STATE OF MICHIGAN

IN THE

SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

STEPHEN L. BORRELLO, P.J., MICHAEL J. KELLY and MARK T. BOONSTRA, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

Supreme Court
No. 147261

LEVON LEE BYNUM,

Defendant-Appellee.
_____/

Court of Appeals No. 307028
Circuit Court No. 2011-001705-FC

BRIEF ON APPEAL – APPELLANT

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant filed an application in this Court for leave to appeal the April 18, 2013, per curiam opinion of the Court of Appeals (Appellant's Appendix at10a-19a) under MCR 7.301; MCR 7.302. In an order dated November 8, 2013, this Court granted the application and instructed the parties to address the following issues:

> (1) whether the police officer's expert testimony regarding gangs and gang membership — especially the testimony as to the defendant's gang, the defendant's role in his gang, and premeditation — was more prejudicial than probative under MRE 403; (2) the extent to which the profiling factors listed in *People v Murray*, 234 Mich App 46, 56-58 (1999), apply to the admissibility of this expert testimony; (3) whether any error by the trial court with respect to this testimony was preserved; and (4) whether, if there was any such error by the trial court, the Court of Appeals correctly held that the defendant was entitled to a new trial or whether any error was harmless.

This Court has jurisdiction under MCR 7.301(A)(2) and MCR 7.302(H)(3).

COUNTER-STATEMENT OF QUESTIONS

I. WHETHER OFFICER SUTHERLAND'S EXPERT TESTIMONY REGARDING GANGS, GANG MEMBERSHIP, AND DEFENDANT'S ROLE IN THE GANG TO WHICH HE BELONGED WAS UNFAIRLY PREJUDICIAL?

The Court of Appeals answered, "Yes."

The trial court answered, "No."

Plaintiff-Appellant answers, "No."

Defendant-Appellee answers, "Yes."

II. WHETHER *PEOPLE v MURRAY* APPLIES TO THE ADMISSIBILITY OF OFFICER SUTHERLAND'S EXPERT TESTIMONY?

The Court of Appeals did not address this issue.

The trial court did not address this issue.

Plaintiff-Appellee answers, "No."

III. WHETHER DEFENDANT PRESERVED THE EVIDENTIARY ERRORS HE COMPLAINED OF AT TRIAL?

The Court of Appeals did not address this issue.

The trial court answered, "Yes."

Plaintiff-Appellant answers, "No."

Defendant-Appellee answers, "Yes."

IV. WHETHER ANY ERROR COMMITTED BY THE COURT WHEN IT PERMITTED OFFICER SUTHERLAND'S EXPERT TESTIMONY REGARDING GANGS WAS HARMLESS?

The Court of Appeals answered, "No."

Plaintiff-Appellant answers, "No."

Defendant-Appellee answers, "Yes."

STATEMENT OF FACTS

A jury found Levon Lee Bynum (Defendant) guilty of the following: (1) first degree premeditated murder, MCL 750.316-A; (2) assault with the intent to commit great bodily harm less than murder, MCL 750.84; (3) assault with the intent to commit great bodily harm less than murder, MCL 750.84; (4) felony firearms, MCL 750.227B-A; and (5) carrying a concealed weapon, MCL 750.227. (Appellant's Appendix at 33a-34a). The trial court sentenced Defendant as a third habitual offender, pursuant to MCL 769.11, to the following: (1) a mandatory term of life imprisonment without the possibility of parole for his first degree premeditated murder conviction; (2) a term of 100-240 months' imprisonment for each of his assaultive convictions; (3) a term of 57-120 months' imprisonment for his carrying a concealed weapons conviction; and (4) a term of two years' imprisonment for his felony firearms conviction. (33a-34a). Judgment of Sentence, dated November 15, 2011). Defendant's sentences are to run concurrently to one another; however, his conviction for the felony firearms conviction runs consecutive to all other sentences. (314a).

Victim Testimony:

On August 28, 2010, Brandon Davis (Davis), Joshua Mitchell (Mitchell), Darese Smith (Smith), and Larry Carter (Carter) were all hanging out together traveling from house to house throughout the city of Battle Creek while they were drinking liquor and smoking marijuana. (69a-70a, 89a). Davis, Mitchell, Smith and Carter were all unarmed that night, they did not imply they were armed at any time, and none of them belonged to a gang. (84a, 86a-87a, 97a-99a).

At approximately 11:00 p.m., Davis was driving his blue Cadillac following behind a second car as they headed to Davis' brother's apartment at Carl Terrace Apartments, which is in close proximity to a Sam's Discount Party Store (Sam's). (71a-73a, 91a). As Davis approached Sam's, which is located on the corner of Carl Avenue and Dickman Road, he decided that he would stop

at the store while his brother continued on toward his residence. This way, Davis theorized, he could purchase "liquor and Swishers" while his brother finished whatever he needed to do at his residence at Carl Terrace. (72a, 76a, 91a).

Davis, Mitchell, Smith and Carter had been to Sam's a couple of times already that day without any incident. (72a, 90a). Davis initially passed Sam's because he decided at the last moment to stop at the store. Therefore, Davis quickly stopped his vehicle and placed the car in reverse so that he could access the driveway that enters the parking lot of Sam's. (91a). As they pulled into the parking lot, they noticed approximately 10-15 people standing outside near the corner of Sam's. (72-73a, 85a, 92a). Davis, Mitchell, Smith and Carter did not know anyone in the large crowd, and they did not have any prior incidents involving any of the individuals in the large group. (85a, 88a).

Davis parked the Cadillac directly in front of the main entrance to the party store. (74a, 92a). Defendant, Brandon Fields (Fields) and Dominique Young (Young) were all in the large crowd that immediately approached the driver's side of the blue Cadillac. (93a). Smith exited the car and sprinted toward the front door of Sam's, seemingly unaware of the approaching crowd, while Davis exited from the driver's seat of the Cadillac. (74a, 93a). As the crowd approached the Cadillac, Young asked, "What the f**k you looking at?" (106a). In response, Carter mimicked Young's question repeating, "What the f**k you looking at?" (93a, 105a-106a). Defendant and Carter began a verbal altercation over the exchange of words. (75a, 93a). Davis testified that he anticipated a confrontation due the larger crowd's immediate approach and confrontational nature as Davis' group exited his vehicle. (100a).

Mitchell exited the front passenger side of the vehicle and walked around the front driver's side of the vehicle near Davis as he attempted to keep an eye on the large crowd. Mitchell was

holding a Styrofoam cup, which contained a liquor drink that he continually kept in his hand for most of that evening. (74a). Davis was not paying much attention to the argument between Carter and Defendant because he was also attempting to keep an eye on the large crowd hovering around them. (93a). The large group became more aggressive as people started yelling and the scene went crazy. (74a, 101a). Mitchell attempted to figure out what the confrontation regarded. However, he never had enough time to figure it all out. (76a).

During the quick exchange of words, Carter suddenly punched Defendant in the face and knocked him down to the ground. (94a). Suddenly, numerous gunshots were fired as Smith, Mitchell and Davis ran into the store while Carter ran for cover along the passenger side of the Cadillac. (78a). Davis turned back to look at the large crowd as he ran into the store and noticed someone (later identified as Fields) with a gun pointed directly at him. Fields then lowered the gun slightly and fired. (94a). Smith ran inside of the store first, followed by Mitchell, then Davis. (78a). A short time later, Carter entered the store and immediately laid down on the floor just inside the entrance. (82a, 97a). Davis was puzzled by the crowd's reaction to such a trivial exchange. There had not been a major fight between the two groups of men, only that Carter had punched Defendant and Defendant punched Carter after Defendant's group initiated the confrontation. (102a-104a).

Once inside of the party store, Davis went to a nearby water fountain to wash blood from his hand and quickly realized that he had been shot in the wrist. (95a-96a). Mitchell approached Carter to check on him as he continued to lie on the floor. Unfortunately, Carter was not able to talk by this time. Mitchell lifted Carter's shirt and noticed a large hole in his stomach. (84a). After the crowd left the area of Sam's, Mitchell went back outside to the parking lot and approached a white car. Mitchell testified that a man who knew his mother was inside of the car offering him a ride to leave

the scene. However, Mitchell told the man that he could not leave because he had people inside of the store. Mitchell then went back inside of the party store. (83a).

After checking on Carter, Mitchell brought it to Davis' attention that he also had blood on the back area of his white clothing. (81a). Davis then realized that he had also been shot in the back/buttock region. (96a). Once the adrenaline wore off, Davis quickly began to feel the pain so he laid down on the floor next to Carter. (96a, 99a). Davis told Carter to hang in there and hold on, that the ambulance was on the way. (97a-98a). Mitchell later realized that he had sustained a through-and-through bullet wound to his left thigh area. (79a-80a).

Medical Treatment:

Tim Stuck (Stuck), a paramedic with LifeCare Ambulance Service, and his partner responded to the shooting at Sam's. (170a-171a). Three victims were present on the scene: Mitchell, Davis and Carter. Davis and Carter were lying on the floor while Mitchell was up and walking around. Stuck assisted Davis while another crew worked on Carter. (171a). Carter appeared to have suffered a gunshot wound to the chest area and was having difficulty breathing. (172a). All three victims were transported to Battle Creek Health Systems (BCHS). (172a-174a).

In the event that victims may come into BCHS, Battle Creek Police Department (BCPD) Officer Andrew Olsen (Olsen)responded to BCHS. (118a-119a). Davis and Mitchell were brought in by ambulance as emergency room staff and paramedics continued to work on Carter. (119a-120a). Numerous medical personnel were attempting to revive Carter, who was lifeless, just laying there not talking or moving. (120a-121a). Carter was taken into surgery, but he did not survive the gunshot wound. Olsen stayed with Carter's body until the medical examiner arrived. (121a).

Police Response:

BCPD Sergeant Brad Palmer (Palmer) testified that Sam's Discount Party Store was a new establishment at the time of the incident. Because of this, the incident was initially dispatched as a Springfield Police Department matter. (161a-162a). However, Palmer and other BCPD officers quickly responded to the location since they knew the store was actually in BCPD's jurisdiction. (162a). Upon his arrival at the scene, Palmer noticed two black males, Davis and Carter, who had sustained multiple gunshot wounds. Carter was moaning and obviously experiencing agonizing pain. Although Carter was moaning and attempting to talk, Palmer was unable to actually understand anything that he was saying. (163a). Palmer testified there was a large amount of blood beneath Carter. (164a).

Davis had sustained three gunshots wounds: one to the hand/wrist area, one to the back/buttock area, and one to the torso area. Mitchell was upset, almost hysterical at the time and very concerned over the well-being of his friends. In fact, Mitchell did not even inform officers that he had also been shot. Mitchell's wound was later discovered when Palmer patted him down for weapons. (164a). In the process of securing the scene, it was confirmed that Davis, Mitchell, Smith and Carter were unarmed. (165a). A search of the premises also did not turn up any weapons; neither inside or outside of the store. (166a-168a). Additionally, a traffic stop was conducted on the white car that Mitchell had approached immediately after the incident and no weapons were recovered from that vehicle either. (307a).

Officer Joel Shepperly (Shepperly), a BCPD Crime Lab Technician, responded to Sam's in regards to the shooting incident. (110a-111a). As he arrived on the scene, officers were already taping off the area and multiple agencies were present. (111a-112a). Officers on scene directed his attention to a few spent shell casings in the parking lot. (112a). Shepperly marked them with

evidence markers and later recovered two (2) spent 9mm shell casings, and one (1) spent .380 caliber shell casing. (113a-115a). Shepperly also photographed the scene and the victims while they were at BCHS receiving treatment for their injuries. (116a-117a).

Officer Allen Marlow (Marlow), a BCPD Crime Lab Technician, also responded to the scene at Sam's. (107a-108a). Sam's party store had two main surveillance cameras: one inside of the store and one outside of the store. (109a). Palmer and other officers viewed the surveillance video in an attempt to identify the suspects. Palmer was able to identify Young and Fields from prior contacts with the suspects. (168a). Palmer called in the BCPD Gang Suppression Unit (GSU) for assistance in identifying the remaining suspects. (169a). Through further investigation conducted by the GSU, and the surveillance videos, Defendant, Fields and Young were identified as the armed suspects from the video. (See generally Bailey's testimony: 122a-160a; 175a-242a).

Defendant's Confession and Admissions:

Defendant was located and interviewed on August 29, 2011, but later released due to Defendant's claim that he was not at the store during the time of the shooting. After further investigation, officers located Defendant at a family member's house on September 1, 2011, and asked him to go down to BCPD's station for a more comprehensive interview. (176a-177a). Defendant agreed and accompanied officers to BCPD's police station. (178a-180a).

A copy of Defendant's interview was played for the jury. (184a). Defendant was read his *Miranda*[1] rights, which he waived and agreed to speak with officers. (180a-181a). In his statement, Defendant admitted that he was, in fact, at the scene during the shooting incident. (See generally Defendant's statement: 182a-196a). Defendant claimed he was scared for his life when Carter

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 694 (1966).

punched him. However, Defendant stated that he did not see Davis, Mitchell, Smith or Carter with any weapons that evening. (See generally 182a-196a).

Although Defendant initially denied carrying a gun or even identifying the type of gun that he later admitted to carrying that evening, he claimed that he only started shooting after he heard shots because he was scared for his life. (See generally 182a-196a). Ironically, Defendant proffered that he was only armed that evening because "it's not safe to walk nowhere." (187a). Defendant also acknowledged that he did not know anybody in the Cadillac. (184a). When asked if he thought he may have been the person that shot and killed Carter, Defendant simply responded by saying, "Bullets don't have names." (226a).

Defendant was placed under arrest and taken to the Calhoun County Jail (CCJ). (196a). After some time had passed, Officer Bailey, Sergeant Austin Simons, and Detective Doug Betts went over to the CCJ, where Young was also housed at the time, to see if either Young or Defendant wanted to talk more. (197a). Officer James Bailey (Bailey) spoke with Young first. In returning Young to the holding cell, it was necessary to walk past Defendant's cell. Defendant was standing in the window of the holding cell while Young was returned to his cell. To the officers, Defendant's demeanor and gestures made it appear as though he wanted to talk further. (198a). Once they determined Defendant did in fact want to talk further, he was removed from the holding cell and placed in a small interview room with the three officers. (198a-200a). No recording devices were available in the interview room at CCJ. (198a).

During the interview, Defendant made admissions to the police officers that he was carrying 9mm Sig Sauer on the date of the incident. (200a-201a). Further investigation, including interviews with Fields and Young and viewing the surveillance videos, confirmed that Fields possessed a revolver, and Young possessed a .380 caliber handgun. Through the process of elimination and

through Defendant's own admissions, it was determined that Defendant was carrying a 9mm handgun. (200a-202a; 230a-232a). During the autopsy of Carter, a 9mm bullet was recovered from what was determined to be the fatal gunshot wound to Carter's abdomen. (199a).

Additional facts will be set forth as they relate to the case at bar.

ARGUMENT

I. OFFICER SUTHERLAND'S EXPERT TESTIMONY REGARDING GANGS, GANG MEMBERSHIP, AND DEFENDANT'S ROLE IN THE GANG TO WHICH HE BELONGED WAS NOT UNFAIRLY PREJUDICIAL. THE TESTIMONY WAS HIGHLY PROBATIVE OF BOTH DEFENDANT'S MOTIVE AND PREMEDITATION. IN ADDITION, THE TRIAL COURT TOOK APPROPRIATE STEPS TO REDUCE ANY DANGER OF UNFAIR PREJUDICE.

Standard of Review:

This Court reviews the trial court's decisions regarding the admission of evidence for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). An abuse of discretion occurs when the court makes a decision that falls outside the range of principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). However, "as we have often observed, the trial court's decision on a close evidentiary question . . . ordinarily cannot be an abuse of discretion." *People v Sabin*, 463 Mich 43, 67; 614 NW2d 888 (2000). In that same vein, "close questions arising from the trial judge's exercise of discretion on matters concerning the admission of evidence do not call for appellate reversal because the reviewing justices would have ruled differently." *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Discussion:

Because of the way in which this Court framed the issues to be addressed in its order granting leave to appeal, the People address this question with the understanding that the trial court properly admitted Officer Tyler Sutherland's expert testimony on gangs, gang membership, and Defendant's membership and role in his gang pursuant to MRE 702. Further, the People understand that Sutherland's testimony is deemed relevant to issues properly in play during Defendant's trial. MRE 401; MRE 402. Taking those foundational questions as met, the next question is whether Sutherland's testimony was unfairly prejudicial, in violation of MRE 403.

A significant part of that analysis, at the appellate level, is whether or not the trial court exercised its discretion when it made an evidentiary ruling as opposed to making an arbitrary decision without due consideration of the consequences of its choice. An exercise of discretion is shown when the trial court is seen to be considering the pros and cons of admitting evidence before making its ruling. If the trial court properly conducts an exercise of discretion, this Court should not lightly disturb the trial court's decisions, even if this Court would have ruled differently under the same circumstances. *Bahoda*, 448 Mich at 289.

A. MRE 403 Only Prohibits the Admission of Unfairly Prejudicial Evidence.

It is a truism that all admissible evidence is prejudicial, or it would not be relevant. *People v Fisher*, 449 Mich 441; 537 NW2d 577 (1995). Highly prejudicial evidence is often admissible because it is also often highly probative of important issues at trial. MRE 403 exists to exclude evidence if "its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403 (emphasis added). Unfair prejudice exists when there is a "danger that *marginally probative* evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998) (emphasis added). This Court has previously stated that potential prejudice is not enough to exclude evidence under MRE 403. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995); *Sabin*, 463 Mich at 71. Taken all together, the text of MRE 403 and the case law make clear that the emphasis of the MRE 403 analysis should be on the admissibility of probative evidence, rather than the exclusion of prejudicial evidence. As the probative value of the evidence goes up, the danger of unfair prejudice goes down.

There is no published case law in Michigan specifically addressing the use of expert testimony regarding gangs. However, the issue has been addressed in several unpublished cases.

Fields[2] (40a-45a) is most directly on point, and should have substantial persuasive value because it involved one of Defendant's co-defendants who was convicted using fundamentally the same testimony by Sutherland. The Court of Appeals upheld Fields' conviction, and found no error in the admission of the same expert testimony regarding gangs that was used in this trial.

Another unpublished opinion that is directly on point is *Williams*.[3] (55a-64a). In *Williams*, the prosecution used a gang expert for essentially the same purposes as in the instant case; to show the defendant's motive and intent, and to provide the jury with context for the defendant's actions. The Court of Appeals held those were valid uses of the gang expert testimony, and—citing MRE 403—that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. (58a). Similarly, in *Smith*[4] (46a-54a) the Court of Appeals upheld convictions in which the defendants' membership in the Aryan Nations gang was used to establish motive for the murder. The Court of Appeals distinguished the facts of *Smith* from those of *People v Wells*[5] because the prosecution in *Smith* offered proofs that connected the two defendants to the gang evidence.

Wells is the published opinion that comes closest to being on point with the case at bar. In *Wells*, the defendant was convicted of first degree murder using non-expert testimony regarding the violent activities of motorcycle gangs. The Court of Appeals overturned the conviction because the

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[2] *People v Brandon*, unpublished per curiam opinion of the Court of Appeals, issued December 27, 2012 (Docket No. 306624).

[3] *People v Williams*, unpublished per curiam opinion of the Court of Appeals, issued July 26, 2002 (Docket No. 229926).

[4] *People v Smith*, unpublished per curiam opinion of the Court of Appeals, issued May 15, 1998 (Docket Nos. 197751, 197758).

[5] *People v Wells*, 102 Mich App 122; 302 NW2d 196 (1980).

gang evidence was not linked—in any way—to Wells himself. "Besides the lack of evidence that defendant was a member of any of the gangs involved, there was no showing that he knew about these alleged activities or that they had any bearing whatsoever on his conduct [at the time of the murder]." *Wells*, 102 Mich App at 129. The *Wells* Court, without saying so directly, implied that the gang evidence would have been admissible to prove Wells' motive had it properly connected to him to a gang. *Id.*; see also 36a-39a (*People v Blackmon*, unpublished per curiam opinion of the Court of Appeals, issued September 14, 2001 (Docket No. 219350) (trial court erred under MRE 403 by admitting evidence of defendant's gang affiliation because it was not probative of any issue raised at trial)). The situation in *Wells*, in which testimony about gangs and gang behavior was never connected to the defendant, is entirely distinguishable from the present case.

Other states have considered the issue of gang testimony and the general rule is that such testimony is admissible, subject to a balancing test under each state's equivalent of MRE 403. The high court in Maryland gave a good overview of the law across the country with regard to gang expert testimony in *Gutierrez v State*, 423 Md 476; 32 A3d 2 (2011). "Generally, a gang expert's testimony is relevant and not unduly prejudicial when other evidence indicates that the crime was gang-related." *Id.* at 491. Other examples include New Jersey, which allows the use of gang expert testimony in murder trials. *State v Torres*, 183 NJ 554, 580; 874 A2d 1084 (2005).

Following similar reasoning, New Mexico found a gang expert's testimony in a murder trial to be unfairly prejudicial because the testimony was not connected specifically to the defendant; no evidence had been presented to show that the defendant was a member of a gang. *State v Torrez*, 146 NM 331, 339; 210 P3d 228 (2009). However, the New Mexico Supreme Court would have admitted the testimony, and stated that the probative value of the evidence would have been significant, if the prosecution had connected the defendant to a gang. *Id.* Thus, the trend in other

states is essentially similar what we have seen developing in Michigan: gang testimony is admissible, and will not be unfairly prejudicial, where it is relevant to an issue in the case, and is properly linked to the defendant on trial. See also *People v Memory*, 182 Cal App 4th 835 (2010) (evidence of gang membership can be used to demonstrate motive); *United States v Mansoori*, 304 F3d 635 (CA 7, 2002).

B. Officer Sutherland's Expert Testimony Was Highly Probative of Defendant's Motive and Premeditation, As Well As Addressing Defendant's Claim of Self-Defense. The Risk of Unfair Prejudice Was Low, and Was Reduced Further by Appropriate Jury Instructions.

In order to weigh the probative value of expert testimony, the court must decide what issues it addresses in the trial. In the present case, Sutherland's testimony spoke to the element of premeditation in first degree murder. Sutherland's testimony also directly addressed the interconnected issue of motive, which—although not an element of the crime—is always relevant. *Wells*, 102 Mich App at 128. Lastly, Sutherland's testimony directly addressed Defendant's self-defense theory, which he raised in his voir dire. (326a-328a).

In addition to the obvious probative value of the direct application of expert testimony to the issues raised in the trial, it can also be useful to explain to the jury the context in which whole body of evidence they are being offered exists. This is an additional area of probative value quite separate from the direct application of testimony to the elements of the crime. The trial court must analyze whether the testimony can offer guidance to the jury in a scenario that would otherwise seem counterintuitive. *People v Kowalski*, 492 Mich 106, 137; 821 NW2d 14 (2012). In the same vein, the *Peterson* Court held that expert testimony can be used to explain behavior that might otherwise be confusing to a jury. *People v Peterson*, 450 Mich 349, 375; 537 NW2d 857 (1995) (permitting expert testimony regarding the behavior of child criminal sexual conduct victims). Michigan has

long allowed the use of expert testimony to help the jury understand the evidence in controlled substance cases. *People v Murray*,[6] 234 Mich App 46, 53; 593 NW2d 690 (1999) (citing *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991)).

Direct Relevance: Premeditation, Motive, and Self-Defense

The probative value of Sutherland's expert testimony was very high. It directly helped to prove Defendant's mental state of premeditation, his motive for committing the several crimes underlying this trial, and to negate the self-defense theory that Defendant raised. Sutherland's testimony showed that Defendant had reasons to violently defend his gang's turf, and that he had pre-existing reasons to bring a gun to an area where he would be likely to encounter people affiliated with rival gangs, and that he was looking for a confrontation. Sutherland provided evidence that gang culture drives members to react with violence in order to gain and maintain respect, both internally within the gang and from rival gangs. See, e.g., 151a ("respect" is a driving force behind gang culture); 151a (gang culture encourages members to use violence and weapons to gain fear and respect). This testimony goes a long way toward establishing the element of premeditation.

Similarly, Sutherland's testimony established Defendant's motive for shooting Carter, Davis and Mitchell, and for carrying a concealed weapon. Proof of motive is especially valuable "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 129. That was exactly the situation at issue in this trial. Defendant told police that he was at the store and that he was scared for his life during the incident, (Defendant's statement to police, played for the jury; 182a-196a), but that he was only armed because "it's not safe to walk nowhere." (187a). In addition, Defendant raised self-defense

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[6] For a more in-depth discussion of *Murray*, see Section II, *infra*. Despite surface similarities, the use of Sutherland's testimony to provide context in this prosecution does not implicate the four-part *Murray* analysis.

during the trial. It may not have been a very compelling self-defense argument, but the People are entitled—even required—to address it. Sutherland's testimony effectively negated Defendant's assertion of self-defense by, among other things, showing that Defendant was primed by his membership in the Boardman Boys gang to defend the gang's turf and to react to disrespect with disproportionate violence.

At the same time, the risk of unfair prejudice from this testimony was low. Sutherland thoroughly connected Defendant to the Boardman Boys gang. (See, e.g., 162a-163a (Sutherland discussing his investigation and observations as a member of the Battle Creek Police Department Gang Suppression Unit); 289a (Defendant has his Boardman Boys nickname, "Cannon," tattooed on his hand)). Similarly, Sutherland's testimony regarding the fact that the store where the murder occurred was in territory controlled by the Boardman Boys, on the border with the territory controlled by a rival gang, was well-documented. (278a-279a). The Court of Appeals acknowledged the thoroughness with which Defendant was connected to the gang evidence in its opinion overturning Defendant's conviction, although it is clear that the court misunderstood the significance of the connection. See 17a (*People v Bynum*, unpublished per curiam opinion of the Court of Appeals, issued April 18, 2013 (Docket No. 307028)). Unlike the situation in *Wells*, the gang evidence here was directly connected to Defendant.

Context: Gangs and Defendant's Role in His Gang

The behavior and actions of Defendant and his co-defendants make little sense outside the context provided by Sutherland's expert testimony. However, once Sutherland provided the necessary background information, the pieces fell into place. For example, Sutherland's evidence indicated: (1) that Defendant and his people were members of the Boardman Boys gang; (2) that gang members are highly attuned to any perceived threat; (3) that the Boardman Boys' turf included

the store at which the murder took place; (4) that the Boardman Boys had an ongoing rivalry with a gang—MOB—whose turf abutted theirs at this store; and (5) that victims Davis and Mitchell were associated with MOB. Just as important, Sutherland told the jury that gang culture primes gang members to respond with violence, even disproportionate violence, in situations where ordinary citizens would not. Without that information, the jury would be hard pressed to understand how an otherwise random, seemingly minor encounter in a store parking lot could escalate into murder. It is true that this information is prejudicial to Defendant, but—as the truism goes—it would not otherwise be relevant.

Jury Instructions: Mitigating Any Danger of Unfair Prejudice

It is well-settled that a trial court can correct errors and reduce the danger of unfair prejudice with jury instructions. "We refuse to operate on the premise that jurors cannot comprehend the difference between substantive evidence and background testimony intended to help them understand the evidence, especially where this difference is pointed out to them." *Murray*, 234 Mich App at 61. This statement by the Court of Appeals was specifically addressing jury instructions regarding drug profile evidence, rather than an MRE 403 analysis, but the basic message still resonates. Our system of justice is premised on the ability of juries to follow the court's instructions regarding the law. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The jury in this case was instructed on the proper use of the expert testimony they heard, and there is no reason to believe that they did not follow those instructions.

The trial judge instructed the jury that they must not take the context evidence they heard about Defendant's gang membership as proof that he committed the crimes for which he was on trial. "You must not convict the Defendant here because you think he is guilty of other bad conduct."

(309a-310a; trial court giving an instruction substantially similar to CJI2d 4.11). This instruction addresses the risk that the jury would be give undue weight to Sutherland's testimony regarding gangs in general, and Defendant's role in the Boardman Boys in particular. Furthermore, the court instructed the jury regarding expert witnesses (CJI2d 5.10) and police witnesses (CJI2d 5.11). (311a-312a). Taken together, the jury instructions were well calculated to correctly inform the jury about the proper consideration they should give the Sutherland's testimony.[7] The trial judge essentially eliminated the risk that the high probative value of Sutherland's testimony would be substantially outweighed by the danger of unfair prejudice. MRE 403.

C. The Trial Court Exercised Its Discretion When It Admitted Officer Sutherland's Expert Testimony.

The trial court considered the pros and cons of admitting Sutherland's expert testimony on the subject of gangs, gang membership, and gang behavior. It did so first during a hearing on a motion in limine filed by the People, with the intent of obtaining a pretrial ruling on the admissibility of the testimony. (315a-325a). The trial court decided that it did not have enough information available at that time, and deferred its ruling until the trial. (325a). During the trial, when the People offered the proposed testimony, the court considered the matter in more depth. (244a-252a; hearing on admissibility of the evidence, out of the presence of the jury). The judge also met with the attorneys the evening before the testimony was to be presented at trial. (250a-251a).

The People offered Sutherland's testimony as proof of Defendant's motive, his level of premeditation, and also more generally to explain the behavior of the people involved in the situation. (245a-246a). The trial judge questioned the prosecutor to make sure that he understood the People's theory. (249a). Having duly considered the testimony offered by the People, and the

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[7] Defense counsel accepted, without demurral, the jury instructions as given by the court. (313a).

theories under which it was to be admitted, the trial court ruled that Sutherland's testimony was admissible as evidence of Defendant's motive. (251a). Although the trial court did not say so explicitly, it also admitted Sutherland's expert testimony to help the jurors understand the behaviors of the people involved in the incident that led to the murder. (252a). "And we're dealing here with an issue which I'm satisfied these jurors have very little knowledge of." (252a). The trial court also admitted the demonstrative evidence intended to accompany the testimony, (250a), after it had been redacted the previous night, referring to it as "rather innocuous." (252a). Later, the trial court considered and overruled Defendant's objection to the qualification of Sutherland as an expert witness. (261a-262a).

It is also clear that the trial court properly exercised its discretion when it chose to admit Sutherland's expert testimony. The decision was not made arbitrarily, but instead after due consideration of whether the offered evidence was relevant to the issues raised in the trial. The trial court did not explicitly mention MRE 403 in its ruling, but the question of whether the proposed evidence was unduly prejudicial was nevertheless something that the court considered. See 250a-251a (trial court making clear that it wanted to limit the demonstrative evidence so it would not be unduly prejudicial); 245a (Defendant objecting that some of the demonstrative evidence was "more prejudicial them [sic] probative"); 252a (trial court referring to part of the demonstrative evidence as "rather innocuous," and carrying a limited degree of prejudice). Because the trial court exercised its discretion, this Court's inquiry should be deferential to the ruling below. "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Conclusion:

Defendant is not entitled to appellate relief over Sutherland's expert testimony. His evidence regarding gangs generally, and Defendant's role in the Boardman Boys gang specifically, was relevant in multiple ways to issues in play during the trial. The testimony was highly probative of Defendant's mental state of premeditation in killing Carter, and his motive for doing that and for committing the other crimes with which he was charged: carrying a gun concealed on his person, assault with intent to murder the two other victims, and felony firearm. In addition, the testimony was relevant to explain the behavior of Defendant and his co-defendants to the jury, in circumstances that would not be readily comprehensible to persons of ordinary experience.

Sutherland's testimony directly tied Defendant to the gang evidence, so there was no danger of the jury convicting Defendant based on sweeping generalities about gang behavior rather than the specifics of the instant case. Expert testimony about gangs, used in this way, is in line with a string of recent (albeit unreported) Court of Appeals cases, as well as with the trend in other states. Furthermore, the trial court exercised its discretion when it admitted the evidence, rather than allowing it in without consideration. The trial court also took appropriate steps to mitigate any danger that the jury might give Sutherland's testimony undue weight in its deliberations by reading limiting instructions before giving them the case to consider.

In short, Sutherland's testimony was relevant and highly probative, and the danger of unfair prejudice was correspondingly low. The trial court properly admitted it after due consideration, and took steps to further reduce any danger of unfair prejudice. Defendant is not entitled to any appellate relief; the decision of the Court of Appeals should be overturned, and Defendant's conviction reinstated.

ARGUMENT

II. *PEOPLE v MURRAY* DOES NOT APPLY TO THE ADMISSIBILITY OF OFFICER SUTHERLAND'S EXPERT TESTIMONY. FURTHER, BECAUSE DEFENDANT FAILED TO OBJECT ON THESE GROUNDS, ANY ERROR BASED ON *MURRAY* IS REVIEWED FOR PLAIN ERROR.

Standard of Review:

Generally, appellate courts review a trial court's evidentiary decisions for abuse of discretion. *Yost*, 278 Mich App at 353. This Court will review de novo whether a trial court applied the correct law to the question of whether to admit evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). With that in mind, however, this Court reviews unpreserved claims of error for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order to be eligible for relief under the plain error standard, Defendant must show that the trial court committed error, that the error was plain and obvious, and that it affected his substantial rights. *Id.* If Defendant can establish those things, then this Court must decide whether or not to grant relief. *Id.* at 763-64. "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.* (internal quotes omitted).

Discussion:

Murray deals with the use of expert testimony in a fashion similar to, but not identical with, the way in which it was used in the instant case. *Murray*, 234 Mich App at 46. In *Murray*, the prosecution called police officers qualified as expert witnesses offered in order to offer so-called "drug profile" testimony. Its purpose was to help the jury understand the otherwise innocuous evidence recovered from the defendant and his surroundings during the execution of a search and seizure warrant. *Id.* at 60. None of that evidence was, by itself, direct evidence of Murray's guilt.

The Court of Appeals created a four part test for expert testimony of this type, and ruled that the testimony offered during Murray's trial largely fell within the bounds of that test, and was therefore properly admitted. *Id.* at 59-62. To the extent that certain parts of the testimony failed the test, they were found to be harmless error, and the verdict was upheld. *Id.* at 64-65.

The *Murray* Court made an important distinction between facts that were innocuous in the context of the case at bar, such as the personal characteristics of Murray and the denomination and amount of money found on his person, and other, non-innocuous, evidence, such as the smear of cocaine found on the coffee table and the plastic baggies containing cocaine residue and with their corners cut off. *Id.* at 62-63. Innocuous, profile evidence is that which might equally apply to an innocent person. *Id.* at 53. *Murray* was primarily concerned with the risk that prosecutions "based wholly or mainly on these innocuous characteristics could potentially convict innocent people." *Id.* As a result, it limited the expert witness testimony to explaining the context in which the otherwise innocuous facts—for example, the amount and denomination of the money found in Murray's possession—were discovered. The experts were not allowed to link their contextual, background testimony to the question of Murray's guilt.

In order to control the risk of wrongful convictions based solely on otherwise innocuous or profile evidence, the *Murray* court discussed four factors that should be considered when using

expert testimony to explain such facts.[8] It is important to note that this analysis applies only to the use of expert testimony to provide context for innocuous evidence. Expert testimony to explain non-innocuous evidence, by contrast, was admissible under *Murray* without the need for a similar analysis. "This testimony [regarding the non-innocuous evidence] by the police was admissible as expert testimony to aid the jury and did not implicate innocuous profile evidence, because this drug evidence is by no means innocuous." *Id.* at 63. Thus, the key to deciding whether the *Murray* analysis applies is determining whether the expert testimony is being offered to explain facts that are substantially probative of guilt, or facts that—in the context of the charges against the defendant—might have an innocent explanation. A roll of money might have an innocent explanation in the context of a prosecution for possession with intent to deliver controlled substances; a smear of cocaine, and plastic bags with the corners cut off do not.

Murray does not apply to Sutherland's expert testimony. While membership in a street gang with all that entails is not, by itself, complete proof that Defendant committed premeditated murder, it is by no means the sort of innocuous evidence that was contemplated in *Murray*.[9] In the present context, it is highly probative of both Defendant's motive and his level of premeditation in

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[8] As will be seen below, the *Murray* analysis does not apply to Sutherland's testimony in this case. For the sake of completeness, however, the four factors are summarized as follows: (1) whether the evidence was offered as background information or general modus operandi information, rather than as substantive proof of guilt; (2) profile evidence alone must not be the basis of a guilty verdict, there must be some other substantive evidence to support the conviction; (3) the jury must be properly instructed about the limits of the profile testimony; and (4) the expert witness should not directly or indirectly testify that the defendant is guilty. *Murray*, 234 Mich App at 56-58. The important thing is to make sure that expert testimony about otherwise innocuous circumstances is not being used only "to demonstrate that the defendant fits the profile and is therefore guilty." *Id.* at 58.

[9] The People do not to assert that there is no set of circumstances in which gang membership might be the sort of innocuous profile evidence envisaged by the *Murray* decision. Clearly such a set of facts exists somewhere; this, however, is not that case.

committing murder.[10] See 251a (trial court ruling that Sutherland's testimony is probative of motive);16a, 18a (Court of Appeals agreeing with the trial court that Sutherland's testimony was relevant to multiple issues, including motive and premeditation); 22a (*Bynum*, at 3 (Boonstra, J., dissenting) (Sutherland's testimony was relevant to motive, premeditation, and other issues)). As such, it goes directly to elements of the crimes charged, and is substantive evidence of his guilt. The evidence of gang behavior generally and Defendant's gang affiliation specifically is analogous to the smear of cocaine and the plastic baggies with the corners cut off in *Murray*. *Murray*, 234 Mich App at 62-63 (expert testimony explained that the smear came from cutting rocks of cocaine for sale, and that the baggie corners were used to package the cocaine for sale). Neither that expert testimony against Murray nor Sutherland's against Defendant were complete evidence of guilt, but both were significantly probative of elements of the crimes charged. The *Murray* Court made clear that its analysis did not apply to expert testimony regarding substantive evidence of guilt.

Because the *Murray* analysis is not on point, there is no need for this Brief to apply the four factors to the circumstances of this case. However, if this Court is inclined to use the *Murray* analysis regardless, and should an error be found, then it is important to remember that Defendant did not preserve a challenge based on *Murray*.[11] As a result, any mistakes by the trial court will be reviewed for plain error. *Carines*, 460 Mich 763. Defendant will not be able to meet prong two of the *Carines* plain error test, that the error be "plain, i.e., clear or obvious." *Id*. This issue, the applicability of *Murray* to Sutherland's testimony, was so far from being plain that it was not even considered by the trial court or the Court of Appeals. Defendant did not raise the issue in any of his

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[10] For a more detailed analysis of the probative value of Sutherland's testimony, see Section I.B., *supra*.

[11] For a more detailed discussion of Defendant's failure to preserve these issues for appellate consideration, and the consequences of that failure, see Section III, *infra*.

arguments, or at any of the three court levels. Nor will he be able to demonstrate prejudice to his substantial rights. This issue was first raised by this Court, *sua sponte* in the order granting leave.

Even if Defendant can satisfy the three prongs of *Carines*, this Court must then use its discretion to decide whether the unpreserved error requires granting him relief. In the present case, there is no question of Defendant being actually innocent. *Carines*, 460 Mich at 763. "We agree that there was overwhelming evidence that Bynum participated in the shooting and that his self-defense theory was not particularly persuasive." See 18a (*Bynum*, at 9). Also, Defendant admitted to police that he was carrying a handgun when he went to the corner store, and that he fired the gun multiple times during the incident. See182a-196a (Defendant's videotaped statement, played for the jury). When asked whether he was the one who shot Carter, Defendant said, "Bullets don't have names." (226a). Similarly, there is no indication that any error based on *Murray* "seriously affected the fairness, integrity, or public reputation" of the trial. *Id.* Even if the trial court improperly failed to consider *Murray*, Sutherland's testimony was highly probative of important issues in the trial, and was properly admitted for some purposes. Defendant is not entitled to relief.

ARGUMENT

III. DEFENDANT DID NOT PRESERVE THE EVIDENTIARY ERRORS HE COMPLAINS OF AT TRIAL. BECAUSE DEFENDANT FORFEITED THESE ISSUES, HE IS ENTITLED ONLY TO PLAIN ERROR REVIEW.

Standard of Review:

An evidentiary issue may not be raised for the first time on appeal, absent a showing of manifest injustice. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Because Defendant failed to preserve these issues below he has forfeited his right to have them reviewed on appeal. *Carines*, 460 Mich at 761-62. Review by this Court should be for plain error. *Id.*

Discussion:

Defendant failed to object to Sutherland's testimony, at least on the grounds at issue before this Court. See 20a (*Bynum,* at 1 (Boonstra, J., dissenting)); see also 18a; (*Bynum*, at 9 (Court of Appeals noting that Defendant may have forfeited his claim of appeal by failing to preserve it below)). Defendant did object to two aspects of the testimony: to the demonstrative evidence (a PowerPoint presentation and some poster boards) that Sutherland used to accompany his testimony, and to the qualification of Sutherland as an expert. (315a-325a; 244a; 261a). Defendant did not object to Sutherland's expert testimony—as opposed to the PowerPoint presentation accompanying the testimony—on the grounds that it was unfairly prejudicial under MRE 403, or that it ran afoul of the profiling analysis of *Murray*.[12] This is an important distinction. Defense counsel's real, substantive objection was to some of the photographs that were part of the PowerPoint (characterizing them as "mug shots"); it was these photos that drew his concern regarding unfair

[12] *Murray*, 234 Mich App at 56-58. See Section II of this brief, *supra*, for a detailed analysis of the applicability of *Murray*.

prejudice. (245a). The objection was not to the underlying expert testimony, which counsel conceded was admissible on multiple occasions.[13] (67a-68a; 245a).

The first time these issues arose was during the People's pretrial "Motion in Limine to Allow Gang PowerPoint Presentation." Despite its title, the People's motion actually refers to the underlying evidence providing the basis for the presentation. (65a-66a). Defendant's answer to the People's motion objects—only in the most general terms—solely to the PowerPoint presentation itself and not to the underlying testimony. He refers to "*this presentation's* potential prejudicial impact." See 67a-68a (emphasis added)). In fact, Defendant concedes that the People can introduce the substantive evidence that informed Sutherland's testimony. "Plaintiff can certainly introduce evidence via testimony of gang association and/or rivalries . . . ." (67a-68a). It is clear that Defendant's objections are focused on the demonstrative evidence—the PowerPoint—rather than the expert testimony underlying the presentation. During the pretrial motion hearing defense counsel is entirely silent, except to thank the court at the very end. (325a). That amounts to a waiver, or, at the very least, a forfeiture of the issue.

During the trial, when the trial court gave its ruling on the admissibility of Sutherland's testimony and his use of demonstrative evidence, Defendant continued his focus on the PowerPoint rather than on the underlying expert testimony. See 244a-252a (entirety of in-trial hearing)). Counsel again conceded that Sutherland could discuss gangs, their behaviors, and Defendant's gang affiliations. "He [Sutherland] can certainly offer his - - his testimony as to associations and behavior and conduct of these groups and what not." (245a). It is true that, at one point, counsel did say, "I

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[13] This is potentially a waiver of the issue for appeal. Forfeiture is the failure to timely raise an issue or assert a right; waiver is the knowing abandonment or relinquishment of an issue or right. See *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993); *Carines*, 460 Mich at 762. Either one significantly curtails a defendant's ability to raise the issue on appeal.

am still objecting to the use of essentially most of this testimony on the basis that it is more prejudicial than probative." However, he goes on to clarify what he meant by that, saying, "It's not particularly relevant as it relates to this particular defendant, whether he is in a gang or not. It seems to be getting a little far afield." (244a). The rest of counsel's argument to the court makes clear that he is really referring to the demonstrative evidence. Counsel summed up his objection as follows: "I would just submit to the court that the use of *the photographs* of gangs that - - and reference to gangs on a national stage that this particular defendant is not a member of is more prejudicial than probative." See 245a (emphasis added)). He went on to clarify that he was referring to the "mug shots" in the PowerPoint. (245a).

During the actual testimony of Sutherland, the one objection that Defendant raised was to Sutherland's qualification as an expert, rather than to his substantive testimony. (261a-262a). Counsel did not establish a blanket, ongoing objection to Sutherland's testimony. Nor did he make specific objections when particular topics arose. To take a handful of examples, there was no objection raised when Sutherland testified that, in general, gangs seek to establish a turf, and use weapons, and commit acts of violence. (265a-267a). Defendant did not object when Sutherland testified that the Boardman Boys met the overall criteria for a gang. (269a). He did not object when Sutherland testified that Defendant and his co-defendants were a hardcore members of the Boardman Boys. (283a-284a). Perhaps most importantly, Defendant did not object when Sutherland told the jury that the Boardman Boys would have been on "extra alert" because of recent troubles with MOB, a rival gang, and because the store where the homicide occurred was on their turf boundary with MOB, and that—as a result—when they went to the store that day they were looking for someone to give them a chance to fight. (293a).

Counsel's decision not to object to Sutherland testimony is not surprising, given his repeated concessions that Sutherland's testimony was admissible, and his focus on the photos in the PowerPoint presentation. However, that failure to object acts as a forfeiture, or even a waiver, of the issues of unfair prejudice under MRE 403 and profiling under the *Murray* standard.[14] If this Court had required the parties to brief issues related to the PowerPoint presentation, then Defendant would have a response to offer on the question of waiver. As it stands, he does not. Defendant has forfeited or waived the issues related to Sutherland's expert testimony, and is relegated to seeking relief under the plain error standard.

Plain Error Review:

In order to be eligible for relief under the plain error standard Defendant must show that the trial court committed error, that the error was plain or obvious, and that it affected his substantial rights. *Carines*, 460 Mich at 763. The third factor is generally understood to require a defendant to show that the error prejudiced him; that is to say, that it affected the outcome of the trial. *Id.*

The People strongly contend that the trial court committed no error when it admitted Sutherland's expert testimony.[15] However, if this Court should find that the trial court admitted all or part of Sutherland's testimony in error, then Defendant cannot meet the plain error test and is not entitled to relief. In particular, any error with regard to Sutherland's testimony is not at all plain or obvious. As was discussed in Section I, *supra*, there is no published Michigan case law on point to give the trial court the guidance it would need to know that Sutherland's evidence should be

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[14] Note that it is long-settled that a defendant cannot cure the forfeiture or waiver of an issue by raising it for the first time in a motion for a new trial. "Failure to object to alleged insufficiency or irregularity in the examination prior to or during the trial constitutes a waiver of the right to object, and counsel cannot raise this question initially on motion for new trial or at the appellate stage." *People v Willis*, 1 Mich App 428, 430; 136 NW2d 723 (1965).

[15] See Section I of this brief, *supra*, for a more detailed discussion of those issues.

excluded. Furthermore, the unpublished Court of Appeals cases discussing the issue agree that testimony such as Sutherland gave is admissible. There was no reasonable way that the trial court could have understood that admitting Sutherland's testimony would be error.

Furthermore, with one important exception, Defendant cannot show that he was prejudiced by the trial court admitting Sutherland's testimony. The evidence against Defendant was overwhelming with regard to the two assault with intent to murder charges, and the felony firearm charge, and with regard to the necessary lesser included offense of second degree murder. The only point for which Defendant could potentially show prejudice is his conviction for first degree murder, because Sutherland's testimony provided the lion's share of the evidence regarding his mental state of premeditation for first degree murder. This was the Court of Appeals' reasoning for granting Defendant a new trial. See 18a (*Bynum*, at 9).

If Defendant establishes that the trial court committed plain error, and that he was prejudiced thereby, then this Court must decide whether or not to grant relief. *Carines*, 460 Mich at 763-64. "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.* (internal quotes omitted). Defendant has no reasonable claim of innocence. "We agree that there was overwhelming evidence that Bynum participated in the shooting and that his self-defense theory was not particularly persuasive." See 18a (*Bynum*, at 9). Also, Defendant admitted to police that he was carrying a handgun when he went to the corner store, and that he fired the gun multiple times during the incident. See 182a-196a (Defendant's videotaped statement, played for the jury). When asked whether he was the one who shot Carter, Defendant said, "Bullets don't have names." (226a).

That leaves Defendant to establish that this unpreserved error seriously affected the fairness, integrity, or public reputation of judicial proceedings. Note that this standard requires a *serious* impact on fairness, integrity, or public reputation, not merely any impact. Considering both the trend in Michigan case law prior to this case (as discussed in Section I, *supra*) and the overwhelming evidence presented in this trial of Defendant's guilt, it is hard to imagine that an evidentiary error would rise to the level of a *serious* impact on the fairness, integrity, or public reputation of these judicial proceedings. Even if Defendant can show plain error with regard to Sutherland's testimony, this Court should not grant him relief.

In the event this Court does decide Defendant is worthy of relief, the correct outcome is remand to the trial court for entry of a judgement of second degree murder, with the People afforded the opportunity to retry Defendant on the issue of first degree murder should they be convinced that the interests of justice require it. This issue is discussed further in Section IV.B, *infra*.

ARGUMENT

IV. ANY ERROR COMMITTED BY THE COURT WHEN IT PERMITTED OFFICER SUTHERLAND'S EXPERT TESTIMONY REGARDING GANGS WAS HARMLESS. IF ANY ERROR IS DEEMED NOT TO BE HARMLESS, THE PROPER RELIEF IS REMAND FOR THE ENTRY OF A JUDGMENT OF SECOND DEGREE MURDER, UNLESS THE PEOPLE DECIDE THAT THE INTERESTS OF JUSTICE REQUIRE A NEW TRIAL. DEFENDANT IS NOT ENTITLED TO A NEW TRIAL.

Standard of Review:

Assuming, for the sake of argument, that Defendant preserved a claim of error for appellate review, and—further—that this Court finds in Defendant's favor, any evidentiary error found by this Court is subject to harmless error review. MCL 769.26; *Lukity*, 460 Mich at 491-92. "[MCL769.26] creates a presumption that preserved, nonconstitutional error is harmless, which presumption may be rebutted by a showing that the error resulted in a miscarriage of justice." *Id.* at 493.

Discussion:

This Court has asked the parties to consider the issues of whether any error by the trial court entitles Defendant to a new trial, or whether any error was harmless.

A. Any Error Arising from the Admission of Officer Sutherland's Expert Testimony Regarding Gangs, Defendant's Role in His Gang, and Premeditation Was Harmless with Regard to Most of Defendant's Convictions.

Assuming that this Court finds Defendant preserved a claim of evidentiary error, and that the trial court actually committed error, then harmless error analysis applies.[16] The burden of proof is on Defendant to show that any errors arising from the admission of evidence were not harmless.

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[16] The People assert that Sutherland's expert testimony was properly admitted under MRE 403, and that Defendant failed to preserve the MRE 403 issue for appellate consideration. See Sections I and III, *supra*, respectively. As a result, should this Court find that the trial court improperly admitted Sutherland's testimony with regard to *Murray*, then the plain error analysis from *Carines* applies, rather than harmless error. See Section II, *supra*.

Lukity, 460 Mich at 497. In order to obtain relief, Defendant needs to show it is more probable than not that a preserved evidentiary error affirmatively resulted in a miscarriage of justice. *Id.* at 495. Defendant will be categorically unable to demonstrate any miscarriage of justice with regard to all of his convictions, other than that for first degree premeditated murder.

Without belaboring the point, the evidence against Defendant was overwhelming. Defendant admitted to police that he was carrying a handgun when he went to the corner store, and that he fired the gun multiple times during the incident. See 182a-196a (Defendant's videotaped statement, played for the jury). When asked whether he was the one who shot Carter, Defendant said, "Bullets don't have names." (226a). The Court of Appeals conceded that the evidence was overwhelming, saying, "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." See 18a (*Bynum,* at 9). The only issue on which Defendant could hope to establish that a preserved evidentiary error affirmatively resulted in a miscarriage of justice is with regard to the premeditation element of first degree murder.

B. If a Non-Harmless Error Is Found, the Proper Relief is to Remand for Entry of Judgment of Second Degree Murder. The People Would Then Have the Option to Retry Defendant on First Degree Murder.

If this Court finds that the trial court committed non-harmless error (or plain error, depending on the circumstances), and—further—that Defendant is entitled to relief, when it allowed Sutherland's expert testimony regarding gangs and Defendant's gang involvement then remand for a new trial is not the appropriate remedy. If Defendant is entitled to appellate relief the appropriate remedy is remand to the trial court with an instruction to enter a judgement of second degree murder in place of the jury's verdict of first degree with the People afforded the option of a new trial on the issue of first degree murder if they believe the interests of justice so require. See *People v Jenkins*,

395 Mich 440, 443; 236 NW2d 50 (1975) (remanding for entry of judgment of second degree murder, and permitting the People to decide to retry on first degree murder if the People felt the interests of justice required it) (overruled on other grounds by *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002)); *People v Ross*, 73 Mich App 588, 697; 252 NW2d 526 (1977) (remanding for entry of judgment on lesser included charge of attempted rape, but allowing People to decide whether the interests of justice warrant a new trial on assault with intent to rape). Defendant's other convictions arising from this trial, for carrying a concealed weapon, felony firearm, and two counts of assault with intent to murder would stand as they were not impacted by any perceived evidentiary error stemming from Sutherland's testimony.

The evidence at issue in this appeal is that which established premeditation and took Defendant's conviction from second degree murder to first degree. As has been discussed at length in the previous Sections of this Brief, Sutherland's expert testimony was the most important evidence of Defendant's level of premeditation in killing Carter. However, there was a great deal of other evidence pointing to Defendant's guilt of the crime of second degree murder. See See 18a (*Bynum,* at 9 (Court of Appeals indicating that there was overwhelming evidence for second degree murder)). The jury decided the element of premeditation had been proven beyond a reasonable doubt and found Defendant guilty of first degree murder. (33a-34a). Second degree murder is a necessary lesser included offense of first degree murder; thus, by finding Defendant guilty of first degree murder, the jury necessarily found that he was guilty of second degree murder. *People v Carter*, 395 Mich 434, 437; 236 NW2d 500 (1975). Because of that, this Court can remand for entry of a judgment of second degree murder when the error in the trial was that which elevated the defendant's conviction from second degree to first degree murder. *People v Hoffmeister*, 394 Mich 155, 161-62; 229 NW2d 305 (1975) (evidence established second degree murder, not first degree; remanded for entry of

modified judgment and resentencing). Should this Court find an error with regard to Sutherland's testimony that would remove the evidence underpinning the premeditation element of Defendant's first degree murder conviction, that error would not affect the evidence of the elements of second degree murder (or the elements of Defendant's other convictions from this trial).

If this Court finds that Defendant is entitled to have his conviction for first degree murder set aside—and remands for entry of a judgment of second degree murder—the People should be allowed the option of a new trial on the issue of first degree murder if, after due consideration, the People believe that the interests of justice require a new trial. Any defects found with the admission of Sutherland's expert testimony would be evidentiary issues, rather than fundamental constitutional issues. Those issues could be addressed by the trial court in a new trial—should the People elect—on the issue of first degree murder, for example, by way of additional jury instructions or further limitations on the specifics of Sutherland's testimony. See, e.g., *Jenkins*, 395 Mich at 443 (permitting the People to elect a new trial on first degree murder when trial court erred in instructing the jury). Or the People could potentially find other means of proving the premeditation element. The appropriate remedy here is remand for the entry of a judgment of second degree murder with the option to retry the case on first degree murder.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Appellant, the People of the State of Michigan, respectfully request that this Honorable Court overturn the judgment of the Court of Appeals and affirm Defendant's conviction. In the alternative, the People request that this Court remand to the trial court for entry of a judgment of second degree murder, with the People to have the option to retry the case on the issue of first degree murder if, after due consideration, they believe the interests of justice should require it. The People also request that this Court grant whatever other relief that justice should require.

Respectfully submitted,

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DATED: January 17, 2014

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