland's testimony on any of the grounds identified by defendant. Defendant has not shown that any objection would have been granted. Counsel is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998), lv den 459 Mich 943 (1999).

Finally, defendant also claims that defense counsel was ineffective when he failed to object on the basis of prosecutorial misconduct to the admission of Sutherland's testimony and when he failed to request a cautionary jury instruction that would have aided the jury in distinguishing between Sutherland's so-called fact and expert testimony. As will be established, *infra*, there was no prosecutorial misconduct. Because there was no prosecutorial misconduct, any objection would have been futile. Counsel is not ineffective for failing to make a futile objection. *Id.* In addition, as will be established, *infra*, defendant's claim of instructional error is without merit. Therefore, any request for a cautionary instruction would have been futile. Counsel is not ineffective for failing to make a futile request. *Id.*

VI. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct because, by presenting the testimony of Sutherland, he shifted the jury's attention from the facts of the case to the violence of street gangs. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009), lv den 485 Mich 1127 (2010). A prosecutor may not interject issues into a defendant's trial that are broader than the guilt or innocence of the defendant. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Here, according to defendant, the prosecutor committed misconduct by presenting the testimony of Sutherland, because it was nothing but propensity evidence. However, because I would hold that the testimony of Sutherland was relevant and properly admitted, there was no prosecutorial misconduct. *Id.*

VII. INSTRUCTIONAL ERROR

Lastly, defendant claims that the trial court erred when it failed to give a cautionary instruction to aid the jury in distinguishing between the fact and expert testimony of Sutherland. This claim is unpreserved and we review for plain error. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). The record reflects that Sutherland was offered as an expert

witness, not a fact witness. Sutherland offered opinion testimony on gangs in Battle Creek. There was no testimony that he was involved, in any manner, in the murder investigation. Additionally, the trial court instructed the jury how to weigh expert opinion testimony:

> When a witness or witnesses has [sic] knowledge, training, education, experience in matters relevant to the case--and I assume that you don't--then that witness is allowed to--to give you opinions about the matters about which they have special knowledge. However, like any piece of evidence or any testimony, it's for you to decide whether you believe it and what weight to give to it.
>
> When you decide whether you believe a--a--such a witness's opinion, think carefully about the reasons and facts given in support of it and whether you accept those facts as true. You should also consider the witness's qualifications and whether their opinions make sense compared with the rest of the evidence in this case.

The instant case is thus distinguishable from *United States v Lopez-Medina*, 461 F3d 724 (CA 6, 2006), the case cited by defendant in support of his claim. In *Lopez-Medina*, the jury was not instructed regarding the use of expert opinion testimony. *Id.* at 744. In addition, although the jury was instructed that the testimony of law enforcement officers was not entitled to "any greater weight," the Sixth Circuit held that the instruction was insufficient because it did not guard against the jury mistakenly weighing opinion testimony as if the opinion were fact and because it did not instruct the jury that it was free to reject the opinions given. *Id.*

Here, the jury was instructed that it was free to reject the expert opinion testimony of Sutherland. Accordingly, the instruction guarded against the jury weighing Sutherland's expert opinion testimony as if the opinions were fact. There was no plain instructional error. *Aldrich*, 246 Mich App at 124-125.

For all of these reasons, I would affirm defendant's convictions, and I respectfully dissent.

/s/ Mark T. Boonstra