

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 18, 2013

v

LEVON LEE BYNUM,
Defendant-Appellant.

No. 307028
Calhoun Circuit Court
LC No. 2011-001705-FC

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